Court File No. CV-19-616077-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED

Applicants

BOOK OF AUTHORITIES OF THE FORMER GENSTAR U.S. RETIREE GROUP COMMITTEE

(Motion on April 25, 2019 for a Representation Order and Reinstatement of Benefits under the Genstar U.S. Plans)

April 23, 2019

KAPLAN LAW
393 University Av., Suite 2000
Toronto ON M5G 1E6

Ari Kaplan (LSO #42042S)
Tel: 416 565.4656
Fax: 416 352.1544
Email: ari@kaplanlaw.ca

Counsel to the Former Genstar U.S. Retiree Group Committee and Proposed Representatives

LIST OF AUTHORITIES

TAB **CASE**

1. *Aveos Fleet Performance Inc. (Arrangement relatif à)*, 2013 QCCS 5762
2. *Aveos Fleet Performance Inc. (Arrangement relatif à)*, 2012 QCCS 6796
3. *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCA 1351
4. *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCS 3064
5. *Canada (Attorney General) v. Bedford*, 2013 SCC 72
6. *Canada (Justice) v. Khadr*, 2008 SCC 28
7. *Canada (Prime Minister) v. Khadr*, 2010 SCC 3
8. *Caterpillar Financial Services Corp. v. Boale, Wood & Company Ltd*., 2014 BCCA 419
9. *Fraser Paper Inc v Superintendent of Pensions*, 2007 NBQB 196
10. *IBM Canada Limited v. Waterman* 2013 SCC 70
11. *McNaughton v. Saskatchewan Government and General Employees' Union*, 2010 SKQB 5
12. *Melanson v. N.B*., 2006 NBQB 73
13. *Moore v. Sweet,* 2018 SCC 52
14. *Re Canwest Publishing Inc.*, 2010 ONSC 1328
15. *Re Catalyst Paper Corporation*, 2012 BCSC 451
16. *Re Fraser Papers Inc.*, 2009 CanLII 55115 (ON SC)
17. *Re Nortel Networks Corporation*, 2009 CanLII 26603 (ON SC)
18. *Re Nortel Networks Corporation et al*, 2017 ONSC 700
19. *Re Target Canada Co.*, 2015 ONSC 303
20. *Re Target Canada Co.*, 2015 ONSC 1028
21. *Re Timminco Limited*, 2012 ONSC 4471

22. *Re United Air Lines Inc. (Bankruptcy)*, 2005 CanLII 7258 (ON SC)
23. *Re U.S. Steel Canada Inc.*, 2014 ONSC 6145
24. *Re U.S. Steel Canada Inc.* 2015 ONSC 5990
25. *RJR Macdonald Inc. v. Canada*, 1994 CanLII 117 (SCC)
26. *Sproule v. Nortel Networks Corporation*, 2009 ONCA 833
27. *Sun Indalex Finance, LLC v. United Steelworkers,* 2013 SCC 6

TAB 1

Aveos Fleet Performance Inc. (Arrangement relatif à), 2013 QCCS 5762

SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
N°: 500-11-042345-120

DATE : November 20, 2013

PRESIDING : THE HONOURABLE MARK SCHRAGER, J.S.C.

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

AVEOS FLEET PERFORMANCE INC. /
AVEOS PERFORMANCE AÉRONAUTIQUE INC.
-and-
AERO TECHNICAL US, INC.
Insolvent Debtors

-and-

FTI CONSULTING CANADA INC.
Monitor

-and-

THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS
Applicant

-and-

WELLS FARGO BANK NATIONAL ASSOCIATION, as holder of a power of attorney
-and-
CRÉDIT SUISSE AG, CAYMAN ISLAND BRANCH, as fondé de pouvoir and administrative agent and collateral agent for the Second Lien Lenders
-and-
AVEOS HOLDING COMPANY, as holder of a power of attorney

-and-

BREOF/BELMONT BAN L.P.
Respondents

-and-

AON HEWITT, as administrator of the pension plans of Aveos Fleet Performance Inc./ Aveos Performance Aéronautique Inc. and the former and retired employees of Aveos Fleet Performance Inc.
Impleaded party

JUDGMENT

INTRODUCTION

[1] Aveos Fleet Performance Inc. ("Aveos") and its related entity Aero Technical US, Inc. applied for and this Court issued an initial order ("Initial Order") under the *Companies' Creditors Arrangement Act* [1] ("C.C.A.A.") on March 19, 2012.

[2] Aveos' operations had largely had been shutdown prior to the C.C.A.A. filing. The remainder of its normal operations were shutdown following the C.C.A.A. filing and most of the remaining employees were laid off.

[3] The present litigation pits the rights of a pension fund to obtain priority for the payment of its deficit against the rights of the Respondent secured lenders ("Secured Lenders") to recover their loans and advances.

[4] The Superintendent of Financial Institutions (the "Superintendent") has filed a motion seeking a declaratory judgment which has been contested by the Secured Lenders. The Superintendent is supported by the pension plan administrator, Aon Hewitt ("Aon").

[5] Aveos has maintained neutrality on the aforementioned issue. However, Aveos has made representations on a secondary issue arising from a recent payment received from Air Canada which, according to the manner in which this payment is applied, could reduce the quantum of the priority treatment sought by the Superintendent.

---

[1] R.S.C., 1985, c. C-36.

Aveos

[50] As indicated, Aveos has taken no position on the principal debate concerning the priority as between the Secured Lenders' security and the deemed trust, over the sum of $2,804,450.00.

[51] Aveos has however taken the position that with respect to the sum received from Air Canada, it has the right to use these funds for the benefit of the employees in accordance with its agreement with Air Canada but more significantly to impute payment against specific amounts as it wishes. Accordingly, Aveos has made it known that it intends to use $600,288.00 of the $5,361,499.00 (i.e. the remaining sum Air Canada was contributing to its October 2007 pension deficit) to pay the Aveos special payments for Aveos' pension deficit which were due and unpaid for February and March 2012 in the amount of $254,950.00 each and an additional $90,388.00 on account of the special payment that was due for the month of April 2012. Such payments would operate to reduce the amount of $2,804,450.00 claimed by the Superintendent to be protected by the deemed trust. Accordingly, with such imputation and if the Superintendent is given priority for such sum, it will be reduced to $2,204,162.00.

[52] The Superintendent and Aon contest this imputation so as to preserve their deemed trust for the full amount of $2.8 million.

[53] The Superintendent and Aon submit that Aveos received the fund from Air Canada in trust (for the former employees of Air Canada). In Québec law, absent agreement, it is the debtor that has the right to impute payment. However, the Superintendent and Aon submit that the debtor of the sum of $600,288.00 is Air Canada and not Aveos since this sum represents the balance of special payments due to defray the deficit for the pension plan with regard to former Air Canada employees.

DISCUSSION

[54] One purpose of insolvency law is to provide for a fair distribution of a debtor's assets given that there is not enough money to pay all creditors [18]. The preferences accorded certain types of claim created by the laws passed by Parliament reflect policy decisions of the legislator. Parliamant decides what is fair.

---

[18] Houlden, Morawetz and Sarra, "*The 2012-2013 Annoted Bankruptcy and Insolvency Act*", Toronto, 2012, p. 2.

[55] The statutory mechanism of the deemed trust to protect sums due to the Crown has been given much attention before the courts. While the law appears settled regarding deemed trusts in favour of the Crown, questions remain concerning deemed trust claims of pension funds.

[56] An understanding of the state of the law and the policy reflected in this law requires a survey of the decisions of the courts considering such laws.

[57] The Superintendent did not urge that Section 8(2) P.B.S.A. creates a true trust. In similar circumstances, analyzing similar statutory language, the Supreme Court of Canada in *Sparrow*[19] stated that the deemed trust is not a real one as the subject matter cannot be identified from the date of the creation of the trust.

[58] Clearly, then, either at common law or in virtue of Article 1260 of the Civil Code of Québec ("C.C.Q."), no real trust exists in the present case since the property subject to the trust is not readily identifiable as funds were not segregated as required by Article 8(1) P.B.S.A., but rather, commingled. This situation is common; thus, the need for the legislator to create the deemed trust in Section 8(2) P.B.S.A. to protect sums due to pension plans.

[59] In *Sparrow*, the Supreme Court of Canada was faced with the deemed trust created by Section 227(4) and 227(5) of the *Income Tax Act* ("I.T.A.") [20] in effect in 1997 which read as follows:

> "(4) Every person who deducts or withholds any amount under this Act shall be deemed to hold the amount so deducted or withheld in trust for Her Majesty.
>
> (5) Notwithstanding any provision of the *Bankruptcy Act,* in the event of any liquidation, assignment, receivership or bankruptcy of or by a person, an amount equal to any amount
>
> (a) deemed by subsection 9(4) to be held in trust for Her Majesty […]
>
> shall be deemed to be separate from and form no part of the estate in liquidation, assignment , receivership or bankruptcy, whether or not that amount has in fact been kept separate and apart from the person's own moneys or from the assets of the estate."

[60] The text is similar to Section 8 P.B.S.A. It should be noted that Section 8(2) P.B.S.A. has not been amended since 1997.

---

[19] *Royal Bank of Canada vs. Sparrow Electric Corporation, op.cit.*, para. 31.
[20] R.S.C. , 1985, c. 1 (5th Supp.).

[61] In *Sparrow*, the secured creditor held perfected security interests over the debtors' inventory in virtue of the *Alberta Personal Property Security Act* [21] and Section 178 (now 427) of the *Bank Act* [22].

[62] Gonthier, J. while in dissent agreed with the basic analysis of Iacobucci, J. writing for the majority, that property validly encumbered by security was not attachable by the deemed trust under the I.T.A. [23].

[63] Iacobucci, J. for the majority was explicit on the competition of the deemed trust with the security interests:

> "The deeming is thus not a mechanism for undoing an existing security interest, but rather a device for going back in time and seeking out an asset that was not, at the moment the income taxes came due, subject to any competing security interest. In short, the deemed trust provision cannot be effective unless it is first determined that there is some unencumbered asset out of which the trust may be deemed. The deeming follows the answering of the chattel security question; it does not determine the answer." [24]

[64] Following *Sparrow*, Sections 227(4) and 227(5) I.T.A. were replaced by 227(4) and 227(4.1) [25] wherein language was added which was subsequently characterized by the Supreme Court as follows:

> 'It is apparent from these changes that the intent of Parliament when drafting Section 227(4) and 227(4.1) was to grant priority to the deemed trust in respect of property that is also subject to a security interest regardless of when the security interest arose in relation to the time the source deductions were made or when the deemed trust takes effect." [26]

[65] Similar amendments were brought in 1998 to the *Canada Pension Plan Act* [27] and the *Employment Insurance Act* [28] and in 2000 to the *Excise Tax Act* [29]. What is noteworthy in this legislative evolution, is that no similar amendments to overcome *Sparrow* were ever brought to Section 8(2) P.B.S.A.

[66] In the present case, when the deemed trust for the special payments arose, the property of Aveos was encumbered by fixed charges in favour of the

---

[21] S.A. 1988 c. P-4.05.
[22] R.S.C. 1985 c. B-1.
[23] Gonthier, J. at para. 39 and Iacobucci, J. at para. 98 to 99.
[24] *Ibid*.
[25] S.C. 1998, c.19.
[26] *First Vancouver Finance vs. M.N.R.*, [2002] 2 S.C.R. 720, para. 28.
[27] R.S.C. , 1985, c. C-8; amendments at S.C. 1998 c. 19.
[28] S.C. 1996, c. 23; amendments at S.C. 1998 c. 19.
[29] R.S.C. , 1985, c. E-15; amendments at S.C. 2000 c. 30.

Secured Lenders. Those fixed charges were created in 2010, except for the security in the Northwest Territories which was perfected in 2011. The deemed trust arose either upon the liquidation of Aveos (which would not have been before the C.C.A.A. filing on March 19, 2012) or at the earliest when a special payment became due following the actuarial valuation report filed in June 2011. Even if the obligation to make the special payments was somehow retroactive to December 31, 2010 (which was not argued by the Superintendent), the fixed charges in favour of the Secured Lenders were already perfected at such date. Moreover, Aveos made the special payments up to and including January 2012 so it is difficult to deem the trust prior to any payments being in default.

[67] Consequently, this Court agrees with the Secured Lenders first position that their security was created before any deemed trust for the $2.8 million could have existed. Since the assets were already charged, any deemed trust under Section (8)(2) P.B.S.A. is at best subordinate to the security of the Secured Lenders.

[68] This Court also agrees with the Secured Lenders second position, that is that the deemed trust to protect or give preferential treatment to the pension special payments is not effective in a C.C.A.A. proceeding at least where secured creditors with prior perfected security are not paid in full, for the reasons which follow.

[69] In the *Century* [30] case, the Supreme Court was called upon to consider whether a statutory deemed trust created under the *Excise Tax Act* [31] would be given effect in a C.C.A.A. matter.

[70] The deemed trust created under Section 222(3) of the *Excise Tax Act* operated "despite (…) any other enactment of Canada (except the Bankruptcy and Insolvency Act)". Section 18.3(1) C.C.A.A. (as it then read) negated the effect of any deemed trust in favour of the Crown except those created under the I.T.A., the *Canada Pension Plan Act* and the *Employment Insurance Act* all for source deductions.

[71] After examining the legislative history, Deschamps, J. writing for the majority, held that Parliament did not intend for the C.C.A.A. to protect the Crown's deemed trust priority for GST claims payable under the *Excise Tax Act*. Deschamps, J. stated that where Parliament's intent is to protect deemed trust claims in insolvency matters, Parliament clearly states so. Absent an express statutory basis for concluding that GST claims enjoy preferred treatment under the C.C.A.A. (or the B.I.A.), no such protection exists [32]. Fish, J. writing minority reasons was even more explicit that the protection of a deemed trust claim in an

---

[30] *Century Services Inc. vs. Canada (P.G.), op.cit*.
[31] *Op.cit.*
[32] *Century Services Inc. vs. Canada (P.G.), op.cit*., para. 45.

insolvency requires a statutory provision creating the trust and a provision in the B.I.A. or C.C.A.A. explicitly preserving the effective operation of the deemed trust [33].

[72] In the present case, while Section 8(2) P.B.S.A. creates the deemed trust, there is no provision of the C.C.A.A. that confirms or preserves it.

[73] Parliament has enacted such "preserving" provisions for deductions at source in Section 37(2) C.C.A.A. (see also Section 86(2) B.I.A.). This is a *Sparrow* legacy amendment. There is no such preservation for the Section 8(2) P.B.S.A. deemed trust.

[74] The Superintendent seeks to distinguish *Century* because there, the confirming provisions recognizing the deemed trust were necessary given that Parliament made the Crown an ordinary creditor in insolvencies in 2005. This is now reflected in Section 37(1) C.C.A.A. Thus, it was necessary for Parliament to specifically recognize the Crown deemed trusts for source deductions in Section 37(2) C.C.A.A. lest they be subsumed by Section 37(1) C.C.A.A. and treated as ordinary claims. Since the Section 8(2) P.B.S.A. deemed trust was never rendered ineffective by insolvency legislation (such as Section 37(1) C.C.A.A.) than there is no need for specific confirmation in the C.C.A.A., argues the Superintendent.

[75] Whatever allure this logic may contain, the reasoning of Deschamps, J. and Fish, J. in *Century* does not appear restricted to considerations of Crown deemed trust though that is the factual background of the case. Deschamps, J. is explicit in referring to the "general rule that deemed trusts are ineffective in insolvency" [34].

[76] More significantly, however, to indicate the intention of the legislator not to preserve the Section 8(2) P.B.S.A. deemed trust, are the 2009 amendments to the C.C.A.A. (and the B.I.A.). Sections 6(6) and 36(7) C.C.A.A. provide that an arrangement may only be sanctioned or an asset sale approved by the court, if provision is made for the payment of certain enumerated pension obligations including obligations under the P.B.S.A. These obligations do not however include special payments but rather are limited to deductions from employee salaries and normal cost contributions of the employer (neither of which is in issue in the present case). Similar protection was given in the B.I.A. for bankruptcy liquidations and receivership sales (see Sections 81.5 and 81.6 B.I.A.).

