

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

No: 500-11-048114-157

SUPERIOR COURT
(Commercial Division)

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

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

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

Petitioners

-and-

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

Mises-en-cause

-and-

FTI CONSULTING CANADA INC.

Monitor

-and-

MICHAEL KEEPER, TERENCE WATT,
DAMIEN LEBEL AND NEIL JOHNSON

PETITIONERS-Mises-en-cause

-and-

UNITED STEELWORKERS, LOCAL 6254,
UNITED STEELWORKERS, LOCAL 6285

Mises-en-cause

-and-

MORNEAU SHEPELL
Mise-en-cause

**AMENDED MOTION FOR AN ORDER FOR LEGAL COSTS OF SALARIED/NON-
UNION EMPLOYEES AND RETIREES**

(Sections 11 and 11.52 of the *Companies' Creditors Arrangement Act*)

TO THE HONOURABLE MR. JUSTICE MICHEL A. PINSONNAULT, J.S.C., OR TO ONE OF THE HONOURABLE JUDGES SITTING IN THE COMMERCIAL DIVISION IN AND FOR THE JUDICIAL DISTRICT OF MONTRÉAL, THE PETITIONERS-MISES-EN-CAUSE RESPECTFULLY SUBMIT THE FOLLOWING:

INTRODUCTION

1. Pursuant to the Order of the Honourable Stephen W. Hamilton J.S.C. (as he was then) dated June 22, 2015, as revised by the Order issued on December 21, 2017, (the “**Representation Order**”), Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson are the Court-appointed representatives (the “**Representatives**”) of all Salaried/Non-union employees and retirees of the Wabush CCAA Parties (as defined below) (the “**Salaried Members**”) in the CCAA proceedings of the Wabush CCAA Parties (the “**CCAA Proceedings**”) and the firms of Koskie Minsky LLP (“**KM**”) of Toronto, and Fishman Flanz Meland Paquin LLP (“**FFMP**”) of Montreal are the Representative Counsel of all of the Salaried Members.
2. The Representatives and Representative Counsel are responsible for the representation of approximately 690 Salaried Members in these CCAA proceedings.

BACKGROUND

3. Wabush Iron Co. Limited, Wabush Resources Inc., Wabush Mines, Arnaud Railway Company, and Wabush Lake Railway Company Limited (collectively, the “**Wabush CCAA Parties**”) had operated an open-pit iron ore mine in northern Labrador and a processing and shipping facilities in Sept-Iles, Quebec. The iron ore would be mined in Labrador and then shipped by rail to Sept-Iles where it would be further processed and shipped via large lake ships to steelmakers.
4. On May 20, 2015, the Wabush CCAA Parties obtained protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (“**CCAA**”). FTI Consulting Canada Inc. was appointed as the Monitor. The CCAA Initial Order includes, among other things, a stay of all proceedings that had been previously brought or could be brought against the Wabush CCAA Parties.
5. While under CCAA protection, Wabush Mines did not restructure. Instead, it shut down all mining operations and began a sales process while under CCAA protection of all of its

assets. Justice Hamilton held in his decision dated September 11, 2017 that Wabush Mines was in liquidation since the CCAA filing date.¹

