

CANADA

COURT OF APPEAL

PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

IN THE MATTER OF THE
COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, c.
C-36, AS AMENDED

S.C.: 500-11-048114-157

C.A.: 500-09-

MICHAL KEEPER, TERENCE WATT, DAMIEN
LEBEL, and NEIL JOHNSON as Representatives of
the Salaried/Non-Union Employees and Retirees

Appellants

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

Debtors

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

SYNDICAT DES METALLOS SECTIONS
LOCALES 6254 ET 6285, MORNEAU SHEPELL
LTD. , in its capacity as Replacement Pension Plan
Administrator, RETRAITE QUÉBEC, THE
ATTORNEY GENERAL OF CANADA, acting on
behalf of the OFFICE OF THE SUPERINTENDENT
OF FINANCIAL INSTITUTIONS HER MAJESTY
IN RIGHT OF NEWFOUNDLAND AND
LABRADOR, as represented by the
SUPERINTENDENT OF PENSIONS, VILLE DE
SEPT-ILES

Mises-en-cause

FTI CONSULTING CANADA INC.

Monitor-Respondent

APPLICATION FOR LEAVE TO APPEAL FROM AN INTERLOCUTORY DECISION
AND TO SUSPEND PROVISIONAL EXECUTION

(Section 13 and 14 of the CCAA and Articles 30, para. 2, and 357 C.C.P.)

Dated: October 2, 2017

TO ONE OF THE HONOURABLE JUSTICES OF THE COURT OF APPEAL SITTING IN AND FOR THE DISTRICT OF MONTREAL, THE APPELLANTS MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON, IN THEIR CAPACITY AS COURT-APPOINTED REPRESENTATIVES OF THE SALARIED/NON-UNION EMPLOYEES AND RETIREES OF THE “WABUSH CCAA PARTIES” (COLLECTIVELY, THE “SALARIED MEMBERS”), RESPECTFULLY SUBMIT:

I. BACKGROUND

1. In 2013, the Supreme Court of Canada released its decision in *Indalex* where the court held, *inter alia*, that provincial statutory pension deemed trusts in favour of pension plan beneficiaries for amounts owing to a pension plan by their employer apply as a priority claim in proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“CCAA”), subject only to the doctrine of paramountcy.

2. Paramountcy was applied in *Indalex* to the limited extent of subordinating the deemed trusts in the Ontario *Pension Benefits Act*, RSO 1990, c P.8 (“PBA”) (which operate in a very similar manner to the pension deemed trusts in the Québec *Supplemental Pension Plans Act*, chapter R-15.1 (“SPPA”), and the Newfoundland *Pension Benefits Act*, 1997, S.N.L.1996 Chapter P-4.01 (“NLPBA”) and the *Pension Benefits Standards Act*, 1985, R.S.C., 1985, c. 32 (“PBSA”) which are the three relevant pension statutes in this appeal) to the priority of the DIP lender's priority granted by the CCAA court in *Indalex*.

3. The Supreme Court in *Indalex* made significant progress in settling many legal issues pertaining to the application of pension deemed trusts in CCAA proceedings. *Indalex* has been applied and followed in subsequent cases. Following the Supreme Court's decision, the CCAA court in *Indalex*¹ approved a settlement that distributed estate funds in that case to the pension plan members. In *Timminco*², the Ontario Timminco pension plan recovered as first priority distribution in respect of the underfunded Ontario pension plan deficit, and the Québec Timminco pension plan also recovered a priority payment pursuant to the decision of Mr. Justice Mongeon of the Québec Superior Court who held, relying on *Indalex*, that the deemed trusts in

¹ *Indalex Ltd., Re*, 2013 ONSC 7932 (Ont. S.C.J.)

² *Timminco ltée (Arrangement relatif à)*, 2014 QCCS 174 (Que. S.C.)

section 37 of the SPPA are valid and enforceable with respect to unpaid current service payments and unpaid special payments³.

4. On September 11, 2017, the Honourable Mr. Justice Stephen Hamilton (the “**CCAA Judge**”) of the Québec Superior Court, District of Montreal rendered the Pension Claims Order, a copy of which is attached hereto as **Schedule [1]**;

5. In his sweeping decision covering many areas of pension and insolvency law in different provinces (Québec and Newfoundland) and different jurisdictions (provincial and federal), the CCAA Judge ruled broadly with different interpretations and on different theories, that the pension deemed trusts in the NLPBA, SPPA, and PBSA are of no force or effect in the CCAA proceedings. He thereby rendered all of the Québec and Newfoundland retirees as unsecured creditors without any priority in the CCAA proceedings.

6. The decision of the CCAA Judge in the case under appeal is, in many respects, contrary to the Supreme Court of Canada's decision in *Indalex*, completely contradictory to the decision of Mr. Justice Mongeon in *Timminco*, and injects new uncertainty into pension and insolvency law with respect to the SPPA, NLPBA, and the PBSA pension deemed trusts. It would have the effect of rendering the Québec and Newfoundland retirees of Wabush Mines as unsecured creditors with virtually no hope for recovery for their substantial pension losses in the Wabush Mines CCAA proceedings.

7. As set out herein, leave to appeal, and the appeal itself, should be granted.

II. THE GROUNDS FOR THIS MOTION

8. Since 1965, the Wabush Mines group of companies, namely, Wabush Iron Co. Limited, Wabush Resources Inc., Wabush Mines, Arnaud Railway Company, and Wabush Lake Railway Company Limited (collectively, “**Wabush Mines**”) operated an open-pit iron ore mine in the Town of Wabush, Newfoundland and Labrador, and processing and transport facilities in the Town of Sept-Iles, Québec.

³ *Ibid* at para 135.