[77] The protection of Section 6(6) C.C.A.A. is not extended specifically to Section 8(2) P.B.S.A. or generally to special payments for actuarial deficits.

[33] *Ibid,* para. 96.
[34] *Ibid,* para. 45.

Moreover, in the next seminal case of the Supreme Court of Canada dealing with deemed trusts in insolvency, Deschamps, J., in the matter of *Indalex* [35], quotes from the report of Parliament's Standing Committee on Banking, Trading and Commerce to conclude that Parliament considered giving special protection to pension plan members in matters of insolvency but chose not to [36].

[78] The deemed trust in Indalex was a deemed trust under the *Pension Benefits Act* (Ontario) [37] which is legislation similar to the P.B.S.A.

[79] Given that the liquidation of Aveos took place in a C.C.A.A. context and that this statute provides no order of collocation or preference, provincial priorities continue to apply [38].

[80] In Ontario, as disclosed in the *Indalex* case, Section 30(7) of the *Personal Property Security Act* [39], subordinates security interests to the deemed trust created by the *Pension Benefits Act* [40]. Counsel for the Superintendent conceded that there is no equivalent provision in Québec provincial law that would give priority to the deemed trust in the present case. Accordingly, there is no basis for a priority claim for the Section 8(2) deemed trust based on Québec law.

[81] The Superintendent argues that it is unfair that Secured Lenders have a better rank in a C.C.A.A. liquidation vis-à-vis the pension than they would have otherwise. This however is not the case. Section 6(6) C.C.A.A. and Sections 81.5 and 81.6 B.I.A. are in harmony. The special payments are not protected and would not have priority over the rights of a secured lender in any scenario: bankruptcy, receivership or C.C.A.A. regime.

[82] The Superintendent also submits that Parliament's intent should also be gleaned from the amendments to the P.B.S.A. in 2009 limiting the deemed trust to the actual payment deficit and not to the whole actuarial deficiency (see Sections 29(6.2) and 29(6.5) P.B.S.A.) The actuarial deficit of the Aveos non-unionized pension plan is approximately $29,748,200.00. This argument is not however logically helpful to extend the protection of Section 8(2) P.B.S.A. to special payments due by a company under C.C.A.A protection. It is plausible that such an amendment was motivated by Parliament's desire not to subordinate

---

[35] *Sun Indalex Finance, LLC vs. United Steelworkers, op.cit.*
[36] *Sun Indalex Finance, LLC vs. United Steelworkers*, *op.cit.,* para. 81 and 82.
[37] R.S.O. 1990, Chapter P-8.
[38] *Sun Indalex Finance, LLC vs. United Steelworkers, op.cit,* para. 51 and 52.
[39] *Op.cit.*
[40] Nevertheless, it was held in *Indalex* that any deemed trust would be superseded by the priority accorded to the interim (debtor in possession) lender by the C.C.A.A. judge because of the doctrine of federal paramountcy.

or dilute ordinary creditors by a mutli-million dollar pension claim. In any event, the argument does not bolster the position vis-à-vis secured claims.

[83] The Superintendent legitimately poses the rhetorical question of what use is the deemed trust? Certainly it is useful for the protection of special payments but only vis-à-vis creditors who do not hold security over the assets of the debtor company which was perfected prior to the deemed trust attaching to the assets.

[84] The beneficiaries of the pension plan may be vulnerable as the Superintendent and Aon submit and as such merit protection for their pension entitlements as a matter of public policy [41]. However, the balance of competing policies is a matter for Parliament whose task is to define policy priorities and to reflect such choices in statutes. As Fish, J. stated in *Century,* legislative discretion belongs to Parliament alone and is not to be exercised by the judiciary [42].

[85] Finally, the Superintendent submitted that paragraph 19 of the Initial Order of March 19, 2011, permitting Aveos to interrupt the payments of the pension plan should be abrogated and that Aveos should be ordered to pay the $2,804,450.00 to the pension fund.

[86] In this regard, an issue arises as to whether the special payments constitute pre or post-filing obligations. Of course, if the obligation is a pre-filing obligation (*albeit* payable in instalments after filing) then it is arguable such amounts be the subject of a proof of claim in an arrangement and not be paid after the C.C.A.A. filing.

[87] The reason advanced that the obligation is pre-filing is that pension entitlement is part of the consideration or remuneration for labour services rendered by employees which in this case were all rendered pre-filing. The undersigned does not think it is necessary to characterize the special payments as pre or post-filing to decide this point in the circumstances of this case.

[88] The interruption of payments to the pension plan has been allowed by C.C.A.A. courts when necessary to enhance liquidity to promote the survival of a company in financial distress [43]. In *Nortel* [44], the company was being put through a sales process and did not appear to be able to continue its normal business operations.

---

[41] *Monsanto Canada Inc. vs. Superintendent of Financial Services*, [2004] 3 S.C.R. 152.
[42] *Century Services Inc. vs. Canada (P.G.), op.cit.,* para. 95.
[43] *Sproule vs. Nortel Networks Corporation, op. cit.,* para. 45 and 46; *AbitibiBowaters, op.cit.,* para. 49 and 50.
[44] *Sproule vs. Nortel Networks Corporation, op. cit.*

[89] The situation in the present case was not essentially different on March 19, 2012. However, the unfolding of the facts made it clear in short order that Aveos would not continue in business. Employees were not recalled to continue anything akin to normal business activity. The sales or divestiture process was approved by this Court on April 20, 2012. There were a number of sales and four (4) distributions of funds to the Secured Lenders between October 24, 2012 and October 21, 2013. The Superintendent was or should have been fully aware of the situation. However, no application was brought by the Superintendent or by Aon to vary the Initial Order as sought herein.

[90] Had an application been brought, the Secured Lenders could have decided on a course of action which may have included provoking a bankruptcy or a receivership.

[91] While the undersigned would not go so far as to say that priorities cannot be revisited following a sale, vesting order and distribution as did Campbell, J. recently in *Grant Forest* [45], I do believe that the Court should be extremely hesitant to alter the Initial Order, retroactively, after such a long period of time has elapsed and salient events in the C.C.A.A. process have occurred. As Farley, J. said :

> "Come back relief, however, cannot prejudicially affect the position of parties who have relied *bona fide* on the previous order in question." [46]

[92] The Initial Order was renewed six (6) times. The Superintendent has been on the service list. It is not sufficient to reserve one's rights. These rights must be exercised. Where a failure to exercise those rights, may cause prejudice to other parties, those rights, though not time barred by statute, may be subject to an estoppel in virtue of the doctrine of laches in common law or as a result of the doctrine of "fin de non-recevoir" [47] in civil law.

[93] It should also be noted that even in its petition for declaratory relief filed in April 2013, the Superintendent did not seek a modification of the Initial Order. The issue arose at the hearing.

[94] In the circumstance described above, the Superintendent's delay in seeking a modification to the Initial Order appears unreasonable given that the

---

[45] *Grant Forest Products Inc. (Re),* 2013 ONSC 5933.

[46] *MuscleTech Research and Development Inc.,* (2006) 19 C.B.R. (5th) 54; see also *Re White Birch Paper Holding Company (Arrangement relatif),* 2012 QCCS 1679, para. 245.

[47] *Banque Nationale du Canada vs. Soucisse et al*., [1981] 2 S.C.R. 339; see *also Baronet Inc. (Arrangement*), 2008 QCCS 288 (Parent, J.) where a three-month delay in a comeback motion was not considered unreasonable.

other parties, particularly the Secured Lenders have relied on that Initial Order, in good faith.

[95] Accordingly, in the opinion of the undersigned, the Superintendent is barred from seeking an amendment to the Initial Order at this time to, in effect, retroactively reverse the power of Aveos to interrupt the pension payments and to order Aveos to pay to the pension fund the $2,804,450.00.

[96] Given the conclusion on the priorities over the special payment of $2.8 million it is not strictly necessary to decide whether Aveos may impute $600,288.00 against the $2.8 million.

[97] However, should it become necessary for the parties, the Court will adjudicate on the question.

[98] In Québec law the general principle set out by Article 1569 C.C.Q. is that a debtor has the right to impute payment. Various exceptions and qualifications set out in the C.C.Q. do not apply to the present circumstances.

[99] Here it is agreed that Aveos received the $5.3 million from Air Canada in trust. The Superintendent and Aon plead that if the debtor is not Aveos, but rather Air Canada (who was liable to make the special payments to defray its pension deficit) then it is Air Canada and not Aveos that may impute the payment.

[100] In the opinion of the undersigned, though Air Canada may have been the debtor vis-à-vis Aveos in virtue of the agreement of 2007 (or even the October 2013 agreement), once in receipt of the funds, Aveos is the debtor vis-à-vis the former employees and thus has the right to impute payment.

[101] Even if Aveos holds the funds in trust, Aveos nevertheless has the right to impute payment of these funds since in Québec law, the trustee has "the control and exclusive administration of the trust patrimony" and "has the exercise of all of the rights pertaining to the patrimony" (Article 1278 C.C.Q). The undersigned would include in those rights, the right to impute payment as foreseen by Article 1569 C.C.Q.

[102] Accordingly this Court will declare as such in the conclusions of this judgment.

CONCLUSION

FOR ALL OF THE FOREGOING REASONS, THE COURT :

[103] **DISMISSES** the Motion for a Declaratory Judgment of the Superintendent of Financial Institutions;

[104] **DECLARES** that the rights of the Respondent secured lenders in virtue of their security rank in priority to the deemed trust created by Section 8(2) of the *Pension Benefits Standards Act* for the special payments due by Aveos Fleet Performance Inc. and aggregating $2,804,450.00.

[105] **DECLARES** that Aveos Fleet Performance Inc. has the right to impute payment of the sum of $600,288.00 forming part of the funds received or to be received from Air Canada in the amount of $5,361,499.00 as follows:

105.1. To the instalments for special payments to the Superintendent of Financial Institutions with respect to the pension plan for non-unionized employees of Aveos Fleet Performance Inc. for February 2012 ($254,950.00), March 2012 ($254,950.00) and April 2012 ($90,388.00);

[106] **THE WHOLE**, with costs against the Superintendent of Financial Institutions and Aon Hewitt.

_____

MARK SCHRAGER, J.S.C.

Me Roger Simard
Me Ari Y. Sorek
Dentons Canada L.L.P.
Attorneys for Aveos Fleet Performance Inc.

Me Bernard Boucher
Me Katherine McEachern
Blake Cassels & Graydon, ***s.e.n.c.r.l.***
Attorneys for Crédit Suisse AG,
Cayman Islands Branch and Wells Fargo Bank National Association

Me Sylvain Rigaud
Norton Rose Fulbright Canada, ***S.E.N.C.R.L.,s.r.l.***
Attorneys for FTI Consulting Canada Inc.

Me Pierre Lecavalier
Me Antoine Lippé
Procureur général du Canada
Attorneys for the Superintendent of Financial Institutions

Me Claude Tardif
Rivest Schmidt
Attorneys for Aon Hewitt

Dates of Hearing: October 21 and 22, 2013

TAB 2

Aveos Fleet Performance Inc. (Arrangement relatif à), 2012 QCCS 6796

SUPERIOR COURT

Commercial Division

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
N°: 500-11-042345-120

DATE : November 20, 2012

PRESIDING : THE HONOURABLE MARK SCHRAGER, J.S.C.

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

AVEOS FLEET PERFORMANCE INC. /
AVEOS FLEET PERFORMANCE AÉRONAUTIQUE INC.
Insolvent Debtor/Petitioner

and

AERO TECHNICAL US, INC.
Insolvent Debtor

and

FTI CONSULTING CANADA INC.
Monitor

and

NORTHGATEARINSO CANADA INC.
Petitioner

and

CREDIT SUISSE AG CAYMAN ISLANDS BRANCH
Secured creditor

JS 1319

JUDGMENT

INTRODUCTION

[1] Aveos Fleet Performance Inc. ("Aveos") is subject to an order under the *Companies' Creditors Arrangement Act* ("C.C.A.A.')[1] It has sold or seeks to sell all of its assets and is not operating its business. Can it invoke Section 32 C.C.A.A. to cancel an executory contract? This is the principal issue before this Court.

FACTS

[2] Aveos and its related entity, Aero Technical US, Inc. (collectively, the "debtors") applied for and this Court issued an initial order under the C.C.A.A. on March 19, 2012. A stay was issued until April 5, 2012, at that time and has subsequently been extended. F.T.I. Consulting Canada Inc. was named monitor. The record of the Court and particularly the orders and reasons of the undersigned indicate that in the hours following the initial order, the entire board of directors (but one) of Aveos resigned. Most of the remaining employees (i.e. those who had not been laid off prior to the C.C.A.A. filing) were laid off immediately following the initial order and the day-to-day operations of Aveos were shut down.

[3] The remaining director signed the affidavit in support of a Motion Seeking the Appointment of a Chief Restructuring Officer ("C.R.O."), in virtue of which Mr. Jonathan Solursh of the firm R.e.I. Consulting Group, an independent consultant, was named C.R.O. and has acted in such capacity since then. The remaining director resigned following such appointment.

[4] Much time and effort were spent in the month following the filing with the emergency situations of a company not having sufficient cash to operate in the normal course, being in possession of property claimed by third parties and having 2800 former or present employees owed millions of dollars in the aggregate. Nevertheless, the C.R.O. quickly concluded with the support of the Monitor that Aveos had to be sold.

[1] R.S.C. 1985, c. C-25

[5] On April 29, 2012, this Court issued an order approving the "Divestiture Process" put forward by the C.R.O. in virtue of which Aveos was offered for sale. The C.R.O. determined that Aveos' three (3) divisions (i.e. engines, components and air frames) should be marketed with a view to separate sales as it was unlikely that anyone would purchase all three (3) divisions. The C.R.O. believed that the value could be maximized by seeking to split Aveos into three (3) enterprises although there was no impediment to any one person acquiring all three (3) divisions. It was certainly hoped that all three (3) divisions would be sold on a going concern basis and would recommence operations and this in the interest of all stakeholders.

[6] As the Court record indicates, at no time did any party bring a motion to end the stay period with a view to petitioning Aveos into bankruptcy.

[7] The C.R.O. and Monitor have reported on an ongoing basis and also gave evidence in the present matter before the undersigned. The Divestiture Process has given rise to over 10 transactions. Unfortunately, only one sale (for the components division) has been made on a going concern basis where approximately 200 jobs should be conserved. However, and significantly, although the process of seeking bids has ended, the C.R.O. and the Monitor testified before the undersigned that a "latecomer" has appeared, and is performing a due diligence investigation with a view to making an offer to acquire the engine maintenance division of Aveos. The engine maintenance equipment remains in the hands of a liquidator but the scheduled auction has now been postponed. The interested party is in the same type of business, so that the tax losses of Aveos may have value as part of the transaction and this could potentially lead to the filing of a plan of arrangement with some benefit for unsecured creditors. Though the engine maintenance contract with Air Canada was sold as part of the Divestiture Process, it represented approximately 55 % of the engine maintenance business. Accordingly, there is a potential value in the business enterprise beyond the liquidation value of the tangible assets.

[8] Against this status update of the C.C.A.A. file is the dispute between Aveos and the present Petitioner, Northgatearinso Canada Inc. ("N.G.A.").

[9] Aveos was created as a result of the C.C.A.A. restructuring of Air Canada. It was the former maintenance department of Air Canada. Initially, it depended on Air Canada's support for payroll and human resources. As part of the process of separating Aveos from Air Canada, Aveos sought to outsource its human resources and payroll departments. To this end, a process to select a service provider was put in place. The goal of Aveos

was to have a completely outsourced human resources and payroll system that would include computer access for employees through a portal where they could access their files and view their status (e.g. benefit accruals) and even input information (e.g. change beneficiaries in insurance plans). The service would include a call center to handle employee questions.

[10] The establishment of the system had many challenges and complicating factors, such as the fact that some Aveos' personnel were Air Canada's employees that had been seconded to Aveos.

