

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

No: 500-11-048114-157

SUPERIOR COURT
(Commercial Division)

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

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

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

Petitioners

-and-

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

Mises-en-cause

-and-

**HER MAJESTY IN RIGHT OF
NEWFOUNDLAND & LABRADOR, AS
REPRESENTED BY THE
SUPERINTENDENT OF PENSIONS**

**THE ATTORNEY GENERAL OF CANADA,
ACTING ON BEHALF OF THE OFFICE OF
THE SUPERINTENDENT OF FINANCIAL
INSTITUTIONS**

**MICHAEL KEEPER, TERENCE WATT,
DAMIEN LABEL AND NEIL JOHNSON**

**UNITED STEEL WORKERS, LOCALS
6254 AND 6285**

RÉGIE DES RENTES DU QUÉBEC

MORNEAU SHEPELL LTD., IN ITS
CAPACITY AS REPLACEMENT PENSION
PLAN ADMINISTRATOR

Mis-en-cause

-and-

FTI CONSULTING CANADA INC.

Monitor

**PLAN OF ARGUMENT OF THE SUPERINTENDENT OF
PENSIONS OF NEWFOUNDLAND & LABRADOR ON THE
MOTION TO REFER CERTAIN ISSUES TO
THE SUPREME COURT OF NEWFOUNDLAND & LABRADOR**

**TO MR. JUSTICE STEPHEN W. HAMILTON, J.S.C., SITTING IN THE
COMMERCIAL DIVISION FOR THE DISTRICT OF MONTRÉAL, THE
SUPERINTENDENT OF PENSIONS OF NEWFOUNDLAND & LABRADOR
RESPECTFULLY SUBMITS AS FOLLOWS:**

1. In a Motion for Directions with Respect to Pension Claims dated September 20th, 2016 (“**Motion for Directions**”), the Monitor submitted to this Court a number of questions for determination. These questions have been reformulated and supplemented by the Representatives of the Salaried Employees and Retirees in their submissions to this Court dated December 15th, 2016.
2. Taken together, this Honourable Court has been asked to determine a number of issues, many of which relate entirely to the interpretation and application of Newfoundland & Labrador legislation. These questions include the following:
 - a. What is the scope of the deemed trusts outlined in section 32 of the *Pension Benefits Act*, 1997, SNL 1996, c. P-4.01 (“**PBA**”), and do

- these deemed trusts extend to the unpaid wind-up liability of the Salaried and Union defined benefit pension plans?
- b. For the purposes of triggering the application of the deemed trust outlined in subsection 32(2) of the *PBA*, has a “liquidation” occurred?
 - c. Is the lien and charge outlined in subsection 32(4) of the *PBA* a valid secured claim in favour of the plan administrator? If so, does this secured claim encompass unpaid current service costs, unpaid special payments and the unpaid wind-up liability?
 - d. Finally – and assuming this question is not judged premature – are the deemed trust and liens arising under the *PBA* limited to assets of the employer located in Newfoundland & Labrador, or can they charge the sale proceeds of assets formerly located in another province?
3. In the Superintendent of Pensions’ submission, this Honourable Court ought to exercise its discretion under section 17 of the *Companies’ Creditors Arrangement Act*, RSC 1985, c. C-36¹ and seek the assistance of the Supreme Court of Newfoundland & Labrador to determine these complex and important issues of provincial law.
4. Furthermore, if this Honourable Court elects to do so, the Superintendent notes that it may be in the interests of simplicity and expedience to refer all of the questions identified by the Representatives of the Salaried Employees and Retirees to the Supreme Court of Newfoundland & Labrador.

¹ Section 17 reads as follows : All courts that have jurisdiction under this Act and the officers of those courts shall act in aid of and be auxiliary to each other in all matters provided for in this Act, and an order of a court seeking aid with a request to another court shall be deemed sufficient to enable the latter court to exercise in regard to the matters directed by the order such jurisdiction as either the court that made the request or the court to which the request is made could exercise in regard to similar matters within their respective jurisdictions.