9. Wabush Mines operated as an integrated company for all its employees. The iron ore would first be mined and concentrated at the Scully Mine in the Town of Wabush in south west Labrador. The iron ore concentrate would be loaded into railcars (privately owned by Wabush Mines) and transported by rail to another Wabush Mines facility (Pointe Noire) located near the Town of Sept-Iles, on the St. Lawrence River in Québec.

10. At Pointe Noire, the concentrated ore was made into small iron ore pellets (pelletized) to make it more efficient for smelting in steel mill blast furnaces. The steel makers operating these steel mills are the major consumers of iron ore. The ore pellets would then be loaded into "Lakers" ships and shipped down the St. Lawrence River and into the Great Lakes to customers in Canada and the USA.

11. All of the salaried employees of Wabush Mines - regardless of where in the organization they worked, whether mining the ore, transporting the ore by rail, processing the ore, or loading it onto Lakers for river transport, were employees of Wabush Mines and earned pension benefits in the same plan: the Wabush Salaried Plan.

12. In 2013, the parent company of Wabush Mines, Cliffs Natural Resources ("CNR"), based in Cleveland, Ohio, decided it would disengage and shut down its mining operations in Eastern Canada, including its mining Wabush Mines and processing operations in Newfoundland and Québec. To avoid paying the \$650M - \$750M that CNR estimated as the costs to close its mining operations at Wabush Mines, CNR chose to render Wabush Mines insolvent and then use the CCAA as its disengagement tool.

13. Since the head office of Wabush Mines is located in Montreal, pursuant to section 9 of the CCAA, Wabush Mines applied for CCAA protection from the Québec Superior Court.

14. On May 20, 2015, Wabush Mines was rendered insolvent and obtained protection from its creditors under the CCAA. Since the head office of Wabush Mines is located in Montreal, pursuant to section 9 of the CCAA, Wabush Mines applied for and obtained CCAA protection from the CCAA Judge of the Québec Superior Court in Montreal. The accounting firm of FTI Consulting Inc. was appointed as the monitor.

15. Wabush Mines did not restructure. Instead, while under CCAA protection, it shut down mining operations, terminated the employees, requested the Newfoundland Superintendent of Pensions to appoint a replacement administrator over the pension plans saying that it did not have the "resources" to administer the pension plans any further itself, and has been liquidating all of its assets to eventually pay toward its creditors' claims.

16. On December 16, 2015, the Newfoundland Superintendent of Pensions (the "**Superintendent**") declared that the Salaried Plan be terminated effective on that date (the "**Wind-up Date**").⁴ The Plans are in the process of being wound up by Morneau Shepell, the actuarial consulting firm appointed by the Superintendent on March 30, 2016 as the replacement pension plan administrator.

17. The Monitor has reported there will be substantial shortfall in paying creditors' claim.

18. Even before the Pension Claims Order, the treatment of the Wabush Mines retirees in the CCAA proceedings has been extraordinarily harsh. The retirees have lost their entire health and life insurance benefits without any prior warning, and have had a 25% reduction to their monthly pension benefits. This has resulted in significant financial hardship to the retirees.

19. This case is very sensitive for the Wabush retirees in Newfoundland and Québec, their families, and their communities.

20. While it was operating, Wabush Mines sponsored two pension plans that are to pay its salaried and unionized employees their pension benefits on retirement that they earned during their employment years with Wabush Mines:

- a) the Contributory Pension Plan for Salaried Employees of Wabush Mines, Cliffs Mining Company, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company (the aforementioned "**Salaried Plan**"); and

⁴ Affidavit of Terry Watt, sworn on December 14, 2016 ("**Watt Affidavit**"), at para. 18, Schedule 10.

- b) the Pension Plan for Bargaining Unit Employees of Wabush Mines, Cliffs Mining Company, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company (the "**Union Plan**")⁵

(collectively, the "**Pension Plans**").

The loss of health and life insurance benefits

21. Through their years of employment service for the Wabush CCAA Parties, the Salaried Members earned entitlement to be paid pension benefits, Health Benefits, and, for certain salaried employees, supplemental pension benefits;

22. Immediately following its obtaining of CCAA protection, in June, 2015, Wabush Mines terminated the employees' health benefits, life insurance benefits, and unfunded supplemental pension benefits (collectively, "other post-employment benefits" or "**OPEBs**") without giving the retirees prior notice.⁶

The losses to pension benefits

23. The Wabush Pension Plans are registered in the province of Newfoundland and Labrador and regulated under the NLPBA by the Newfoundland Superintendent. All regulatory filings for the plan are made with the Superintendent.⁷

24. The Salaried Plan is a "contributory" defined benefit plan, meaning that employees were required to contribute a percentage of their regular pay into the plans. The company was required under the terms of the plans and statute law to contribute amounts so that the plans would pay the pension benefits earned by the employees.

25. The pension plans are underfunded, meaning they do not have enough funds to pay the full monthly pension benefit to retirees. This predicament has directly caused the 25% reduction to monthly benefits for the Salaried Members and rendered elderly retirees as creditors in the CCAA proceeding of Wabush Mines.

⁵ Monitor's Amended Motion for Directions with respect to Pension Claims dated April 13, 2017 at para. 21 ("**Monitor's Motion**"), Schedule 6.

⁶ *Ibid.* at para. 27.

⁷ Watt Affidavit, *supra* note 4 at para. 13, Schedule 10.

26. On January 26, 2016, the Salaried Members received a letter from Wabush Mines notifying them that the Superintendent directed Wabush Mines to reduce the amount of monthly pension benefits of the Salaried retirees by 25%.⁸ Morneau has completed its wind-up reports for the pension plans as of the Wind-up Date. The Salaried Plan has a wind-up deficit of \$27,450,000 and the Union Plan has a wind-up deficit of \$27,486,548.