[11] Originally, an operating system completely independent from Air Canada and its services providers was targeted for autumn 2010. This date was extended due to extraneous considerations to July 14, 2011, which was fortunate given all of the developmental problems experienced as will be addressed below.

[12] The "Global Master Services Agreement" ("G.M.S.A.") with N.G.A. was signed between Aveos and N.G.A. in January 2011. By the time of the C.C.A.A. filing in March 2012 not all outstanding operational issues had been resolved. The relationship was fraught with frustration on both sides. Aveos felt that N.G.A. took too long to install systems and was unable to provide certain services altogether. Costs ran over those stipulated in the G.M.S.A. for services not covered under the agreement. All of this caused Aveos to lose confidence in N.G.A.

[13] N.G.A. was frustrated by the ongoing changes in Aveos management personnel charged with the implementation of the system, so that from N.G.A.'s point of view, once it finally "educated" one member of the Aveos team he she was replaced so that Aveos throughout did not fully understand what the system was designed to do, and by extension, what the system could not do.

[14] Aveos felt that N.G.A. as the expert should tell it not merely what was needed, but what was missing in the system to address Aveos' needs. Instead, the Aveos' personnel in charge learned piecemeal that features that they wanted or needed were not available or at least not included in the contract price. This situation was severe enough to cause Aveos to engage the services of Deloitte at the beginning of 2012 as a consultant to help Aveos resolve the continuing issues arising during implementation of the services to be provided by N.G.A. under the G.M.S.A.

[15] N.G.A. felt not only did Aveos fail to understand the system, but it provided incomplete or incorrect data to N.G.A. for input and thus further complicated matters.

[16] The problems with N.G.A. were such that Aveos has sought cancellation of the G.M.S.A. not only under Section 32 C.C.A.A. but also Aveos seeks resiliation for cause pursuant to the law of contracts generally based on N.G.A.'s alleged faulty execution of its obligations.

[17] The level of frustration existing between N.G.A. and Aveos continued after the C.C.A.A. filing. The lay-offs and the shut down of day-to-day operations required services not contemplated by the G.M.S.A. Obtaining such services in a timely manner from N.G.A. was the subject of ongoing extensive and tense negotiations over a period of approximately one month. Aveos was now represented by the C.R.O. and his staff with the support of the Monitor.

[18] Before the undersigned, the representative of the Monitor diplomatically described the situation between N.G.A. and Aveos prior to the C.C.A.A. filing as a "failed business relationship". Unfortunately, the situation did not improve during the post-filing period.

[19] Upon learning of the initial filing under the C.C.A.A., N.G.A. communicated with Aveos. The thrust of N.G.A.'s written and verbal communications were either a refusal to continue services under the existing contract and seeking assurance of payment going forward (according to Aveos) or a request as to what would be required given the change of operations and personnel as described above (according to N.G.A). There followed a series of exchanges including numerous conference calls which gave rise, in succession, to three Memoranda of Understanding dated March 26, April 10 and April 13, 2012 which outlined the services to be provided by N.G.A. to Aveos and the pricing in respect thereof.

[20] Aveos had payroll needs because 120 employees had been recalled. Also payroll periods which fell on both sides of the C.C.A.A. filing date required special attention. Certain "claw-back" amounts previously set off against amounts due to employees had to be paid post-filing. Records of employment had to be issued in order for employees to be able to claim benefits from the government unemployment insurance program.

[21] Other ongoing services under the G.M.S.A. were obviously not required as Aveos' operations were not continuing as had been the case prior to the C.C.A.A. filing.

[22] From N.G.A.'s point of view, the demands being made by Aveos were exorbitant mainly because the time delays were extremely aggressive. Many of the services requested were not what the system was designed to do. For example, records of employment resulting from mass layoffs were

not designed into the system, nor were reversing deductions from past pay periods and ledgering these reversals in the former pay period already closed for purposes of data entry. The system had to be (re-)designed to accommodate these needs.

[23] From the C.R.O's point of view, N.G.A.'s performance failures experienced by Aveos pre-filing now continued into the post-filing period. N.G.A.'s difficulty to meet tight time deadlines imposed by the C.C.A.A. circumstances and the exorbitant pricing made it such that Aveos, through the C.R.O., sought and engaged an alternate payroll service provider as of May 1st, 2012. The price for a one-year contract albeit encompassing far less extensive services than those under the G.M.S.A., is one-half of N.G.A.'s monthly fee. Indeed, the representative of the C.R.O. testified that the exorbitant pricing under the three (3) Memoranda of Agreement was only accepted because there was no alternative at that time. As such, $240,000.00 was paid by Aveos to N.G.A. for the 4-week period between the end of March and the end of April 2012.

[24] In one instance, where the payroll included the reversal of amounts previously set off, N.G.A. could not produce the work product at all or at least on time such that the C.R.O. organized staff to produce 800 pay cheques manually. Moreover, the data in question was entered into the database by N.G.A. in the current as opposed to the old, pre-filing period in consideration of which the payments were being made. This caused Services Canada to question whether the employees were indeed eligible for Unemployment Insurance ("UIC") benefits. Apparently, much energy was expended in order to correct this situation and the results were additional delays for employees to receive their UIC benefits.

[25] Effective May 1st, 2012, Aveos gave notice to N.G.A. that it was cancelling the G.M.S.A. and the three (3) Memoranda of Agreement for faulty performances both pre and post-filing. Alternatively, Aveos took the position that it was cancelling and repudiating the agreements pursuant to its rights to do so under Section 32 C.C.A.A. N.G.A. claims $501,381.00 which is the indemnity provided by the G.M.S.A. where cancellation is for "convenience", i.e. without cause. N.G.A. also claims the sum of $91,377.00 for unpaid services rendered under the three (3) Memoranda of Agreement.

[26] Crédit Suisse, the secured creditor, has taken the position that whatever sums might be due to N.G.A., they fall within the definition of "claim" in Sections 2 and 19 C.C.A.A. and are not post-filing claims as postulated by N.G.A. Thus, any payment would be subordinate to the rights of Crédit Suisse.

ISSUES

[27] Is Section 32 C.C.A.A. available to Aveos as a means to resiliate or cancel the G.M.S.A.?

[28] Aside from Section 32 C.C.A.A., does Aveos have the right to resiliate the G.M.S.A. because of the alleged faulty execution by N.G.A. of its obligations there under?

[29] Does N.G.A. have the right to claim the cancellation indemnity of $501,381.00 foreseen by the G.M.S.A.? If so, is the amount due immediately by Aveos as a claim arising after the C.C.A.A. filing, and as such not subject to the stay of proceedings? In the alternative, is the amount due but subject to be treated as a (pre-filing) ordinary or unsecured claim to be dealt with under an arrangement, if any, or a bankruptcy?

[30] Is the sum of $91,377.00 due immediately for services rendered by N.G.A. to Aveos after the C.C.A.A. filing?

POSITION OF N.G.A.

[31] N.G.A. contends that Section 32 C.C.A.A. does not apply in the circumstances where Aveos ceased to carry on business, is being liquidated and as such will not propose an arrangement to its creditors. N.G.A. argues that Section 32(1)(b) C.C.A.A. does not apply to such a scenario. The purpose of Section 32 C.C.A.A. is to allow a debtor company to rid itself of contractual obligations which are an impediment to an arrangement. Where no arrangement will be filed, Section 32 C.C.A.A. should not apply according to N.G.A.

[32] Moreover, since the G.M.S.A. contains a provision allowing for cancellation without cause, such recourse must be used before reverting to a statutory mechanism to seek cancellation of the contract. In other words, according to N.G.A., Aveos must pay the stipulated cancellation penalty of $501,381.00 to achieve cancellation in such manner rather than having recourse to Section 32 C.C.A.A.

[33] The resiliation of the G.M.S.A. for faulty execution is not available to Aveos because on the facts of the case, N.G.A. is not at fault having fulfilled its contractual obligations at all relevant times.

[34] The $501,381.00 cancellation penalty is not a claim provable within the meaning of the C.C.A.A., but rather is a post-filing claim. This claim arises from the unilateral cancellation of the G.M.S.A. by Aveos after the

C.C.A.A. filing. N.G.A. continued to render services after the filing albeit in a modified manner, at Aveos' request and in order to respond to Aveos' needs in the situation as it unfolded after the C.C.A.A. filing. On or about May 1st, 2012, approximately five (5) weeks after the C.C.A.A. filing, Aveos cancelled the G.M.S.A. and as such the obligation of Aveos to pay the penalty of $501,381.00.00 arose after the filing. Consequently, it is not a provable claim, but rather an amount arising and payable after the C.C.A.A. filing.

[35] Similarly, the $91,377.00 representing charges for services rendered after the filing, and at the request of and as agreed with Aveos, are currently due. This is not a claim provable to be dealt with under an arrangement, according to N.G.A. As such, it should be paid by Aveos immediately, as were the other amounts for services rendered after the C.C.A.A. filing, the whole as pleaded by N.G.A.

DISCUSSION

[36] Section 32 C.C.A.A. provides a mechanism for a debtor company to "disclaim or resiliate" agreements to which it is a party at the time of the initial C.C.A.A. filing. This disclaimer is achieved by notice given by the debtor to the co-contracting party.

[37] The debtor company's notice to disclaim may be contested by the other party to the contract as N.G.A. has done in the present case. It then falls upon the Court to make (or not) an order of disclaimer :

[38] Section 32(4) C.C.A.A. provides as follows :

> "Factors to be considered
>
> In deciding whether to make the order, the court is to consider, among other things,
>
> a) whether the monitor approved the proposed disclaimer or resiliation;
>
> b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement."

[39] On the face of the drafting of Section 32(4) C.C.A.A., the matters listed are not an exhaustive enumeration of the matters that this Court may consider in deciding whether to approve the cancellation of a contract where the notice is contested.

[40] Section 37(4)(c) C.C.A.A. is not in issue in these proceedings because N.G.A. did not allege nor prove any financial hardship arising from the G.M.S.A. There is the obvious lack of revenue stream when the contract is cancelled (approximately $80,000.00 per month), but it was not contended that the loss of this, *per se* constituted, in this particular case, the "financial hardship" to which subparagraph (c) refers.

[41] Section 32(4)(b) C.C.A.A. addresses the issue of whether the cancellation of the contract would "enhance the prospects of a viable" arrangement being made.

[42] The Monitor filed a report and its representative, Ms. Toni Vanderlaan, testified before the undersigned.

[43] The Monitor confirmed that it had approved the proposed cancellation of the G.M.S.A. as foreseen by Section 32(4)(a) C.C.A.A. In so doing, the Monitor considered the cost of continuing the G.M.S.A., which as indicated above represents approximately $80,000.00 per month prior to the C.C.A.A. filing. The alternate provider engaged by Aveos after May 1st (Ceridian), was considerably cheaper at $40,000.00 per year albeit that the scope of the service under the G.M.S.A. provided by N.G.A. was much broader than those provided by Ceridian. In any event, the Monitor determined that the G.M.S.A. was far too expensive given the cash position of Aveos and its payroll and human resources needs in any scenario post C.C.A.A. filing.

[44] In addition to cost, the Monitor concluded that cancelling the G.M.S.A. would enhance the prospect of filing an arrangement. The Monitor underlined that not merely was the G.M.S.A. expensive, but it was undesirable. As stated above, Ms. Vanderlaan summarized the relations between N.G.A. and Aveos at the time of the C.C.A.A. filing as a "failed business relationship". It is clear to the Court that the systems provided by N.G.A. either did not do what they were supposed to do or if they did do what they were supposed to do, then there was a breakdown in communication between N.G.A. as service provider and Aveos as consumer as to what the requirements of Aveos were.

[45] The representative of N.G.A., Mr. Latulippe, referred on a number of occasions to the fact that the representatives of Aveos responsible for the negotiation and implementation of the G.M.S.A. with N.G.A. did not properly

understand what the system was designed to do. This may have been so, but it became evident during the hearing before the undersigned that N.G.A. was lacking in its ability both before and after the C.C.A.A. filing to understand its client's needs and to address them adequately or where that was not possible to explain such inability in a timely and comprehensible fashion. It was therefore not conceivable that Aveos could use the G.M.S.A. going forward because of all of the problems associated with it.

[46] Moreover, the system described in the G.M.S.A. was designed for a company with approximately 3,000 employees. After the C.C.A.A. filing, Aveos only had a fraction of that number on a descending basis. Since the Divestiture Process was based on the premise that no one acquirerer would seek to purchase all three (3) divisions of Aveos, then any possible purchasers would not want the contract based purely on the number of employees. Aside from such consideration, the system did not work very well and the likelihood was that any acquirerer would be an operator in the industry and already have its own payroll and human resources systems in place. The sale or assignment of the G.M.S.A. as part of a sale of assets was not an alternative in the view of the Monitor even absent all the problems experienced by Aveos with the system. Thus, in any possible scenario, the G.M.S.A. was of no use to Aveos and could not enhance, in any scenario, the making of an arrangement.

[47] However, and as stated above, N.G.A. contends that cancellation under Section 32 C.C.A.A. is not available because Section 32(4)(b) C.C.A.A. does not apply. According to N.G.A., there is no discussion to be had about the prospect of an arrangement since early on in the C.C.A.A. process, Aveos shut down its normal operations and went into liquidation mode. Thus, no plan of arrangement will be made, so that an essential element for the application of Section 32 C.C.A.A. is not met according to N.G.A.

[48] The text of Section 32(4)(b) C.C.A.A. does not impose as a condition for resiliation that there be a plan of arrangement or even the certainty that there will be a plan of arrangement filed. Rather 32(4)(b) C.C.A.A. requires that the cancellation of the G.M.S.A. enhance the prospects of a viable arrangement. It is clear from the Monitor's analysis referred to above that the cancellation would rid Aveos of an expensive contract for a system which never functioned in a completely satisfactory manner, and that under the best of circumstances was inappropriate for a company with less than 2,800 employees, and where the relationship with the service provider (both pre and post C.C.A.A. filing) had failed. Viewed in this way, the disclaimer could only enhance the possibility of an arrangement.

[49] It is accepted by the case law that the disclaimer need not be essential but merely advantageous to a plan [2]. There need not be any certainty that there will be a plan of arrangement but just that cancellation of the contract in question would be beneficial to the making of a plan.

[50] Section 32 C.C.A.A. applies even where there is a sales process in place as is the situation with Aveos [3]. Prior to Section 36 C.C.A.A. coming into force in 2009, it was broadly accepted that liquidating while under C.C.A.A. protection was not contrary to the Act.[4] Now, Section 36 C.C.A.A. explicitly provides for sales out of the ordinary course of business, with Court approval.

[51] A sales process, particularly when assets are offered on a going concern basis together with intangible property (e.g. customer contracts) can lead to a result where one or several operating business entities similar to those operated by the debtor pre C.C.A.A. filing, continues after the C.C.A.A. process is completed. The ability to file an arrangement can largely be a function of the sales proceeds received and the amounts available to different stakeholders, particularly secured creditors. The point is that the existence of a sales process or "liquidation" does not *per se* mean that an arrangement is not a possibility. The fact that Aveos ceased operations was a function of cash (or the lack thereof), but the sales process was specifically designed to enhance the possibility of going-concern sales. Indeed, the timetable was short, specifically so as to limit the deterioration of critical mass of such things as customer base and labour pool. Despite the fact that only one division (components) of Aveos was sold on a going concern basis through the process, the C.R.O. testified at the hearing that a new prospective purchaser had come forward to possibly purchase the engine maintenance center together with tax losses arising from Aveos' operations. This could result in a plan of arrangement being filed with benefit for unsecured creditors.

[52] Accordingly, in the view of this Court, the shutdown of Aveos' normal operations and the implementation of a sales process does not in itself, eliminate the application of Section 32 C.C.A.A. as argued by N.G.A.

---

[2] *Timminco Limited (Re)*, 2012 ONSC 4471 at par. 52 to 57; *Boutique Jacob inc. (Arrangement relatif à),* 2011 QCCS 276 at par. 38 to 41 and 46; *Homburg Invest inc. (Re)*, 2011 QCCS 6376 at par. 103-106; *9145-7978 Québec inc. (arrangement relatif à*), 2007 QCCA 768 at par. 26 to 29.

