

C A N A D A

PROVINCE OF QUÉBEC  
DISTRICT OF MONTRÉAL

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

N<sup>o</sup>: 500-11-048114-157

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

**BLOOM LAKE GENERAL PARTNER LIMITED  
QUINTO MINING CORPORATION  
8568391 CANADA LIMITED  
CLIFFS QUÉBEC IRON MINING ULC  
WABUSH IRON CO. LIMITED  
WABUSH RESOURCES INC.**

Petitioners

-and-

**THE BLOOM LAKE IRON ORE MINE LIMITED  
PARTNERSHIP  
BLOOM LAKE RAILWAY COMPANY LIMITED  
WABUSH MINES  
ARNAUD RAILWAY COMPANY  
WABUSH LAKE RAILWAY COMPANY LIMITED**

Mises-en-cause

-and-

**FTI CONSULTING CANADA INC.**

Monitor

-and-

**BMO TRUST COMPANY  
BEUMER KANSAS CITY, LLC  
BEUMER CORPORATION**

Respondents

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**ANSWER TO THE WRITTEN CONTESTATION OF THE RESPONDENT, BEUMER  
CORPORATION, TO THE BLOOM LAKE CCAA PARTIES' RE-AMENDED MOTION TO  
OBTAIN THE RELEASE OF ESCROWED FUNDS (#222)**

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**IN ANSWER TO THE WRITTEN CONTESTATION OF THE RESPONDENT, BEUMER CORPORATION, THE BLOOM LAKE CCAA PARTIES RESPECTIFULLY SUBMIT:**

**1. RESTATEMENT AND SUMMARY OF THE FACTUAL BACKGROUND**

1. The Bloom Lake CCAA Parties<sup>1</sup> hereby reiterate all allegations of the Re-Amended Motion to Obtain the Release of Escrowed Funds (the "**Motion**") filed in the Court record as if expressly restated herein.
2. By way of the Motion, the Bloom Lake CCAA Parties seek the release of Escrowed Funds held on deposit by BMO Trust Company ("**BMO**") pursuant to the Escrow Agreement between Bloom Lake LP, Beumer Corporation ("**Beumer**") and BMO.
3. These Escrowed Funds represent amounts (the "**Retained Amounts**") retained by Bloom Lake LP pursuant to contracts between Bloom Lake LP and Beumer, filed by Beumer as Exhibits C-1 and C-2 (the "**Contracts**").
4. By way of the Beumer Claim (Exhibit R-5 to the Motion), Beumer has brought U.S. Federal Court proceedings in Ohio to recover, *inter alia*, the Retained Amounts on the basis of breach of contract, fraud in the inducement/fraudulent misrepresentation/promissory estoppel, and unjust enrichment/quantum meruit.
5. The Beumer Claim is contested by Bloom Lake LP by way of its Answer and Counterclaim (Exhibit R-9 to the Motion). Bloom Lake contests, in particular, that any of the Retained Amount claimed by Beumer is owing.
6. Like any such claim, the Beumer Claim represents a contingent, unsecured, pre-filing claim against Bloom Lake LP, which Bloom Lake LP has contested by way of its Answer and Counterclaim. This claim must be treated as such in the context of the Claims Procedure Order rendered by this honourable Court on November 5, 2015.
7. The Escrowed Funds have not left Bloom Lake LP's patrimony the place of the Escrowed Funds with BMO pursuant to the Escrow Agreement certainly does not constitute a payment by Bloom Lake LP to Beumer, as will be described more fully below.
8. Even in the event that the Beumer Claim is successful, whether before the U.S. Federal Court or following the procedure set out in the aforementioned Claims Procedure Order, Beumer's unsecured, pre-filing claim must be treated like all other unsecured, pre-filing claims in these CCAA proceedings.
9. Therefore, the Escrow Agreement is without object, and the Escrowed Funds should be returned to Bloom Lake LP to be distributed to creditors in the context of these CCAA Proceedings.