6. As part of their compensation as employees of the Wabush CCAA Parties, the Salaried Members earned post-retirement benefits which the Wabush CCAA Parties were contractually obligated to pay to them in their retirement years, including:
 - (a) a monthly pension benefit paid on retirement from the Contributory Defined Benefit Pension Plan for Salaried Employees of Wabush Mines, Cliffs Mining Company, Managing Agent (Nfld & Lab. Reg. No. 0021314, CRA Reg. No. 0343558) (the "**Salaried Pension Plan**");
 - (b) retiree health benefits and life insurance; and,
 - (c) an additional supplemental pension benefit for certain senior managers paid directly by the company (collectively, with health and life insurance benefits, referred to in (b) above, the "other post-employment benefits" or "**OPEBs**").
7. The Wabush CCAA Parties terminated the Salaried Members OPEBs entirely immediately after obtaining CCAA protection. The loss was in the amount of (...) \$24,380,794.81.
8. The underfunding in the Salaried Pension Plan was underfunded by \$27,450,000 meaning there were not enough assets in the plan to pay full pension benefits which precipitated both the Newfoundland Superintendent of Pensions (the "**Superintendent**") to order its wind up while the company was under CCAA protection, as well as a 25% reduction to the monthly pension benefits being paid to retirees.
9. The Salaried Members thus became major creditors of the Wabush CCAA Parties.
10. The vast majority of the Salaried Members are retired and elderly individuals. They are not commercial creditors, and do not have union representation. Prior to the appointment of Representative Counsel, they constituted one of the most vulnerable creditor groups in these CCAA proceedings without means to represent themselves in complex and, often adversarial, insolvency proceedings where they had been significantly prejudiced.
11. This case involved, among other things, employee and retiree benefit and insolvency issues in the Québec, Newfoundland and Labrador, and federal jurisdictions.

Background to Legal Costs Orders for the Salaried Members

12. On June 22, 2015, four Salaried Members, and Representative Counsel were appointed on behalf of the Salaried Members by Mr. Justice Hamilton.

¹*Arrangement relatif à Bloom Lake*, 2017 QCCS 4057 (CanLII) at para. 166.

13. Representative Counsel has provided important representation and assistance to the Salaried Members throughout the CCAA proceedings (...) in connection with their OPEB claim and the pension deficit claim.
14. Representative Counsel also functions as a single point of representation and contact for the 690 Salaried Members, thus streamlining the CCAA process and generating costs savings.
15. In addition to settling the claims for the terminated OPEBs (...), Representative Counsel was successful in resolving two major issues on behalf of the Salaried Members:
 - (a) advancing a claim for priority for the deficit in the underfunded Salaried Pension Plan which was ultimately settled and resulted in the distributions under the CCAA Plan (as defined below) to the Salaried Pension Plan being higher than distributions to other unsecured creditors of the Wabush Mines CCAA Parties as a percentage of claims; and
 - (b) outside the CCAA proceeding, a class action was filed on behalf of the same class of Salaried Members before the Newfoundland Superior Court against the non-CCAA filed parent companies of the Wabush CCAA Parties seeking compensation for the losses suffered by the Salaried Members in respect of their pension losses and the terminated OPEBs. The class action was also ultimately settled on favourable terms for the Salaried Members²

(together the "**Pension Settlement**").
16. As part of the Representation Order of Mr. Justice Hamilton dated June 22, 2015, the legal costs of the Representatives incurred from the inception of the CCAA proceedings were ordered to be paid by the Wabush CCAA Parties. Further cost orders were issued throughout the CCAA proceedings as the work required to represent the Salaried Members continued.
17. The motions for cost orders proceeded unopposed, following often extensive negotiations with the Monitor and Wabush CCAA Parties.
18. In certain cases, the amount of the "fee cap" in the previous cost order was exceeded due to the work required in the period of the order, which in turn required another cost order to be sought for those "excess" incurred costs to be paid, as well as future anticipated costs. The chronology of costs orders is summarized below:
 - (a) On October 28, 2016, by further Order of Mr. Justice Hamilton, the legal costs of the Representatives incurred prior to October 1, 2016 that were incurred in excess of the amount ordered in the June 22, 2015 Representation Order, and the

² The USW commenced a similar class action on behalf of its members, which was also settled.

Representatives' legal costs for the period from October 1, 2016 until January 31, 2017, inclusive, were directed to be paid by the Wabush CCAA Parties.