[3] *Timminco Limited* (Re), op.cit, at par. 52-27

[4] *Sproule vs. Nortel Networks Corporation 2009 ONCA 833; First Leaside Wealth Management Inc. (Re),* 2012 ONSC 1299; *PCAS Patient Care Automation Services Inc. (Re),* 2012 ONSC 3367; *Brainhunter Inc. (Re),* (2009) 62 C.B.R. (5th) 41 (ONSC); *Anvil Range Mining Corp. (Re)*, (2002) 34 C.B.R. (4th) (ONCA)

[53] As indicated above, the undersigned has considered the evidence of the C.R.O. with respect to the late bidder. C.C.A.A. issues generally must be decided in "real time" if for no other reason so as to achieve the broad remedial purpose of the legislation[5] of providing a means for financially-strapped enterprises to correct problems and continue in business. This is all the more so in a process such as the Aveos Divestiture Process where the parties' business judgment dictates that the debtor be offered for sale but the parties do not know ahead of time what the outcome of such process will be. The situation evolves constantly and rapidly. The Court's decisions along the way cannot be frozen in time lest those decisions be unrealistic and unhelpful to the process. In any event, even if the undersigned only considered the facts as they were at the date of the notice to disclaim the G.M.S.A. as urged by N.G.A., the undersigned would still be of the opinion that Section 32 C.C.A.A. is available to Aveos for the reasons given above pertaining to the interpretation of Section 32 C.C.A.A.

[54] N.G.A. also submitted that since the G.M.S.A. contains a mechanism to cancel where cancellation for cause under the common law of contracts is not available, then Section 32 C.C.A.A. cannot apply. The argument put forward by N.G.A. is based on the decision in the matter of Hart Stores [6] where Mongeon, J.S.C. held that Section 32 C.C.A.A. did not apply to the cancellation or termination of verbal contracts of employment having no fixed term.

[55] The reasoning in that case was that the mechanism in Section 32 C.C.A.A. was inappropriate to cancel a verbal contract of indeterminate term where the law (Article 2091 of the Civil Code of Québec) provided a mechanism for unilateral cancellation. In this Court's opinion that reasoning does not apply to a written service agreement of determinate term such as the G.M.S.A.

[56] Moreover taken to its logical conclusion, the argument is not really of any help to N.G.A. for the following reason. If Aveos could not rely on Section 32 C.C.A.A. and was obliged to rely on the cancellation for convenience clause in the G.M.S.A., the penalty of $501,381.00 would nonetheless constitute a provable claim payable under an eventual plan of arrangement or bankruptcy.

[57] "Claim" is defined in Section 2 of the C.C.A.A. by reference to the *Bankruptcy and Insolvency Act* ("B.I.A.") [7]. Section 19 C.C.A.A. introduced

---

[5] *Century Services Inc. vs. Canada (Attorney General),* [2010] 3 S.C.R. 379
[6] Re *Hart Stores Inc*., 2012 QCCS 1094
[7] R.S.C. *c*. B.-3

in the 2007 amendments which came into force in 2009, includes in claims that can be dealt with under a plan of arrangement the following:

> "19.(1)(*b*) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (*a*)(i) and (ii)."

This is precisely the situation with the cancellation indemnity claimed by N.G.A. in this case. Though Aveos may have triggered the cancellation penalty after the C.C.A.A. filing, the obligation stems from a contract to which it was bound pre-C.C.A.A. filing.

[58] The claim for the cancellation penalty would also be a claim provable in a bankruptcy (see Section 2 and Section 121 of the *B.I.A.* which are substantially similar to Section 19 C.C.A.A.).

[59] Accordingly, in any and all scenarios, the $501,381.00 claimed by N.G.A. for the cancellation indemnity would be a claim provable and would not have the status of a "post-filing claim" payable immediately, i.e. prior to the claims of other creditors.

[60] The Courts have said on numerous occasions that pre-filing creditors cannot under the guise of making a post-filing claim, obtain a preference over other creditors. [8] This applies even to employees for severance claims arising from termination of employment after the C.C.A.A. filing [9]. The equitable treatment of creditors' demands that claims for contractual damages arising from the termination of contracts after filing under the C.C.A.A. be treated on a par with other provable claims [10].

[61] Consequently, N.G.A.'s argument based on the cancellation of the G.M.S.A. without cause after the C.C.A.A. filing date is not helpful to N.G.A., since even if correct, the argument would give rise to a claim provable only.

[62] Moreover, the parties cannot write out part of the C.C.A.A. from contracts. [11] This is against public policy. Parties to a contract cannot exclude in advance the application of the C.C.A.A. It would be offensive to the wording of Section 32 and the C.C.A.A. in general if Section 32 C.C.A.A. could not achieve its purpose as a result of the drafting of the contract which

---

[8] *Pine Valley Mining Corporation (Re),* 2008 B.C.S.C. 368 para. 37-42; *Canwest Global Communications Corp. (Re),* 2010 O.N.S.C. 1746, para. 29-31, 33-35

[9] *Canwest Global Communications Corp. (Re),* op.cit.

[10] *Timminco Limited (Re*), op.cit., para. 44

[11] Section 8 C.C.A.A.

the debtor sought to cancel. This would defeat the rehabilitative purpose of the C.C.A.A. and thus would be contrary to the public policy of the C.C.A.A.

[63] Consequently, Section 32 C.C.A.A. is available to Aveos in order to cancel the G.M.S.A. The appropriate order will issue.

[64] Because of the manner in which the Court has answered the first issue set forth hereinabove (i.e. the application of Section 32 C.C.A.A.) it is not necessary to analyse whether Aveos could cancel the G.M.S.A. for cause because of alleged faulty execution by N.G.A. in virtue of the law of contracts generally.

[65] Regarding the $501,381.00 cancellation indemnity, the following should be added. Section 32(7) C.C.A.A. provides that any loss suffered in relation to the disclaimer is a provable claim. The Court renders no judgment on whether the amount of any such claim is $501,381.00 or any other amount in the circumstances. That will have to be determined at a later date, if necessary.

[66] The final issue requiring determination is the matter of N.G.A.'s claim for $91,377.00 for system maintenance. This amount represents the fee of $10,153.00 per week stipulated in the memorandum of understanding of April 13th. Such an amount was paid for the period up to the end of April 2012. The $91,377.00 represents $10,153.00 per week for the 9-week period commencing April 30, 2012, i.e. the expiry of the term of the last memorandum of understanding.

[67] N.G.A. needed the data maintained in the system to complete the records of employment ("R.O.E.") for each of the employees. It had contracted to make "best efforts" to complete those R.O.E.s by April 28, 2012. Mr. Latulippe, N.G.A.'s representative, testified that N.G.A. completed all of the R.O.Es by April 28th, except for 50 which were problematic and could not be completed until the end of June. Accordingly, N.G.A. required the data to be maintained until that time. He conceded that there was no explicit agreement in place after April 30, 2012 for Aveos to pay such weekly system maintenance fee.

[68] Even though N.G.A. only contracted to make best efforts to complete the R.O.E.s before April 28th, if N.G.A. needed to maintain the data in the system after April 28th, it was not justified, without Aveos' consent, to charge the $10,153.00 per week to maintain the data in the system. The "best efforts" clause may have attenuated N.G.A.'S obligation to complete by April 28th but did not impose an obligation on Aveos after that date without its consent. It had been agreed after the C.C.A.A. filing that the services to be provided by N.G.A. and paid for by Aveos were set

forth in the memoranda of understanding. There was no obligation to pay for system maintenance after April 28th.

[69] The Court adds that the fact that the cancellation of the G.M.S.A. takes effect according to Section 32(5) C.C.A.A. on the 30th day following Aveos' notice of May 7, 2012 does not entitle N.G.A. to charge for services under the M.G.S.A. not provided nor for services not agreed to under the memoranda of understanding. Accordingly, the claim for $91,377.00 will be denied.

FOR ALL OF THE FOREGOING REASONS, THE COURT :

[70] **DISMISSES** Northgatearinso Canada Inc.'s "Amended Motion to Strike *De Bene Esse* Notice by Debtor Company to Disclaim or Resiliate an Agreement and for Payment of Post-filing Obligations", dated July 9, 2012;

[71] **DECLARES** and **ORDERS** resiliated as of June 6, 2012 the following agreement, namely: "Global Master Services Agreement" between Aveos Fleet Performance Inc. and Northgatearinso Canada Inc. dated June 30, 2010 as amended from time to time including, *inter alia*, by subsequent Memoranda of Agreement".

[72] THE WHOLE with costs against Northgatearinso Canada Inc.

Montreal, November 20, 2012

MARK SCHRAGER, J.S.C.

Mtre. Martin Poulin
Fraser Milner Casgrain LLP
Attorneys for Aveos Fleet Performance inc./
Aveos Fleet Performance Aéronautique Inc.
and Aéro Technical US, Inc.
Insolvent Debtor/Petitioner

Mtre. Geneviève Cloutier
Gowling Lafleur Henderson s.e.n.c.r.l
Attorneys for Northegatearinso Canada Inc.

Mtre. Bernard Bouchard and Mtre. Caroline Dion
Blake, Cassels & Graydon LLP
Attorneys for Canadian Counsel for Credit Suisse AG, Cayman Islands Branch

Mtre. Sylvain Rigaud
Norton Rose Canada LLP
Attorneys for FTI Consulting Canada Inc.
Monitor

Dates of Hearings: September 28, October 18, 19 and 30, 2012

TAB 3

Bloom Lake, g.p.l. (Arrangement relatif à),
2015 QCCA 1351

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-025441-155
500-09-025469-156
(500-11-048114-157)

DATE: AUGUST 18, 2015

PRESIDING: THE HONOURABLE NICHOLAS KASIRER, J.A.

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

500-09-025441-155

MICHAEL KEEFER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON, as representatives of the salaried / non-union employees and retirees
APPLICANTS – objecting parties
v.

BLOOM LAKE GENERAL PARTNER LIMITED
QUINTO MINING CORPORATION
8568391 CANADA LIMITED
CLIFFS QUEBEC IRON MINING ULC
WABUSH IRON CO. LIMITED
WABUSH RESOURCES INC
RESPONDENTS – 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
IMPLEADED PARTIES – impleaded parties

and
FTI CONSULTING CANADA INC.
IMPLEADED PARTY – monitor
and
HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR, as represented by THE SUPERINTENDENT OF PENSIONS
THE ATTORNEY GENERAL OF CANADA
SYNDICAT DES MÉTALLOS, SECTION LOCALE 6254
SYNDICAT DES MÉTALLOS, SECTION LOCALE 6285
IMPLEADED PARTIES – objecting parties

500-09-025469-156

SYNDICAT DES MÉTALLOS, SECTION LOCALE 6254
SYNDICAT DES MÉTALLOS, SECTION LOCALE 6285
APPLICANTS – objecting parties
v.

BLOOM LAKE GENERAL PARTNER LIMITED
QUINTO MINING CORPORATION
8568391 CANADA LIMITED
CLIFFS QUEBEC IRON MINING ULC
WABUSH IRON CO. LIMITED
WABUSH RESOURCES INC
RESPONDENTS – 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
IMPLEADED PARTIES – impleaded parties
and
FTI CONSULTING CANADA INC.
IMPLEADED PARTY – monitor
and
HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR, as represented by
THE SUPERINTENDENT OF PENSIONS
THE ATTORNEY GENERAL OF CANADA
MICHAEL KEEFER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON, as representatives of the salaried / non-union employees and retirees

IMPLEADED PARTIES – objecting parties

and

QUEBEC NORTHSHORE AND LABRADOR RAILWAY COMPANY INC.
IRON ORE COMPANY OF CANADA

IMPLEADED PARTY – impleaded parties

JUDGMENT

---

[1] Sitting as judge in chambers pursuant to sections 13 and 14 of the *Companies' Creditors Arrangement Act*[1] ("CCAA") and articles 29, 511 and 550 C.C.P., I am seized of two motions for leave to appeal from a judgment of the Superior Court, District of Montreal (the Honourable Stephen Hamilton), rendered on June 26, 2015. The Superior Court dismissed contestations made on behalf of the petitioners, who are, respectively, representatives of non-union employees and retired employees (petitioners in court file C.A.M. 500-09-025441-155 and hereinafter designated the "Salaried Members") and the Syndicat des Métallos, sections locales 6254 and 6285 (in court file C.A.M. 500-09-025469-156, hereinafter referred to together as the "Union"). In so doing, the Superior Court confirmed the respondent's request to grant priority to an interim lender charge over claims made by the petitioners based on deemed trusts in pension legislation. The Court also suspended certain payments due under pension plans as well as for post-retirement benefits.

[2] The Union filed an amended motion prior to the hearing. Both motions for leave also ask for orders to suspend provisional execution of the judgment notwithstanding appeal.

I Background

[3] The facts are usefully and completely recounted in the judgment *a quo*.[2]

[4] On May 20, 2015, the CCAA Judge Hamilton, J. granted a motion for the issuance of an initial order to commence proceedings under the CCAA to respondents Wabush Iron Ore Co. Ltd., Wabush Resources Inc., Wabush Mines, Arnaud Railway Company and Wabush Railway Co. Ltd. (the "Wabush CCAA Parties"). The CCAA proceedings as they concern the Wabush CCAA Parties were joined to CCAA proceedings started some four months earlier involving the "Bloom Lake CCAA Parties".[3]

---

1 R.S.C. 1985, c. C-36.

2 2015 QCCS 3064.

3 The pre-existing CCAA proceedings were commenced on January 27, 2015, by an initial order issued by Castonguay, J. of the Superior Court, in respect of Bloom Lake General Partner Ltd., Quinto

[5] Prior to the filing of the motion, Wabush Mines operated an iron ore mine located near the Town of Wabush and Labrador City, in the province of Newfoundland and Labrador, with facilities at Pointe-Noire, Quebec.

[6] The Wabush CCAA Parties are currently involved in a court-ordered sales process, originally commenced in the Bloom Lake CCAA proceedings, whereby they seek to sell assets with a view either to concluding a plan of compromise with their creditors (including the petitioners) or disposing of assets and distributing the proceeds to creditors (including the petitioners).

[7] The Wabush CCAA Parties have two defined pension plans for their employees, one for salaried employees and the other for unionized employees paid an hourly wage. Because some employees work in a provincially-regulated setting in Newfoundland and Labrador and others work in federally-regulated industries, the plans are subject to oversight by both the federal Office of Superintendent of Financial Institutions and the Newfoundland and Labrador Superintendent of Pensions.

[8] Both plans are underfunded. The CCAA Judge set forth estimated amounts to be paid as winding-up deficiencies, monthly amortization payments and lump-sum "catch-up" amortization payments. He noted as well that the Wabush CCAA Parties provide other post-employment benefits ("OPEB"), including health care and life insurance, to certain retired employees. Accumulated benefits' obligations for the OPEBs, as well as monthly premiums required to fund those benefits, are to be paid by the Wabush CCAA Parties. In addition, amounts are due pursuant to a supplemental retirement arrangement plan for certain salaried employees (see paras [4] to [13] of the judgment).

[9] The Wabush CCAA Parties arranged for interim financing (a debtor-in-possession or "DIP" loan) from Cliffs Mining Company, a related company. The CCAA Judge was of the view that the Wabush CCAA Parties' cash-flow was compromised and that the interim financing was necessary to continue operations during restructuring. The Wabush initial order approved an interim financing term sheet pursuant to which the interim lender would provide US$10M of interim financing, on conditions, for the Wabush CCAA Parties short-term liquidity needs during the CCAA proceedings. These conditions included, as the CCAA Judge recorded in paragraph [16] of his reasons, a requirement that the interim lender have a charge in the principal amount of CDN $15M, with priority over all charges, against Wabush CCAA Parties' property, subject to some exceptions. There is a further condition that Wabush CCAA Parties may not make any special payments in relation to the pension plans or any payments in respect of the OPEBs. The initial order granted the interim lender charge of $15M but did not give priority to that charge over existing secured creditors in order to allow the parties to make representations at a comeback hearing.