27. With claims for their terminated health benefits and losses to monthly pension benefits, the Salaried retirees are a very significant creditor group:

Employee and Retiree Claims			
	Pension Wind-Up Deficit	Terminated OPEBs*	Terminated Supplemental Retirement Allowance
Salaried	\$27,450,000	\$43,452,000	\$1,483,182.35
USW	\$27,486,548	\$123,885,000	N/A
TOTAL	\$54,936,548	\$167,337,000	\$1,483,182.35

*still subject to confirmation with actuaries for employees and monitor

The Monitor's "Motion for Directions with respect to Pension Claims"

28. On November 16, 2015, at the hearing of the motion by the Monitor for approval of the Claims Procedure Order, Representative Counsel advised the Monitor and the CCAA Judge that any issue(s) regarding the interpretation of the NLPBA Deemed Trust should be referred to the Supreme Court of Newfoundland and Labrador for adjudication. The Monitor, company, and certain other creditors opposed such a transfer of the NLPBA issue to the Newfoundland Court.

29. On September 20, 2016, the Monitor proceeded to file its Motion for Directions, which was subsequently amended on April 16, 2017.

30. Although styled as a "Motion for Directions", the Monitor sought specific orders and argued strongly that the Wabush Salaried Plan members in Newfoundland and Québec should have the bulk of their statutory deemed trust priorities declared of no effect in the CCAA proceeding and reduced to unsecured claims.

⁸ Watt Affidavit, *supra* note 4 at para. 19, Schedule 10.

31. Currently, the Monitor reports that there is approximately \$75,081,000 total in the different estates of Wabush Mines.⁹ Other than repaying the DIP Loan that had been provided by another subsidiary of CNR, Cliffs Mining Company, at the outset of the CCAA proceedings, there have not been any distributions to creditors. The Monitor's latest estimate of the ranges of potential distribution to unsecured creditors is 0.00% to 2.42% of claims.¹⁰

32. On October 7, 2016, Representative Counsel, Morneau Shepell, and the Superintendent of Pensions of Newfoundland & Labrador (the “**Superintendent**”) each filed Notices of Objection to the Monitor's Motion for Directions. The Notices of Objection, *inter alia*, disagreed with the formulation of the Monitor's questions and proposed alternate more straightforward questions. After extensive negotiations with the Monitor and the company on alternate questions, the Monitor and company did not accept any changes to their questions.

33. In a decision dated January 30, 2017, this Court dismissed the joint request by Representative Counsel, the Superintendent, and Morneau to transfer the issues relating to the interpretation of the NLPBA to the Newfoundland Court. The Monitor's motion was therefore set down for hearing on June 28 and 29, 2017 to decide all of the Monitor's questions.

Reference by the Newfoundland Government to the Newfoundland Court of Appeal

34. In the CCAA Judge's decision of January 30, 2017 declining to transfer the issues of interpretation of the NPBA, he stated at paragraph 89:

[89] *...If the government of Newfoundland and Labrador wishes to obtain a judgment from the courts of the province on the interpretation of the NLPBA, it can refer a matter to the Court of Appeal and Labrador.*¹¹ [emphasis added]

35. On March 27, 2017, the Newfoundland & Labrador government, referring to paragraph 89 of the CCAA Judge's decision above, issued an Order in Council directing that a Reference be brought before the Newfoundland & Labrador Court of Appeal and setting out Reference

⁹ Cash balance as at June 16, 2017, per Thirty-Eighth Report of the Monitor dated June 21, 2017 at para 21, Schedule 12.

¹⁰ Thirty-Fourth Report of the Monitor dated April 26, 2017 at p. 26, Schedule 13.

¹¹ *Arrangement relatif à Bloom Lake*, 2017 QCCS 284, at para. 89, Schedule 2.

questions (the “**Reference**”) that are different from the Monitor's questions.¹² The Reference hearing was heard by the Newfoundland Court of Appeal on September 21 and 22, 2017 and the court has reserved its decision;

36. On September 11, 2017, the CCAA Judge released his decision in the Pension Claims Motion;

The decision of the CCAA Judge

37. In his decision, the CCAA Judge made at least 13 determinations:

- a) that the Salaried Plan (and Union Plan) are governed by the PBSA with respect to the employees who worked on the railway, by the SPPA with respect to the non-railway employees who reported for work in Sept-Iles, Québec, and by the NLPBA with respect to the non-railway employees who reported for work in Newfoundland¹³;
- b) that the combined effect of section 8(1) and (2) of the PBSA create a deemed trust in the event of a liquidation of the employer, and that the liquidation was a "triggering event" for the deemed trust¹⁴;
- c) that the statutory deemed trust language identifying the property covered on a so-called "triggering event" is necessary for the effectiveness of a statutory deemed trust based on the reasons of the Supreme Court of Canada in Sparrow Electric (a GST case) which was followed by the Québec Superior Court in *Aveos* (a PBSA deemed trust case)¹⁵;
- d) that the deemed trust under section 49 of the SPPA and the unseizability provision under section 264 of the SPPA are not effective to a deemed trust for Québec pension plan members¹⁶;

¹² March 27, 2017 Certified true copy of a Minute of a Meeting of the Committee of the Executive Council of Newfoundland and Labrador approved by His Honour the Lieutenant-Governor directing a Reference, Schedule 14.

¹³ Pension Claims Order, at para. 80, Schedule 1.