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<sup>1</sup> Unless otherwise defined herein, all initially capitalized terms used in this Answer shall have the meanings given to them in the Motion.

**2. ANSWER TO THE SPECIFIC GROUNDS FOR DISMISSAL RAISED IN BEUMER'S CONTESTATION**

10. In its written contestation herein (the "**Contestation**"), Beumer alleges that the Motion should be dismissed on three specific grounds:

- a) the Escrowed Funds are not in the patrimony of Bloom Lake LP;
- b) alternatively, Bloom Lake LP and Beumer are undivided co-owners of the Escrowed Funds; and
- c) alternatively, the Escrowed Funds have been pledged by Bloom Lake LP in favour of Beumer to guarantee payment of the amounts owed pursuant to the Contracts.

11. These grounds of contestation are without foundation and the Contestation should be dismissed by this Court for the reasons set out below.

**2.1 The Escrowed Funds remain in Bloom Lake LP's patrimony and in no way represent a payment to Beumer**

12. Beumer relies heavily on the decision of *Entreprises Bigknowledge inc. (Syndic de)*, 2008 QCCA 1613 ("**Bigknowledge**") for the proposition that the Escrowed funds would have left the patrimony of Bloom Lake LP.

13. The facts in *Bigknowledge* simply do not apply to the facts at hand herein, however. The relevant facts of *Bigknowledge* can be summarized as follows:

- a) The debtor had withheld rent owed to a sub-lessor as a set off against a separate claim against the sub-lessor for reduction of the purchase price of certain assets purchased from the sub-lessor;
- b) The Debtor was ordered by an arbitrator to pay the withheld rent into trust in order to avoid being evicted from the premises leased from the sub-lessor;
- c) There was no dispute that the rent was due and payable;
- d) Rather, the debtor retained the due and payable rent as an offset against a possible judgment in its favour in reduction of the purchase price of the assets purchased from the sub-lessor;
- e) The Court found that the placement of amounts due in trust constituted a payment by the debtor of the amounts of rent due and payable to the sub-lessor, as the debtor had lost all ability to deal with amount in trust.

14. In order to try to analogize the facts herein to the facts in *Bigknowledge*, Beumer falsely alleges that the Escrowed Funds were "earned" by Beumer (see paras. 2, 3, 5, 10, 13, 15, 21, 22, 26, etc. of the Contestation).

15. This is simply not true.



16. At paragraph 21 of the Contestation, Beumer goes so far as to cite an extract of section 2.3 of the Escrow Agreement out of context in disingenuous attempt to argue that Bloom Lake LP has agreed that the Escrowed Funds representing the retained amount would have been earned by Beumer. Beumer failed to cite the last sentence of section 2.3 however, which belies the argument it is attempting. Section 2.3 of the Escrow Agreement reads as follows:

**2.3 Basis and Effect of Escrowed Funds**

The Parties intend for the Initial Escrowed Funds to represent the final five percent (5%) payment specified in the Purchase Agreements, less 10% withholding on such amount, which equals to the amount of \$1,964,748, plus the aggregate ten percent (10%) withholding amount specified in the Purchase Agreements, equal to the amount of \$4,366,106. Nothing herein constitutes a representation, admission, or denial regarding the proper interpretation of the Purchase Agreements or existence or extent of liability under the Purchase Agreements or any modifications thereto.