Mining Corp., 8568391 Canada Ltd., Cliffs Quebec Iron Mining ULC, The Bloom Lake Iron Ore Partnership and Bloom Lake Railway Co. Ltd. (the "Bloom Lake CCAA Parties").

[10] At that comeback hearing, the Wabush CCAA Parties sought, *inter alia*, priority for the interim lender charge ahead of deemed trusts created by pension legislation and a suspension of obligations to pay amortization payments in relation to the pension plans and payments for OPEBs. The Salaried Members and the Union contested these matters. The CCAA Judge issued an order on June 9, 2015 granting priority to the interim lender charge, subject to the rights of, *inter alia*, the Salaried Members, the Union and the federal and provincial pension authorities to be determined at a later hearing.

[11] That hearing on June 22, 2015 gave rise to the judgment a *quo* in which the CCAA Judge granted the Wabush CCAA Parties' comeback motion and dismissed the contestations brought by the Salaried Members and the Union.

II The judgment of the Superior Court

[12] The CCAA Judge made numerous findings and rendered different orders, not all of which concern the motions before me. I will limit my comments to those aspects of the judgment relevant here.

[13] After setting forth the context and the arguments of the parties, the CCAA Judge considered the conflict between the super-priority of the interim lender charge and the deemed trusts created by federal and provincial legislation. (His findings in respect of the provincial rules do not concern us directly at this stage).

[14] As to the impact of CCAA proceedings on the deemed trust created by subsection 8(2) of the *Pension Benefits Standards Act, 1985*,[4] the judge wrote "there is no general rule that deemed trusts in favour of anyone other than the Crown are ineffective in insolvency" (para. [72]). He then considered the effect of subsection 8(2) PBSA on the provisions of the CCAA that deal with pension obligations, including subsections 6(6) and 36(7) CCAA that were added to the Act in 2009. Based on his interpretation of the general rule in subsection 8(2) PBSA and the particular rules in the CCAA, the judge concluded, as an exercise of statutory interpretation, that "Parliament's intent is that federal pension claims are protected in […] restructurings only to the limited extent set out in the […] CCAA, notwithstanding the potentially broader language in the PBSA" (para. [78]). In the alternative, he wrote, "the Court could conclude that a liquidation under the CCAA does not fall within the term "liquidation" in Subsection 8(2) PBSA such that there has been no triggering event" (para. [79]). Either way, he observed, the deemed trust in subsection 8(2) PBSA did not prevent him from granting a priority to the interim lending charge if the conditions of section 11.2 CCAA were met.

[15] After considering the relevant factors under the CCAA to the facts of the case, the CCAA Judge decided that the proposed sale was in the interests of the Wabush CCAA Parties and their stakeholders as it should lead to a greater recovery. The sale

---

[4] R.S.C. 1985, c. 32 (2nd Supp.).

required new financing and, without that financing, it is likely that the Wabush CCAA Parties would go bankrupt. The judge also expressed his view that the terms and conditions of the interim financing were reasonable, and that the security is limited to the amount of the new financing. He then wrote that "[t]his is sufficient for the Court to conclude that the Interim Financing should be approved and the interim lender charge should be granted with priority over the deemed trust under the PBSA, if it is effective in the CCAA context" (para. [95]). He also found that the terms of the interim lending sheet, including the requirement that the interim lender be granted super priority, were not unusual and that he was not satisfied that the Superior Court had jurisdiction to order the lender to advance the funds on other terms (para. [100]).

[16] The CCAA Judge then gave reasons for his decision to grant the Wabush CCAA Parties' request that their obligation to make special and OPEB payments be suspended. He held that forcing the Wabush CCAA Parties to make special payments would lead to a default under the interim financing arrangement and a likely bankruptcy (para. [112]). He came to the same conclusion in respect of the OPEBs (para. [122]). In so doing, he rejected the argument that the suspension of the OPEBs amounted to a resiliation of the insurance contract under which the benefits are provided, resiliation which would have required notice under section 32 CCAA (paras [127] to [131]).

[17] The CCAA Judge rejected all other grounds for contestation. He confirmed the priority of the interim lending charge over the deemed trusts as set out in the initial order; he ordered the suspension of payment by the Wabush CCAA Parties of monthly amortization payments, of the annual lump sum catch-up payments, and of other post-retirement benefits.

III **The motions for leave**

[18] The two motions raise some similar issues but are different in scope.

[19] The Salaried Members ask for leave to appeal in respect of conclusions relating to two aspects of the judgment.

[20] First, the Salaried Members seek to reverse the CCAA Judge's approval of what they characterize as the termination of OPEBs and of payment of supplemental pension benefits imposed by the Wabush CCAA Parties without proper notice as required by section 32 CCAA. In this regard, the Salaried Members object to the following paragraph in the judgment *a quo*:

> [146] ORDERS the suspension of payment by the Wabush CCAA Parties of other post-retirement benefits to former hourly and salaried employees of their Canadian subsidiaries hired before January 1, 2013, including without limitation payments for life insurance, health care and a supplemental retirement arrangement plan, *nunc pro tunc* to the Wabush Filing Date.

[21] In argument, the Salaried Members also contended that the CCAA Judge's finding that the Wabush CCAA Parties did not have the funds to meet the $182,000 monthly payments for the premiums to fund the OPEBs and the supplemental pension benefits was mistaken.

[22] Second, the Salaried Members seek to reverse that portion of the CCAA Judge's reasons bearing on the ineffectiveness of the federal statutory deemed trust in CCAA proceedings. They say that to hold the deemed trust priority under the PBSA to be "of no force and effect in CCAA Proceedings on a wholesale basis" is wrong in law. Specifically they state that the deemed trust priority should continue to apply for the benefit of Salaried Members over the assets of the company in future priority distributions (after the DIP and CCAA-ordered priorities). For this second argument, the Salaried Members target the following paragraphs of the CCAA Judge's reasons as they pertain to the effectiveness of the PBSA deemed trust in CCAA proceedings:

> [78] For all of these reasons, the Court concludes that Parliament's intent is that federal pension claims are protected in insolvency and restructurings only to the limited extent set out in the *BIA* and the *CCAA*, notwithstanding the potentially broader language in the PBSA.
>
> [79] In the alternative, the Court could conclude that a liquidation under the CCAA does not fall within the term "liquidation" in Section 8(2) PBSA such that there has been no triggering event.

[23] It may be noted that the Salaried Members had initially contemplated objecting to the non-payment of other amounts owing by the Wabush CCAA Parties in respect of the pension plans. But given limits to the Wabush CCAA Parties' cash-flow and the significant amounts of these payments, the Salaried Members chose not to pursue the objections in these proceedings.

[24] As noted, the Salaried Members also ask to suspend provisional execution notwithstanding appeal of this order.

[25] The Union's proposed appeal is somewhat broader.

[26] In respect of the portion of the judgment regarding the deemed trust provided in the PBSA, the Union is of the view, like the Salaried Members, that the CCAA Judge erred in holding that the subsection 8(2) PBSA deemed trust is ineffective in CCAA proceedings. Moreover, the Union disagrees with the CCAA Judge that the pension amortization payments constitute ordinary, unsecured claims under the CCAA rather than trust claims (paras [103] to [118] of the judgment). The Union also says the CCAA Judge was mistaken in deciding that the financing conditions in respect of the interim financial loan were reasonable insofar as those conditions precluded the payment of OPEBs (paras [119] to [133]). The judge should have set aside the unreasonable conditions in the interim lending sheet. Had he done so, the judge would have found

that the Wabush CCAA Parties had the necessary funds to make the payments owed under the plans.

[27] The Union also seeks a stay of provisional execution of the judgment.

[28] It bears mentioning that the Union's motion was filed late. In keeping with section 14(2) CCAA, the Union obtained permission from the CCAA Judge to bring the late appeal, subject to the determination by a judge in chambers of this Court as to whether the appeal is a serious one.[5] None of the parties objected to this way of proceeding and I find the Union's amended motion to be correctly before me.

IV Criteria for granting leave

[29] The test for leave under the CCAA is well known. Writing for the Court of Appeal for Saskatchewan in *Re Stomp Pork Farm Ltd*.,[6] Jackson, J.A. wrote:

> [15] In a series of cases emanating first from British Columbia and then from Quebec, Alberta and Ontario, there has developed a consensus among the Courts of Appeal that leave to appeal an order or decision made under the *CCAA* should be granted only where there are serious and arguable grounds that are of real significance and interest to the parties and to the practice in general. The test is often expressed as a four-part one:
>
> 1. whether the issue on appeal is of significance to the practice;
>
> 2. whether the issue raised is of significance to the action itself;
>
> 3. whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and,
>
> 4. whether the appeal will unduly hinder the progress of the action.

[30] Judges sitting in chambers of this Court have consistently applied this four-part test to measure the seriousness of a proposed appeal. As my colleague Hilton, J.A. observed in *Statoil Canada Ltd. (Arrangement relative à)*,[7] the above-mentioned four criteria are understood to be cumulative, with the result that if a petitioner fails to establish any one of them, the motion for leave will be dismissed. Hilton, J.A. alluded to the oft-repeated injunction that a petitioner seeking leave to appeal faces a heavy burden given the role of a CCAA judge, the discretionary character of the decisions he or she must make and the nature of the proceedings. He recalled the longstanding cautionary note that motions for leave should only be granted "sparingly".[8]

---

5 2015 QCCS 3584, paras [32] to [34] (*per* Hamilton, J.).
6 2008 SKCA 73 (footnotes omitted).
7 2013 QCCA 851, para. [4] (in chambers).
8 *Ibid.*, para. [4].

[31] The grounds upon which a stay of provisional execution notwithstanding appeal may be granted by a judge in chambers are also well known.[9] Applying the principles developed pursuant to article 550 C.C.P. to this case, I note that the petitioners must show that the judgment suffers from a plain weakness; that failing to grant the stay would result in serious harm (sometimes characterized as irreparable harm) to them; and that the balance of inconvenience favours granting a stay.

IV Analysis

[32] Despite the importance of certain of the questions raised in the motions for leave to the practice and to this action, and notwithstanding the *prima facie* meritorious character of some arguments made by the petitioners, I am of the respectful view that both the Salaried Members and the Union have failed to meet the test for leave. In particular, they have not convinced me that an appeal would not unduly hinder the progress of the action.

[33] I shall make brief comments on each of the four criteria in turn.

IV.1 Importance of the questions to the practice

[34] Some questions raised in both motions, to varying degrees, have importance to the practice as that notion is understood in connection with applications for leave brought under sections 13 and 14 CCAA.

[35] The issue of the effectiveness of the PBSA deemed trust in CCAA proceedings raised in both motions meets this first criterion. This issue is not, as the respondent argued, a settled matter. In pointing to the CCAA Judge's comment in paragraph [61] to the effect that "[t]hese are not new issues", respondent has, it seems to me, quoted the judge out of context. It is of course true, as the CCAA Judge observed, that courts, including the Supreme Court, have been called upon to consider the effect of statutory deemed trusts in insolvency on numerous occasions. But as the CCAA Judge's own reasons make plain, the interpretation of the deemed trust protection in subsection 8(2) PBSA in light of amendments made to the CCAA in 2009, in particular subsections 6(6) and 36(7), involve a different exercise of statutory interpretation. In undertaking that work, the judge did have the benefit of principles set out in *Century Services*[10] relating to the conflict between the deemed trust for the GST and the CCRA, in *Sparrow Electric*[11] dealing with a deemed trust in favour of the Crown in respect of payroll deductions for taxation, as well as *Indalex*[12] in which a conflict between provincial deemed trust and federal insolvency law was in part at issue. But these settings were different from that of the case at bar. Others have observed that difficulties arising out of

---

9 Recently summarized by the Court in *Imperial Tobacco Canada Ltd*. v. *Conseil québécois sur le tabac et la santé*, 2015 QCCA 1224, para. [14].

10 *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379.

11 *Royal Bank of Canada v. Sparow Electric Corp.*, [1997] 1 S.C.R. 411.

12 *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 S.C.R. 272.

the interaction between deemed trust rules for pensions and the CCAA persist, notwithstanding the jurisprudence of the Supreme Court on point.[13] Moreover, the narrow issue would be new to this Court and the practice would have a precise consideration of the interaction between the federal deemed trust in subsection 8(2) and the CCAA by an appellate court.

[36] This is not to say that the CCAA Judge was the first to consider the problem. He had the benefit of *Aveos*[14], decided by Schrager, J., as he then was, as well as a scholarly paper on the topic which he cited with approval in paragraph [77]. And while the CCAA Judge and Schrager, J. agree on central aspects of that interpretation exercise, they are not at ones on all points, including the importance of a Crown exception in this context (as the CCAA Judge himself noted at para. [72]). While I recognize the care with which the CCAA Judge examined the question of statutory interpretation, as well as the alternative argument as to whether "any liquidation" within the meaning of subs. 8(2) PBSA includes CCAA proceedings – a point not given full analysis in *Aveos* – the matter of the effectiveness of the federal deemed trust in CCAA proceedings is not settled law and remains important to CCAA practice.

[37] Is the issue raised by the Salaried Members of the proper scope of section 32 CCAA, and the prior notice rule, also of sufficient importance to the practice?

[38] As I will note below, I am of the respectful view that the merits of this argument are less strong. Nonetheless, the matter of the proper scope of section 32 in light of the kind of insurance contract that provided benefits here, and in particular of competing notions of suspension and termination of OPEBs, is one of importance to the practice.

[39] What about the Union's argument that the judge erred in holding that the terms of the interim financing were reasonable?

[40] This decision was one that called upon the CCAA Judge to make a determination of fact and exercise discretion afforded him under the Act, matters generally viewed as less consequential to the practice. Moreover, it would seem to me that the ability of a lender to determine the basis of risk he or she is willing to tolerate in a restructuring is not a matter widely disputed. I have not been convinced that this point, viewed on its own, is important to the practice.

---

[13] Scholars have alluded to the different permutations of the deemed trust problem in CCAA matters as important to the practice: see, *e.g.*, Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Carswell, 2013) at 370 *et seq*. and a useful comment by Jassmine Girgis entitled "*Indalex*: Priority of Provincial Deemed Trusts in CCAA Restructuring" posted by the University of Calgary Faculty of Law on the website http://ablawg.ca in which the author comments on the on-going importance of the issue after *Indalex*.

[14] *Aveos Fleet Performance Inc. (arrangement relatif à)*, 2013 QCCS 5762.

IV.2 Importance of the questions to the present action

[41] The decision not to apply the PBSA deemed trust in CCAA proceedings has meaningful negative consequences for both the Salaried Members and the Union. The importance to the action in this regard seems beyond serious dispute.

[42] I agree with the petitioners that the question relating to the suspension or termination of the OPEBs is also significant to the action. The CCAA Judge recognized at para. [126] and again at para. [133] of his reasons that if the Wabush CCAA Parties fail to pay the premiums on the insurance policy, the policy will be cancelled thereby causing hardship to the Petitioners. I agree too with the position of counsel to the Union who argued that aspects of the pension claims may usefully be compared to alimentary claims, and that the hardship in suspending them gives the question sufficient importance to the action.

IV.3 The proposed appeals are *prima facie* meritorious and not frivolous

[43] The arguments brought in service of the petitioners' view that the deemed trust under the PBSA remains effective in CCAA proceedings are not frivolous. While the exercise of statutory interpretation undertaken by the CCAA Judge – which, it should be noted, is not a discretionary exercise in and of itself – shows no *prima facie* weakness, that is not to say that it precludes an arguable case for the other side.[15] There are, in my view, grounds for framing a statutory interpretation argument for the petitioners' position that have *prima facie* merit when one considers, for example, that the CCAA amendments are the product of a complicated evolution; that the CCAA and the PBSA have different policy objectives which may shape interpretation; that the relevance of principles developed by the Supreme Court in other settings to the deemed trusts problem faced in this case is the matter of fair debate; that comparisons might be made with deemed trust regimes from the provinces or other statutes, and more. All of these factors suggest to me that, notwithstanding the strength of the judgment *a quo*, there are *prima facie* meritorious lines of argument that might be pressed on appeal. The parties debated vigorously the scope of "any liquidation" in subs. 8(2) PBSA before me, for example, as they did the proper scope of amendments to the CCAA and the policy they reflect. On the question of the effectiveness of the PBSA deemed trust as raised by the Salaried Members and in the first three grounds of appeal in the Union's amended motion, I am of the view that this criterion is satisfied.