¹⁴ Pension Claims Order, at para. 88, Schedule 1

¹⁵ Pension Claims Order, at para. 99, Schedule 1

¹⁶ Pension Claims Order, at para. 112, Schedule 1

- e) that the SPPA deemed trust, even if effective, would cover only the unpaid going concern payments and unpaid special payments (to the extent that they relate to Wabush non-railway employees who reported for work in Québec)¹⁷;
- f) that the NLPBA deemed trusts do not apply to the assets of Wabush Mines located within the province of Québec¹⁸;
- g) that the Wabush Mines CCAA proceedings was a liquidation (as compared to a restructuring) that started on May 19, 2015 (the date Wabush Mines obtained protection under the CCAA from the CCAA Judge)¹⁹, and that the deemed trust under section 8(2) of the PBSA and section 32(2) of the NLPBA came into effect on that date, and that the liquidation is the so-called "triggering event" for the creation of the deemed trust in section 32(2) in NLPBA, and further that there is no need for the court to decide whether the "triggering event" must occur prior to the CCAA Initial Order or prior to the sale of the assets²⁰;
- h) that the NLPBA deemed trusts are inoperable in a CCAA proceeding based on the doctrine of paramountcy²¹;
- i) that the lien and charge created by section 32(4) of the NLPBA is a valid fixed charge under the law of Newfoundland and Labrador²²;
- j) that the PBSA deemed trust attaches to the debtor's current property, with effect retroactive to the date that the contributions become due; however, such priority is subordinate to pre-existing secured creditors with a fixed charge²³;
- k) that the PBSA deemed trust is not effective in the CCAA proceedings for reasons other than paramountcy²⁴;

¹⁷ Pension Claims Order, at para. 131, Schedule 1

¹⁸ Pension Claims Order, at para. 154, Schedule 1

¹⁹ The CCAA Judge reversed himself on this finding in his decision of June 26, 2015, where he held that the Wabush CCAA proceedings was not a liquidation at paragraph 79, Schedule 3

²⁰ Pension Claims Order, at paras. 173 and 175, Schedule 1.

²¹ Pension Claims Order, at para. 210, Schedule 1.

²² The Court assumes that the lien and charge under section 32(4) of the NLPBA is a valid fixed charge under the law of Newfoundland and Labrador. See Pension Claims Order, at para. 126, Schedule 1

²³ Pension Claims Order, at paras. 122-124, Schedule 1.

²⁴ Pension Claims Order, at para. 126, Schedule 1.

- l) that the Pension Claims are only protected to the extent provided for by sections 6(6) and 37(6) of the CCAA²⁵; and
- m) that the scheme of distribution to creditors in the Bankruptcy and Insolvency Act, R.S.C. 1985, c B-3 ("BIA") should be incorporated into the CCAA²⁶;

III - ERRORS OF LAW

The CCAA Judge erred in his decision as follows:

38. **Error #1:** concluding that the Salaried Plan (as well as the Union Plan) is regulated on a compartmentalized basis by three different pension statutes for different groups of Wabush Mines pension plan members to be determined either by the province in which they reported for work while they were active employees, or whether the employees worked on an aspect of the Wabush Mines mining operations that in and of itself is subject to federal jurisdiction (e.g., the federal regulation of railways under the *Constitution Act*). Specifically, he erred by finding that the PBSA applies exclusively to the Wabush railway retirees, the SPPA applies exclusively to the Wabush non-railway employees who reported for work in Québec, and that the NLPBA applies exclusively to the non-railway employees who reported for work in Newfoundland. In so doing, he erred by, *inter alia*:

- a) misinterpreting and misapplying the interpretative principles applicable to multi-jurisdictional pension plans, including, but not limited to, certain inter-provincial agreements respecting pension plans with members in more than one province;
- b) misinterpreting the Salaried Plan, including but not limited to section 12.06 which states that Newfoundland law is the applicable law to the plan;
- c) failing to conclude that the railway workers and those reporting for work in Québec are also concurrently subject to and protected by the NLPBA deemed trusts;

²⁵ Pension Claims Order, at para. 217, Schedule 1.

²⁶ Pension Claims Order, at para. 208, Schedule 1.

- d) misinterpreting section 5 of the NLPBA to limit the application of the NLPBA deemed trusts to only the Newfoundland-resident members of the Salaried Plan; and
- e) failing to recognize the historical context of the Salaried Plan, which militates in favour of applying the NLPBA deemed trusts to all employees, including that since the inception of the Salaried Plan in 1968 and for the next 47 years until the CCAA proceedings in 2015, the Salaried Plan had been regulated exclusively by the Newfoundland Superintendent of Pensions in accordance with the NLPBA only including with respect to the funding of the plan; and the federal regulator of the PBSA has had no regulatory involvement with the Salaried Plan;

39. **Error #2:** concluding that the property covered on an event he called a deemed trust "triggering event" is necessary for a statutory deemed trust to be valid, and further erred by misconstruing and misapplying the decision of the Supreme Court of Canada in *Sparrow Electric*²⁷ (a GST case) which was adopted by the Québec Superior Court in *Aveos*²⁸ (a PBSA case) in forming the above conclusion. In particular, he erred, *inter alia*, by:

- a) applying the reasoning of *Sparrow Electric* that deals with specific statutory language deemed trusts for GST under the *Income Tax Act* to pension deemed trusts despite the complete absence of *Sparrow* GST-type language for pension deemed trusts in the CCAA, SPPA, NLPBA, PBSA, or any other statute;
- b) misinterpreting section 49 of the SPPA to conclude that property to which the deemed trust attaches must be identified for the SPPA deemed trusts to be effective, in contradiction to the decision of the same Québec court in *Timminco*, thus generating opposite legal results on the same issues by the same Québec court; and
- c) rationalizing that since he found no deemed trust protection for the Québec members of the Salaried Plan under the SPPA, he ought to similarly penalize the

²⁷ *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411.