[Emphasis added]

17. Unlike in *Bigknowledge*, the Escrowed Funds certainly do **not** constitute a payment by Bloom Lake LP of any amount allegedly owed by Bloom Lake LP to Beumer, which could be set off against any amount owed by Beumer to Bloom Lake LP.
18. The Escrowed Funds deposited with BMO represent an amount of money in the patrimony of Bloom Lake LP, which Beumer claims (by way of the Beumer Claim) to be owed by Bloom Lake LP and which Bloom Lake LP (by way of the Answer and Counterclaim) denies owing to Beumer.
19. Furthermore, the Court in *Bigknowledge* relied heavily on the fact that the debtor had lost all ability to deal with the funds in trust in holding that such funds had left the debtor's patrimony and been paid to the sub-lessor.
20. This is not the case herein, as Bloom Lake LP has retained significant power and ability to deal with the Escrowed Funds pursuant to the Escrow Agreement (see e.g. section 6.1 thereof).
21. Finally, pursuant to section 4.2 of the Escrow Agreement, BMO is acting solely as a depositary, and it is clear from the nature of the Escrow Agreement that the Escrowed Funds are in sequestration pursuant to the articles 2305 to 2311 of the *Civil Code of Québec* (the "C.C.Q.").
22. The C.C.Q. provisions on sequestration do not provide that funds held in sequestration have left the patrimony of the depositor, and there is no legal basis to make such a conclusion, especially since the Beumer Claim is disputed by Bloom Lake LP.
23. In light of the foregoing, *Bigknowledge* does not apply herein, and the Escrowed Funds continue to form part of the patrimony of Bloom Lake LP.

**2.2 Bloom Lake LP and Beumer do not have co-ownership of the Escrowed Funds**

24. At paragraphs 31 through 34 of its Contestation, Beumer, in direct contradiction to its principal argument that the Escrowed Funds would have left Bloom Lake LP's patrimony, makes the alternative argument that Bloom Lake LP and Beumer are co-owners of the Escrowed Funds.
25. Firstly, in support of this contention Beumer again cites an extract of a provision of the Escrow Agreement out of context, arguing that section 7.1 thereof "specifically provides that 'each Party will be treated as the owners of that portion of the original Escrowed Funds and the earnings thereon which is equal to its respective proportional part of the original Escrowed Funds which each ultimately receives.'"
26. In order to see how misleading this is, one must examine the entirety of section 7.1 of the Escrow Agreement:

**7.1 Taxes**

For purposes of federal and other taxes based on income, each party will be treated as the owners of that portion of the original Escrowed Funds and the earnings thereon which is equal to its respective proportional part of the original Escrowed Funds which each ultimately receives. The Parties are required to prepare and file any and all income or other tax returns applicable to the Escrowed Funds attributable to such Party in all years income is earned in any particular tax year on the Escrowed Funds.

Subject to the paragraph above, in the absence of distribution of the Escrowed Funds prior to the requirement to pay taxes on any interest, income, gains or accretions of the Escrowed Funds in any given year, such earnings shall be allocated to BLLP, and reported by the Escrow Agent, to the extent required by applicable law, to the Canada Revenue Agency ("CRA") and any other applicable Governmental Entity.

The Escrow Agent shall also deduct and withhold from any distribution of the Escrowed Funds that could be payable to Beumer, any taxes as it determines in its sole discretion may be required by any applicable law or regulation. To the extent that amounts are so withheld, such withheld amounts shall be treated for all purposes of this Agreement as having been paid to Beumer, in respect of which such deduction and withholding was made, provided that such withheld amounts are actually remitted to the applicable Governmental Entity. For the purpose of this Section "**Governmental Entity**" means any domestic or foreign governmental, legislative, judicial, administrative or regulatory authority, agency, commission, body, court, association or entity.

[Emphasis added]

27. As appears from the foregoing, Bloom Lake LP and Beumer were to be "treated" as owners of the Escrowed Funds solely for tax purposes.