---

[15] The gradation between "*prima facie* meritorious" and "frivolous" is not always clear, and the better view may well be that "meritorious" and "frivolous" do not constitute a *summa division* for proposed appeals: see *Statoil*, *supra*, note 7, para. [11]. It is certainly true that the petitioners may have an arguable case – one with *prima facie* merit – but that the judgment *a quo* may still be said to suffer from no apparent weakness: see the helpful comments, albeit in another context, in *Droit de la famille – 081957*, 2008 QCCA 1541, para. [4] (Morissette, J.A., in chambers).

[44] The issue of the proper scope of section 32 CCAA, and the prior notice rule, strikes me, from my disadvantaged position, to be less compelling, but I would not say it is wholly lacking in merit.

[45] Counsel for the monitor argued, in support of the respondents' position that leave should be refused, that this ground of appeal was frivolous. He contended that the CCAA Judge rightly held that section 32 plainly did not apply to the resiliation of the Wabush CCA Parties' insurance contract. Like the respondents, the monitor said the CCAA Judge rightly relied on *Mine Jeffrey*[16] decided by this Court in 2003, and that his analysis of the "tri-partite relationship" between the employer, the insurer and the beneficiary in paragraphs [129] *et seq*. is free from error.

[46] The question as to the applicability of section 32 here is not frivolous, even if *Mine Jeffrey* presents a formidable obstacle to a successful appeal. While not equal in strength, arguments raised by counsel for the Salaried Members as to type of contract to which the rule applies and, in particular, to the distinction between the termination of a contract and the suspension of a contract, are not without some merit. While I recognize that the test of the relative merit of the arguments proposed can be construed in some circumstances as requiring more than "a limited prospect of success"[17] given the nature of CCAA proceedings, I would not dismiss the motions on this narrow issue on this basis alone.

[47] The Union says the interim lender's conditions should be set aside as unreasonable. I am not convinced that this argument is *prima facie* meritorious.

[48] Counsel for the Union argues strongly that the interim lender should not be allowed to dictate terms to the CCAA Judge or to the stakeholders as a whole by imposing conditions on financing that have the effect of exploiting the vulnerability of the employees and former employees. He says that if the interim lender's conditions were struck as unreasonable, the Wabush CCAA Parties would have access to those funds and that there would be no need to suspend the various payments due to the petitioners.

[49] With respect, this argument strikes me as flawed in two respects. First, it requires an overturning of the CCAA Judge's view – with all the advantages of perspective he has in so deciding – that as a matter of fact the conditions of the interim financing are reasonable. Secondly, the Union has left unanswered the questions raised by the judge concerning the "harsh commercial realities of interim financing" at paragraph [115]. Why indeed should the interim lender advance funds be used to pay someone else's debt, particularly one that is pre-filing and unsecured? Why should a condition of the financing be ignored, effectively forcing the lender to advance funds on disadvantageous terms to

---

16 *Syndicat national de l'amiante d'Asbestos inc. c. Mine Jeffrey Inc*., [2003] R.J.Q. 420 (C.A.).

17 *Doman Industries Ltd.* v. *Communications, Energy and Paperworkers' Union, Local 514*, 2004 BCCA 253, para. [15] (per Prowse, J.A., in chambers).

which it did not agree? It is not a matter of the CCAA Judge being callous or insensitive to hardship faced by vulnerable parties. In my view, the comment of Deschamps, J. for the majority in *Indalex*, as adapted to the setting of federal deemed trusts, is apposite here: "The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries".[18]

IV.4 The appeal will not hinder the progress of the action

[50] The petitioners argue that the Wabush CCAA Parties are undergoing a court-supervised sales process in accordance with timelines and procedures that are supervised by the CCAA Judge with the oversight of the monitor. In the circumstances, they say, the proposed appeal, especially if it were placed on an accelerated roll, would not hinder the progress of the action. They contend, to differing degrees, that the CCAA Judge erred in his measure of the financial vulnerability of the Wabush CCAA Parties. Mindful no doubt of the difficulty that this aspect of the analysis presents to their leave application, the Salaried Members "part company" (to use the expression of counsel) with the Union in framing their appeal more narrowly, in particular in respect of the recognition that the DIP loan enjoys a wider priority than does the Union, and in limiting their claim in respect of the payments that should escape suspension.

[51] Given the findings of fact concerning the fragility of the Wabush CCAA Parties as observed by the CCAA Judge, I find the positions of both petitioners on this point unconvincing. Even the "strategic" decision of the Salaried Members to contest the judgment on a narrower basis does not satisfy this criterion. In my view, both proposed appeals would unduly hinder the action.

[52] My conclusion is based largely on the findings of fact arrived at by the CCAA Judge regarding the vulnerability of the Wabush CCAA Parties at this stage of the restructuring.

[53] In canvassing the circumstances in which the interim financing was put in place, the CCAA Judge observed that the cash-flow position of the Wabush CCAA Parties was compromised with the result that they needed the interim financing to continue even their limited operations during the CCAA process (para. [16]). The CCAA Judge made the following specific findings, which I consider to be findings of fact: (1) that the sale and investor solicitation process in progress are in the interests of the Wabush CCAA Parties and their stakeholders because they will likely lead to a greater recovery; (2) that without new financing, the Wabush CCAA Parties could not complete the sale; (3) that without new financing allowing them to complete the sale, it is likely that the Wabush CCAA Parties will go bankrupt; (4) that the Wabush CCAA Parties and the monitor have not identified any other source of new financing; and (5) that the terms of the interim financing are reasonable (para. [94]).

---

[18] *Indalex*, *supra* note 12, para. [59].

[54] When discussing the suspension of special payments, the CCAA Judge observed, at para. [112]:

> [112] The Wabush CCAA Parties do not have the funds available to make these payments. The cash flow statements filed with the Court show that the Wabush CCAA Parties need the funds from the Interim Financing to meet their current obligations other than the special payments. The Interim Lender Term Sheet expressly requires the Wabush CCAA Parties not to make any special payments. As a result, forcing the Wabush CCAA Parties to make the special payments would lead to a default under the Interim Financing and a likely bankruptcy.
>
> [Footnote omitted.]

[55] In respect of the suspension of the OPEBs – including what the Salaried Members characterize as the modest premiums of $182,000 per month and the supplemental retirement arrangement plan amount – the CCAA Judge recalled at para. [122] that "[t]he Wabush CCAA Parties do not have any funding valuable to continue to pay any of the foregoing OPEBs, as the Interim Financing Sheet prohibits such payments". In para. [125], the CCAA Judge explained that it was not enough to say, as did the Salaried Members, that $182,000 and the supplemental amount could be found elsewhere if the interim lending sheet prevents them from making the payments: "Given the cash flow statement filed with the Court and the language of the Interim Lender Sheet, the Court accepts that the Wabush CCAA Parties do not have the funds".

[56] These findings of fact, while not immune from review, are deserving of deference on appeal. It is not enough to say, without more, that the amount is a small one in the grand scheme of things, as do the Salaried Members, or that another interim lender could be found without difficulty as the action proceeds. The CCAA Judge decided specifically otherwise. A reviewable error would have to be shown on this point to overcome the strong impression that comes from reading the judgment that granting leave and suspending provisional execution would hinder the action.

[57] In like circumstances, leave has been denied. Recently in *Bock inc. (arrangement relative à)*,[19] my colleague Bich, J.A. declined to grant leave, notwithstanding the presence of a question she characterized as "interesting" for the purposes of an eventual appeal and one in respect of which, like ours, there was a paucity of appellate court consideration. "Granting leave to appeal", she wrote at para. [12] of her reasons, "would most likely jeopardize the course of the action and cause irreparable harm to the debtor company and, consequently, all other stakeholders (creditors, employees, etc.)". Similarly, in *Re: Consumer Packaging Inc.*,[20] a bench of

---

19 2013 QCCA 851 (in chambers).

20 2001 CanLII 6708 (Ont. C.A.).

the Court of Appeal for Ontario declined to grant leave in circumstances where conditions set by the interim lender meant that the time and financial constraints that would have come with an appeal were prohibitive: "Leave to appeal should not be granted", wrote the Court at para. [5], "where, as in the present case, granting leave would be prejudicial to restructuring the business for the benefit of stakeholders as a whole […]".[21]

[58] All told, the risk of default on the interim financing and of bankruptcy to the Wabush CCAA Parties is serious. Granting leave would, in this setting, risk hindering the action. If leave were granted, the petitioners would likely obtain, at best, a Pyrrhic victory if they succeeded on appeal.

***

[59] Given my conclusion that leave should be denied, the motions seeking a stay of the judgment pursuant to article 550 C.C.P. are without further object and should be dismissed as well. In any event, the conditions necessary for a stay were not present. While the petitioners have, to be sure, shown that they have an arguable case, they have not pointed to something I would characterize as a weakness in the judgment *a quo*. They did satisfy the burden of showing that the failure to grant a stay would cause them harm. However, the balance of inconvenience – considering the impact that lifting the stay would have on the Wabush CCAA Parties – would not have favoured granting a stay.

[60] Counsel should be commended for their helpful presentation of the matter in dispute.

[61] **FOR THE AFOREMENTIONED REASONS**: the undersigned:

[62] **DISMISSES** the Salaried Members motion for leave to appeal and for a stay, with costs;

[21] As a final observation on this point, it may be recalled that, prudently, the CCAA Judge offered a further observation that gives weight, I think, to the conclusion that granting leave would be inopportune here. He suggested that even if the PBSA deemed trusts were effective in CCAA proceedings, he would have exercised his discretion under the CCAA to grant priority to the interim lender: see para. [95].

[63] **DISMISSES** the Union's amended motion for leave to appeal and for a stay, with costs.

NICHOLAS KASIRER, J.A.

Mtre Andrew J. Hatnay
Mtre Ari Nathan Kaplan
KOSKIE MINSKY LLP
Mtre Geeta Narang
NARANG & ASSOCIÉS
Mtre Nicholas Scheib (absent)
SCHEIB LEGAL
For Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson

Mtre Bernard Boucher
BLAKE CASSELS & GRAYDON S.R.L. (MONTREAL)
For Bloom Lake General Partner

Mtre Steven Weisz
BLAKE CASSELS & GRAYDON S.R.L. (TORONTO)
For Bloom Lake General Partner

Mtre Louis Dumont
DENTONS CANADA LLP
For Cliffs Quebec Iron Mining ULC

Mtre Sylvain Rigaud
NORTON ROSE FULBRIGHT CANADA LLP
For FTI Consulting Canada Inc.

Mtre Douglas Mitchell (absent)
Mtre Leslie-Anne Wood (absent)
IRVING MITCHELL KALICHMAN
For Her Majesty in right of Newfoundland and Labrador, as represented by the Superintendent of Pensions

Mtre Pierre Lecavalier
DEPARTMENT OF JUSTICE – CANADA
For the Attorney General of Canada

Mtre Jean-François Beaudry
PHILION, LEBLAND, BEAUDRY, AVOCATS, S.A.
For the Syndicat des Métallos, Section Locale 6254 and Section Locale 6285

Mtre Gerald N. Apostolatos
LANGLOIS KRONSTRÖM DESJARDINS
For the Creditors Quebec North Shore and Labrador Railway Company Inc. and Iron Ore Company of Canada

Date of hearing: August 5, 2015

TAB 4

Bloom Lake, g.p.l. (Arrangement relatif à),
2015 QCCS 3064

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-025441-155
500-09-025469-156
(500-11-048114-157)

DATE: AUGUST 18, 2015

PRESIDING: THE HONOURABLE NICHOLAS KASIRER, J.A.

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

500-09-025441-155

MICHAEL KEEFER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON, as representatives of the salaried / non-union employees and retirees
APPLICANTS – objecting parties
v.

BLOOM LAKE GENERAL PARTNER LIMITED
QUINTO MINING CORPORATION
8568391 CANADA LIMITED
CLIFFS QUEBEC IRON MINING ULC
WABUSH IRON CO. LIMITED
WABUSH RESOURCES INC
RESPONDENTS – 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
IMPLEADED PARTIES – impleaded parties

and
FTI CONSULTING CANADA INC.
IMPLEADED PARTY – monitor
and
HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR, as represented by THE SUPERINTENDENT OF PENSIONS
THE ATTORNEY GENERAL OF CANADA
SYNDICAT DES MÉTALLOS, SECTION LOCALE 6254
SYNDICAT DES MÉTALLOS, SECTION LOCALE 6285
IMPLEADED PARTIES – objecting parties

500-09-025469-156

SYNDICAT DES MÉTALLOS, SECTION LOCALE 6254
SYNDICAT DES MÉTALLOS, SECTION LOCALE 6285
APPLICANTS – objecting parties
v.

BLOOM LAKE GENERAL PARTNER LIMITED
QUINTO MINING CORPORATION
8568391 CANADA LIMITED
CLIFFS QUEBEC IRON MINING ULC
WABUSH IRON CO. LIMITED
WABUSH RESOURCES INC
RESPONDENTS – 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
IMPLEADED PARTIES – impleaded parties
and
FTI CONSULTING CANADA INC.
IMPLEADED PARTY – monitor
and
HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR, as represented by
THE SUPERINTENDENT OF PENSIONS
THE ATTORNEY GENERAL OF CANADA
MICHAEL KEEFER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON, as representatives of the salaried / non-union employees and retirees

IMPLEADED PARTIES – objecting parties

and

QUEBEC NORTHSHORE AND LABRADOR RAILWAY COMPANY INC.
IRON ORE COMPANY OF CANADA

IMPLEADED PARTY – impleaded parties

JUDGMENT

---

[1] Sitting as judge in chambers pursuant to sections 13 and 14 of the *Companies' Creditors Arrangement Act*[1] ("CCAA") and articles 29, 511 and 550 C.C.P., I am seized of two motions for leave to appeal from a judgment of the Superior Court, District of Montreal (the Honourable Stephen Hamilton), rendered on June 26, 2015. The Superior Court dismissed contestations made on behalf of the petitioners, who are, respectively, representatives of non-union employees and retired employees (petitioners in court file C.A.M. 500-09-025441-155 and hereinafter designated the "Salaried Members") and the Syndicat des Métallos, sections locales 6254 and 6285 (in court file C.A.M. 500-09-025469-156, hereinafter referred to together as the "Union"). In so doing, the Superior Court confirmed the respondent's request to grant priority to an interim lender charge over claims made by the petitioners based on deemed trusts in pension legislation. The Court also suspended certain payments due under pension plans as well as for post-retirement benefits.

[2] The Union filed an amended motion prior to the hearing. Both motions for leave also ask for orders to suspend provisional execution of the judgment notwithstanding appeal.

I Background

[3] The facts are usefully and completely recounted in the judgment *a quo*.[2]

[4] On May 20, 2015, the CCAA Judge Hamilton, J. granted a motion for the issuance of an initial order to commence proceedings under the CCAA to respondents Wabush Iron Ore Co. Ltd., Wabush Resources Inc., Wabush Mines, Arnaud Railway Company and Wabush Railway Co. Ltd. (the "Wabush CCAA Parties"). The CCAA proceedings as they concern the Wabush CCAA Parties were joined to CCAA proceedings started some four months earlier involving the "Bloom Lake CCAA Parties".[3]

---

1 R.S.C. 1985, c. C-36.

2 2015 QCCS 3064.

3 The pre-existing CCAA proceedings were commenced on January 27, 2015, by an initial order issued by Castonguay, J. of the Superior Court, in respect of Bloom Lake General Partner Ltd., Quinto

[5] Prior to the filing of the motion, Wabush Mines operated an iron ore mine located near the Town of Wabush and Labrador City, in the province of Newfoundland and Labrador, with facilities at Pointe-Noire, Quebec.