²⁸ *Aveos Fleet Performance Inc./Aveos Performance aéronotique inc. (Arrangement relative à)*, 2013, QCCS 5662.

NLPBA members by finding that the NLPBA deemed trust also does not attach to any of the company's assets in Québec;

40. **Error #3:** concluding that the deemed trusts in section 49 of the SPPA and the unseizability provision under section 264 of the SPPA are not effective to create a deemed trust for the amounts owing to a pension plan by an employer and do not create a property or security interest. In particular, he erred, *inter alia*, by:

- a) finding that even if section 49 of the SPPA created a valid deemed trusts, the deemed trusts would be of no effect in a CCAA; and
- b) mis-interpreting and applying sections 49 and 264 of the SPPA, and rejecting the ratio in *Timminco* which dealt with the same issue in a lengthy decision by a judge of the same court which found that the SPPA deemed trusts are effective in a CCAA proceeding.

41. **Error #4:** not determining the priority issues with respect to the Pension Plan Administrator's lien and charge (a secured claim) pursuant to section 32(4) of the NLPBA despite that the CCAA Judge assumed that such lien and charge is a valid fixed charge under the law of Newfoundland and Labrador;

42. **Error #5:** concluding that the NLPBA deemed trusts, even if valid (which the CCAA Judge held were not in CCAA proceedings, which is an error), do not apply to attach assets located in the Province of Québec. In particular, he erred, *inter alia*, by:

- a) concluding that the Court would not recognize or enforce the deemed trusts under the NLPBA against assets of the employer located in the province of Québec; and
- b) misinterpreting and misapplying Articles 1262, 3079, 3097, 3102 and 3118 of the *Civil Code of Québec*, CQLR c CCQ-1991 ("CCQ") regarding the NLPBA deemed trusts;

43. **Error #6:** determining that the scheme of distribution to creditors in the BIA should be incorporated into the CCAA, and thereby excluding the pension deemed trusts from application

that are intended to protect pension plan beneficiaries from pension plan underfunding, in particular, he erred, *inter alia*, by:

- a) disregarding the clear language of the Supreme Court of Canada in *Indalex* where the Supreme Court addressed this exact issue and held that BIA priorities are not to be read into the CCAA:

"[51]... *[T]his does not mean* that courts may read bankruptcy priorities into the CCAA at will. Provincial legislation defines the priorities to which creditors are entitled *until that legislation is ousted by Parliament. Parliament did not expressly apply all bankruptcy priorities either to CCAA proceedings or to proposals under the BIA.*";
²⁹ [emphasis added]

- b) assuming wrong facts and outcomes in commercial transactions and CCAA proceedings without any evidence in order to support his legal conclusions summarized herein.

44. **Error #7:** concluding that the NLPBA deemed trust "frustrates the purpose of Parliament if it were to operate in the context of a CCAA proceeding" by misapplying the doctrine of paramountcy, and further misinterpreting the language of the CCAA and reading language into the CCAA that does not exist. In particular, he erred, *inter alia*, by:

- a) not following the Supreme Court of Canada's decision in *Indalex* where the Court confirmed (in the context of the Ontario *Pension Benefits Act*) that provincial pension deemed trusts create a valid and enforceable deemed trust in CCAA proceedings, and instead deciding that the NLPBA deemed trusts are not effective in a CCAA proceeding;
- b) finding that the retirees' pension claims are protected only to the limited extent provided for by sections 6(6) and 37(6) of the CCAA despite the complete absence of any limiting language in the CCAA or in the NLPBA, SPPA, and PBSA, and despite that similar arguments were asserted before the Supreme Court

²⁹ *Indalex Ltd., Re*, 2013 SCC 3, at para 51.

in *Indalex* by the company in that case and were rejected by the Supreme Court;
and

- c) interpreting the CCAA to conclude that Parliament only intended that the unpaid normal costs payments but not unpaid special payments and wind-up deficit are to be protected in a CCAA proceeding and that provincial pension deemed trust provisions are of no force or effect in a CCAA proceeding;

45. **Error #8:** concluding that the PBSA deemed trust is not effective in the CCAA proceedings, on the rationale of the timing of legislative amendments and concluding that since the pension provisions in the CCAA (and BIA) were added in December 2007 (coming into force in September 2009), which was after the initial deemed trust protections were inserted into sections 8 and 29 of the PBSA (in June 1986), it must mean that Parliament intended for the PBSA deemed trusts to no longer apply. In so doing, he failed to take into account that the PBSA was in fact amended again by Parliament *after* the pension provisions were added to the CCAA (and BIA). The PBSA was amended on July 12, 2010 (coming into force on April 1, 2011) to specifically remove only the wind up deficit deemed trust from the PBSA, giving rise to the inescapable conclusion that Parliament turned its mind to amending federal pension protections and intentionally kept the PBSA deemed trusts for unpaid current service costs and unpaid special payments in place, in addition to and as a supplement to the provisions it previously added to the CCAA in 2007 in section 6(6) that requires a CCAA Plan of Compromise to provide for the payment of unpaid current service costs only as part of such plan, (unless expressly approved by the CCAA Judge to the contrary). Further, the CCAA Judge misinterpreted section 6(6) of the CCAA.

V. THE TEST FOR LEAVE TO APPEAL IN CCAA CASES IS MET

46. The test for granting leave to appeal in CCAA cases is well established and set out below.
- (a) The point on appeal is of significance to the practice;
 - (b) The point raised is of significance to the action;
 - (c) The appeal is *prima facie* meritorious and is not frivolous; and
 - (d) The appeal will not unduly hinder the progress of the action.

