

CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

N°: 500-09-

N°: 500-11-048114-157

COURT OF APPEAL

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

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

APPELLANT – Mis en cause

v.

FTI CONSULTING CANADA INC.

RESPONDENT - Monitor

-and-

BLOOM LAKE GENERAL PARTNER
LIMITED

QUINTO MINING CORPORATION

8568391 CANADA LIMITED

CLIFFS QUEBEC IRON MINING ULC

WABUSH IRON CO. LIMITED

WABUSH RESOURCES INC.

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 - Mises en cause

-and-

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

MICHAEL KEEPER, TERENCE WATT,
DAMIEN LABEL AND NEIL JOHNSON

UNITED STEEL WORKERS, LOCALS 6254
AND 6285

RETRAITE QUÉBEC

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

VILLE DE SEPT-ÎLES

MIS EN CAUSE - Mis en cause

APPLICATION FOR LEAVE TO APPEAL

(Section 13 and 14 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
and Section 30, para. 2 and 357 C.C.P.)

Appellant

Dated September 29, 2017

**TO ONE OF THE HONOURABLE JUSTICES OF THE COURT OF APPEAL SITTING
IN AND FOR THE REGISTRY OF MONTREAL, THE APPLICANT, THE ATTORNEY
GENERAL OF CANADA, ACTING IN HIS OWN CAPACITY AND ON BEHALF OF THE
OFFICE OF THE SUPERINTENDANT OF FINANCIAL INSTITUTIONS (OSFI),
RESPECTFULLY SUBMITS:**

INTRODUCTION

- 1- The Debtors obtained protection from their creditors under the Companies' Creditors Arrangement Act, RSC 1985 c. C-36 (hereinafter CCAA);
- 2- This is a motion for leave to appeal by the Attorney General of Canada acting on its own behalf and on behalf of the Superintendent of Financial Institutions (collectively the AGC), of the decision of the Honourable Mr. Justice Stephen Hamilton (the CCAA Judge) dated September 11, 2017. A copy of this decision is attached to this motion as **Schedule 1**;
- 3- The AGC seeks leave to appeal that decision, which granted the Motion by the Monitor for Directions with respect to Pension Claims and declared, among other

things, that trusts created under the *Pension Benefits Standards Act, 1985* (hereinafter *PBSA*) are not enforceable in CCAA proceedings;

- 4- The Applicant respectfully requests that this Court:
 - (a) Grant leave to appeal from that decision with respect to the issue noted above;
 - (b) Render any further relief that this Honourable Court deems just and appropriate;

- 5- If leave to appeal is granted, the Applicant will ask the Court of Appeal to
 - (a) Reverse the CCAA Judge's decision declaring that the trust created under the *PBSA* is not enforceable in CCAA proceedings, particularly in the context of the case at hand where the almost all of debtors' assets have been liquidated under the CCAA without a plan being presented to the creditors;
 - (b) Declare that, unlike deemed trusts in favour of the crown, a deemed trust created by subsections 8(1) and (2) of the *PBSA* cannot be treated as a floating charge ranking after the previous securities;

GROUNDS FOR THIS MOTION

- 6- The Debtors and the *mises en cause* received protection under the CCAA by a first initial order issued in January 27, 2015 (Bloom Lake Parties) and by a second initial order rendered on May 28, 2015 (Wabush Parties) (**Schedules 2 and 3**);

- 7- Even before either of these orders were made, the Debtors and the *mises en cause* had already ceased their mining activities and the majority of the employees had already been dismissed; (Motion for the Issuance of an Initial Order, **Schedule 4**);

- 8- The CCAA Judge recognized that the Debtors are liquidating, and not restructuring their affairs (Para 160 of the decision);

- 9- In fact, by the time the CCAA Judge rendered the judgment for which leave to appeal is sought, the CCAA Judge had already rendered 14 Vesting Orders;
- 10- Almost all of the assets have already been liquidated;
- 11- As appears from the decision dated September 11, 2017, two pension plans for the employees and former employees of the Debtors are the issue in that decision;
- 12- On December 16, 2015 OSFI terminated the Pension Plan for Bargaining Unit Employees (**Schedule 5**); on the same date the Superintendent of Pensions of Newfoundland and Labrador terminated the same pension plan as well as the Pension Plan for Salaried Employees (**Schedule 6**);
- 13- No plan of arrangement had been presented to the creditors. All evidence suggests that the debtors will end the CCAA procedures without ever filing a plan with their creditors;
- 14- The Attorney General of Canada challenged the Controller's motion seeking directives from the Court. The AGC argued that the liquidation of the business under the CCAA constitutes a liquidation within the meaning of subsection 8(2) of the *PBSA* and, as such, the deemed trust created by sections 8(2) applies to the extent of the amounts owing to the pension plans under s 8(1);