[6] The Wabush CCAA Parties are currently involved in a court-ordered sales process, originally commenced in the Bloom Lake CCAA proceedings, whereby they seek to sell assets with a view either to concluding a plan of compromise with their creditors (including the petitioners) or disposing of assets and distributing the proceeds to creditors (including the petitioners).

[7] The Wabush CCAA Parties have two defined pension plans for their employees, one for salaried employees and the other for unionized employees paid an hourly wage. Because some employees work in a provincially-regulated setting in Newfoundland and Labrador and others work in federally-regulated industries, the plans are subject to oversight by both the federal Office of Superintendent of Financial Institutions and the Newfoundland and Labrador Superintendent of Pensions.

[8] Both plans are underfunded. The CCAA Judge set forth estimated amounts to be paid as winding-up deficiencies, monthly amortization payments and lump-sum "catch-up" amortization payments. He noted as well that the Wabush CCAA Parties provide other post-employment benefits ("OPEB"), including health care and life insurance, to certain retired employees. Accumulated benefits' obligations for the OPEBs, as well as monthly premiums required to fund those benefits, are to be paid by the Wabush CCAA Parties. In addition, amounts are due pursuant to a supplemental retirement arrangement plan for certain salaried employees (see paras [4] to [13] of the judgment).

[9] The Wabush CCAA Parties arranged for interim financing (a debtor-in-possession or "DIP" loan) from Cliffs Mining Company, a related company. The CCAA Judge was of the view that the Wabush CCAA Parties' cash-flow was compromised and that the interim financing was necessary to continue operations during restructuring. The Wabush initial order approved an interim financing term sheet pursuant to which the interim lender would provide US$10M of interim financing, on conditions, for the Wabush CCAA Parties short-term liquidity needs during the CCAA proceedings. These conditions included, as the CCAA Judge recorded in paragraph [16] of his reasons, a requirement that the interim lender have a charge in the principal amount of CDN $15M, with priority over all charges, against Wabush CCAA Parties' property, subject to some exceptions. There is a further condition that Wabush CCAA Parties may not make any special payments in relation to the pension plans or any payments in respect of the OPEBs. The initial order granted the interim lender charge of $15M but did not give priority to that charge over existing secured creditors in order to allow the parties to make representations at a comeback hearing.

Mining Corp., 8568391 Canada Ltd., Cliffs Quebec Iron Mining ULC, The Bloom Lake Iron Ore Partnership and Bloom Lake Railway Co. Ltd. (the "Bloom Lake CCAA Parties").

[10] At that comeback hearing, the Wabush CCAA Parties sought, *inter alia*, priority for the interim lender charge ahead of deemed trusts created by pension legislation and a suspension of obligations to pay amortization payments in relation to the pension plans and payments for OPEBs. The Salaried Members and the Union contested these matters. The CCAA Judge issued an order on June 9, 2015 granting priority to the interim lender charge, subject to the rights of, *inter alia*, the Salaried Members, the Union and the federal and provincial pension authorities to be determined at a later hearing.

[11] That hearing on June 22, 2015 gave rise to the judgment a *quo* in which the CCAA Judge granted the Wabush CCAA Parties' comeback motion and dismissed the contestations brought by the Salaried Members and the Union.

II The judgment of the Superior Court

[12] The CCAA Judge made numerous findings and rendered different orders, not all of which concern the motions before me. I will limit my comments to those aspects of the judgment relevant here.

[13] After setting forth the context and the arguments of the parties, the CCAA Judge considered the conflict between the super-priority of the interim lender charge and the deemed trusts created by federal and provincial legislation. (His findings in respect of the provincial rules do not concern us directly at this stage).

[14] As to the impact of CCAA proceedings on the deemed trust created by subsection 8(2) of the *Pension Benefits Standards Act, 1985*,[4] the judge wrote "there is no general rule that deemed trusts in favour of anyone other than the Crown are ineffective in insolvency" (para. [72]). He then considered the effect of subsection 8(2) PBSA on the provisions of the CCAA that deal with pension obligations, including subsections 6(6) and 36(7) CCAA that were added to the Act in 2009. Based on his interpretation of the general rule in subsection 8(2) PBSA and the particular rules in the CCAA, the judge concluded, as an exercise of statutory interpretation, that "Parliament's intent is that federal pension claims are protected in […] restructurings only to the limited extent set out in the […] CCAA, notwithstanding the potentially broader language in the PBSA" (para. [78]). In the alternative, he wrote, "the Court could conclude that a liquidation under the CCAA does not fall within the term "liquidation" in Subsection 8(2) PBSA such that there has been no triggering event" (para. [79]). Either way, he observed, the deemed trust in subsection 8(2) PBSA did not prevent him from granting a priority to the interim lending charge if the conditions of section 11.2 CCAA were met.

[15] After considering the relevant factors under the CCAA to the facts of the case, the CCAA Judge decided that the proposed sale was in the interests of the Wabush CCAA Parties and their stakeholders as it should lead to a greater recovery. The sale

---

[4] R.S.C. 1985, c. 32 (2nd Supp.).

required new financing and, without that financing, it is likely that the Wabush CCAA Parties would go bankrupt. The judge also expressed his view that the terms and conditions of the interim financing were reasonable, and that the security is limited to the amount of the new financing. He then wrote that "[t]his is sufficient for the Court to conclude that the Interim Financing should be approved and the interim lender charge should be granted with priority over the deemed trust under the PBSA, if it is effective in the CCAA context" (para. [95]). He also found that the terms of the interim lending sheet, including the requirement that the interim lender be granted super priority, were not unusual and that he was not satisfied that the Superior Court had jurisdiction to order the lender to advance the funds on other terms (para. [100]).

[16] The CCAA Judge then gave reasons for his decision to grant the Wabush CCAA Parties' request that their obligation to make special and OPEB payments be suspended. He held that forcing the Wabush CCAA Parties to make special payments would lead to a default under the interim financing arrangement and a likely bankruptcy (para. [112]). He came to the same conclusion in respect of the OPEBs (para. [122]). In so doing, he rejected the argument that the suspension of the OPEBs amounted to a resiliation of the insurance contract under which the benefits are provided, resiliation which would have required notice under section 32 CCAA (paras [127] to [131]).

[17] The CCAA Judge rejected all other grounds for contestation. He confirmed the priority of the interim lending charge over the deemed trusts as set out in the initial order; he ordered the suspension of payment by the Wabush CCAA Parties of monthly amortization payments, of the annual lump sum catch-up payments, and of other post-retirement benefits.

III **The motions for leave**

[18] The two motions raise some similar issues but are different in scope.

[19] The Salaried Members ask for leave to appeal in respect of conclusions relating to two aspects of the judgment.

[20] First, the Salaried Members seek to reverse the CCAA Judge's approval of what they characterize as the termination of OPEBs and of payment of supplemental pension benefits imposed by the Wabush CCAA Parties without proper notice as required by section 32 CCAA. In this regard, the Salaried Members object to the following paragraph in the judgment *a quo*:

> [146] ORDERS the suspension of payment by the Wabush CCAA Parties of other post-retirement benefits to former hourly and salaried employees of their Canadian subsidiaries hired before January 1, 2013, including without limitation payments for life insurance, health care and a supplemental retirement arrangement plan, *nunc pro tunc* to the Wabush Filing Date.

[21] In argument, the Salaried Members also contended that the CCAA Judge's finding that the Wabush CCAA Parties did not have the funds to meet the $182,000 monthly payments for the premiums to fund the OPEBs and the supplemental pension benefits was mistaken.

[22] Second, the Salaried Members seek to reverse that portion of the CCAA Judge's reasons bearing on the ineffectiveness of the federal statutory deemed trust in CCAA proceedings. They say that to hold the deemed trust priority under the PBSA to be "of no force and effect in CCAA Proceedings on a wholesale basis" is wrong in law. Specifically they state that the deemed trust priority should continue to apply for the benefit of Salaried Members over the assets of the company in future priority distributions (after the DIP and CCAA-ordered priorities). For this second argument, the Salaried Members target the following paragraphs of the CCAA Judge's reasons as they pertain to the effectiveness of the PBSA deemed trust in CCAA proceedings:

> [78] For all of these reasons, the Court concludes that Parliament's intent is that federal pension claims are protected in insolvency and restructurings only to the limited extent set out in the *BIA* and the *CCAA*, notwithstanding the potentially broader language in the PBSA.
>
> [79] In the alternative, the Court could conclude that a liquidation under the CCAA does not fall within the term "liquidation" in Section 8(2) PBSA such that there has been no triggering event.

[23] It may be noted that the Salaried Members had initially contemplated objecting to the non-payment of other amounts owing by the Wabush CCAA Parties in respect of the pension plans. But given limits to the Wabush CCAA Parties' cash-flow and the significant amounts of these payments, the Salaried Members chose not to pursue the objections in these proceedings.

[24] As noted, the Salaried Members also ask to suspend provisional execution notwithstanding appeal of this order.

[25] The Union's proposed appeal is somewhat broader.

[26] In respect of the portion of the judgment regarding the deemed trust provided in the PBSA, the Union is of the view, like the Salaried Members, that the CCAA Judge erred in holding that the subsection 8(2) PBSA deemed trust is ineffective in CCAA proceedings. Moreover, the Union disagrees with the CCAA Judge that the pension amortization payments constitute ordinary, unsecured claims under the CCAA rather than trust claims (paras [103] to [118] of the judgment). The Union also says the CCAA Judge was mistaken in deciding that the financing conditions in respect of the interim financial loan were reasonable insofar as those conditions precluded the payment of OPEBs (paras [119] to [133]). The judge should have set aside the unreasonable conditions in the interim lending sheet. Had he done so, the judge would have found

that the Wabush CCAA Parties had the necessary funds to make the payments owed under the plans.

[27] The Union also seeks a stay of provisional execution of the judgment.

[28] It bears mentioning that the Union's motion was filed late. In keeping with section 14(2) CCAA, the Union obtained permission from the CCAA Judge to bring the late appeal, subject to the determination by a judge in chambers of this Court as to whether the appeal is a serious one.[5] None of the parties objected to this way of proceeding and I find the Union's amended motion to be correctly before me.

IV Criteria for granting leave

[29] The test for leave under the CCAA is well known. Writing for the Court of Appeal for Saskatchewan in *Re Stomp Pork Farm Ltd*.,[6] Jackson, J.A. wrote:

> [15] In a series of cases emanating first from British Columbia and then from Quebec, Alberta and Ontario, there has developed a consensus among the Courts of Appeal that leave to appeal an order or decision made under the *CCAA* should be granted only where there are serious and arguable grounds that are of real significance and interest to the parties and to the practice in general. The test is often expressed as a four-part one:
>
> 1. whether the issue on appeal is of significance to the practice;
>
> 2. whether the issue raised is of significance to the action itself;
>
> 3. whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and,
>
> 4. whether the appeal will unduly hinder the progress of the action.

[30] Judges sitting in chambers of this Court have consistently applied this four-part test to measure the seriousness of a proposed appeal. As my colleague Hilton, J.A. observed in *Statoil Canada Ltd. (Arrangement relative à)*,[7] the above-mentioned four criteria are understood to be cumulative, with the result that if a petitioner fails to establish any one of them, the motion for leave will be dismissed. Hilton, J.A. alluded to the oft-repeated injunction that a petitioner seeking leave to appeal faces a heavy burden given the role of a CCAA judge, the discretionary character of the decisions he or she must make and the nature of the proceedings. He recalled the longstanding cautionary note that motions for leave should only be granted "sparingly".[8]

---

5 2015 QCCS 3584, paras [32] to [34] (*per* Hamilton, J.).
6 2008 SKCA 73 (footnotes omitted).
7 2013 QCCA 851, para. [4] (in chambers).
8 *Ibid.*, para. [4].

[31] The grounds upon which a stay of provisional execution notwithstanding appeal may be granted by a judge in chambers are also well known.[9] Applying the principles developed pursuant to article 550 C.C.P. to this case, I note that the petitioners must show that the judgment suffers from a plain weakness; that failing to grant the stay would result in serious harm (sometimes characterized as irreparable harm) to them; and that the balance of inconvenience favours granting a stay.

IV Analysis

[32] Despite the importance of certain of the questions raised in the motions for leave to the practice and to this action, and notwithstanding the *prima facie* meritorious character of some arguments made by the petitioners, I am of the respectful view that both the Salaried Members and the Union have failed to meet the test for leave. In particular, they have not convinced me that an appeal would not unduly hinder the progress of the action.

[33] I shall make brief comments on each of the four criteria in turn.

IV.1 Importance of the questions to the practice

[34] Some questions raised in both motions, to varying degrees, have importance to the practice as that notion is understood in connection with applications for leave brought under sections 13 and 14 CCAA.

[35] The issue of the effectiveness of the PBSA deemed trust in CCAA proceedings raised in both motions meets this first criterion. This issue is not, as the respondent argued, a settled matter. In pointing to the CCAA Judge's comment in paragraph [61] to the effect that "[t]hese are not new issues", respondent has, it seems to me, quoted the judge out of context. It is of course true, as the CCAA Judge observed, that courts, including the Supreme Court, have been called upon to consider the effect of statutory deemed trusts in insolvency on numerous occasions. But as the CCAA Judge's own reasons make plain, the interpretation of the deemed trust protection in subsection 8(2) PBSA in light of amendments made to the CCAA in 2009, in particular subsections 6(6) and 36(7), involve a different exercise of statutory interpretation. In undertaking that work, the judge did have the benefit of principles set out in *Century Services*[10] relating to the conflict between the deemed trust for the GST and the CCRA, in *Sparrow Electric*[11] dealing with a deemed trust in favour of the Crown in respect of payroll deductions for taxation, as well as *Indalex*[12] in which a conflict between provincial deemed trust and federal insolvency law was in part at issue. But these settings were different from that of the case at bar. Others have observed that difficulties arising out of

---

9 Recently summarized by the Court in *Imperial Tobacco Canada Ltd*. v. *Conseil québécois sur le tabac et la santé*, 2015 QCCA 1224, para. [14].

10 *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379.

11 *Royal Bank of Canada v. Sparow Electric Corp.*, [1997] 1 S.C.R. 411.

12 *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 S.C.R. 272.

the interaction between deemed trust rules for pensions and the CCAA persist, notwithstanding the jurisprudence of the Supreme Court on point.[13] Moreover, the narrow issue would be new to this Court and the practice would have a precise consideration of the interaction between the federal deemed trust in subsection 8(2) and the CCAA by an appellate court.

[36] This is not to say that the CCAA Judge was the first to consider the problem. He had the benefit of *Aveos*[14], decided by Schrager, J., as he then was, as well as a scholarly paper on the topic which he cited with approval in paragraph [77]. And while the CCAA Judge and Schrager, J. agree on central aspects of that interpretation exercise, they are not at ones on all points, including the importance of a Crown exception in this context (as the CCAA Judge himself noted at para. [72]). While I recognize the care with which the CCAA Judge examined the question of statutory interpretation, as well as the alternative argument as to whether "any liquidation" within the meaning of subs. 8(2) PBSA includes CCAA proceedings – a point not given full analysis in *Aveos* – the matter of the effectiveness of the federal deemed trust in CCAA proceedings is not settled law and remains important to CCAA practice.

[37] Is the issue raised by the Salaried Members of the proper scope of section 32 CCAA, and the prior notice rule, also of sufficient importance to the practice?

[38] As I will note below, I am of the respectful view that the merits of this argument are less strong. Nonetheless, the matter of the proper scope of section 32 in light of the kind of insurance contract that provided benefits here, and in particular of competing notions of suspension and termination of OPEBs, is one of importance to the practice.

[39] What about the Union's argument that the judge erred in holding that the terms of the interim financing were reasonable?

[40] This decision was one that called upon the CCAA Judge to make a determination of fact and exercise discretion afforded him under the Act, matters generally viewed as less consequential to the practice. Moreover, it would seem to me that the ability of a lender to determine the basis of risk he or she is willing to tolerate in a restructuring is not a matter widely disputed. I have not been convinced that this point, viewed on its own, is important to the practice.