The importance of deferring to the courts of Newfoundland & Labrador on these important and complex matters of provincial law

5. Referring these issues to the Supreme Court of Newfoundland & Labrador will promote the interests of justice as well as the administration and enforcement of the *PBA*.
6. Firstly, the courts of Newfoundland & Labrador possess far greater expertise in interpreting the *PBA* than does the Superior Court of Québec.
7. In the past, courts possessing nationwide jurisdiction under the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 or under the *CCAA* have recognized the limits of their own expertise, and have referred specific questions of provincial law to the courts of another province.
8. Indeed, the power to do so has been conferred by Parliament in subsections 188 (2) of the *BIA*² and section 17 of the *CCAA*.
9. These provisions have been applied to situations similar to the one currently before this Court. In *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.*, (1994) 27 C.B.R. (3d) 148 (Ont. Gen. Div.) [Tab 1], Curragh Inc. was subject to bankruptcy proceedings in Ontario but its main asset was a mine in the Yukon against which various persons had filed liens. Within the Ontario court's "overall jurisdiction" under the *BIA*, Farley J. allowed for certain issues relating to a miner's lien claim to be determined by a Yukon court:

This legislation [...] and its concept of the lien affecting the output of the mine or mining claim is apparently unique to the Yukon Territory. It was felt appropriate to have the courts of the Territory deal with the interpretation and entitlement of those provisions. Certainly their approach is the preferable one when

² Subsection 188(2) reads as follows: All courts and the officers of all courts shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of one court seeking aid, with a request to another court, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court that made the request or the court to which the request is made could exercise in regard to similar matters within its jurisdiction.

looked at from the aspect of one court accordingly due deference to another with a "closer" connection to the situation and this course alleviates the necessity of having to deal with the MLA through opinions on foreign law. [...]

It would therefore seem to me that I should not do anything which would interfere with the determination of the right which persons claiming under the *MLA* would have against the Faro mine (i.e. its output).

Curragh, at pp. 156-157 or paras. 11 and following.

10. A similar conclusion was drawn by the British Columbia Supreme Court in *Yukon Zinc Corp. (Re)*, [2015] B.C.J. No. 2342, 2015 BCSC 1961 [Tab 2]. In that case, applicants in an insolvency proceeding sought to transfer the resolution of certain issues to the Yukon. Noting the trend that many "Western Canadian corporations" have filed insolvency proceedings in other jurisdictions, and "notably Ontario", Fitzpatrick J. concluded that:

[57] In my view, the above factor supports that the Yukon court is the more appropriate forum to adjudicate the very specific issues raised by Hy's and Sidhu on this application. These issues are confined to the interpretation and application of the *MLA*, a unique piece of legislation that the Yukon courts have familiarity and expertise with. Assessing the validity of the miners liens should not require an application of British Columbia law or involve any *CCAA* considerations. [Emphasis added]

11. There is also direct precedent for referring questions relating to the existence of a deemed trust over unpaid pension contributions to the courts of the province which enacted the pension legislation: *Timminco Ltd. and Bécancour Silicon Inc. (Re)*, (Ont. Sup. Ct., Court. File No. CV-12-9539-00CL, order dated October 18th, 2012) [Tab 3].
12. In that case, Morawetz J. relied on section 17 of the *CCAA* to seek the aid of the Superior Court of Québec (Commercial Division) to adjudicate whether certain pension reimbursement claims constituted priority claims.

13. It is worth stressing that Mongeon J.'s resulting decision, *Timminco Ltée (Arrangement relatif à)*, 2014 QCCS 174, is viewed as a leading authority and one of the most consequential decisions in this area of the law.
14. The Superintendent submits that this Court should similarly defer to the Supreme Court of Newfoundland & Labrador on these complex and important issues of provincial law.
15. Secondly, if justice is to be both done and *be seen to be done*, it is important that consequential decisions on provincial legislation be made by the courts of that province.
16. The question of whether Newfoundland & Labrador's *PBA* provides for a deemed trust over the wind-up deficit is of purely local concern, and it may significantly impact a large number of residents of Newfoundland & Labrador. This is a decision, in short, that should be determined by a local court. After all, there is a well-established "local interest in having localized controversies decided at home" that has guided the *forum non conveniens* analysis, and this consideration should weigh heavily in the case at bar: see e.g. J.-G. Castel, *Canadian Conflict of Laws* (3rd ed.: 1994) at pp. 245-246 [Tab 4]; *Hunt v. Durdle*, [1996] N.S.J. No. 327, 153 N.S.R. (2d) 223, at para. 22 [Tab 5].
17. Thirdly, regardless of the result, the Superintendent of Pensions desires an authoritative precedent on the question of what constitutes a "liquidation" for the purpose of subsection 32(2) of the *PBA*, as well as whether the *PBA* provides for either a deemed trust or a lien that covers the wind-up deficit. These questions have not yet been considered by any court in the province of Newfoundland & Labrador, and any conclusion drawn by the courts of this province will have no precedential value.
18. In Québec, the law of another province is treated as foreign law: art. 3077 of the *Civil Code of Québec*. Any conclusion on a matter of foreign law is

