File No. 38156

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL OF QUÉBEC)

BETWEEN:

VILLE DE FERMONT

APPLICANT
(Appellant)

- and -

BLOOM LAKE GENERAL PARTNER LIMITED

QUINTO MINING CORPORATION

856839 CANADA LIMITED

CLIFFS QUÉBEC IRON MINING ULC

WABUSH IRON CO. LIMITED

WABUSH RESOURCES INC.

RESPONDENTS
(Respondents)

- and -

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP

BLOOM LAKE RAILWAY COMPANY LIMITED

WABUSH MINES

ARNAUD RAILWAY COMPANY LIMITED

WABUSH LAKE RAILWAY COMPANY LIMITED

RESPONDENTS
(Mis en cause)

- and -

FTI CONSULTING CANADA INC.

RESPONDENT
(Mis en cause)

- and -

SYNDICAT DES MÉTALLOS, SECTIONS LOCALES 6254 ET 6285

RESPONDENT
(Mis en cause)

RESPONSE OF THE RESPONDENTS BLOOM LAKE GENERAL PARTNER LIMITED ET AL.

(Rule 27 of the *Rules of the Supreme Court of Canada*)

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FACTUM OF THE RESPONDENTS BLOOM LAKE GENERAL PARTNER LIMITED ET AL.

PART I — OVERVIEW OF THE POSITION AND FACTS

A. Overview

1. By its application, Ville de Fermont (the "**Leave Applicant**") seeks leave to appeal a unanimous judgment of the Court of Appeal for Québec (the "**Appeal Court**" and the "**Appeal Judgment**"), which affirmed a decision of the Superior Court of Québec (Commercial Division) (the "**CCAA Court**"), which held that the Leave Applicant failed to meet its evidentiary burden to establish that a contractual allocation as established between the seller and an arm's length purchase was unreasonable (the "**Leave Application**").

2. The CCAA Parties (as defined below) operated a mine located approximately 13 km north of Fermont, Québec in the Labrador Trough, known as the Bloom Lake Mine (the "**Bloom Lake Mine**").

3. Following the issuance of an initial order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") in respect to the CCAA Parties, the Bloom Lake Mine was sold as a result of a sales process approved by the CCAA Court.

4. The sale of the Bloom Lake Mine included the mine itself and the related residential properties (the "**Bloom Lake Properties**"), and the purchaser proposed to allocate the sale price as follows: 58% for the Bloom Lake Properties, 22% for the Bloom Lake Mine, and 22% for the mining leases.

5. The Leave Applicant unsuccessfully attempted to demonstrate before the CCAA Court that the allocation produces an inequitable result, arguing that the allocation should reflect the relative property values as set out in the municipal evaluations.

6. After carefully reviewing the evidence and arguments put forward by the Leave Applicant in opposition of the contractual allocation, the CCAA Court, in exercising its judicial discretion, concluded that the Leave Applicant has failed to satisfy its burden of showing that the contractual allocation is unreasonable.[1]

7. Subsequently, the Appeal Court, after granting leave to appeal, concluded that "the judge [of the CCAA Court] considered all of the pertinent factors, including public interest, and his decision to accept the contractual allocation is not marked by a palpable and overriding error."[2]

8. The Leave Applicant is essentially attempting to bring before this Court the same arguments as before the Appeal Court, seeking to bypass the deference owed to the CCAA Court in the exercise of its judicial discretion, with the sole purpose of increasing its tax income from the sale of the Bloom Lake Mine.

9. The Leave Applicant fails to identify any issues of national and public importance in its Leave Application, as it raises fact-specific questions in an area of law where the courts exercise their discretion and are owed a high degree of deference.

B. Statement of Facts

10. On January 27, 2015, Bloom Lake General Partner Limited, Quinto Mining Corporation, 8568391 Canada Limited and Cliffs Québec Iron Mining ULC, as Petitioners, and Bloom Lake Iron Ore Mine Limited Partnership and Bloom Lake Railway Company Limited, as Mis en cause (collectively, the "**Bloom Lake CCAA Parties**") sought and obtained an initial order (as amended, restated or rectified from time to time, the "**Bloom Lake Initial Order**") under the CCAA from the CCAA Court, *inter alia* appointing FTI Consulting Canada Inc.