The criteria for leave to appeal in CCAA cases have been met. Leave to appeal should be granted.

a) *The proposed appeal involves issues that are significant to the practice*

47. The issues in the proposed appeal are significant to insolvency practice in Québec, Newfoundland, as well as the rest of Canada. The interpretation, scope, effect, and application of pension deemed trusts in CCAA proceedings are significant to the insolvency and pension practice. Hamilton J. made determinations on these issues that are inconsistent with decisions of the Supreme Court of Canada and the Québec Superior Court, generating new uncertainty in the law, in particular following the release of *Indalex* which had settled many issues. The decision of this court would assist insolvency practice and help settle the law;

b) *The point raised on the appeal is of significance to the action*

48. The Salaried retirees are both a significant creditor group with claims of approximately \$72 million³⁰ and vulnerable stakeholder group in the Wabush CCAA Proceedings.

49. The points raised on the appeal directly impact the priority of distribution from the Wabush Mines estate to all creditors and therefore are significant to the action;

c) *The proposed appeal is meritorious and not frivolous*

50. The above-noted errors and the misinterpretations of the, NLPBA, CCAA and PBSA (and BIA) and Supreme Court caselaw are palpable and overriding errors and have merit. The issues for the proposed appeal are clearly not frivolous;

d) *The appeal will not hinder the progress of the action*

51. The Wabush CCAA Parties are in liquidation, are not restructuring, and undergoing a sales process in accordance with timelines and procedures that are being calculated by the Monitor and overseen by the CCAA Judge. The next major step is to vet creditors' claims,

³⁰ This includes the pension wind-up deficit, and claims for terminated OPEBs and terminated supplemental retirement allowances, the amount of which are still subject to confirmation from the actuaries for the Salaried retirees and the Monitor.

determine priorities among creditors, and distribute the sales proceeds to creditors. No distributions have been made to creditors and no distribution is scheduled. The appeal will not hinder the progress of the action;

52. The Appellants will ask the Court of Appeal to:

- a) **ALLOW** the appeal;
- b) **SET ASIDE** the judgment in first instance;
- c) **DECLARE THAT:**
 - i) the NLPBA, PBSA, and SPPA deemed trusts concurrently apply in favour of all the members of the Salaried Plan, are enforceable in the CCAA proceeding, and generate a priority recovery for the Salaried Plan members in respect of the amounts owing that covered by the deemed trusts ahead of all other creditors, ranking only after the priorities granted to the DIP lender and other CCAA court-ordered charges in the CCAA proceedings;
 - ii) the pension plan administrator's lien and charge under section 32(4) of the NLPBA is a secured claim of the pension plan administrator for the amount of unpaid current service payments, unpaid special payments, and unpaid wind up deficit in respect of all members of the Salaried Plan, including the Wabush retirees who worked on the railway and the Wabush retirees who had reported for work in Québec;
 - iii) sections 49 and 264 of the SPPA create a valid and enforceable deemed trust over the amount of all unpaid current service payments, and unpaid special payments owing to the Salaried Plan with respect to the Québec retirees and that such contributions with interest are unassignable and unseizable;
 - iv) the NLPBA, SPPA, and PBSA deemed trusts charge or otherwise apply to all of the applicable Wabush CCAA Parties' assets, including its assets located in Québec;

- v) the pension plan administrator's lien and charge under section 32(4) of the NLPBA charges or otherwise applies to all of the applicable Wabush CCAA Parties' assets, including its assets located in Québec;
- vi) the scope of the NLPBA deemed trusts and the pension plan administrator's lien and charge covers the amount of unpaid current service payments, unpaid special payments, and the unpaid wind-up deficit of the Salaried Plan; and
- vii) such other declarations and orders as counsel may request and this Honourable Court will grant.

53. The undersigned are the Court-appointed Representative Counsel to the Applicants/Objection Parties in the latter's capacity as Court-appointed Representatives of all salaried and non-union active and retired employees of the Wabush CCAA Parties. The CCAA Judge made these orders (the "**Representation Order**"), on June 22, 2015, a copy of which is attached to this Motion (**Schedule [5]**; *Order Appointing Representatives and Representative Counsel*).

VII. A STAY OF PROVISIONAL EXECUTION IS WARRANTED

54. Should the relevant provisions in the Pension Claims Order be allowed to stand, then the beneficiaries of the Salaried Plan will suffer serious and irreparable hardship. This Court should stay execution of the Pension Claims Order, suspend any distribution from the CCAA estate that could not be made if this Court finds that the pension claims are entitled to the protection of the pension deemed trusts and/or the lien and charge under the NLPBA, PBSA, and SPPA, which includes but is not limited to the wind up deficit; and that such claims are enforceable against all of the assets of the Wabush CCAA Parties, including but not limited to those assets located in Québec.

VIII. ANY DELAYS FOR SERVICE, FILING AND PRESENTING THIS MOTION SHOULD BE ABRIDGED

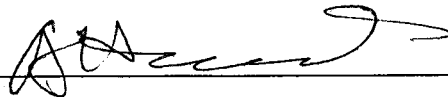
55. Given the gravity of the hardship of the relevant parts of the Pension Claims Order on the Salaried retirees and the need for all stakeholders in the Wabush CCAA Parties to have proper direction on the state of the law applicable to the many issues raised in this appeal, any delays for service, filing and presenting this Motion should be abridged, if necessary;

56. Further, should this Court grant leave to appeal, it is anticipated that all interested parties in the Wabush CCAA Proceedings would cooperate to request case management from this Court to facilitate a fast track appeal hearing of the merits to ensure that the issues are adjudicated quickly and to ensure there is no material delay or prejudice to the CCAA stakeholders;

WHEREFORE, MAY IT PLEASE THIS HONOURABLE COURT TO:

- [A] **GRANT** this application for leave to appeal;
- [B] **ABRIDGE**, if necessary, the delays for serving, filing and presenting the Applicants' Motion for Leave to Appeal and from an Interlocutory Decision and to Suspend Provisional Execution;
- [C] **AUTHORIZE** the Applicants to institute an appeal from the judgment rendered by the Honourable Mr. Justice Stephen W. Hamilton, on September 11, 2017;
- [D] **SUSPEND** the provisional execution of the Pension Claims Order until such time as judgment has been rendered on the appeal; and
- [E] **FIX** a date for hearing the appeal.