DECISION OF THE CCAA JUDGE

- 15- The CCAA Judge found that a liquidation under the CCAA constitutes a liquidation in accordance with subsection 8(2) of the *PBSA* and that this triggers the deemed trust (Para 218 a) of the decision);
- 16- The Judge likens the deem trust to a floating charge that ranks after all the previous specific charges;
- 17- The Judge concludes that the *PBSA* ss 8(2) deemed trust does not apply to matters under the CCAA, Parliament having protected only normal cost payments,

employee deductions, and payments in respect of defined contribution provisions under the CCAA;

- 18- Furthermore, the CCAA omitted to rule on the issue of the payment of the normal payments for the period from December 17 to 31, 2015 (Para 13, note 16 of the decision);
- 19- The Attorney General of Canada is in agreement with the CCAA Judge with respect to the application of the pension benefits legislation of different jurisdictions in the context of the present case, in which the pension plans were multi-jurisdictional.

QUESTIONS PROPOSED TO THE COURT OF APPEAL

- 1- In the context of a liquidation conducted under the guise of the CCAA and that does not result in any plan of arrangement being submitted to the creditors, can section 6(6) of the CCAA be used to conclude that the intention of Parliament in such a context was to protect only the normal cost payments, employee deductions, and payments in respect of defined contribution provisions?
- 2- Is the deemed trust created by section 8(2) of the *PBSA* comparable to a floating charge?
- 3- Could the CCAA Judge, in the absence of a plan of arrangement, refer to the Scheme of Distribution under the *Bankruptcy and Insolvency Act* to exclude the application of the ss 8(2) *PBSA* deemed trust?

ERRORS OF LAW

- 20- The CCAA Judge erred in law when he interpreted the intention of Parliament and concluded that the deemed trust created by ss 8(2) of the *PBSA* has no application in a liquidation carried out under the CCAA, even if said liquidation does not lead to any recovery plan for the creditors;

- 21- The CCAA Judge erred in mistaking Parliament's intention in the context of corporate restructuring for Parliament's intention in the context of liquidation;
- 22- The CCAA Judge also erred in concluding that in a CCAA case, without even being able to vote on the matter, the beneficiaries of the pension plans have no protection other than those available under the CCAA;
- 23- The CCAA Judge erroneously applied the principles of statutory interpretation. His conclusion in the present case rendered two federal statutes irreconcilable;
- 24- The CCAA Judge held that bankruptcy and liquidation are elements that trigger the *PBSA* deemed trust, though he also concluded that this trust does not apply in matters of the *CCAA* or proposals. In so doing, he created a different regime for bankruptcy, one which contravenes the very wording of section 8(2) of the *PBSA*;
- 25- The CCAA Judge applied the interpretative criteria concerning deemed trusts in favour of the crown to the deemed trusts of the pension plan, without taking into account:
 - The broad and liberal criteria that must be applied in matters of the protection of pension plans¹;
 - The unseizable nature of assets that make up a pension plan;
 - The intention of Parliament to provide increased protection to pension plans; the beneficiaries of those plans being, by virtue of ss 6(6) of the *CCAA*, the only ones able to renounce this protection;
 - Section 37 (1) of the *CCAA*;
- 26- The CCAA Judge failed to rule on whether normal payments should be made for the period from December 17 to 31, 2015;

¹ *Buschau v. Roger Communication Inc.* [2006] 1 RCS 973; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Institutions)* [2004] 3 RCS 152; *Schmidt v. Air Product Canada Limited* [1974] 2 RCS 611;