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1 CCAA Judgment, para. 57, **Application for leave to Appel, (hereinafter "A.L.A."), p. 17.**
2 Appeal Judgment, para. 22, **A.LA., p. 30.**

as monitor (the "**Monitor**"). The proceedings commenced under the CCAA by the Bloom Lake CCAA Parties will be referred to herein as the "**CCAA Proceedings**".

11. On May 20, 2015, the CCAA Proceedings were extended to include Wabush Iron Co. Limited, Wabush Resources Inc., Wabush Mines, Arnaud Railway Company and Wabush Lake Railway Company Limited (collectively the "**Wabush CCAA Parties**", and together with the Bloom Lake CCAA Parties, the "**CCAA Parties**").

12. On April 17, 2015, the CCAA Court issued an Order (as amended and restated on June 9, 2015, in order to include the Wabush CCAA Parties, the "**SISP Order**") approving a sale and investor solicitation process (as may be amended from time to time, the "**SISP**") involving the business and assets of the CCAA Parties.

13. Since the issuance of the Bloom Lake Initial Order, seventeen asset sale transactions have been entered into by the CCAA Parties in consultation with the Monitor. Each of these transactions was subject to and approved by an Approval and Vesting Order issued by the CCAA Court.

14. On December 11, 2015, as a result of the SISP, certain of the Bloom Lake CCAA Parties entered into an asset purchase agreement (the "**Bloom Lake APA**") with Québec Iron Ore Inc. as purchaser (the "**Bloom Lake Purchaser**"), and Champion Iron Limited as guarantor ("**Champion**"), for the sale of the Bloom Lake Mine and the Bloom Lake Properties.

15. On December 23, 2015, the CCAA Parties filed their *Motion for the Issuance of an Approval and Vesting Order* with respect to the Bloom Lake APA (as amended on January 4, 2016, the "**Bloom Lake AVO Motion**").

16. As of the date of the filing of the Bloom Lake AVO Motion, the Bloom Lake Mine was not operational, and had carrying costs of $1.5-1.8 million per month, and environmental liabilities of more than $41.7 million.

17. On January 27, 2017, the CCAA Court granted the Bloom Lake AVO Motion and issued the Approval and Vesting order (the "**Bloom Lake AVO**"), approving the sale of the Bloom Lake Mine and the Bloom Lake Properties.

18. On May 19, 2017, the CCAA Parties filed their Motion for Approval of Allocation Methodology and Other Relief (the "**Allocation Motion**"), which set out the Monitor's proposed methodology to allocate proceeds and costs among the CCAA Parties (the "*Allocation Methodology*"). The Allocation Motion was granted by CCAA Court on July 25, 2017 (the "**Allocation Judgment**"), which decision is the subject of the present appeal.

19. The Leave Applicant contested the issuance of the Allocation Motion, but its contestation was limited to the contractual allocation by the Bloom Lake Purchaser as between the three categories of assets in the total amount of $6.9 million, namely 58% for the Bloom Lake Properties, 22% for the Bloom Lake Mine, and 22% for the mining leases.

20. The Contractual Allocation set out in the Bloom Lake APA was determined an arm's length purchaser and was accepted by the CCAA Parties without negotiation.

PART II — STATEMENT OF ISSUE

21. The sole issue is whether this Application for Leave raises any issues of national and public importance.

22. This is a fact-specific case, which deals with the exercise by the CCAA Court of its judicial discretion in a matter subject to the provisions of the CCAA, where the Leave Applicant is asking the appellate Courts to bypass the high degree of deference owed to the CCAA Court and to re-examine the evidence presented, despite the absence of a palpable and overriding error.

PART III — STATEMENT OF ARGUMENT

23. In its Application for Leave, the Leave Applicant has identified the following issues, essentially identical to those it submitted to the Appeal Court:

> **Question 1** : La Cour d'appel du Québec a-t-elle erré en concluant que l'intérêt public a été suffisamment pris en compte en considérant les pertes de recettes fiscales résultant de l'allocation du prix de vente décidées par l'acheteur, en mettant l'accent sur le fait que la Demanderesse ne s'était ni opposée à la vente, et ce, alors que la Demanderesse n'était nullement en position de s'y opposer?
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> **Question 2** : La Cour d'appel du Québec a-t-elle erré dans son analyse du caractère raisonnable de la valeur accordée aux actifs résidentiels, pourtant accessoires à l'exploitation minière en cause?
>
> **Question 3** : La Cour d'appel du Québec a-t-elle erré en écartant totalement la pertinence du rôle d'évaluation foncière de la Demanderesse afin de déterminer le caractère raisonnable de l'allocation du prix entre les différents actifs immobiliers de la mine Bloom Lake?