28. Additionally, their proportional ownership treatment for tax purposes pursuant to section 7.1 of the Escrow Agreement is to be determined based on the "respective proportional part of the original Escrowed Funds which each ultimately receives". Therefore, such ownership treatment for tax purposes will not be determined or determinable until a final judgment on the Beumer Claim, which, Bloom Lake LP contends, will see Bloom Lake LP as the 100% owner of the Escrowed Funds and Beumer as the 0% owner of the Escrowed Funds.
29. What is more, the second paragraph of section 7.1 of the Escrow Agreement provides that earnings from the Escrowed Funds prior to the distribution thereof by BMO following a determination of the Beumer Claim shall be allocated to Bloom Lake LP. This means that, so long as the Escrowed Funds have not been distributed, Bloom Lake LP shall be treated as the owner thereof, even for tax purposes.
30. Secondly, section 3.1 of the Escrow Agreement cited by Beumer regarding the joint directions to be given by Bloom Lake LP and Beumer to BMO regarding the investment of the Escrowed Funds in no way establish co-ownership of the Escrowed Funds. Rather, this is nothing more than a contractual control on the investment of the Escrowed Funds.
31. Finally, for the reasons elaborated in Section 2.1 above and in the Motion, the ownership of the Escrowed Funds has not left the patrimony of Bloom Lake LP, whether fully or in indivision.
32. Just as Beumer has not provided any legal grounds to justify a finding that the Escrowed Funds have left the patrimony of Bloom Lake LP, they have provided even less of a legal basis for a finding that the Escrowed Funds would have entered the patrimony of Beumer.

### **2.3 The Escrowed Funds have not been pledged in favour of Beumer**

33. A pledge in the civil law of Québec is represented by a movable hypothec with delivery of property to the creditor, governed by articles 2702 to 2709 of the C.C.Q.
34. A fundamental criterion of a pledge is that the property under pledge or the title thereto is physically delivered to the creditor, or that the creditor already has possession thereof, pursuant to article 2702 of the C.C.Q.
35. While the creditor "may hold the property through a third person" pursuant to article 2705 C.C.Q., the language of this article makes clear that this third person must be acting as an agent of the creditor in respect of its possession of the property in question.
36. This is not the case herein, as appears clearly from the text of to 4.2 of the Escrow Agreement:

#### **4.2 Escrow Agent not a Trustee**

The Parties acknowledge that the Escrow Agent is acting solely as a depositary at their request and for their convenience and, notwithstanding anything to the contrary herein contained, no term or provision of the Agreement is intended to create, nor shall any such term or provision be deemed to have created, any principal, agency,

trust, joint venture, or partnership relationship between and among the Escrow Agent and the Parties. The Escrow Agent is acting under this Agreement as an independent contractor only and shall be considered as independent contractor with respect to the other party.

[Emphasis added]

37. In any case, even in the event that the Escrowed Funds were deemed to be secured in favour of Beumer by a movable hypothec with delivery, which is expressly denied, article 2705 of the C.C.Q. provides that any alleged hypothec that Beumer could assert over the Escrowed Funds held by BMO would be subject to Bloom Lake LP's agreement and would only be considered published and opposable to Bloom Lake LP's other creditors from the time that BMO receives evidence in writing of the hypothec, which evidence does not exist and has never been provided to BMO. Therefore, Bloom Lake LP's other creditors having security over the universality of Bloom Lake LP's assets rank ahead of Beumer over the Escrowed Funds even if the "pledge" alleged by Beumer were to exist.
38. Furthermore, even in the event that the Escrowed Funds were deemed to be secured in favour of Beumer by a movable hypothec with delivery, which is expressly denied, the Escrowed Funds should still be returned to Bloom Lake LP, with Beumer making a secured claim in these CCAA proceedings pursuant to the terms of the Claims Procedure Order rendered herein.

**3. CONCLUSION**

39. In light of the foregoing, the Escrowed Funds form part of the patrimony of Bloom Lake LP and should be returned to Bloom Lake LP for the benefit of Bloom Lake LP's creditors.
40. The Bloom Lake CCAA Parties therefore respectfully seek the dismissal of Beumer's Contestation and the granting of the Motion on its conclusions.

Montréal, January 29, 2016



**BLAKE, CASSELS & GRAYDON LLP**  
Attorneys for the Bloom Lake CCAA Parties

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ORIGINAL

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M<sup>re</sup> Bernard Boucher

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