TORONTO, October 2, 2017



Andrew J. Hatnay, Demetrios Yiokaris, Amy Tang
KOSKIE MINSKY LLP
20 Queen St. West, Suite 900, Toronto, ON M5H 3R3
Tel: 595-2083 / Fax: 416-204-2872
Email: ahatnay@kmlaw.ca

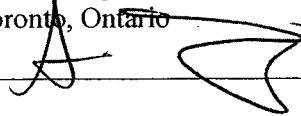
Attorneys for the Appellants, Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson, as Representatives of the Salaried/Non-Union Employees and Retirees

AFFIDAVIT OF AMY TANG
(October 2, 2017)

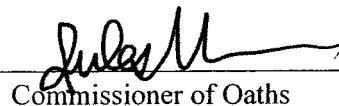
I, **AMY TANG**, attorney, practicing law at KOSKIE MINSKY LLP, 20 Queen Street, Suite 900, Toronto, Ontario, M5H 3R3, solemnly affirm:

1. I am an associate at the law firm Koskie Minsky LLP. We are the court-appointed representative counsel to all salaried/non-union employees and retirees (the "**Salaried Members**") of the Wabush CCAA Parties, pursuant to an order of the CCAA Judge on June 22, 2015 (the "**Representation Order**") (**Schedule 5**). We are counsel to the Applicants (Objecting parties) Messrs. Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson, who are court-appointed representatives of the Salaried Members, pursuant to the Representation Order;
2. In September 2016, the Respondent and Monitor in the CCAA proceedings, FTI Consulting Inc., filed a "Motion for Direction with respect to Pension Claims", which was amended on April 13, 2017 (**Schedule 6**), before the CCAA Court seeking various relief relating to the pension plans of the Wabush CCAA Parties. We filed a Notice of Objection (**Schedule 7**) to the Motion in October 2016. On September 11, 2017, the CCAA Judge rendered his decision (**Schedule 1**) granting the Respondent's Motion. The Applicants, along with a number of other interested parties, are now seeking leave to appeal the September 11, 2017 order of the CCAA Judge.
3. All the facts alleged in the within *Application for Leave to Appeal from an Interlocutory Decision & to Suspend Provisional Execution* are true and correct to the best of my knowledge. The facts give rise to important questions of law and equity, inter-provincial jurisdiction and the interpretation and application of constitutional law.

And I have signed on this, the 2nd day of October, 2017
in Toronto, Ontario



Solemnly affirmed before me on this, the 2nd day of
October, 2017 in Toronto, Ontario



Commissioner of Oaths

LSUO# 72980C

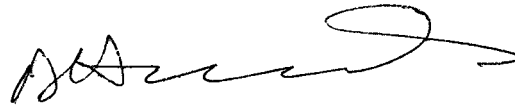
LIST OF SCHEDULES

(In support of the Applicants, Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson (as Representatives of the Salaried/Non-Union Employees and Retirees) *Application for Leave to Appeal from an Interlocutory Decision and to Suspend Provisional Execution*

Schedule 1	September 11, 2017 Judgment on the Motion of the Monitor for Directions with Respect to Pension Claims, rendered by the Honourable Stephen W. Hamilton, J.S.C. in Superior Court file no. 500-11-048114-157
Schedule 2	January 30, 2017 Judgment on the Motion of the Monitor, rendered by the Honourable Stephen W. Hamilton, J.S.C. in Superior Court file no. 500-11-048114-157
Schedule 3	June 26, 2015 Judgment on Motion of the Wabush CCAA Parties to Grant Priority to the Interim Lender Charge and to Suspend the Payment of Certain Pension Amortization Payments and Post-Retirement Employee Benefits, and Related Matters, rendered by the Honourable Stephen W. Hamilton, J.S.C. in Superior Court file no. 500-11-048114-157
Schedule 4	August 18, 2015 Judgment on Motion for Leave to Appeal, rendered by the Honourable Nicholas Kasirer, J.A. in Court of Appeal file no. 500-09-025441-155
Schedule 5	June 22, 2015 Order Appointing Representatives and Representative Counsel, rendered by the Honourable Stephen W. Hamilton, J.S.C. in Superior Court file no. 500-11-048114-157
Schedule 6	April 13, 2017 Amended Motion by the Monitor for Directions with Respect to Pension Claims, without attachments
Schedule 7	October 7, 2016 Notice of Objection by the Representatives of the Salaried Employees and Retirees to the Motion by the Monitor for Directions with Respect to Pension Claims
Schedule 8	Notice of Objection by Superintendent of Pensions of Newfoundland and Labrador
Schedule 9	Notice of Objection by Morneau Shepell, in its capacity as the Replacement Pension Plan Administrator
Schedule 10	Affidavit of Terry Watt in support of the October 7, 2016 Notice of Objection by the Representatives of the Salaried Employees and Retirees to the Motion by the Monitor for Directions with Respect to Pension Claims, sworn on