24. The CCAA Parties respectfully submit that all three questions must be answered in the negative, and that the Appeal is devoid of merit, even on a *prima facie* basis.

25. In addition, the CCAA Parties respectfully submit that the questions raised by the Leave Applicant are not of national and public importance. They essentially concern findings of facts and inferences made from those facts by the CCAA Court that has overseen the CCAA

Proceedings for over two years, and has intimate knowledge of the details of the file and of the interests of various stakeholders involved.

A. Standard of Review

26. It is clearly established that absent an error of law, the standard of review applicable to the exercise of judicial discretion in matters subject to the provisions of the CCAA is that of a palpable and overriding error.[3]

27. The Appeal Court correctly summarized the applicable principles in the following terms:

> [14] On the standard of review, the exercise of judicial discretion in matters subject to the provisions of the CCAA is accorded a high degree of deference. Appellate courts across the country have agreed that, absent an error of law (reviewed for correctness), intervention will only be justified in the presence of a palpable and overriding error.[4]
>
> [References omitted]

28. In the present case, due to its hands-on role in overseeing the CCAA Proceedings, the CCAA Court is acutely aware of the interests of the stakeholders at play. Its evaluation of the reasonableness of the purchase price allocation was based on such awareness, as well as on findings of fact and inferences made from those facts. The Appeal Court therefore correctly held that a high degree of deference was owed to the CCAA Court in the circumstances:

> [23] The exercise of judicial discretion in matters subject to the provisions of the CCAA is accorded a high degree of deference and the role of an appellate court is largely supervisory. Here, the judge made no palpable and overriding errors in assessing the evidence and the

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3 *Resurgence Asset Management LLC v. Canadian Airlines Corporation*, 2000 ABCA 149, para. 29; *White Birch Paper Holding Company, (Arrangement relatif à)*, 2013 QCCA 1302, para. 48.

4 Appeal Judgment, para. 14, **A.LA., p. 29.**

> reasonableness of the contractual allocation, even though it differed significantly from the municipal evaluation.[5]

29. The CCAA Parties submit that the Appeal Court applied the correct standard of review, giving deference to the CCAA Court, and that this Court must only interfere with the discretion of the CCAA Court if it comes to the clear conclusion that there has been a palpable and overriding error.

30. The CCAA Parties submit that the Leave Applicant has failed to identify such an error in its Leave Application, even on a *prima facie* basis.

B. Consideration of Public Interest

31. In its Leave Application, the Leave Applicant argues that the Appeal Court erred in concluding that the public interest criterion was correctly and sufficiently considered by the CCAA Court.[6]

32. The Leave Applicant relies on the decision of this Court in *Century Services Inc. v. Canada (Attorney General)*,[7] which established that public interest was to be included as one of the factors in the exercise of judicial discretion pursuant to the CCAA:

> [60] Judicial decision making under the CCAA takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the status quo while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed. In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors,

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5 Appeal Judgment, para. 23, **A.L.A., p. 30.**
6 Leave Application paras. 39-46, **A.L.A., p. 39-41.**
7 2010 SCC 60, para. 60 ("*Century Services*").

> shareholders, and even other parties doing business with the insolvent company. In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed.
>
> [Our emphasis, references omitted]

33. In considering this argument, the Appeal Court decided that while the CCAA Court did take public interest into account in the Allocation Judgment, in referring to the loss of tax income of the Leave Applicant, such loss was not the sole determining factor, as per the approach outlined by this Court in *Century Services*:

> [21] Finally, the judge properly took the public interest into account when he considered the loss of tax income to Fermont resulting from the difference between the two proposed allocations (paragraph 43), emphasizing that Fermont had opposed neither the sale nor the purchase price. While public interest is one factor which should be considered by the judge, it is not the sole determining factor. It may be regrettable that Fermont will lose significant tax income from the contractual allocation set out by the purchaser, but courts must consider and weigh all of the various interests at stake in a reorganization, not just the consideration of public interest.
>
> [Our emphasis, references omitted]

34. Despite the correct analysis by the Appeal Court, the Leave Applicant insists that the Allocation Judgment is contrary to public interest, and asserts that it baffles its statutory priority in favour of a tax-driven arrangement by the Bloom Lake Purchaser. Respectfully, these assertions are blatantly incorrect.