- (b) On May 31, 2017, by further Order of Mr. Justice Hamilton, the legal costs of the Representatives prior to February 1, 2017 that were incurred in excess of the amount ordered in the October 28, 2016 Court Order, and the Representatives' legal costs for the period from February 1, 2017 until June 30, 2017, inclusive, were directed to be paid by the Wabush CCAA Parties.
- (c) On June 28, 2017, by further Order of Mr. Justice Hamilton, the Representatives' legal costs for the period from July 1, 2017 until November 30, 2017, inclusive, were directed to be paid by the Wabush CCAA Parties.
- (d) On December 21, 2017, by further Order of Mr. Justice Hamilton, the firm FFMP was appointed as Québec Representative Counsel, the legal costs of FFMP for the months of October and November, 2017, were directed to be paid by the Wabush CCAA Parties, and the Representatives' legal costs for the period from December 1, 2017 until March 31, 2018, inclusive, were directed to be paid by the Wabush CCAA Parties.
- (e) On April 16, 2018, by further Order of Mr. Justice Hamilton, the legal costs of the Representatives for the period of April 1, 2018 to June 29, 2018 were directed to be paid by the Wabush CCAA Parties.
- (f) On June 29, 2018, the same day that Mr. Justice Hamilton approved the CCAA Plan (as defined below), he also ordered that the excess legal costs of the Representatives and Representative Counsel for the period April 1, 2018 to June 29, 2018 were directed to be paid by the Wabush CCAA Parties, and an aggregate cap of \$100,000 for the period from June 30, 2018, until the discharge of Representative Counsel or termination of the CCAA proceedings, was established for the payment of future costs of the Salaried Members to finalize all matters relating to the CCAA proceedings (the “**Seventh Order for Legal Costs**”).

18.1 Pursuant to the various orders, all payments of the costs of the Salaried Members were subject to sufficiently detailed accounts being rendered (subject to reasonable redaction due to solicitor-client privilege) and subject to invoices being approved by the Monitor.

19. Pursuant to an agreement reached with the Monitor, the actuarial firm Segal Consulting (“**Segal**”) was retained to provide actuarial calculations and advice to the Salaried Members with respect to the terminated OPEBs and the underfunded Salaried Pension Plan. The arrangement was such that Segal was shared with the USW employees and retirees to provide similar advice and to generate consistency and cost efficiency. With respect to Segal’s fees, Representative Counsel and counsel to the USW negotiated that the Wabush CCAA Parties would contribute to the actual reasonable fees and expenses of Segal, which the Wabush CCAA Parties agreed to do up to a maximum of \$175,000 (plus taxes and disbursements). Representative Counsel and counsel to the USW advised the Monitor in

email prior to the completion of the negotiations that the budgeted amount may need to be adjusted in the future “to reflect any variation that we did not anticipate in this file’s process”. These arrangements were not reflected in any court order. Based on the Monitor’s records, the last payment on account of Segal’s fees was in respect of Segal’s invoice dated November 6, 2018, following which \$169,148.58 had been paid by the Wabush CCAA Parties in respect of Segal’s fees, leaving a balance of \$5,851.42 available in the budget for actuarial fees.

ACTIVITIES OF REPRESENTATIVE COUNSEL DURING THE PERIOD FROM JUNE 29, 2018 TO AUGUST 31, 2019

20. On June 29, 2018, after extensive negotiations with creditors, including the Salaried Members, an Amended and Restated Joint Plan of Compromise and Arrangement was reached between the Wabush CCAA Parties and their creditors, which was approved by the Court (the “**CCAA Plan**”).
21. Concurrently with the approval of the CCAA Plan and the issuance of the Seventh Order for Legal Costs on June 29, 2018, a motion was brought by the CCAA Parties seeking an extension of the stay of proceedings under the CCAA until November 30, 2018, which was granted by the Court. The expectation of Representative Counsel at the time was that the CCAA proceedings would be substantially terminated by November 30, 2018, five months away, and consequently, the assumption was that the work required of Representative Counsel to continue to represent the Salaried Members after June 29, 2018 until the termination of the CCAA proceedings would be diminished.
22. However, the Wabush CCAA Parties brought two further motions to extend the stay: one motion on November 27, 2018, to extend the stay until May 30, 2019, and a second motion on May 10, 2019, to extend the stay until February 28, 2020. (...) As a result additional fees have been incurred by all the parties.³ As reported in the Forty-Ninth Monitor's Report released on November 22, 2018, a number of issues remained unresolved.
23. The CCAA Plan is complicated and contains different cash distributions to various creditors based on different claims against the different estates of the Wabush CCAA Parties. It also includes a mechanism for the Pension Settlement amounts to flow through the CCAA Plan and into the funds of the Salaried Pension Plan and the USW Pension Plan.
 - a) ***OPEB Claim Distribution***
24. In September 2018, an interim distribution was mailed by the Monitor to employee creditors with approved claims, including to the Salaried Members, with respect to their claims for terminated OPEBs. Due to the amount generated by the liquidations of the applicable Wabush estates, the payment to the Salaried Members for their OPEB Claims