	December 14, 2016
Schedule 11	Wind-Up Actuarial Valuation as at December 16, 2015 of the Contributory Pension Plan for Salaried Employees of Wabush Mines, Cliffs Mining Company, Managing Agent, Arnaud Railway Company and Wabush lake Railway Company, Limited
Schedule 12	June 21, 2017 FTI Consulting Canada Inc.'s Thirty-Eighth Report to the Court in its Capacity as Monitor, without appendices
Schedule 13	April 26, 2017 FTI Consulting Canada Inc.'s Thirty-Fourth Report to the Court in its Capacity as Monitor, without appendices
Schedule 14	March 27, 2017 Certified true copy of a Minute of a Meeting of the Committee of the Executive Council of Newfoundland and Labrador approved by His Honour the Lieutenant-Governor directing a Reference

TORONTO, October 2, 2017



Andrew J. Hatnay, Demetrios Yiokaris, Amy Tang
KOSKIE MINSKY LLP
20 Queen St. West, Suite 900
Toronto, ON M5H 3R3
Tel: 595-2083 / Fax: 416-204-2872
Email: ahatnay@kmlaw.ca

Attorneys for the Applicants, Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson

NOTICE OF PRESENTATION

TO: FTI CONSULTING CANADA INC.

TD Waterhouse Tower
79 Wellington St. West, Suite 2010, PO Box 104
Toronto, ON M5K 1G8

Attention: Nigel Meakin
Tel: (416) 649-8100 x48065 / Fax: 416-649-8101
Email: nigel.meakin@fticonsulting.com

Respondent – Monitor

AND TO: NORTON ROSE FULBRIGHT CANADA LLP

1 Place Ville Marie, Suite #2500
Montreal, Québec H3B 1R1

Attention: Sylvain Rigaud
Tel: 514-847-4702
Email: sylvain.rigaud@nortonrosefulbright.com

Attorney for the Respondent-Monitor

AND TO: BLAKE, CASSELS & GRAYDON LLP

1 Place Ville Marie, Suite 3000
Montreal, QC H3B 4N8

Attention: Bernard Boucher (Montreal)
Tel: 514-982-4006 / Fax: 514-982-4099
Email: bernard.boucher@blakes.com

BLAKE, CASSELS & GRAYDON LLP
199 Bay St., Suite 4000, Commerce Court West
Toronto, ON M5L 1A9

Attention: Steven Weisz (Toronto)
Tel: 416-863-2616
Email: steven.weisz@blakes.com

Attorney for the Debtors and Mises-en-cause, Bloom Lake General Partner

AND TO: IRVING MITCHELL KALICHMAN

3500, De Maisonneuve Blvd. West, Suite 1400

Montréal, Québec H3Z 3C1

Attention: Doug Mitchell
Tel: 514 935-2725 / Fax: 514 935-2999
dmitchell@imk.ca
Edward Bechard-Torres
Tel: 514 934-7743 / Fax: 514 935-2999
ebechardtorres@imk.ca

Attorney to Superintendent of Pensions (Newfoundland and Labrador)

AND TO: PHILION LEBLANC BEAUDRY AVOCATS
5000, boul. des Gradins, bureau 280
Québec, QC G2J 1N3

Attention: Daniel Boudreault
Tel: 514.387.3538 / Fax: 514.387.7386
dboudreault@plba.ca

Attorney to the Syndicat des Metallos, Section Locale 9996, Section Locale 6254,
Section Locale 6285

AND TO: PINK LARKIN
Suite 201, 1463 South Park Street
P.O. Box 36036, Halifax
Nova Scotia, B3J 3S9

Attention: Ron Pink
Tel: 902-423-7777 / Fax: 902-423-9588
Email: rpink@pinklarkin.com
Bettina Quistgaard
Tel: 902-423-7777 / Fax 902-423-9588
Email: bquistgaard@pinklarkin.com

Attorney for Morneau Shepell Ltd., in its capacity as Replacement Pension Plan
Administrator

AND TO: VAILLANCOURT & CLOCCHIATTI
2600, boul. Laurier, Suite 501
Québec, QB G1V 4T3

Attention: Louis Robillard
Tel: 418-657-8702
louis.robillard@retraiteQuebec.gouv.qc.ca

Attorneys for the Attorney General of Québec and Retraite Québec

AND TO: OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS (OSFI)

Department of Justice – Canada
Guy-Favreau Complex
200 Rene-Levesque Blvd. West, 9th Floor
Montreal, QC H2Z 1X4

Attention: Pierre Lecavalier and Michelle Kellam
Tel: 514-496-4073 / Fax: 514-283-3856
pierre.lecavalier@justice.gc.ca
michelle.kellam@justice.gc.ca

Attorney for the Attorney General of Canada

AND TO: STEIN MONAST LLP

70, Dalhousie, Suite 300
Québec, QC G1K 4B2


Attention: Richard Laflamme
Tel: 418-640-4418 / Fax: 418-523-5391
Email: richard.laflamme@steinmonast.ca

Attorneys for Ville de Sept-Iles

NOTICE IS HEREBY GIVEN that the *Application for leave to appeal from an interlocutory decision and to suspend provisional execution* will be presented before a judge of the Court of Appeal sitting at Edifice Ernest-Cormier, located at 100 Notre-Dame Street East, in Montreal, on October 31, 2017 at 9:30 a.m.

PLEASE ACT ACCORDINGLY.

TORONTO, October 2, 2017



Andrew J. Hatnay, Demetrios Yiokaris, Amy Tang
KOSKIE MINSKY LLP
20 Queen St. West, Suite 900
Toronto, ON M5H 3R3
Tel: 595-2083 / Fax: 416-204-2872
Email: ahatnay@kmlaw.ca

Attorneys for the Appellants, Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson, as Representatives of the Salaried/Non-Union Employees and Retirees of Wabush Mines