35. The Leave Applicant does not lose its statutory priority as a result of the contractual allocation, and there exists no evidence on the record that such allocation was tax-driven, or had any other improper purpose.[8]

36. It is not because the contractual allocation is detrimental to the Leave Applicant that it is detrimental to public interest in the context of the CCAA Proceedings. On the contrary, interests of other stakeholders, including those of unionized and non-unionized employees, retirees, charge holders and secured creditors, stand to be negatively affected should the Leave Applicant succeed in its appeal.

37. Essentially, the Leave Applicant is asking this Court to endorse the untenable view that a municipality must always prevail in CCAA matters, despite the fact that it already holds a favourable position due to its statutory priorities.

38. It should be reminded that the Leave Applicant stands to receive a payment of $3.4-3.5 million in priority over all the other stakeholders with claims against assets sold pursuant to the Bloom Lake APA. It is clear that the contestation of the Allocation Motion by the Leave Applicant is nothing more than an attempt to further improve its financial position to the detriment of other stakeholders.

39. Finally, the consideration of the impact of a decision on various stakeholders falls squarely into the exercise of discretion of the CCAA Court, and the Leave Applicant has simply failed to identify a palpable and overriding error which would justify the intervention of this Court.

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8 Appeal Judgment, para. 20, **A.LA., p. 30.**

C. Reasonable Nature of the Contractual Allocation

40. In its Leave Application, the Leave Applicant argues that the Appeal Court erred in concluding that it was reasonable for the CCAA Court to consider that the Bloom Lake Properties may be attributed a higher value than the Bloom Lake Mine.[9]

41. The Appeal Court disposed of this argument in the following terms:

> [19] Fermont argued at length as to the reasonableness of the sale price as well as the actual value of the mine, especially in relation to the residential properties, submitting that the contractual allocation of the $6.9 million sale price as between the mine and the residential properties is "unreasonable". The judge considered these submissions, concluding (at paragraph 42) that it was reasonable for the purchaser to place relatively little value on the mine, which had been closed for several years and which was "more of a liability than an asset", having maintenance costs of $1.5 million per month. The judge concluded (at paragraph 48) that on the evidence, the municipal evaluation does not reflect the value of the mine and that he preferred to retain the contractual allocation, as set out in the arm's length sale.[10]
>
> [Our emphasis]

42. The CCAA Parties submit that there is no error in the above reasoning, let alone a palpable and overriding error that would justify an intervention of this Court. It is not unreasonable to attribute less value on a property which effectively is "more of a liability".

43. Indeed, the Leave Applicant fails to take into account the fact that the Bloom Lake Mine is currently not in operation, and its idle involves carrying costs of $1.5-1.8 million per month. It is far from unreasonable to foresee that an asset that involves such a significant recurring investment (in addition to an even more significant environmental liability) would warrant a

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9 Leave Application paras. 47-71, **A.LA., p. 41-45.**

10 Appeal Judgment, para. 19, **A.L.A., p. 30.**

smaller upfront price than housing units that may be used notwithstanding the operation of the Bloom Lake Mine, and that involve little-to-no maintenance costs.

44. Therefore, as concluded by the CCAA Court[11] and confirmed by the Appeal Court,[12] the Leave Applicant failed to meet its burden of proof developed in *Royal Bank of Canada. v. Atlas Block Co. Limited*[13] to show that the proposed allocation is unfair or prejudicial.

D. Consideration of the Property Assessment

45. The Leave Applicant also argues that the Appeal Court failed to give sufficient weight to the property assessment of the Bloom Lake Mine.[14]

46. In its argument, the Leave Applicant attempts to confuse the concept of the presumption of validity of property assessment with the exercise by the CCAA Court of its judicial discretion to determine whether the contractual allocation was reasonable.