assimilated to a finding of fact, which evidently cannot bind subsequent courts: *Constructions Beauce-Atlas inc. c. Pomerleau inc.*, 2013 QCCS 4077, at paras. 12-13 [Tab 6]; citing J.-C. Royer, *La preuve civile* (4th ed: 2008), at para. 114, or p. 69.

19. Furthermore, resolving these issues in Québec would limit appellate courts from fulfilling their responsibility to review significant conclusions on matters of law. Both the Québec Court of Appeal and the Supreme Court of Canada would be compelled to review a conclusion on these matters of “foreign law” as a finding of fact, which can only be overturned in the presence of a palpable and overriding error: *Canada (Minister of Citizenship and Immigration) v. Saini*, 2001 FCA 311, [2001] F.C.J. No. 1577, at para. 26 [Tab 7]. Moreover, an appellate court’s conclusions on matters of foreign law are findings of “fact”, which cannot subsequently bind lower courts.
20. In short, having these issues decided in Québec would limit appellate courts from performing *both* their recognized “law-making function”, as well as their institutional responsibility to render decisions that ensure consistency and universal application, “as the rule of law demands”: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, at para. 35 [Tab 8].
21. By contrast, if these issues are resolved in Newfoundland & Labrador, the first instance court’s interpretation will have precedential value. In the event of an appeal, the Court of Appeal could review conclusions on a question of law for correctness, and render a decision that could settle these debates for all time.
22. As a pension regulator responsible for the administration and enforcement of the *PBA*, the Superintendent has an obvious interest in a clear and definitive answer to these questions. Such an answer can only be provided by the courts of Newfoundland & Labrador. It is worth remembering, here, that had Morawetz J. declined to seek the aid of the Superior Court of

Québec in the *Timminco* proceedings, Mongeon J.'s leading and consequential decision would never have been rendered.

23. Fourthly, proceeding before the Supreme Court of Newfoundland & Labrador avoids the added cost of retaining experts to provide a legal opinion on the substance of a “foreign” law. The importance of avoiding these additional costs has always weighed on the *forum non conveniens* analysis: see *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205, 2002 SCC 78 (CanLII), at para. 71 [Tab 9]; *S. (S.) c. M. (N.) Sub nom Droit de la famille*, REJB 1996-65623 (C.A.), at para. 35 [Tab 10].
24. Finally, the Province of Newfoundland & Labrador is closely connected with this dispute. A majority of the employees covered by these two defined benefit pension plans reported for work in the province, and the Wabush CCAA Parties clearly maintained significant business operations in the province.

The Monitor has misjudged the importance of the “single proceeding model”

25. The Monitor has stressed the importance of containing the entirety of the insolvency proceedings within a single forum. In the Superintendent's view, the importance of this so-called “single proceeding model” has been misjudged.
26. The value of the “single proceeding model” flows from the fact that it “avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt”: *Century Services Inc. c. Canada (Attorney General)*, [2010] 3 S.C.R. 379, 2010 SCC 60, at para. 22 [Tab 11]. Deschamps J. adds that:

Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive

creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise.

Century Services, at para. 22.