TEST FOR LEAVE TO APPEAL

- 27- The criteria for leave to appeal in CCAA have been met:
- (a) The proposed appeal involves issues that are significant to the practice
- 28- The issues that would be raised on appeal are very important to the practice in matters of insolvency and, more precisely, to the liquidation of assets within the framework of the CCAA.
- (b) The point raised on the appeal is of significance to the action
- 29- The pension plan was terminated in December 2015 because the plan has failed to meet the prescribed tests and standards for solvency as required by subsection 9(1) of the PBSA and sections 8 and 9 of the Regulations, and that the employer has discontinued all of its business operations. Without the contributions due up to and including December 31, 2015, the impact on the beneficiaries of these pension plans is very significant and cannot be remedied later.
- (c) The proposed appeal is meritorious and not frivolous
- 30- The grounds for appeal include an erroneous analysis of the intent of Parliament and of the scope of the deemed trust under section 8(2) of the PBSA. In addition, the CCAA Court concluded that in the context of the CCAA, ss 8(2) does not apply, such that beneficiaries of a pension plan can be provided less than what is provided by ss 8(2) *PBSA*, and without the power to vote (i.e to accept or deny this reduction) provided by ss 6(6) of the *CCAA* when there is a plan. These are certainly not frivolous grounds.
- (d) The appeal will not hinder the progress of the action
- 31- Although this case began in May 2015, the assets have now been liquidated and no plan of arrangement is foreseeable. In the circumstances, the proposed appeal will not delay administration of this file, which appears to be headed towards a release from the CCAA without an arrangement or reorganisation.

CONCLUSION SOUGHT ON APPEAL

32- The appellant will ask the Court of Appeal to:

- a) GRANT the appeal;
- b) OVERTURN in part the judgment rendered in first instance;
- c) REJECT in part the request for directives of the Monitor;
- d) DECLARE that, in the context of liquidation under the CCAA, the deemed trust under section 8(2) of the PBSA applies, and, as a result, the amounts owed must be paid to the pension plans unless the beneficiaries of the plans accept lesser amounts as part of a plan submitted to them;
- e) DECLARE THAT NORMAL PAYMENTS ARE DUE UP TO DECEMBER 31, 2015;
- f) ORDER costs against the Respondent and other contesting parties/intervenors in both first instance and appeal;

FOR THESE REASONS, MAY IT PLEASE THE COURT :

GRANT the present motion;

AUTHORISE the appellant to commence an appeal of the judgment rendered on September 11, 2017 by the Honourable Stephen W. Hamilton of the Superior Court, Commercial Division, district of Montreal bearing file number 500-11-048114-157;

THE WHOLE, with costs follow.

MONTREAL, September 29, 2017


ATTORNEY GENERAL OF CANADA

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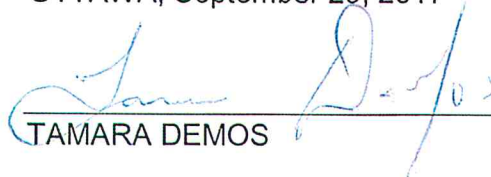
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SOLEMN DECLARATION

I, the undersigned Tamara DeMos, Managing Director, Private Pension Plans Division at the Office of the Superintendent of Financial Institutions Canada, having its head office at 255 Albert Street, Floor 14, in the city of Ottawa, province of Ontario K1A 0H2, certify the following:


1. I am the Managing Director, Private Pension Plans Division, at the Office of the Superintendent of Financial Institutions Canada;
2. All of the alleged facts in the Application for Leave to Appeal dated September 29, 2017 are true.

OTTAWA, September 29, 2017



TAMARA DEMOS

Solemnly affirmed before me in
Ottawa, province of Ontario, on
September 29, 2017



Commissioner for oaths

Tara Berish, LSUC # 53352A

NOTICE OF PRESENTATION

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TAKE NOTICE that the present Application for Leave to Appeal will be presented for adjudication before one of the honourable judges of the Cour of Appeal, sitting in and for the District of Montréal, in the Ernest-Cormier Building, located at 100, Notre-Dame Street East, Montréal, Québec, on **October 31, 2017**, at 9 h 30, in Room RC-18.

DO GOVERN YOURSELF ACCORDINGLY.

MONTREAL, September 29, 2017


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Ref. : 8072696

COURT OF APPEAL OF QUEBEC
DISTRICT OF MONTRÉAL

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

THE ATTORNEY GENERAL OF CANADA, ACTING
ON BEHALF OF THE OFFICE OF THE
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APPELLANT- Mis en cause

v.

FTI CONSULTING CANADA INC.

RESPONDENT - Monitor

-and-

BLOOM LAKE GENERAL PARTNER LTD *ET AL.*

MISES EN CAUSE – Mises en cause

-and-

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

MIS EN CAUSE - Mis en cause

APPLICATION FOR LEAVE TO APPEAL
(S. 13 & 14 of CCAA and S. 30, al.2 & 357 CCP)

Appellant

Dated September 29, 2017

ORIGINAL

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