---

[13] Scholars have alluded to the different permutations of the deemed trust problem in CCAA matters as important to the practice: see, *e.g.*, Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Carswell, 2013) at 370 *et seq*. and a useful comment by Jassmine Girgis entitled "*Indalex*: Priority of Provincial Deemed Trusts in CCAA Restructuring" posted by the University of Calgary Faculty of Law on the website http://ablawg.ca in which the author comments on the on-going importance of the issue after *Indalex*.

[14] *Aveos Fleet Performance Inc. (arrangement relatif à)*, 2013 QCCS 5762.

IV.2 Importance of the questions to the present action

[41] The decision not to apply the PBSA deemed trust in CCAA proceedings has meaningful negative consequences for both the Salaried Members and the Union. The importance to the action in this regard seems beyond serious dispute.

[42] I agree with the petitioners that the question relating to the suspension or termination of the OPEBs is also significant to the action. The CCAA Judge recognized at para. [126] and again at para. [133] of his reasons that if the Wabush CCAA Parties fail to pay the premiums on the insurance policy, the policy will be cancelled thereby causing hardship to the Petitioners. I agree too with the position of counsel to the Union who argued that aspects of the pension claims may usefully be compared to alimentary claims, and that the hardship in suspending them gives the question sufficient importance to the action.

IV.3 The proposed appeals are *prima facie* meritorious and not frivolous

[43] The arguments brought in service of the petitioners' view that the deemed trust under the PBSA remains effective in CCAA proceedings are not frivolous. While the exercise of statutory interpretation undertaken by the CCAA Judge – which, it should be noted, is not a discretionary exercise in and of itself – shows no *prima facie* weakness, that is not to say that it precludes an arguable case for the other side.[15] There are, in my view, grounds for framing a statutory interpretation argument for the petitioners' position that have *prima facie* merit when one considers, for example, that the CCAA amendments are the product of a complicated evolution; that the CCAA and the PBSA have different policy objectives which may shape interpretation; that the relevance of principles developed by the Supreme Court in other settings to the deemed trusts problem faced in this case is the matter of fair debate; that comparisons might be made with deemed trust regimes from the provinces or other statutes, and more. All of these factors suggest to me that, notwithstanding the strength of the judgment *a quo*, there are *prima facie* meritorious lines of argument that might be pressed on appeal. The parties debated vigorously the scope of "any liquidation" in subs. 8(2) PBSA before me, for example, as they did the proper scope of amendments to the CCAA and the policy they reflect. On the question of the effectiveness of the PBSA deemed trust as raised by the Salaried Members and in the first three grounds of appeal in the Union's amended motion, I am of the view that this criterion is satisfied.

---

[15] The gradation between "*prima facie* meritorious" and "frivolous" is not always clear, and the better view may well be that "meritorious" and "frivolous" do not constitute a *summa division* for proposed appeals: see *Statoil*, *supra*, note 7, para. [11]. It is certainly true that the petitioners may have an arguable case – one with *prima facie* merit – but that the judgment *a quo* may still be said to suffer from no apparent weakness: see the helpful comments, albeit in another context, in *Droit de la famille – 081957*, 2008 QCCA 1541, para. [4] (Morissette, J.A., in chambers).

[44] The issue of the proper scope of section 32 CCAA, and the prior notice rule, strikes me, from my disadvantaged position, to be less compelling, but I would not say it is wholly lacking in merit.

[45] Counsel for the monitor argued, in support of the respondents' position that leave should be refused, that this ground of appeal was frivolous. He contended that the CCAA Judge rightly held that section 32 plainly did not apply to the resiliation of the Wabush CCA Parties' insurance contract. Like the respondents, the monitor said the CCAA Judge rightly relied on *Mine Jeffrey*[16] decided by this Court in 2003, and that his analysis of the "tri-partite relationship" between the employer, the insurer and the beneficiary in paragraphs [129] *et seq*. is free from error.

[46] The question as to the applicability of section 32 here is not frivolous, even if *Mine Jeffrey* presents a formidable obstacle to a successful appeal. While not equal in strength, arguments raised by counsel for the Salaried Members as to type of contract to which the rule applies and, in particular, to the distinction between the termination of a contract and the suspension of a contract, are not without some merit. While I recognize that the test of the relative merit of the arguments proposed can be construed in some circumstances as requiring more than "a limited prospect of success"[17] given the nature of CCAA proceedings, I would not dismiss the motions on this narrow issue on this basis alone.

[47] The Union says the interim lender's conditions should be set aside as unreasonable. I am not convinced that this argument is *prima facie* meritorious.

[48] Counsel for the Union argues strongly that the interim lender should not be allowed to dictate terms to the CCAA Judge or to the stakeholders as a whole by imposing conditions on financing that have the effect of exploiting the vulnerability of the employees and former employees. He says that if the interim lender's conditions were struck as unreasonable, the Wabush CCAA Parties would have access to those funds and that there would be no need to suspend the various payments due to the petitioners.

[49] With respect, this argument strikes me as flawed in two respects. First, it requires an overturning of the CCAA Judge's view – with all the advantages of perspective he has in so deciding – that as a matter of fact the conditions of the interim financing are reasonable. Secondly, the Union has left unanswered the questions raised by the judge concerning the "harsh commercial realities of interim financing" at paragraph [115]. Why indeed should the interim lender advance funds be used to pay someone else's debt, particularly one that is pre-filing and unsecured? Why should a condition of the financing be ignored, effectively forcing the lender to advance funds on disadvantageous terms to

---

16 *Syndicat national de l'amiante d'Asbestos inc. c. Mine Jeffrey Inc*., [2003] R.J.Q. 420 (C.A.).

17 *Doman Industries Ltd.* v. *Communications, Energy and Paperworkers' Union, Local 514*, 2004 BCCA 253, para. [15] (per Prowse, J.A., in chambers).

which it did not agree? It is not a matter of the CCAA Judge being callous or insensitive to hardship faced by vulnerable parties. In my view, the comment of Deschamps, J. for the majority in *Indalex*, as adapted to the setting of federal deemed trusts, is apposite here: "The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries".[18]

IV.4 The appeal will not hinder the progress of the action

[50] The petitioners argue that the Wabush CCAA Parties are undergoing a court-supervised sales process in accordance with timelines and procedures that are supervised by the CCAA Judge with the oversight of the monitor. In the circumstances, they say, the proposed appeal, especially if it were placed on an accelerated roll, would not hinder the progress of the action. They contend, to differing degrees, that the CCAA Judge erred in his measure of the financial vulnerability of the Wabush CCAA Parties. Mindful no doubt of the difficulty that this aspect of the analysis presents to their leave application, the Salaried Members "part company" (to use the expression of counsel) with the Union in framing their appeal more narrowly, in particular in respect of the recognition that the DIP loan enjoys a wider priority than does the Union, and in limiting their claim in respect of the payments that should escape suspension.

[51] Given the findings of fact concerning the fragility of the Wabush CCAA Parties as observed by the CCAA Judge, I find the positions of both petitioners on this point unconvincing. Even the "strategic" decision of the Salaried Members to contest the judgment on a narrower basis does not satisfy this criterion. In my view, both proposed appeals would unduly hinder the action.

[52] My conclusion is based largely on the findings of fact arrived at by the CCAA Judge regarding the vulnerability of the Wabush CCAA Parties at this stage of the restructuring.

[53] In canvassing the circumstances in which the interim financing was put in place, the CCAA Judge observed that the cash-flow position of the Wabush CCAA Parties was compromised with the result that they needed the interim financing to continue even their limited operations during the CCAA process (para. [16]). The CCAA Judge made the following specific findings, which I consider to be findings of fact: (1) that the sale and investor solicitation process in progress are in the interests of the Wabush CCAA Parties and their stakeholders because they will likely lead to a greater recovery; (2) that without new financing, the Wabush CCAA Parties could not complete the sale; (3) that without new financing allowing them to complete the sale, it is likely that the Wabush CCAA Parties will go bankrupt; (4) that the Wabush CCAA Parties and the monitor have not identified any other source of new financing; and (5) that the terms of the interim financing are reasonable (para. [94]).

---

[18] *Indalex*, *supra* note 12, para. [59].

[54] When discussing the suspension of special payments, the CCAA Judge observed, at para. [112]:

> [112] The Wabush CCAA Parties do not have the funds available to make these payments. The cash flow statements filed with the Court show that the Wabush CCAA Parties need the funds from the Interim Financing to meet their current obligations other than the special payments. The Interim Lender Term Sheet expressly requires the Wabush CCAA Parties not to make any special payments. As a result, forcing the Wabush CCAA Parties to make the special payments would lead to a default under the Interim Financing and a likely bankruptcy.
>
> [Footnote omitted.]

[55] In respect of the suspension of the OPEBs – including what the Salaried Members characterize as the modest premiums of $182,000 per month and the supplemental retirement arrangement plan amount – the CCAA Judge recalled at para. [122] that "[t]he Wabush CCAA Parties do not have any funding valuable to continue to pay any of the foregoing OPEBs, as the Interim Financing Sheet prohibits such payments". In para. [125], the CCAA Judge explained that it was not enough to say, as did the Salaried Members, that $182,000 and the supplemental amount could be found elsewhere if the interim lending sheet prevents them from making the payments: "Given the cash flow statement filed with the Court and the language of the Interim Lender Sheet, the Court accepts that the Wabush CCAA Parties do not have the funds".

[56] These findings of fact, while not immune from review, are deserving of deference on appeal. It is not enough to say, without more, that the amount is a small one in the grand scheme of things, as do the Salaried Members, or that another interim lender could be found without difficulty as the action proceeds. The CCAA Judge decided specifically otherwise. A reviewable error would have to be shown on this point to overcome the strong impression that comes from reading the judgment that granting leave and suspending provisional execution would hinder the action.

[57] In like circumstances, leave has been denied. Recently in *Bock inc. (arrangement relative à)*,[19] my colleague Bich, J.A. declined to grant leave, notwithstanding the presence of a question she characterized as "interesting" for the purposes of an eventual appeal and one in respect of which, like ours, there was a paucity of appellate court consideration. "Granting leave to appeal", she wrote at para. [12] of her reasons, "would most likely jeopardize the course of the action and cause irreparable harm to the debtor company and, consequently, all other stakeholders (creditors, employees, etc.)". Similarly, in *Re: Consumer Packaging Inc.*,[20] a bench of

---

[19] 2013 QCCA 851 (in chambers).

[20] 2001 CanLII 6708 (Ont. C.A.).

the Court of Appeal for Ontario declined to grant leave in circumstances where conditions set by the interim lender meant that the time and financial constraints that would have come with an appeal were prohibitive: "Leave to appeal should not be granted", wrote the Court at para. [5], "where, as in the present case, granting leave would be prejudicial to restructuring the business for the benefit of stakeholders as a whole […]".[21]

[58] All told, the risk of default on the interim financing and of bankruptcy to the Wabush CCAA Parties is serious. Granting leave would, in this setting, risk hindering the action. If leave were granted, the petitioners would likely obtain, at best, a Pyrrhic victory if they succeeded on appeal.

***

[59] Given my conclusion that leave should be denied, the motions seeking a stay of the judgment pursuant to article 550 C.C.P. are without further object and should be dismissed as well. In any event, the conditions necessary for a stay were not present. While the petitioners have, to be sure, shown that they have an arguable case, they have not pointed to something I would characterize as a weakness in the judgment *a quo*. They did satisfy the burden of showing that the failure to grant a stay would cause them harm. However, the balance of inconvenience – considering the impact that lifting the stay would have on the Wabush CCAA Parties – would not have favoured granting a stay.

[60] Counsel should be commended for their helpful presentation of the matter in dispute.

[61] **FOR THE AFOREMENTIONED REASONS**: the undersigned:

[62] **DISMISSES** the Salaried Members motion for leave to appeal and for a stay, with costs;

[21] As a final observation on this point, it may be recalled that, prudently, the CCAA Judge offered a further observation that gives weight, I think, to the conclusion that granting leave would be inopportune here. He suggested that even if the PBSA deemed trusts were effective in CCAA proceedings, he would have exercised his discretion under the CCAA to grant priority to the interim lender: see para. [95].

[63] **DISMISSES** the Union's amended motion for leave to appeal and for a stay, with costs.

NICHOLAS KASIRER, J.A.

Mtre Andrew J. Hatnay
Mtre Ari Nathan Kaplan
KOSKIE MINSKY LLP
Mtre Geeta Narang
NARANG & ASSOCIÉS
Mtre Nicholas Scheib (absent)
SCHEIB LEGAL
For Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson

Mtre Bernard Boucher
BLAKE CASSELS & GRAYDON S.R.L. (MONTREAL)
For Bloom Lake General Partner

Mtre Steven Weisz
BLAKE CASSELS & GRAYDON S.R.L. (TORONTO)
For Bloom Lake General Partner

Mtre Louis Dumont
DENTONS CANADA LLP
For Cliffs Quebec Iron Mining ULC

Mtre Sylvain Rigaud
NORTON ROSE FULBRIGHT CANADA LLP
For FTI Consulting Canada Inc.

Mtre Douglas Mitchell (absent)
Mtre Leslie-Anne Wood (absent)
IRVING MITCHELL KALICHMAN
For Her Majesty in right of Newfoundland and Labrador, as represented by the Superintendent of Pensions

Mtre Pierre Lecavalier
DEPARTMENT OF JUSTICE – CANADA
For the Attorney General of Canada

Mtre Jean-François Beaudry
PHILION, LEBLAND, BEAUDRY, AVOCATS, S.A.
For the Syndicat des Métallos, Section Locale 6254 and Section Locale 6285

Mtre Gerald N. Apostolatos
LANGLOIS KRONSTRÖM DESJARDINS
For the Creditors Quebec North Shore and Labrador Railway Company Inc. and Iron Ore Company of Canada

Date of hearing: August 5, 2015

TAB 5

Canada (Attorney General) v. Bedford,
2013 SCC 72

TAB 6

Canada (Justice) v. Khadr, 2008 SCC 28

TAB 7

Canada (Prime Minister) v. Khadr, 2010 SCC 3

TAB 8

Caterpillar Financial Services Corp. v. Boale, Wood & Company Ltd., 2014 BCCA 419

TAB 9

Fraser Paper Inc v Superintendent of Pensions,
2007 NBQB 196

TAB 10

IBM Canada Limited v. Waterman 2013 SCC 70

TAB 11

McNaughton v. Saskatchewan Government and General Employees' Union, 2010 SKQB 5

TAB 12

Melanson v. N.B., 2006 NBQB 73

TAB 13

Moore v. Sweet, 2018 SCC 52

TAB 14

Re Canwest Publishing Inc., 2010 ONSC 1328

TAB 15

Re Catalyst Paper Corporation, 2012 BCSC 451

TAB 16

Re Fraser Papers Inc., 2009 CanLII 55115 (ON SC)

TAB 17

Re Nortel Networks Corporation,
2009 CanLII 26603 (ON SC)

TAB 18

Re Nortel Networks Corporation et al,
2017 ONSC 700

TAB 19

Re Target Canada Co., 2015 ONSC 303

TAB 20

Re Target Canada Co., 2015 ONSC 1028

TAB 21

Re Timminco Limited, 2012 ONSC 4471

TAB 22

Re United Air Lines Inc. (Bankruptcy),
2005 CanLII 7258 (ON SC)

TAB 23

Re U.S. Steel Canada Inc., 2014 ONSC 6145

TAB 24

Re U.S. Steel Canada Inc. 2015 ONSC 5990

TAB 25

RJR Macdonald Inc. v. Canada,
1994 CanLII 117 (SCC)

TAB 26

Sproule v. Nortel Networks Corporation,
2009 ONCA 833

TAB 27

Sun Indalex Finance, LLC v. United Steelworkers,
2013 SCC 6

Court File No. CV-19-616077-00CL

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF IMPERIAL TOBACCO CANADA LIMITED, *et al.*

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

BOOK OF AUTHORITIES

KAPLAN LAW
393 University Av., Suite 2000
Toronto ON M5G 1E6

Ari Kaplan (LSO #42042S)

Tel: 416 565.4656
Fax: 416 352.1544
Email: ari@kaplanlaw.ca

Counsel to the Former Genstar U.S. Retiree Group Committee and the Representatives