47. The CCAA Court reasoned in the following terms on this issue:

> [48] It is clear that the municipal evaluation of the mine bears little relationship with its current value. The municipal evaluation of the mine is $318,009,000. Ville de Fermont defended the municipal evaluation, arguing that it represented only 15% of the total amount invested of $2 billion. However, the amount invested is not necessarily the same as value. The mine, together with the residential properties, sold for a total of $6.9 million after a sale process. That must be taken to be the current market value of the properties. The purchaser allocated $2.9 million of the price to the mine and Ville de Fermont argues that it should be $6.3 million. Whether the mine is worth 1% of its municipal evaluation

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11 Allocation Judgment, para. 57.
12 Appeal Judgment, paras. 18, 23, **A.LA., p. 29-30.**
13 2014 ONSC 1531, para. 43.
14 Leave Application, paras. 72-97, **A.L.A., p. 45-51.**

> or 2%, it is clear that the municipal evaluation does not reflect the value of the mine.[15]
>
> [Our emphasis]

48. In light of the foregoing, it is evident that in the present case, the property assessment value bears no connection to the determination of whether the contractual allocation was reasonable. The presumption of accuracy of the valuation cannot be invoked by the Leave Applicant in these circumstances. The Appeal Court correctly made the distinction in this regard:

> [18] It should be noted that the presumption of accuracy of an assessment role is not absolute, especially given that the judge was not called upon to review the municipal evaluation. Rather, he was asked to determine whether the contractual allocation was reasonable. FTI and the respondents properly submit that the reasonableness of an arms-length contractual allocation was a fact he was entitled to presume in the absence of any evidence to the contrary. Moreover, where an allocation appears prima facie to be fair, as in the present case, the onus falls on the opposing creditor to satisfy the court that the proposed allocation is unfair or prejudicial.[16]
>
> [Our emphasis, references omitted]

49. In addition, the Leave Applicant incorrectly describes the sale of the Bloom Lake Mine as a "fire sale", which allegedly cannot be used to determine its current market value.

50. Contrary to the assertions of the Leave Applicant, the Bloom Lake APA represents the highest and the best offer obtained through a fair, transparent and reasonable process carried in accordance with the SISP Order where the opportunity to acquire the Bloom Lake Mine and related assets was widely known. These conclusions were strongly supported by the

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15 CCAA Judgment, para. 48, **A.L.A., p. 16.**

16 Appeal Judgment, at para. 18, **A.L.A., 29-30.**

Leave Applicant at the time, who has never, until this appeal process, contested the Bloom Lake APA purchase price.

51. The CCAA Parties were not "forced" to sell the Bloom Lake Mine as quickly as possible. The Bloom Lake APA was the result of a court approved sale process during which the CCAA Parties and the Monitor did everything reasonably possible in the circumstances to obtain the best price.

52. It therefore stands to reason that the true fair market value of the assets sold pursuant to the Bloom Lake APA is that established by the Bloom Lake APA, and not a proportion of the unreliable and outdated property assessment. The Ontario Superior Court has determined in a similar context that "a sale is always a better indication of value of a particular property than a valuation."[17]

53. Once again, the CCAA Parties submit that the Leave Applicant has failed to identify a palpable and overriding error in the consideration by the CCAA Court of the true fair market value of the assets sold in its analysis of the reasonable nature of the contractual allocation.

E. Absence of an Issue of National and Public Importance

54. As outlined above, the Leave Applicant has failed to identify a palpable and overriding error in the Allocation Judgment or the Appeal Judgment which could justify the intervention of the Court. Simply put, the appeal has no reasonable chance of success.

55. More importantly, the Leave Application identifies no issue of national and public importance which could warrant this Court to grant leave in this case.

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17 *Royal Bank of Canada. v. Atlas Block Co. Limited*, 2014 ONSC 1531, at para. 37.

56. The Allocation Judgment essentially constitutes a fact-specific exercise of judicial discretion by the CCAA Court, in which it concludes that the Leave Applicant has failed to meet its burden of proof in contestation of the contractual allocation in the Bloom Lake APA, as provided by an arm's length purchaser.

57. The facts and circumstances leading to the Allocation Judgment are unique and underscore the knowledge and understanding by the CCAA Court of the interests of various stakeholders in these CCAA Proceedings.

58. Finally, the Leave Applicant does not challenge the applicable legal tests or principles, and generally fails to identify any issue of interest to either the insolvency practice or of public importance in general.

PART IV — SUBMISSIONS CONCERNING COSTS

59. The CCAA Parties respectfully request their costs of this Leave Application.

PARTIE V – ORDER SOUGHT

60. Based on the foregoing, the CCAA Parties respectfully request that the Leave Application be dismissed, with costs.

Montréal, August 13, 2018

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PART VI —TABLE OF AUTHORITIES

Legislation **Paragraph(s)**

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