27. This risk is plainly *not* a concern in a case like the one currently before this Court, where one CCAA court retains overall jurisdiction and control over the insolvency proceedings, and simply exercises its discretion to refer certain complex and unresolved matters of importance to the courts of the province most familiar with the applicable legislation.
28. There is also no reason to believe that fragmenting the proceedings in this manner will result in additional delays. Courts across provincial and state borders are capable of cooperation and coordination to reduce inefficiencies. Indeed, as the Supreme Court of Canada has recently re-affirmed, the inherent jurisdiction of superior courts empowers courts “to regulate [their] proceedings in a way that secures convenience, expeditiousness and efficiency in the administration of justice”: *Endean v. British Columbia*, 2016 SCC 42, at para. 60 [**Tab 12**].
29. In this case, the following measures could conceivably be adopted by the Supreme Court of Newfoundland & Labrador to mitigate potential inefficiencies:
 - a. The Supreme Court could consider and resolve the issues relating specifically to Newfoundland & Labrador law at the same time as this Court considers and resolves the balance of the issues;
 - b. The Supreme Court of Newfoundland & Labrador could proceed with resolving these issues on an expedited basis;
 - c. The Supreme Court of Newfoundland & Labrador could even conceivably hear the parties in the Province of Québec: *Endean*, at paras. 59-62 [**Tab 12**].

30. In the Superintendent's view, the real risk lies in placing undue importance on a single CCAA court to resolve all legal questions that could arise in any given proceeding. The danger is that CCAA courts will be routinely called upon to resolve questions of law of another province over which it may have little or no expertise. CCAA courts in the common law provinces may well be made regularly responsible for resolving complex and important matters in Québec civil law. And the CCAA courts' findings of "fact" on these matters will be nearly immune from appellate review.
31. Such a state of affairs is plainly not in the interests of justice.
32. As a final word, the Superintendent submits that if this Court is still concerned about fragmenting the proceedings regarding the Monitor's Motion for Directions, this Court could simply elect to refer all of the questions put before it in the context of this Motion to the Supreme Court of Newfoundland & Labrador.

CONCLUSION

33. For all of these reasons, the Superintendent of Pensions of Newfoundland & Labrador asks this Honourable Court to refer the aforementioned questions to the Supreme Court of Newfoundland & Labrador for determination.

THE WHOLE WITHOUT COSTS, EXCEPT IN CASE OF CONTESTATION.

MONTREAL, December 15, 2016

Irving Mitchell Kalichman

M^{re} Doug Mitchell | dmitchell@imk.ca

M^{re} Edward B.-Torres | ebechardtorres@imk.ca

IRVING MITCHELL KALICHMAN LLP

3500 De Maisonneuve Blvd W., # 1400

Montréal, Québec H3Z 3C1

T: 514 935-2725 | F: 514 935-2999

Lawyers for the Mis-en-cause

SUPERINTENDENT OF PENSIONS OF

NEWFOUNDLAND & LABRADOR

Our file: 1606-4 | BI0080

N° 500-11-048114-157

**SUPERIOR COURT
DISTRICT OF MONTRÉAL
PROVINCE OF QUÉBEC**

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

BLOOM LAKE GENERAL PARTNER LIMITED, *et al.*

Petitioners

and

**THE BLOOM LAKE IRON ORE MINE LIMITED
PARTNERSHIP, *et al.***

Mises-en-cause

and

**HER MAJESTY IN RIGHT OF NEWFOUNDLAND &
LABRADOR, AS REPRESENTED BY THE
SUPERINTENDENT OF PENSIONS**

**THE ATTORNEY GENERAL OF CANADA, ACTING ON
BEHALF OF THE OFFICE OF THE SUPERINTENDENT OF
FINANCIAL INSTITUTIONS *et al.***

Mis-en-cause

ET AL.

**PLAN OF ARGUMENT OF THE SUPERINTENDENT OF
PENSIONS OF NEWFOUNDLAND & LABRADOR ON THE
MOTION TO REFER CERTAIN ISSUES TO
THE SUPREME COURT OF NEWFOUNDLAND &
LABRADOR**

ORIGINAL

IMK

**IRVING
MITCHELL
KALICHMAN**

BI0080

IRVING MITCHELL KALICHMAN S.E.N.C.R.L./LLP

Place Alexis Nihon | Tour 2
3500, boulevard De Maisonneuve Ouest | bureau 1400

Montréal (Québec) H3Z 3C1

☎ 514 935-4460 📠 514 935-2999

M^o Doug Mitchell ✉ 1606-1

dimitcheil@imk.ca

☎ 514 935-2725