³ The Monitor has advised, on or about August 7, 2019, that it, with its counsel, as well as counsel to the Wabush CCAA Parties, has charged approximately \$1.217 million in fees to the Wabush CCAA Parties from April 30, 2018 to June 2019.

was low. The Salaried Members received an initial distribution of only 7.3605% of their proven unsecured claims.

b) Pension Claim Distribution

25. As a result of the Pension Settlement reached in May 2018, the Salaried Pension Plan received a total payment of \$18 million (a recovery of approximately 67% of the pension deficit claim amount) which resulted in an increase to the funded ratio for the Salaried Pension Plan from approximately 75% as of the wind-up date to approximately 92% for Newfoundland and Québec pensioners, 85.77% for Québec non-pensioners and 86.8% for Salaried Members who are subject to federal pension regulation. The reduction in monthly pension benefits referred to above was decreased from 25% to 8-15%, and the Salaried Members received a lump sum retroactive payment to compensate them for the 25% reduction that had been imposed on them for the previous years.
26. The Pension Settlement provided a significantly better recovery for the underfunded pension plans than (...) than the recoveries of other unsecured creditors as a percentage of claims. The Monitor had estimated that contributions to the underfunded Salaried Pension Plan (and USW Pension Plan) would have been only in the range of \$4-\$6 million from the Wabush estates if the pension claims were treated as any other unsecured claims.
27. Following the first interim distribution in September 2018, Representative Counsel has dealt with a number of issues, including time-sensitive unexpected issues (discussed below) that have affected the Salaried Members and which led to the fee cap provided for in the June 29, 2018 Seventh Order for Legal Costs being exceeded:
 - (a) Responding to questions from Salaried Members regarding their distributions, individual claim amounts and income tax withholdings;
 - (b) Providing submissions to the Monitor with respect to the tax treatment of certain distribution amounts;
 - (c) Advising Salaried Members with respect to tax slips sent to the Salaried Members, which reported the distributions for some Salaried Members as taxable income when they were not taxable, and had had no tax withholdings applied at the time of the distribution. The corrections required for this problem were very time sensitive as the Salaried Members received the erroneous tax slips in early March and needed to file their taxes by April 30, 2019;
 - (d) Providing CCAA claim information to Salaried Members to assist with disputing repayment notices from Employment and Social Development Canada ("ESDC"), for Employment Insurance ("EI") that were precipitated by the distribution payments.

Pursuant to section 45 of the *Employment Insurance Act*, S.C. 1996, c. 23, where a claimant is paid EI for a particular period and the claimant later receives an amount

classified as "earnings" for the same period from an employer, trustee or other person, the claimant becomes liable for any "overpayments" of EI that were made and has to repay ESDC an amount representing said "overpayment" to prevent claimants from recovering earnings twice for the same period. Since Salaried Members were not initially provided a breakdown of the type of claims for which distributions were paid by the Monitor in the first interim distribution, Representative Counsel obtained this information from the Monitor and provided it to Salaried Members to assist them with the disputes they had with ESDC;

- (e) Advising the Salaried Members and dealing with Morneau Shepell (the replacement administrator appointed for the Salaried Pension Plan and the USW Pension Plan) with respect to the annuity purchase process for pension plan wind-up. The Superintendent in December 2015 had directed that the Salaried Pension Plan be terminated as a result of the Wabush CCAA Parties no longer making special payments owing to the Salaried Pension Plan as a result of the discontinuance of their business operations.

As the next major step of the wind up of the Salaried Pension Plan, annuity contracts needed to be purchased with the pension fund assets, inclusive of the Pension Settlement amounts, from insurance companies to continue the payment of monthly pension benefits. This process proceeded on short notice and under very tight deadlines. Representative Counsel was asked to provide advice to the Salaried Members in early 2019 during this process and to work with Morneau Shepell to negotiate the best pricing to generate the best available improvement to the pension benefits which had been reduced by 25%. The annuity purchases were completed successfully.

- 28. Representative Counsel continues to respond to inquiries from Salaried Members regarding the first interim distribution, and anticipates there will be further inquiries in respect of the second and final CCAA distribution.
- 29. Also, a number of late claims were reportedly filed by other creditors, including a claim by a creditor who seeks to change its claim from unsecured to secured status, which Representative Counsel has been monitoring. The Monitor recently advised Representative Counsel that such a priority change, if achieved, would marginally reduce the amount available to distribute to unsecured creditors in the Wabush Mines Parties Unsecured Creditor Class, which includes the Salaried Members in the next distribution. The Monitor has reported that it is awaiting a decision in another case before dealing further with this issue.
- 30. Representative Counsel submitted its invoices to the Monitor following the June 29, 2018 Order up until the aggregate cap was reached in December 2018. The following chart summarizes the legal fees that have been incurred for the Salaried Members in excess of the \$100,000 cap provided for in the Seventh Order for Legal Costs.

MONTH	FFMP	KM
December 2018	\$89.15	\$1,952.00
January 2019	\$1,377.00	\$17,337.50
February 2019	\$348.00	\$2,571.50
March 2019	\$661.50	\$12,666.00
April 2019	\$1,609.00	\$9,847.50
May 2019	\$2,711.50	\$14,402.00
June 2019	\$5,453.00	\$9,906.00
July 2019	\$2,834.50	\$5,541.00
August 2019	\$1,245.00	\$2,948.00
TOTAL	\$16,328.65	\$77,171.50
Grand TOTAL	\$93,500.15	

31. Consequently, Representative Counsel brings this motion for an Order from this Honourable Court directing the payment by the Wabush CCAA Parties of the excess fees of Representative Counsel incurred for the period December 1, 2018 to August 31, 2019, in the aggregate amount of \$93,500.15 (plus disbursements and taxes).
32. The amounts sought in this order for Salaried Members representation and actuarial advice described below have no material impact on the next distribution to creditors.⁴

COSTS OF THE ACTUARY FOR THE SALARIED MEMBERS

33. Due to the complexity of the annuity purchase process described above, the Salaried Members required the assistance and advice of the actuarial firm Segal. Segal attended a number of calls with the Representatives, Morneau Shepell and Representative Counsel and provided regular input and advice on very tight deadlines during the annuity purchase bidding process.
34. As described above, the annuity purchase was successful and the initial reduction to monthly pension benefits was mitigated from 25% to 8-15% as a result of the negotiations of the parties, including Segal, with the insurance companies. Segal's work exceeded the amount remaining (\$5,851.42) in the actuarial budget by \$15,918.58 (plus taxes and disbursements).
35. Consequently, Representative Counsel brings this motion for an Order from this Honourable Court directing the payment of Segal's fees of \$25,830.11 (i.e. \$21,770 plus \$1,088.50 disbursements and \$2,971.61 taxes), which would apply the \$5,851.42 remaining in the amount that the Wabush CCAA Parties had agreed to contribute for the

⁴ The Monitor has advised that it, with its counsel, as well as counsel to the Wabush CCAA Parties, have charged approximately \$37.4 million in fees to the Wabush CCAA Parties from the date of the CCAA filing to June 2019.

payment of actuarial fees plus approve the payment of an additional \$15,918.58 (plus taxes and disbursements) above the remaining budget.

PROJECTED ACTIVITIES OF REPRESENTATIVE COUNSEL AFTER AUGUST 31, 2019

36. The future work of Representative Counsel is expected to be limited. Representative Counsel anticipates that it will continue to interact with the Monitor for any additional issues that may arise related to the second and final distribution, respond to questions to assist the Salaried Members and address any remaining matters in the CCAA proceedings that are relevant to the interests of the Salaried Members, including the pending priority claim of a creditor described above.
37. It is respectfully submitted that the fee cap for work performed by Representative Counsel in the period September 1, 2019, to the earlier of the discharge of Representative Counsel or the termination of the CCAA proceedings should be \$75,000 (plus disbursements and taxes). This amount is a cap; if less work is involved, then the full amount of the cap would not be utilized.
38. The present Motion is well founded in fact and in law.

FOR THESE REASONS THE PETITIONERS-MISES-EN-CAUSE ASK THAT THIS HONOURABLE COURT:

GRANT the present Motion;

ISSUE an Order in the form of the Draft Order communicated herewith as **Exhibit R -1**;

DECLARE that service and notice of this Motion was good and sufficient;

THE WHOLE without costs, save and except in case of contestation.

Toronto and Montreal, September 19, 2019

Koskie Minsky LLP
KOSKIE MINSKY LLP

Fishman Flanz Meland Paquin LLP
FISHMAN FLANZ MELAND PAQUIN LLP

Representative Counsel for the Petitioners-Mises-en-cause Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson, the Representatives of the Salaried Members.

AFFIDAVIT

I, the undersigned Andrew Hatnay, carrying on practice at 20 Queen Street West, Suite 900, Toronto, ON M5H 3R3, hereby solemnly declare and make oath and say the following:

1. I am a partner with the firm of Koskie Minsky LLP, the Court-appointed Representative Counsel to all the Salaried Members of the Wabush CCAA Parties;
2. All of the facts alleged in the present *Amended Motion for an Order for Legal Costs of Salaried/Non-Union Employees and Retirees* are true.

SWORN BEFORE ME at Toronto,
in the Province of Ontario,
on September 19, 2019



A Commissioner of Oaths

LSUC# 70164K



ANDREW J. HATNAY

N° / No. C.S.: 500-11-048114-157

SUPERIOR COURT
DISTRICT OF MONTREAL
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IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
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Petitioners

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WABUSH MINES, ARNAUD RAILWAY COMPANY, WABUSH LAKE RAILWAY COMPANY LIMITED

Mises-en-cause

FTI CONSULTING CANADA INC.

Monitor

MICHAEL KEEPER, TERENCE WATT, DAMIEN LABEL and NEIL JOHNSON (as Representatives of the Salaried/Non-
Union Employees and Retirees)

PETITIONERS-Mises-en-cause

UNITED STEELWORKERS, LOCAL 6254, UNITED STEELWORKERS, LOCAL 6285

Mises-en-cause

MORNEAU SHEPELL

Mise-en-cause

AMENDED MOTION FOR AN ORDER FOR LEGAL COSTS OF SALARIED/NON-UNION EMPLOYEES AND RETIREES
(Sections 11 and 11.52 of the *Companies' Creditors Arrangement Act*)

ORIGINAL

Koskie Minsky LLP
20 Queen O. | W, #900
Toronto, Ontario M5H 3R3
T:416.595.2083 + 416.542.6288 | F:416.204.2872
Andrew Hatnay | Barbara Walancik
ahatnay@kmlaw.ca | bwalancik@kmlaw.ca
AS-0G41

Fishman Flanz Meland Paquin LLP
4100-1250 René-Lévesque Blvd. West
Montreal, QC H3B 4W8
T:514.932.4100 | F:514.932.4170
Mark E. Meland | Nicolas Brochu
mmeland@ffmp.ca | nbrochu@ffmp.ca
BM-0309

Attorneys for the Mises-en-Cause Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson