CANADA

PROVINCE DE QUÉBEC
District de Montréal

C.S. N° : 500-11-048114-157

C.A. N° : 500-09-

C O U R D ' A P P E L

DANS L'AFFAIRE DE LA LOI SUR LES ARRANGEMENTS AVEC LES CRÉANCIERS DES COMPAGNIES, L.R.C. 1985, CH. C-36, TELLE QU'AMENDÉE :

SYNDICAT DES MÉTALLOS, SECTION LOCALE 6254, SYNDICAT DES MÉTALLOS, SECTION LOCALE 6285

PARTIE APPELANTE – Mises en cause

c.

FTI CONSULTING CANADA INC.

PARTIE INTIMÉE – Contrôleur Requérant

et

BLOOM LAKE GENERAL PARTNER LIMITED ET AL.

PARTIE MISES EN CAUSE

LISTE DES ANNEXES
(Cahier 2 de 2)

ANNEXE 1 Jugement de première instance;

ANNEXE 2 Copie des pièces et des éléments de preuve présentés en première instance;

ANNEXE 3 Copie des actes de procédures relatifs à l'audition de la requête en première instance.

Le 2 octobre 2017, à Montréal

Me Daniel Boudreault
Philion Leblanc Beaudry, avocats, s.a.
Avocats de la Partie Appelante

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ANNEXE 3

|C A N A D A

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

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

N°: 500-11-048114-157

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-

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

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

MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON

UNITED STEEL WORKERS, LOCALS 6254 AND 6285

RETRAITE QUÉBEC

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

Mis-en-cause

-and-

FTI CONSULTING CANADA INC.

Monitor

AMENDED MOTION BY THE MONITOR FOR DIRECTIONS WITH RESPECT TO PENSION CLAIMS

(Sections 11 and 23(k) of the *Companies' Creditors Arrangement Act*)

TO MR. JUSTICE STEPHEN W. HAMILTON, J.S.C. OR TO ONE OF THE HONORABLE JUDGES OF THE SUPERIOR COURT, SITTING IN THE COMMERCIAL DIVISION FOR THE DISTRICT OF MONTRÉAL, THE MONITOR SUBMITS:

I. INTRODUCTION

1. On January 27, 2015, the Honourable Justice Martin Castonguay, J.S.C., issued an Order (as subsequently amended, rectified and/or restated, the **Bloom Lake Initial Order**) pursuant to the *Companies' Creditors Arrangement Act* (**CCAA**) in respect of the Petitioners Bloom Lake General Partner Limited, Quinto Mining Corporation, 8568391 Canada Limited, and Cliffs Québec Iron Mining ULC (**CQIM**), as well as Mises-en-cause The Bloom Lake Iron Ore Mine Limited Partnership and Bloom Lake Railway Company Limited (collectively, the **Bloom Lake CCAA Parties**), as appears from the Court record;

2. Pursuant to the Bloom Lake Initial Order, *inter alia*, FTI Consulting Canada Inc. was appointed as monitor of the Bloom Lake CCAA Parties (the **Monitor**), and a stay of proceedings was granted in respect of the Bloom Lake CCAA Parties until February 26, 2015 (subsequently extended from time to time, and most recently until September 30, 2016 by Order dated April 20, 2016);

3. On May 20, 2015, the Honourable Justice Stephen W. Hamilton, J.S.C., issued an Order (as subsequently amended, rectified and/or restated, the **Wabush Initial Order**) extending the scope of these CCAA proceedings to the Petitioners Wabush Iron Co. Limited (**Wabush Iron**) and Wabush Resources Inc. (**Wabush Resources**), as well as Mises-en-cause Wabush Mines, an unincorporated contractual joint venture (**Wabush Mines**), Arnaud Railway Company (**Arnaud Railway**), and Wabush Lake Railway Company Limited (**Wabush Railway**) (collectively, the **Wabush CCAA Parties**, and together with the Bloom Lake CCAA Parties, the **CCAA Parties**), as appears from the Court record. For ease of reference a copy of the Wabush Initial Order dated May 20, 2015, as rectified on May 28, 2015, is communicated herewith as **Exhibit R-1**;

4. Pursuant to the Wabush Initial Order (R-1), *inter alia*, the Monitor was appointed as the monitor of the Wabush CCAA Parties, and a stay of proceedings was granted in respect of the Wabush CCAA Parties until June 19, 2015 (subsequently extended from time to time, and most recently until September 30, 2016 by Order dated April 20, 2016);

5. On November 5, 2015, the Honourable Justice Stephen W. Hamilton, J.S.C., issued an order (as amended on November 16, 2015, the **Claims Procedure Order**), which approved and established a procedure for the filing of creditors' claims against the CCAA Parties and their directors and officers (the **Claims Procedure**), as appears from the Claims Procedure Order, a copy of which is communicated in support herewith for ease of reference as **Exhibit R-2**;

6. Capitalized terms not otherwise defined herein have the meaning ascribed thereto in the Claims Procedure Order (R-2);

7. Both the Bloom Lake Initial Order and the Wabush Initial Order provide that the Monitor assist the CCAA Parties in dealing with their creditors over the course of the Stay Period, and declare that the Monitor may apply to the Court for directions as becomes necessary in discharging its duties, the whole as appears from, *inter alia*, paragraphs 39 and 65 the Wabush Initial Order (R-1);

8. Moreover, paragraphs 61 and 68 of the Claims Procedure Order (R-2) entitle the Monitor to apply to the Court for advice and directions in connection with the discharge or variation of its powers and duties thereunder;

9. The Monitor hereby applies for directions with respect to the priority of Pension Claims filed by the Plan Administrator pursuant to the Claims Procedure Order (R-2), and the applicability and scope of deemed trusts, if any, under the *Pension Benefits Standards Act*, R.S.C. 1985, c. 32 (2nd Supp.) (**PBSA**) and the Newfoundland & Labrador *Pension Benefits Act*, S.N.L. 1996, c. P-4.01 (**PBA**) as well as the Québec *Supplemental Pension Plans Act*, R.L.R.Q., c. R-15.1 (**SPPA**), the whole as more fully set out below;

10. Specifically, the Monitor is asking the Court to issue an Order in the form of the draft Order communicated herewith as **Exhibit R-3** with respect to the priority of the various components of the Salaried DB Plan Claim and the Union DB Plan Claim (each as defined herein below);

II. OVERVIEW OF WABUSH CCAA PROCEEDINGS

11. As stated in paragraphs 16 to 19 and 21 of the *Motion for the Issuance of an Initial Order* of the Wabush CCAA Parties dated May 19, 2015 (the **Wabush Initial Motion**), a copy of which is communicated herewith as **Exhibit R-4**, there were no operations as of the date of the Wabush Initial Order at either the Wabush Pointe-Noire pellet plant (the **Pointe-Noire Plant**) or the Wabush Mine (as defined in the Wabush Initial Motion);

12. The Pointe-Noire Plant had been shut down in June 2013, while the Wabush Mine was shut down in the first quarter of 2014, and substantially all of the employees at both sites had been terminated or laid off prior to the issuance of the Wabush Initial Order, as stated in paragraphs 37 and 38 and 87 to 96 of the Wabush Initial Motion (R-4);

13. The Wabush Initial Order (R-1) provided for *inter alia*:

a) The creation of non-priming charges, including an Administration Charge for an aggregate amount of $1,750,000, a Directors' Charge for an aggregate amount of $2,000,000, and an Interim Lender Charge for an aggregate amount of $15,000,000 (each as defined in the Wabush Initial Order, and collectively referred to as the **CCAA Charges**);

b) The permission, but no requirement, for the Wabush CCAA Parties to pay normal cost pension contributions payable on or after the date thereof as follows:

> [12] **ORDERS** that the Wabush CCAA Parties shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

(a) all outstanding and future wages, salaries, bonuses, employee and current service pension contributions, expenses, benefits, vacation pay and termination and severance obligations payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; [...] [Emphasis added]

14. On June 9, 2015, the Court issued an order with respect to the Wabush CCAA Parties (the **Wabush Comeback Order**), a copy of which is communicated herewith for ease of reference as **Exhibit R-5**, which provided for *inter alia*:

a) The approval on a *nunc pro tunc* basis of the **SISP** (as defined therein) with respect to the Wabush CCAA Parties;

b) The creation of the **Sale Advisor Charge** (as defined in paragraph 16 thereof);

c) The priority status of the CCAA Charges and the Sale Advisor Charge, to rank ahead of all Encumbrances (as defined therein), subject to the rights of the various parties having objected to the priming of the Interim Lender Charge;

d) The adjournment to June 22, 2015 of the debate as to both the proposed priority of the Interim Lender Charge and the suspension by the Wabush CCAA Parties of its special payments to the DB Plans (as defined below), as follows:

[5] **ORDERS** that paragraph 47 of the Wabush Initial Order shall be amended as follows:

[47] **DECLARES** that each of the CCAA Charges shall rank ahead of all hypothecs, mortgages, liens, security interests, priorities, trusts, deemed trusts (statutory or otherwise), charges, encumbrances or security of whatever nature or kind (collectively, the "**Encumbrances**") [...] affecting the Property of the Wabush CCAA Parties whether or not charged by such Encumbrances [...], with the exception of the Crown deemed trusts for sources deductions described in Section 37(2) CCAA and the sums that could be subject to a claim under Section 38(3) CCAA. For greater certainty, the CCAA Charges only extend to assets or rights against assets over which the Wabush CCAA Parties hold or acquire title and the Interim Lender's Charge is subject to the Permitted Priority Liens (as defined in the Interim Financing Term Sheet). [underlining in the original]

[6] **RESERVES** the rights of Her Majesty in right of Newfoundland and Labrador, as represented by the Superintendent of Pensions, the Syndicat des Métallos, Section Locale 6254, the Syndicat des Métallos, Section 6285 and the Attorney General of Canada to contest the priority of the Interim Lender Charge over the deemed trust(s) as set out in the Notices of Objection filed by each of those parties in response to the Motion, which shall be heard and determined at the hearing scheduled on June 22, 2015. [Emphasis added.]

[...]

[21] **ORDERS** the request by the Wabush CCAA Parties for an order for the suspension of payment by the Wabush CCAA Parties of the monthly amortization payments coming due pursuant to the Contributory Pension Plan for Salaried Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company and the Pension Plan for Bargaining Unit Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company, *nunc pro tunc* to the Wabush Filing Date is adjourned to June 22, 2015; [Emphasis added.]

> [22] **ORDERS** the request by the Wabush CCAA Parties for an order for the suspension of payment by the Wabush CCAA Parties of the annual lump sum "catch-up" payments coming due pursuant to the Contributory Pension Plan for Salaried Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company and the Pension Plan for Bargaining Unit Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company, *nunc pro tunc* to the Wabush Filing Date is adjourned to June 22, 2015; [Emphasis added.]

the whole as it appears from the Wabush Comeback Order (R-5);

15. A copy of the *Motion for the Issuance of an order in respect of the Wabush CCAA parties (1) granting priority to certain CCAA charges, (2) approving a Sale and Investor Solicitation Process nunc pro tunc, (3) authorizing the engagement of a Sale Advisor nunc pro tunc, (4) granting a Sale Advisor Charge, (5) amending the Sale and Investor Solicitation Process, (6) suspending the payment of certain pension amortization payments and post-retirement employee benefits, (7) extending the stay of proceedings, (8) amending the Wabush Initial Order accordingly* of the Wabush CCAA Parties dated May 29, 2015 (the **Wabush Comeback Motion**), which led to the Wabush Comeback Order (R-5), is also communicated herewith for ease of reference as **Exhibit R-6**;

16. By way of judgment dated June 26, 2015, the Court rendered Orders with respect to the priority of the Interim Lender Charge and the suspension of payment of monthly and annual lump sum "catch-up" payments (the **Pension Priority and Suspension Order**), as follows:

> [143] [...] **CONFIRMS** the priority of the Interim Lender Charge over deemed trusts, as set out in paragraph 47 of the Wabush Initial Order, as amended on June 9, 2015;
>
> [144] **ORDERS** the suspension of payment by the Wabush CCAA Parties of the monthly amortization payments coming due pursuant to the Contributory Pension Plan for Salaried Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company and the Pension Plan for Bargaining Unit Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company, *nunc pro tunc* to the Wabush Filing Date;
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> [145] **ORDERS** the suspension of payment by the Wabush CCAA parties of the annual lump sum "catch-up" payments coming due pursuant to the Contributory Pension Plan for Salaried Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company and the Pension Plan for Bargaining Unit Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company, *nunc pro tunc* to the Wabush Filing Date; [Emphasis added.]

the whole as it appears from the Pension Priority and Suspension Order, a copy of which is communicated herewith as **Exhibit R-7**;

17. Motion for leave to appeal the Pension Priority and Suspension Order (R-7) was dismissed by the Court of Appeal on August 18, 2015, as appears from the judgment of the Honourable Nicholas Kasirer, J.C.A., a copy of which is communicated herewith as **Exhibit R-8;**

18. On February 1, 2016, the Court issued Approval and Vesting Orders with respect to:

a) An Asset Purchase Agreement dated as of December 23, 2015, a copy of which is communicated herewith as **Exhibit R-9**, whereby CQIM, Wabush Resources, Wabush Iron and Arnaud Railway (collectively, the **Port Vendors**) agreed to sell to Investissement Québec (together with Société ferroviaire et portuaire de Pointe-Noire s.e.c., its subsequent assignee pursuant to an agreement dated January 29, 2016, the **Port Purchaser**), substantially all of the assets, with the exception of certain excluded assets, of the Port Vendors relating to the Pointe-Noire Plant, the port facility located in the Bay of Sept-Îles (the **Pointe-Noire Port Facility**), and the Arnaud railway (collectively, the **Port Assets**), the whole as appears from the Approval and Vesting Order dated February 1, 2016 issued with respect to the Port Assets (the **Port Approval and Vesting Order**), communicated herewith as **Exhibit R-10**;

b) An Asset Purchase Agreement dated as of January 26, 2016, a copy of which is communicated herewith as **Exhibit R-11**, whereby Wabush Resources and Wabush Iron (the **Block Z Vendors**) agreed to sell to Administration Portuaire de Sept-Îles / Sept-Îles Port Authority (the **Block Z Purchaser**), the immovable property known as "Block Z" located near the Pointe-Noire Port Facility, the whole as appears from the Approval and Vesting Order dated February 1, 2016 issued with respect to Block Z (the **Block Z Approval and Vesting Order**), communicated herewith as **Exhibit R-12**;

19. The Port Approval and Vesting Order (R-10) and the Block Z Approval and Vesting Order (R-12) provided for the vesting of the assets on a free and clear basis, with the net proceeds from both transactions to stand in "the place and stead" of the Port Assets and the Block Z, respectively:

> **ORDERS** that for the purposes of determining the nature and priority of the Encumbrances, the balance of the Proceeds remaining following deduction for applicable Cure Costs (if any) and Transfer Taxes (if any is payable) that are remitted by the Monitor pursuant to Paragraph 10 of this Order (the "Net Proceeds") shall stand in the place and stead of the Purchased Assets, and that upon the issuance of the Certificate, all Encumbrances except for the Permitted Encumbrances shall attach to the Net Proceeds with the same priority as they had with respect to the Purchased Assets immediately prior to the Closing, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the Closing.
>
> [Para. 21 of the Port Approval and Vesting Order and para. 19 of the Block Z Approval and Vesting Order. Emphasis added.]

20. The total outstanding amount owing to the Interim Lender under the Interim Financing Documents (as defined in the Port Approval and Vesting Order) was repaid by the Monitor using the proceeds of the sale of the Port Assets, as contemplated in the Port Approval and Vesting Order (R-10);

III. DEFINED BENEFIT PENSION PLANS AND CONTRIBUTIONS

A. Defined Benefit Pension Plans

21. Two of the Pensions Plans in place for the CCAA Parties' Employees contained defined benefit schemes:

a) A hybrid pension plan for salaried employees at the Wabush Mine and the Pointe-Noire Port hired before January 1, 2013, known as the Contributory Pension Plan for Salaried Employees of Wabush Mines, Cliffs Mining Company, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company, Limited, registered with the Newfoundland & Labrador Superintendent of Pensions (the **N&L Superintendent**) under member 021314 and the Canada Revenue Agency under number 0343558, as amended and restated effective as of January 1, 1997, together with subsequent amendments thereto[1], communicated herewith as **Exhibit R-23** (the **Salaried DB Plan**), which included both defined benefit and defined contribution components [...]; and

b) A pension plan for unionized hourly employees at the Wabush Mine and the Pointe-Noire Port, known as the Pension Plan for Bargaining Unit Employees of Wabush Mines, Cliffs Mining Company, Managing Agent, Arnaud Railway Company, [...] Wabush Lake Railway Company, Limited, registered with the Newfoundland & Labrador Superintendent of Pensions under number 024699, the Office of the Superintendent of Financial Institutions of Canada (**OSFI**) under number 57777, and the Canada Revenue Agency under number 0555201, as amended and restated effective as of March 1, 1996, together with subsequent amendments thereto[2], communicated herewith as **Exhibit R-24** (the **Union DB Plan**, and together with the Salaried Pension Plan, the **DB Plans**);

both of which were administered by Wabush Mines (the **Plan Administrator**), until the DB Plans were terminated in December 2015. The Plan Administrator was subsequently replaced by Morneau Shepell Ltd. (the **Replacement Plan Administrator**), the whole as further detailed herein below;

22. [...]

23. [...]

24. On December 15, 2015, the Wabush CCAA Parties received two notices from the [...] N&L Superintendent announcing the termination, effective as of that date, of both DB Plans (the **N&L Termination Notices**), as appears from the copy of said notices, communicated herewith *en liasse* as **Exhibit R-13**;

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[1] It would appear that the amendments were only received by the N&L Superintendant on July 30, 2015.

[2] It would appear that the amendments were only received by the N&L Superintendant on July 30, 2015.

25. In the N&L Termination Notice (R-13), the N&L Superintendent noted the following:

    a) The Wabush CCAA Parties had discontinued or were in the process of discontinuing all of their business operations within the meaning of Section 59(1)(b) PBA; and

    b) The N&L Superintendent was of the opinion that the DB Plans had failed to meet the solvency requirements prescribed by the applicable regulations within the meaning of Section 59(1)(d) PBA;

26. Also on December 15, 2015, the Wabush CCAA Parties received a notice from [...] OSFI, declaring the termination, effective as of that date, of the Union DB Plan (the **OSFI Termination Notice**, and collectively with the N&L Termination Notices, the **Termination Notices**), as appears from a copy of the OSFI Termination Notice, communicated herewith as **Exhibit R-14**;

27. In the OSFI Termination Notice (R-14), OSFI noted the following:

    a) Special payments had been suspended in the CCAA Proceedings;

    b) The Wabush Mine had been shut down and substantially all the Wabush CCAA Parties' employees had been terminated;

    c) OSFI was of the opinion that the DB Plans had failed to meet the prescribed tests and standards for solvency under the PBSA;

    d) There had been a cessation of crediting of benefits to plan members;

28. In the Termination Notices (R-13 and R-14), both OSFI and the N&L Superintendent indicated that the Wabush CCAA Parties were required to pay into the pension funds all amounts that would have been required to be paid to meet the prescribed solvency requirements, as well as the amounts necessary to fund the benefits provided for in the DB Plans. Both OSFI and the N&L Superintendent of Pensions also took the position that a deemed trust had arisen in respect of such amounts;

29. On March 30, 2016, upon written requests by the Wabush CCAA Parties, OSFI and the N&L Superintendent appointed the Replacement Pension Plan Administrator in respect to both DB Plans, as appears from the three notices received from OSFI and the N&L Superintendent, communicated herewith *en liasse* as **Exhibit R-15**;

B. Employer Contributions

(i) Normal Costs

30. The normal cost payments were made to the [...] DB Plans by the Wabush CCAA Parties based on the actuarial reports prepared by Towers Watson Canada Inc. (as it then was, now Willis Towers Watson, hereinafter **Towers Watson**) in its capacity as consultant to the Plan Administrator [...] prior to the appointment of the Replacement Pension Plan Administrator;

31. The normal cost payments with respect to the Salaried DB Plan were fully paid as of the Wabush Initial Order, and were in fact overpaid in the amount of $169,961 as of December 15, 2015, the date of the termination of the Salaried DB Plan, as appears from the summary table with respect to the Salaried DB Plan prepared by the Replacement Pension Plan Administrator (the **Salaried DB Plan Summary**), a copy of which is communicated herewith as **Exhibit R-16**;

32. The normal cost payments with respect to the Union DB Plan were fully paid as of the Wabush Initial Order and continued to be paid up until December 15, 2015, the date of the termination of the Union DB Plan, (including a payment of $ 22,893 for December 2015 being the amount for the month prorated to the Union DB Plan termination date), as appears from the summary table with respect to the Union DB Plan prepared by the Replacement Pension Plan Administrator (the **Union DB Plan Summary**), communicated herewith as **Exhibit R-17**. It is noted that the Salaried DB Plan Summary and the Union DB Plan Summary appear to have rounding errors in the some of the totals shown thereon;

(ii) Special Payments

33. As appears from Section 2 of the Salaried DB Plan Summary (R-16):

a) The special payments with respect to the Salaried DB Plan required to be paid prior to the date of the Wabush Initial Order were paid in full except for $3;

b) One special payment in the amount of $273,218 was paid after the date of the Wabush Initial Order and before the granting of the Pension Priority and Suspension Order (R-7), which payment constituted an underpayment of $1;

c) The special payments required to be paid after the date of the Pension Priority and Suspension Order (R-7) , and which, in conformity with the Pension Priority and Suspension Order (R-7), were not paid, amount to $ 2,185,752;

the whole based on a Towers Watson actuarial report dated September 12, 2014 for actuarial valuation as at January 1, 2014;

34. As appears from Section 2 of the Union DB Plan Summary (R-17):

a) The special payments with respect to the Union DB Plan required to be paid prior to the date of the Wabush Initial Order were underpaid in the amount of $146,776;

b) One special payment in the amount of $393,337 was paid after the date of the Wabush Initial Order and before the granting of the Pension Priority and Suspension Order (R-7), which payment constituted an overpayment of $16,308;

c) The special payments required to be paid after the date of the Pension Priority and Suspension Order (R-7), and which, in conformity with the Pension Priority and Suspension Order (R-7), were not paid, amount to $3,016,232;

the whole based on a Towers Watson actuarial report dated September 12, 2014 for actuarial valuation as at January 1, 2014;

(iii) Catch-Up Special Payments

35. In the Wabush Comeback Motion (R-6), the Wabush CCAA Parties indicated that lump sum "catch up" special payments (each, a **Catch-Up Payment**) were estimated to be approximately $5.5 million for both DB Plans and would become payable as of July 2015 (at paragraph 88);

36. Subsequently, the Wabush CCAA Parties determined that no such Catch-Up Payment was due in respect of the Salaried DB Plan;

37. The Catch-Up Payment in respect of the Union DB Plan for its part was revised and estimated to be approximately $1.9 million;

38. In fact, pursuant to a Towers Watson actuarial report dated July 1, 2015 for an actuarial valuation as of January 1, 2015, which only became available after the issuance of the Wabush Initial Order, additional special payments in the aggregate amount of $3,525,120 were required with respect to the Union DB Plan, as appears from the Union DB Plan Summary (R-17);

39. As also appears from Section 3 thereof (R-17), these additional special payments with respect to the Union DB Plan were payable by way of a Catch-Up Payment of $1,762,560 due August 26, 2015, and thereafter in additional special payments payable in six monthly instalments of $293,760 starting August 30, 2015;

40. None of these monthly additional special payments were paid or kept separate and apart from their own moneys by the Wabush CCAA Parties, nor was any Catch-Up Payment made (or kept separate and apart by the Wabush CCAA Parties from their own moneys) with respect to the Union DB Plan, the whole as contemplated and authorized by the Pension Priority and Suspension Order (R-7);

(iv) Wind-Up Deficiencies

41. In the Wabush Comeback Motion (at paragraph 83), based on estimates received from Towers Watson, the Wabush CCAA Parties estimated the wind-up deficits to be approximately $18.2 million for the Salaried DB Plan and $23.3 million for the Union DB Plan;

42. [...] The Replacement Pension Plan Administrator [...] later informed the Monitor that it [...] expected the wind-up deficits as at December 16, 2015, to be approximately $26.7 million for the Salaried DB Plan and $27.7 million for the Union DB Plan;

42.1 In December 2016, Morneau Shepell filed a report titled "Wind-Up Actual Valuation as at December 16, 2015" in respect of the Salaried DB Plan (the **Salaried DB Plan Wind-Up Report**), a copy of which is communicated herewith as **Exhibit R-25**;

42.2 Based on the Salaried DB Plan Wind-Up Report (R-25), the financial position of the Salaried DB Plan as of December 16, 2015 presented a wind-up deficit of $27.45 million, as appears from page 3 thereof;

42.3 On December 14, 2016, Towers Watson filed a report titled "Plan Termination as at December 16, 2015" in respect of the Union DB Plan (the **Union DB Plan Wind-Up Report** and together with the Salaried DB Plan Wind-Up Report, the **Wind-Up Reports**[3]), a copy of which is communicated herewith as **Exhibit R-26**;

42.4 Based on the Union DB Plan Wind-Up Report (R-26), the financial position of the Union DB Plan as of December 16, 2015 presented a wind-up deficit of $27,486,548, as appears from pages 8 and 9 thereof. This calculation does not account for the benefits covered by Section 17 PBSA, which is qualified as "Priority no. 2" ranking after the wind-up deficit and would represent an additional wind-up liability of $2,349,912, as appears from pages 4 and 10 of the Union DB Plan Wind-Up Report;

(v) Summary of Amounts Owing

43. In summary and based on the foregoing, the amounts owing to the [...] DB Plans based on payment due date are as follows:

	Salaried DB Plan	Union DB Plan
Normal Cost Payments		
Pre-filing	$0	$0
Post-Filing	$0	$0
Total	**$0**	**$0**
Special Payments		
Pre-filing	$3	$146,776
Post-Filing	$2,185,753	$2,999,924
Total	**$2,185,756**	**$3,146,700**
Catch-up Special Payments		
Pre-filing	$0	$0
Post-Filing	$0	$3,525,120
Total	**$0**	**$3,525,120**
[...] **Wind-Up Deficits**	$27,450,000	$27,486,548[4]

[3] Both Wind-up Reports remain subject to review and approval by the pension regulators.

[4] Excluding the additional wind-up deficit in the amount of $ 2,349,912 (see para. 42.4 above).

IV. PENSION CLAIMS

44. The Claims Procedure Order (R-2) provides for specific procedures with respect to Pension Claims, as follows:

> [32] **ORDERS** that the Plan Administrator will have the sole authority to file Proofs of Claim with respect to any and all Pension Claims.
>
> [32.1] **ORDERS** that the Monitor shall provide to the Pension Regulator and the Representatives' Counsel a copy of each Proof of Claim filed in respect of the Salaried Pension Plan and details of any determination by the Monitor of a Pension Claim in respect of the Salaried Pension Plan.
>
> [32.2] **ORDERS** that the Monitor shall provide to the Pension Regulator and the USW a copy of each Proof of Claim filed in respect of the Union Pension Plan and details of any determination by the Monitor of a Pension Claim in respect of the Union Pension Plan.
>
> [...]
>
> [38.1] **ORDERS** that the Pension Regulator and the Representatives' Counsel may file a Notice of Dispute with respect to any determination by the Monitor of a Pension Claim in respect of the Salaried Pension Plan, including for the purpose of asserting any trust claims in respect of the Salaried Pension Plan, and if no Notice of Dispute is filed within fourteen (14) days of the date of receipt of the Monitor's notice of its determination of a Pension Claim in respect of the Salaried Pension Plan such determination shall be deemed to be the Allowed Claim. If a Notice of Dispute is filed by the Pension Regulator or the Representatives' Counsel within the time specified herein, paragraphs 37 and 46 to 51 hereof shall apply *mutatis mutandi*.
>
> [38.2] **ORDERS** that the Pension Regulator and the USW may file a Notice of Dispute with respect to any determination by the Monitor of a Pension Claim in respect of the Union Pension Plan, including for the purpose of asserting any trust claims in respect of the Union Pension Plan, and if no Notice of Dispute is filed within fourteen (14) days of the date of receipt of the Monitor's notice of its determination of a Pension Claim in respect of the Union Pension Plan such determination shall be deemed to be the Allowed Claim. If a Notice of Dispute is filed by the Pension Regulator or the USW within the time specified herein, paragraphs 37 and 46 to 51 hereof shall apply *mutatis mutandi*.
>
> [38.3] **ORDERS** that the Pension Regulator and the Representatives' Counsel shall be given written notice by the Monitor of, and are entitled to participate in (i) any hearing before a Claims Officer concerning a Pension Claim in respect of the Salaried Pension Plan and (ii) any hearing before the Court concerning a Pension Claim in respect of the Salaried Pension Plan.
>
> [38.4] **ORDERS** that the Pension Regulator and the USW shall be given written notice by the Monitor of, and are entitled to participate in (i) any hearing before a Claims Officer concerning a Pension Claim in respect of the Union Pension Plan and (ii) any hearing before the Court concerning a Pension Claim in respect of the Union Pension Plan. [Emphasis added]

45. On December 18, 2015, the Plan Administrator filed, in accordance with the Claims Procedure Order (R-2), Proofs of Claim with respect to each of the DB Plans, as follows:

a) With respect to the Salaried DB Plan, (i) a secured Claim in the amount of $24,000,000 against Wabush Mines, Arnaud Railway and Wabush Railway (for

the wind-up deficit), and (ii) a Restructuring Claim in the amount of $1,932,940 against Wabush Mines, Arnaud Railway and Wabush Railway (for unpaid special payments), the whole as appears from said Proof of Claim (in the amount finally determined in accordance with the Claims Procedure Order, the **Salaried DB Plan Claim**), a copy of which is communicated herewith as **Exhibit R-18**; and

b) With respect to the Union DB Plan, (i) a secured Claim in the amount of $29,000,000 against Wabush Mines, Arnaud Railway and Wabush Railway (for the wind-up deficit), and (ii) a Restructuring Claim in the amount of $6,059,238 against Wabush Mines, Arnaud Railway and Wabush Railway (for unpaid special payments), the whole as appears from said Proof of Claim (in the amount finally determined in accordance with the Claims Procedure Order, the **Union DB Plan Claim**), a copy of which is communicated herewith as **Exhibit R-19**;

V. APPLICABLE STATUTORY REGIME

46. [...]

46.1 As noted above, the DB Plans are registered with OSFI and/or the N&L Superintendent;

46.2 The PBSA applies to pension plans providing benefits to employees and retirees employed in "included employment", which in turn is defined as work, undertaking of business that falls within the legislation authority of the Parliament of Canada, including navigation and shipping and extra-provincial railways, the whole as provided for in Section 4 PBSA:

> **4 (1)** This Act applies in respect of pension plans.
>
> **(2)** In this Act, pension plan means a superannuation or other plan organized and administered to provide pension benefits to employees employed in included employment (and former employees) and to which the employer is required under or in accordance with the plan to contribute [...]
>
> **(4)** In this Act, included employment means employment, other than excepted employment, on or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada, including, without restricting the generality of the foregoing,
>
> (a) any work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of a ship and transportation by ship anywhere in Canada;
>
> (b) any railway, canal, telegraph or other work or undertaking connecting a province with another province or extending beyond the limits of a province [...]
>
> **(6)** The Governor in Council may make regulations excepting from included employment [...]
>
> (b) any other employment if the Governor in Council, on a report of the Minister, is satisfied that
>
> (i) provision has been made for the coverage of employees employed in that employment under the terms of a pension plan that is organized and administered for the benefit primarily of employees employed in other than included employment and that is required to be registered under the law of a designated province [...] [Emphasis added.]

46.3 No regulation exempting the DB Plans from the application of the PBSA were adopted pursuant to Subsection 4(6)(b) above;

46.4 The PBA applies to pension plans for persons employed in Newfoundland & Labrador, except those to which an Act of the Parliament of Canada applies, as provided for in Section 5 PBA:

> **5.** This Act applies to all pension plans for persons employed in the province [of Newfoundland & Labrador], except those pension plans to which an Act of the Parliament of Canada applies.

46.5 Subsection 2(ee) PBA defines "province of employment" as "the province where an employee reports for work, but if the employee is not required to report for work, the province where an employer's establishment is located from which an employee's remuneration is paid";

46.6 The SPPA applies to pension plans provided for employees who report for work at an establishment of their employer located in Québec, as provided for in Section 1 thereof:

> **1.** This Act applies to pension plans provided
>
> **(1)** for employees who report for work at an establishment of their employer located in Québec or, if not, who receive their remuneration from such an establishment, provided, in the latter case, they do not report for work at any other establishment of their employer;
>
> **(2)** for employees not referred to in paragraph 1 who, while residing in Québec and being employed by an employer whose main establishment is located in Québec, work outside Québec, provided the plans are not governed by an Act of a legislative body other than the Parliament of Québec which provides for a deferred pension.

46.7 The Salaried DB Plan is comprised of 656 members, approximately half of which were employed in the province of Québec, with the other half in Newfoundland & Labrador[5];

46.8 The Union DB Plan is comprised of 1732 members, the majority of which are in the province of Newfoundland & Labrador;

46.9 Following the termination of the Salaried DB Plan, 14 of its members were found to be subject to federal legislation as a result of the nature of their functions, as explained at page 4 of the Salaried DB Plan Wind-Up Report (R-25)[6];

46.10 As for the Union DB Plan, it would appear that 55 of its 1732 members are governed by federal jurisdiction as a result of the nature of their functions;

46.11 Based on the foregoing and the information found in the Wind-Up Reports (R-25 and R-26), the members of both DB Plans appear to be subject to the following jurisdictions:

---

[5] As noted in Appendix C of the Salaried DB Plan Wind-Up Report (R-25, at page 19), the membership data is currently under review and remains subject to change.

[6] See note 3 above with respect to membership data.

	Salaried DB Plan[7]	Union DB Plan	TOTAL
Newfoundland & Labrador PBA	313	1005	1318
Québec SPPA	329	661	990
Federal PBSA	14	66	80
TOTAL	**656**	**1732**	**2388**

46.12 Sections 6.1 PBSA, 8(2) PBA and 249 SPPA each provide for the entering into of multilateral agreements as between the federal government and that of provinces with a view to determine, *inter alia*, the legislative regime applicable to multi-jurisdictional pension plans;

V.1 DEEMED TRUSTS

46.13 The PBSA, the PBA and the SPPA all include provisions with respect to deemed trusts applicable under certain circumstances with respect to unpaid pension contributions;

A. PBSA

47. Section 8(1) of the PBSA requires an employer to segregate funds from its own moneys, including for certain types of payments owing to the pension fund, and further provides that a trust is deemed to have arisen with respect to said funds for the benefit of the pension members:

> **8 (1)** An employer shall ensure, with respect to its pension plan, that the following amounts are kept separate and apart from the employer's own moneys, and the employer is deemed to hold the amounts referred to in paragraphs (a) to (c) in trust for members of the pension plan, former members, and any other persons entitled to pension benefits under the plan:
>
> **(a)** the moneys in the pension fund,
>
> **(b)** an amount equal to the aggregate of the following payments that have accrued to date:
>
> (i) the prescribed payments, and
>
> (ii) the payments that are required to be made under a workout agreement; and
>
> **(c)** all of the following amounts that have not been remitted to the pension fund:
>
> (i) amounts deducted by the employer from members' remuneration, and
>
> (ii) other amounts due to the pension fund from the employer, including any amounts that are required to be paid under subsection 9.14(2) or 29(6).
>
> [Emphasis added.]

---

[7] See note 3 above with respect to membership data.

48. Section 8(2) PBSA provides that the amounts deemed to be held in trust pursuant to Section 8(1) shall not form part of the estate of the employer upon in the event of its liquidation, assignment or bankruptcy:

> **(2)** In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (1) is deemed to be held in trust shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate.
>
> [Emphasis added.]

49. Section 29 PBSA permits OSFI to declare the whole or part of a pension plan terminated in certain circumstances, and further provides for payments by the employer into the pension fund upon termination:

> **29** [...] **(2)** The Superintendent may declare the whole or part of a pension plan terminated where
>
> **(a)** there is any suspension or cessation of employer contributions in respect of all or part of the plan members;
>
> **(b)** the employer has discontinued or is in the process of discontinuing all of its business operations or a part thereof in which a substantial portion of its employees who are members of the pension plan are employed; or
>
> **(c)** the Superintendent is of the opinion that the pension plan has failed to meet the prescribed tests and standards for solvency in respect of funding referred to in subsection 9(1).
>
> **(2.1)** The Superintendent may also declare the whole of a pension plan terminated if there is a cessation of crediting of benefits to the plan members.
>
> **(3)** In a declaration made under subsection (2) or (2.1), the Superintendent shall declare a pension plan or part of a pension plan, as the case may be, to be terminated as of the date that the Superintendent considers appropriate in the circumstances.
>
> [...]
>
> **(6)** If the whole of a pension plan is terminated, the employer shall, without delay, pay into the pension fund all amounts that would otherwise have been required to be paid to meet the prescribed tests and standards for solvency referred to in subsection 9(1) and, without limiting the generality of the foregoing, the employer shall pay into the pension fund
>
> **(a)** an amount equal to the normal cost that has accrued to the date of the termination;
>
> **(b)** the amounts of any prescribed special payments that are due on termination or would otherwise have become due between the date of the termination and the end of the plan year in which the pension plan is terminated;
>
> **(c)** the amounts of payments that are required to be made under a workout agreement that are due on termination or would otherwise have become due between the date of the termination and the end of the plan year in which the pension plan is terminated;
>
> **(d)** all of the following amounts that have not been remitted to the pension fund

at the date of the termination:

(i) the amounts deducted by the employer from members' remuneration, and

(ii) other amounts due to the pension fund from the employer; and

(e) the amounts of all of the payments that are required to be made under subsection 9.14(2).

[...]

(6.4) On the winding-up of the pension plan or the liquidation, assignment or bankruptcy of the employer, the amount required to permit the plan to satisfy any obligations with respect to pension benefits as they are determined on the date of termination is payable immediately.

(6.5) Subsection 8(1) does not apply in respect of the amount that the employer is required to pay into the pension fund under subsection (6.4). However, it applies in respect of any payments that have accrued before the date of the winding-up, liquidation, assignment or bankruptcy and that have not been remitted to the fund in accordance with the regulations made for the purposes of subsection (6.1). [...]

B. PBA

50. The PBA contains similar provisions to those described above in respect of the PBSA. Section 32 PBA deems a trust to come into existence under certain circumstances:

32 (1) An employer or a participating employer in a multi-employer plan shall ensure, with respect to a pension plan, that

(a) the money in the pension fund;

(b) an amount equal to the aggregate of

(i) the normal actuarial cost, and

(ii) any special payments prescribed by the regulations, that have accrued to date; and

(c) all

(i) amounts deducted by the employer from the member's remuneration, and

(ii) other amounts due under the plan from the employer that have not been remitted to the pension fund are kept separate and apart from the employer's own money, and shall be considered to hold the amounts referred to in paragraphs (a) to (c) in trust for members, former members, and other persons with an entitlement under the plan.

(2) In the event of a liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that under subsection (1) is considered to be held in trust shall be considered to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own money or from the assets of the estate.

(3) Where a pension plan is terminated in whole or in part, an employer who is required to pay contributions to the pension fund shall hold in trust for the member or former member or other person with an entitlement under the plan an amount of money equal to employer contributions due under the plan to the date of termination.

(4) An administrator of a pension plan has a lien and charge on the assets of the employer in an amount equal to the amount required to be held in trust

under subsections (1) and (3).

51. Sections 59 PBA sets out the circumstances in which the N&L Superintendent may declare a plan to be terminated;

> **59 (1)** The superintendent may declare the whole or part of a pension plan terminated where
>
> **(a)** there is a suspension or cessation of employer contributions in respect of all or part of the plan membership, except where surplus is used to meet funding requirements;
>
> **(b)** the employer has discontinued or is in the process of discontinuing all of its business operation or a part in which a substantial portion of its employees who are members of the plan are employed;
>
> **(c)** the employer is bankrupt within the meaning of the *Bankruptcy Act* (Canada);
>
> **(d)** the superintendent is of the opinion that the plan has failed to meet the requirements prescribed by the regulations for solvency in respect of funding; or
>
> **(e)** all or part of the business or assets of a predecessor employer's business are sold, assigned or otherwise disposed of and the successor employer who acquired the business or assets does not provide a pension plan for the members of the predecessor employer's plan who become employees of the successor employer.
>
> **(2)** A declaration made under subsection (1) shall declare the whole or part of a pension plan to be terminated as of a date determined by the superintendent.

52. The wind-up of a pension plan commences immediately after the termination of the plan unless the N&L Superintendent postpones the wind-up by giving written approval, pursuant to Section 60(3) PBA;

53. Section 61 PBA provides for certain termination payments as follows:

> **61 (1)** On termination of a pension plan, the employer shall pay into the pension fund all amounts that would otherwise have been required to be paid to meet the requirements prescribed by the regulations for solvency, including
>
> **(a)** an amount equal to the aggregate of
>
> (i) the normal actuarial cost, and
>
> (ii) special payments prescribed by the regulations,
>
> that have accrued to the date of termination; and
>
> **(b)** all
>
> (i) amounts deducted by the employer from members' remuneration, and
>
> (ii) other amounts due to the pension fund from the employer
>
> that have not been remitted to the pension fund at the date of termination.
>
> **(2)** Where, on the termination, after April 1, 2008, of a pension plan, other than a multi-employer pension plan, the assets in the pension fund are less than the value of the benefits provided under the plan, the employer shall, as prescribed by the regulations, make the payments into the pension fund, in addition to the payments required under subsection (1), that are necessary to fund the benefits provided under the plan.

C. SPPA

53.1 The only deemed trust provided for under the SPPA is that found in Section 49 thereof with respect to unpaid contributions and accrued interest:

> **49.** Until contributions and accrued interest are paid into the pension fund or to the insurer, they are deemed to be held in trust by the employer, whether or not the latter has kept them separate from his property.

53.2 In addition, Section 264 SPPA provides that contributions payable into the pension fund are unassignable and unseizable:

> **264.** Unless otherwise provided by law, the following amounts or contributions are unassignable and unseizable:
>
> **(1)** all contributions paid or payable into the pension fund or to the insurer, with accrued interest; [...]

53.3 With respect to the employer's obligations upon termination of a pension plan, Sections 228-230 SPPA provides:

> *§4 – Debts of the employer*
>
> **228.** The amount to be funded to ensure full payment of the benefits of the members or beneficiaries affected by the withdrawal of an employer from a multi-employer pension plan or the termination of a pension plan shall constitute a debt of the employer. The amount to be funded shall be established at the date of termination.
>
> If, at the date of termination, the employer has failed to pay contributions into the pension fund or to the insurer, as the case may be, the debt shall be the amount by which the amount to be funded exceeds such contributions. [...]
>
> 229. Any amount owed by an employer under section 228 must, upon its determination, be paid into the pension fund or to the insurer, as the case may be. However, Retraite Québec may, on the conditions it determines, allow any employer to spread the payment of such amount over a period of not more than five years.
>
> Any amount not paid into the pension fund or to the insurer shall bear interest from the date of default, at the rate determined pursuant to section 61 that was applicable at the date of termination.
>
> 230. Any amount paid by an employer under this subdivision, including any amount recovered after the date of termination, particularly in respect of contributions outstanding and unpaid at the date of termination, shall be applied to the payment of benefits of members or beneficiaries in the order of priority established under this Act.

such that the termination deficit, if any, is a debt of the employer and not a "contribution" subject to a deemed trust;

D. SUMMARY OF AVAILABLE DEEMED TRUSTS

54. The [...] PBSA and PBA provisions set out above provide for two types of deemed trust:

(1) a trust that is deemed to exist while the employer continues in business and that covers amounts that the employer is required to keep separate and apart from its own moneys (Sections 8(1) PBSA and 32(1) PBA, hereinafter referred to as **limited deemed trusts**); and

(2) a trust that arises in the event of any liquidation, assignment or bankruptcy of an employer and that covers amounts that the employer is required to keep separate and apart from its own moneys, whether or not the amounts have in fact been kept separate and apart from the employer's own moneys or assets (Sections 8(2) PBSA and 32(2) PBA, hereinafter referred to as **liquidation deemed trusts**);

55. In the case at hand, OSFI and the N&L Superintendent issued the Termination Notices (R-13 and R-14) with respect to the DB Plans after the CCAA Proceedings had commenced;

V.2 MULTI-JURISDICTIONAL AGREEMENTS AND CONFLICT OF LAWS

56. While the assets of the Wabush CCAA Parties have not been fully realized to date, the Court may need to consider whether any eventual shortfall between the sale proceeds of the Wabush CCAA Parties' assets in Newfoundland and the amounts potentially duly secured by a pension deemed trust created under the PBA could possibly extend to the sale proceeds of the Wabush CCAA Parties' assets formerly located in Quebec;

57. Should it determine that the amounts potentially duly secured by a pension deemed trust created under the PBA exceed the value of sale proceeds generated from assets located in Newfoundland, this Court will need to consider applicable conflict rules so as to determine whether the applicable pension deemed trust under the PBA could extend to the sale proceeds of assets formally located in Quebec;

58. Under the general conflict rules in Quebec, real rights and by extension priority disputes over property are governed by the laws where the property is located, subject to an exception for property in transit (3097 C.c.Q.);

59. The Province of Quebec is also party to certain multi-jurisdictional agreements in relation to pension matters that may provide in certain circumstances for the application of laws of another jurisdiction by way of incorporation where the Quebec government has agreed to do so and its supervisory authority has delegated its authority to the supervisory authority of another jurisdiction;

60. In 2011, the Canadian Association of Pension Supervisory Authorities (**CAPSA**) developed an Agreement Respecting Multi-Jurisdictional Pension Plans (the **2011 Agreement**), which was adopted by the Provinces of Ontario and Quebec, a copy of which is communicated herewith as **Exhibit R-20**;

61. CAPSA also developed in 2016 a revised version thereof (the **2016 Agreement**), which was adopted by the Provinces of British Columbia, Nova Scotia, Ontario, Quebec and Saskatchewan, a copy of which is communicated herewith as **Exhibit R-21**;

62. These 2011 and 2016 Agreements (R-20 and R-21) provide *inter alia* that:

> **6 (1)** While a pension supervisory authority is the major authority for a pension plan in accordance with this Agreement:
>
> **(a)** the provisions of the pension legislation of the major authority's jurisdiction in respect of matters referred to in Schedule B[1] apply to the plan instead of those of the corresponding provisions of the pension legislation of any minor authority's jurisdiction that would apply to the plan if this Agreement did not exist; and
>
> **(b)** subject to the provisions of this Agreement, the provisions of the pension legislation of each jurisdiction that are applicable to the plan under the terms of such legislation apply to the plan in respect of matters not referred to in Schedule B.[1]

[1] Schedule B states: "8. Legislative provisions respecting: [...] (c) requirements that the pension fund be held separate and apart from the employer's assets and deeming the pension fund to be held in trust for the active members or other persons; (d) an administrator's lien and charge on the employer's assets equal to the amounts deemed held in trust [...]".

63. However, Newfoundland & Labrador is not a party to the 2011 and 2016 Agreements (R-20 and R-21);

64. The only applicable multi-jurisdictional agreement between the governments of Quebec and Newfoundland & Labrador is a Memorandum of Agreement[8], to which the government of Newfoundland & Labrador became a party in 1986, communicated herewith as **Exhibit R-22**;

65. The Memorandum of Agreement (R-22) does not provide for the incorporation and application of legislative provisions and administrative powers by the participating pension supervisory authorities, but merely provides for a certain delegation of powers as follows:

> **2.** The major authority[1] for each plan shall exercise both its own statutory functions and powers and the statutory functions and powers of each minor authority for such plan.
>
> [...]
>
> **9.** Where a major authority is unable to exercise a particular power of enforcement available to one of the minor authorities, it shall so advise that minor authority.

[1] According to the Memorandum of Agreement (R-22), "major authority" means, with respect to a plan, the participating authority of the province where the plurality of the plan members are employed, excluding members employed in a province not having a participating authority.

[8] The Memorandum of Agreement (R-22) remains effective, as provided by Section 284 SPPA.

66. As such, the Memorandum of Agreement (R-22) could not serve as the basis for the application of the PBA in relation to property located in Quebec;

67. In view of the foregoing and absent a multi-jurisdictional agreement providing for the application in Quebec of the laws of Newfoundland & Labrador, it is submitted that this Court is bound to apply the laws applicable in the Province of Quebec to adjudicate a dispute with respect to tangible assets located in Québec (or the proceeds standing in their stead);

68. The Monitor notes Article 3079 of the *Civil Code of Québec*:

> **3079.** Where legitimate and manifestly preponderant interests so require, effect may be given to a mandatory provision of the law of another State with which the situation is closely connected.
>
> In deciding whether to do so, consideration is given to the purpose of the provision and the consequences of its application.

but is of the view that this exception is not applicable in the circumstances as the possible application of the PBA could have been properly achieved by way of a multi-jurisdictional agreement and absent the execution of the 2011 and 2016 Agreements (R-20 and R-21) by Newfoundland & Labrador it could not justify why its legislation should override Quebec law in the present circumstances, including Articles 2644 and 2647 C.c.Q.;

VI. DIRECTIONS WITH RESPECT TO PENSION CLAIMS

69. Based on its review of the relevant statutes and applicable case-law, the Monitor is of the view that:

a) Unpaid and accrued normal costs or special costs owing at the date of the Wabush Initial Order would be subject to a limited deemed trust pursuant to subsections 8(1) of the PBSA and 32(1) of the PBA;

b) A liquidation deemed trust did not arise prior to or since the Wabush Initial Order pursuant to subsections 8(2) PBSA or 32(2) PBA, as none of the applicable triggering events, including a "liquidation", have occurred, either before or since the date of the Wabush Initial Order;

c) In any event, any liquidation deemed trust triggered after the Wabush Initial Order with respect to unpaid amortization payments as a result of a "liquidation" would be ineffective given the terms of the Wabush Initial Order and applicable stay thereunder, the terms of the Pension Priority and Suspension Order, the fact that the special costs were assessed on the basis of a deficit which existed as of the Wabush Initial Order and were calculated for past services rendered as of a pre-filing reference date, the treatment of special costs under the CCAA generally, and legislative choices made with respect to same;

d) As a matter of statutory interpretation of the applicable pension legislation alone, the full amount of the wind-up deficit of the DB Plans would not be subject to a pension deemed trust pursuant to the PBSA or the PBA;

e) Even if the wind-up deficits of the DB Plans were to be subject to a pension deemed trust pursuant to the terms of PBSA or the PBA, such deemed trust would be ineffective considering the Wabush Initial Order and applicable stay thereunder, the pre-filing nature of deficits of the DB Plans even if crystalized post-fling upon termination of the DB Plans, the treatment of pension deficits under the CCAA and legislative choices made with respect to same;

f) Even if the deemed trusts under the PBA were to cover assets located outside of Newfoundland & Labrador, this Court should not recognize and enforce it to the extent applicable the PBA deemed trust against assets located in this Province or the sale proceeds thereof;

70. The Monitor accordingly seeks an Order determining the priority of the various components of the Salaried DB Plan Claim (R-18) and the Union DB Plan Claim (R-19) to be as follows:

a) normal costs and special payments outstanding as at the date of the Wabush Initial Order to be subject to a limited deemed trust;

b) normal costs and special payments payable after the date of the Wabush Initial Order, including additional special payments and Catch Up Payments established on the basis of actuarial reports issued after the Wabush Initial Order to constitute an unsecured Claim;

c) wind-up deficiency to constitute an unsecured Claim;

d) any trust created pursuant to the PBA may only charge property located in Newfoundland & Labrador;

71. Pursuant to paragraphs 38.1 and following of the Claims Procedure Order (R-2), reproduced above, the Pension Regulators, Representatives' Counsel and well as USW are all entitled to challenge the adjudication of Pension Claims by the Monitor;

72. The Monitor fully expects that various other stakeholders will have an interest in the determination of these priority issues;

73. The Monitor submits that it is proper to seek and obtain directions at this stage in respect of questions outlined above. [...] The amounts and the membership data included herein, including the wind-up deficits, are based on the information appearing in the Wind-Up Reports and are provided solely as information, as it is not necessary to know the actual quantum of the Pension Claims in order to determine their relative priority in these CCAA Proceedings;

74. In any event, should a dispute over the quantum of the wind-up deficits or any other factual information affecting the quantum of the Pension Claims arise, that issue could easily (and efficiently) be bifurcated and resolved independently from the directions sought herein;

75. The Monitor further submits that any proposed distribution of proceeds to creditors, including the choice of the mechanism to effect same, will be impacted by the issues set out herein above;

76. Based on the foregoing, the Monitor hereby submits that the Court will need to deal with the following questions:

Liquidation giving rise to a liquidation deemed trust

a) What is the proper meaning of "liquidation" pursuant to subsections 8(2) PBSA and 32(2) PBA?

b) Did a "liquidation" within the meaning of subsections 8(2) PBSA and 32(2) PBA occur prior or since the Wabush Initial Order?

c) Would such a liquidation deemed trust (...) be effective if triggered by a "liquidation" occurring after the Wabush Initial Order?

Deficit upon termination

d) Absent CCAA or BIA proceedings with respect to an employer, could the full amount of the deficit upon termination of a defined benefit pension plan be subject to a deemed trust pursuant to either of the PBSA or the PBA?

e) Would such a wind-up deficit deemed trust be effective if triggered by a termination occurring after the Wabush Initial Order?

Enforcement or recognition of a PBA deemed trust charging assets located in Québec

f) Is the deemed trust arising under the PBA specifically or implicitly limited to assets of the employer located in Newfoundland & Labrador?

g) Could this Court nonetheless recognize and enforce a PBA deemed trust against assets located in this Province (or the sale proceeds standing in their stead)?

VII. CONCLUSIONS AND PROCEDURAL MATTERS

77. The Monitor submits that the notices given of the presentation of the present Amended Motion, the initial iteration of which was originally notified to all Persons on the Service List on September 20, 2016, are proper and sufficient;

78. Pursuant to paragraph 56 of the Wabush Initial Order (R-1), all motions in these CCAA Proceedings are to be brought on no less than ten (10) calendar days' notice to all Persons on the Service List;

78.1 Following discussions amongst the Monitor and various interested parties, the Motion was first made returnable on a *pro forma* basis on October 28, 2016;

78.2 Prior to the October 28, 2016 hearing, the following Notices of Objection were filed:

a) Notice of Objection dated October 7, 2016 filed by the USW;

b) Notice of Objection dated October 7, 2016 filed by the Representatives; and

c) Notice of Objection dated October 7, 2016 filed by the Replacement Plan Administrator;

the whole as appears from the Court record;

79. [...] Both before and after the October 28, 2016, the Monitor has made efforts in order [...] to agree to a timetable for the filing of materials and the presentation of the Motion with the CCAA Parties, Representative Counsel, the USW, the Replacement Plan Administrator and the relevant regulators that would allow relevant parties sufficient opportunity to respond and ensure the efficient hearing of the present Motion [...];

79.1 The N&L Superintendent went on to file a Notice of Objection on December 15, 2016, as appears from the Court record. While they have not filed a formal Notice of Objection, the Monitor also understands that OSFI and Retraite Québec intend to take position with respect to the issues raised in the Motion;

79.2 A hearing was held on December 20, 2016 to debate the preliminary issues raised in the Notices of Objection, mainly the jurisdictional argument raised by the Representatives as to whether the Court should refer parts or all of the questions arising in the Motion to the Supreme Court of Newfoundland & Labrador;

79.3 On January 30, 2017, the Court issued a ruling whereby it determined that it had jurisdiction to deal with all issues stemming from this Motion, including the interpretation of the PBA in the context of the CCAA Proceedings and therefore refused to refer the matter to the Supreme Court of Newfoundland & Labrador;

79.4 During a case management hearing held on April 5, 2017, hearing dates on the merits were set (June 28 and 29, 2017), with the Court reserving the right of all parties to submit their position concerning the legal issues this Court needed or ought to rule on to resolve the issues raised by the present Motion;

79.5 The service of the present Amended Motion serves as notice pursuant to [...] paragraph 56 of the Wabush Initial Order (R-1);

80. [...];

81. The CCAA Parties have been consulted by the Monitor and support the conclusions sought herein;

82. The present Motion is well founded in fact and in law.

FOR THESE REASONS, MAY IT PLEASE THE COURT TO:

GRANT the present Amended Motion;

ISSUE an Order [...] determining the various priority disputes and issues raised by the present Amended Motion;

WITHOUT COST, save and except in case of contestation.

Montréal, April 13, 2017

Norton Rose Fulbright Canada LLP

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Our reference : 01028478-0001

NOTICE OF PRESENTATION

TO: SERVICE LIST

TAKE NOTICE that the present *Amended Motion by the Monitor for Directions with Respect to Pension Claims* will be presented for adjudication before the Honourable Stephen W. Hamilton, J.S.C., or another of the honourable judges of the Superior Court, Commercial Division, sitting in and for the district of Montréal, in the Montréal Courthouse located at 1, Notre-Dame Street East, Montréal, Québec, on a date, at a time and in in a room to be determined by the Court.

DO GOVERN YOURSELF ACCORDINGLY.

Montréal, April 13, 2017

Norton Rose Fulbright Canada LLP

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CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

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

N°: **500-11-048114-157**

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

BLOOM LAKE GENERAL PARTNER LIMITED *et al*

Petitioners

-and-

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

Mises-en-cause

-and-

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

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

MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON

UNITED STEEL WORKERS, LOCALS 6254 AND 6285

RÉGIE DES RENTES DU QUÉBEC

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

Mis-en-cause

-and-

FTI CONSULTING CANADA INC.

Monitor

AMENDED LIST OF EXHIBITS IN SUPPORT OF THE AMENDED MOTION BY THE MONITOR FOR DIRECTIONS WITH RESPECT TO PENSION CLAIMS

Exhibit R-1	Wabush Initial Order dated May 20, 2015, as rectified on May 28, 2015;
Exhibit R-2	Claims Procedure Order dated November 5, 2015, as amended on November 16, 2015;
Exhibit R-3	Draft Order;
Exhibit R-4	Wabush Initial Motion dated May 19, 2015;
Exhibit R-5	Wabush Comeback Order dated June 9, 2015;
Exhibit R-6	Wabush Comeback Motion dated May 29, 2015;
Exhibit R-7	Pension Priority and Suspension Order dated June 26, 2015;
Exhibit R-8	Decision of Justice Kasirer, J.C.A. dated August 18, 2015;
Exhibit R-9	Asset Purchase Agreement (Port Assets) dated December 23, 2015;
Exhibit R-10	Port Approval and Vesting Order dated February 1, 2016;
Exhibit R-11	Asset Purchase Agreement (Block Z) dated January 26, 2016;
Exhibit R-12	Block Z Approval and Vesting Order dated February 1, 2016;
Exhibit R-13	N&L Termination Notices dated December 15, 2015;
Exhibit R-14	OSFI Termination Notice dated December 15, 2015;
Exhibit R-15	Notices with respect to the Replacement of the Pension Plan Administrator dated March 30, 2016;
Exhibit R-16	Salaried DB Plan Summary Table;
Exhibit R-17	Union DB Plan Summary Table;
Exhibit R-18	Salaried DB Plan Proof of Claim dated December 18, 2015;
Exhibit R-19	Union DB Plan Proof of Claim dated December 18, 2015;
Exhibit R-20	2011 CAPSA Agreement Respecting Multi-Jurisdictional Pension Plans;
Exhibit R-21	2016 CAPSA Agreement Respecting Multi-Jurisdictional Pension Plans;
Exhibit R-22	Memorandum of Agreement entered into by Newfoundland & Labrador in 1986;
Exhibit R-23	Salaried DB Plan, together with Amendments;
Exhibit R-24	Union DB Plan, together with Amendments;

Exhibit R-25 Salaried DB Plan Wind-Up Report;

Exhibit R-26 Union DB Plan Wind-Up Report.

Montréal, April 13, 2017

Norton Rose Fulbright Canada LLP

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NO: 500-11-048114-157

SUPERIOR COURT
DISTRICT OF MONTREAL

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

BLOOM LAKE GENERAL PARTNER LIMITED ET AL

Petitioners

-and-

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP ET AL.

Mises-en-cause

-and-

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

Mis-en-cause

-and-

FTI CONSULTING CANADA INC.

Monitor

AMENDED MOTION BY THE MONITOR FOR DIRECTIONS WITH RESPECT TO PENSION CLAIMS
(Sections 11 and 23(k) of the *Companies' Creditors Arrangement Act*)

ORIGINAL

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CANADA

PROVINCE DE QUÉBEC
District de Montréal

N° : 500-11-048114-157

COUR SUPÉRIEURE
(Chambre commerciale)

DANS L'AFFAIRE DE LA LOI SUR LES ARRANGEMENTS AVEC LES CRÉANCIERS DES COMPAGNIES, L.R.C. 1985, CH. C-36, TELLE QU'AMENDÉE :

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

Débitrices

et

SOCIÉTÉ EN COMMANDITE MINE DE FER DU LAC BLOOM, BLOOM LAKE RAILWAY COMPANY LIMITED, WABUSH MINES, ARNAUD RAILWAY COMPANY, WABUSH LAKE RAILWAY COMPANY LIMITED

Mises en cause

et

FTI CONSULTING CANADA INC.,

Contrôleur

et

SYNDICAT DES MÉTALLOS, SECTION LOCALE 6254

SYNDICAT DES MÉTALLOS, SECTION LOCALE 6285

Opposants – Mis-en-cause

et

SA MAJESTÉ DU CHEF DE TERRE-NEUVE-LABRADOR, REPRÉSENTÉE PAR LE SURINTENDANT DES PENSIONS,

PROCUREUR GÉNÉRAL DU CANADA,

MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON, AS REPRESENTATIVES

RÉGIE DES RENTES DU QUÉBEC

MORNEAU SHEPELL

VILLE DE SEPT-ÎLES

Mis-en-cause

PLAN D'ARGUMENTATION DES OPPOSANTS, SYNDICAT DES MÉTALLOS, SECTIONS LOCALES 6254 ET 6285
quant à la *Amended Motion by the Monitor for Directions with Respect to Pension Claims*

I. LES FAITS QUI ENTOURENT LE LITIGE

A. Les procédures

1. Le 27 janvier 2015, les Parties LACC Bloom se plaçaient sous la protection de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. (1985), ch. C-36 (ci-après la « **Loi** »)

2. Le 17 avril 2015, la Cour approuvait la mise en place d'un processus de sollicitation d'acquéreurs et d'investisseurs (ci-après le « **SISP** »);

3. Le 20 mai 2015, les Parties LACC Wabush se plaçaient également sous la protection de la Loi et les dossiers des Parties LACC furent joints administrativement;

4. Le SISP a conséquemment été étendu par la Cour pour inclure les Parties LACC Wabush;

5. Depuis le début des procédures en vertu de la Loi, les Parties LACC ont procédé à la vente de la majorité de leurs actifs tel que contemplé par le SISP, soit :

   a) La vente approuvée par la Cour le 27 avril 2015 des intérêts détenus par les Parties LACC dans des projets de chromite;

   b) La vente approuvée par la Cour le 5 novembre 2015 du *Bunker C Fuel*;

   c) La vente approuvée par la Cour le 27 janvier 2016 de la mine de fer du Lac Bloom;

   d) La vente approuvée par la Cour le 1er février 2016 des installations ferroviaires et portuaires de Pointe-Noire;

   e) La vente approuvée par la Cour le 1er février 2016 du Bloc Z;

   f) La vente approuvée par la Cour le 28 juin 2016 de vingt-sept (27) wagons Phase II;

   g) La vente approuvée par la Cour le 20 juillet 2016 de trois (3) génératrices Caterpillar XQ2000;

   h) La vente approuvée par la Cour le 30 août 2016 de cent cinquante-neuf (159) wagons Phase II;

   i) La vente approuvée par la Cour les 23 septembre et 21 octobre 2016 de quatorze (14) camions Komatsu 830E;

   j) La vente approuvée par la Cour le 28 octobre 2016 d'un ensemble d'équipements mobiles, comprenant notamment : vingt-six (26) camions Ford, sept (7) Komatsu 930E, dix-sept (17) Caterpillar de divers modèles, quatre (4) Letourneau L-1850, ainsi que divers autres équipements et camions;

   k) La vente approuvée par la Cour le 18 novembre 2016 du *Wabush Terminal Station* et du *Wabush Substation*;

   l) La vente approuvée par la Cour le 18 novembre 2016 de deux-cent cinquante-trois (253) wagons Phase II;

   m) La vente approuvée par la Cour le 28 novembre 2016 de trois-cent dix (310) wagons Phase II;

6. De plus, le Contrôleur indiquait dans son trente-troisième (33e) rapport qu'il y avait quatre (4) parties intéressées quant à la Mine Scully, conformément aux termes du processus de vente mis en place;

7. Il y avait toujours quatre (4) parties intéressées quant à la Mine Scully lorsque le Contrôleur a déposé son trente-quatrième (34e) rapport comprenant une mise à jour des démarches entourant la vente de la Mine Scully;

8. Vraisemblablement, le processus de vente devrait se conclure par la vente de la Mine Scully étant donné l'intérêt qui l'entoure actuellement;

9. Le trente-quatrième (34e) rapport contenait également des informations quant à la réalisation d'autres ventes, telles plusieurs maisons qui étaient la propriété des Parties LACC Wabush, et des démarches qui entouraient la vente d'autres propriétés, certains terrains à Wabush par exemple;

10. Il y a également une requête qui sera présentée le 16 mai prochain quant à l'approbation de la vente d'un camp minier au Mont-Wright;

11. Ainsi, au terme du processus entrepris sous la protection de la *Loi*, les Parties LACC ne possèderont plus aucun actif de valeur et ne seront plus en mesure d'exploiter une entreprise quelle qu'elle soit;

12. Conséquemment, il n'y a, à ce stade-ci, aucune indication que les Parties LACC pourraient présenter un plan d'arrangement pour leur permettre de poursuivre leurs activités;

13. C'est d'ailleurs l'objectif avoué qui a été communiqué à de nombreuses reprises par la société mère des Débitrices, Cliffs Natural Resources;

14. Nous sommes donc en présence de procédures visant une liquidation ordonnée;

B. Les régimes de retraite

15. Tel que mentionné dans la requête du Contrôleur (para. 21), il y a en l'espèce deux régimes de retraite qui sont concernés en l'espèce :

    a) Le régime de retraite des salariés non-syndiqués (R-23);

    b) Le régime de retraite des salariés syndiqués (R-24);

16. Bien que les Opposants discutent dans la présente argumentation uniquement du régime de retraite R-24, les inférences tirées pour un régime seront également valable pour l'autre;

17. Le régime de retraite R-24 contient également une définition d'Employeur, à son article 2.18, qui sera utile pour déterminer les biens de quelles entités corporatives peuvent faire être visées par une fiducie réputée;

18. Ainsi, les employeurs qui y sont nommés[1] sont solidairement responsables du versement des sommes au régime de retraite et les fiducies réputées pourront être appliquées à chacune de ces entités pour la totalité des sommes dues;

II. LES MOTIFS DE CONTESTATION

19. Généralement, les Opposants supportent les arguments exposés par les Représentants (salariés non-syndiqués) et par le Surintendant des Pensions de Terre-Neuve-et-Labrador;

20. De plus, les Opposants supportent l'interprétation qui est faite par les autres organismes de régulation quant à la loi relevant de leur autorité;

21. Toutefois, les Opposants souhaitent ajouter les commentaires suivants;

A. La fiducie réputée législative créée par la PBA

22. C'est l'article 32 de la *Pension Benefits Act*, S.N.L. 1996, c. P-4.01 (ci-après la « **PBA** ») (**Onglet #1**) qui crée une fiducie réputée pour les régimes de retraite en droit terre-neuvien :

> « **32.** (1) An employer or a participating employer in a multi-employer plan shall ensure, with respect to a pension plan, that
>
> (a) the money in the pension fund;
>
> (b) an amount equal to the aggregate of
>
> (i) the normal actuarial cost, and
>
> (ii) any special payments prescribed by the regulations, that have accrued to date; and
>
> (c) all
>
> (i) amounts deducted by the employer from the member's remuneration, and
>
> (ii) other amounts due under the plan from the employer that have not been remitted to the pension fund are kept separate and apart

[1] « Wabush Mines, Cliffs Mining Company, Managing Agent, Arnaud Railway Company (et) Wabush Lake Railway Company »

from the employer's own money, and shall be considered to hold the amounts referred to in paragraphs (a) to (c) in trust for members, former members, and other persons with an entitlement under the plan.

(2) In the event of a liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that under subsection (1) is considered to be held in trust shall be considered to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own money or from the assets of the estate.

(3) Where a pension plan is terminated in whole or in part, an employer who is required to pay contributions to the pension fund shall hold in trust for the member or former member or other person with an entitlement under the plan an amount of money equal to employer contributions due under the plan to the date of termination.

(4) An administrator of a pension plan has a lien and charge on the assets of the employer in an amount equal to the amount required to be held in trust under subsections (1) and (3). »

23. Cet article doit être lu en parallèle avec l'article 61 de la PBA qui définit les sommes qui doivent être versées à la terminaison d'un régime :

« **61.** (1) On termination of a pension plan, the employer shall pay into the pension fund all amounts that would otherwise have been required to be paid to meet the requirements prescribed by the regulations for solvency, including

(a) an amount equal to the aggregate of

(i) the normal actuarial cost, and

(ii) special payments prescribed by the regulations, that have accrued to the date of termination; and

(b) all

(i) amounts deducted by the employer from members' remuneration, and

(ii) other amounts due to the pension fund from the employer that have not been remitted to the pension fund at the date of termination.

(2) Where, on the termination, after April 1, 2008, of a pension plan, other than a multiemployer pension plan, the assets in the pension

> fund are less than the value of the benefits provided under the plan, the employer shall, as prescribed by the regulations, make the payments into the pension fund, in addition to the payments required under subsection (1), that are necessary to fund the benefits provided under the plan. »

24. Selon les Opposants, la lecture combinée de ces articles nous permet de conclure que l'ensemble du déficit de terminaison est visé par la fiducie réputée;

25. En effet, l'espèce constitue vraisemblablement une procédure de liquidation entreprise en vertu de la *Loi*, tel que démontré par les faits exposés d'entrée de jeu;

26. Le fait qu'aucune entreprise ne puisse ressortir de ce processus ou encore le fait qu'aucun plan d'arrangement ne sera présenté sont des éléments qui permettent de constater l'existence d'une procédure de liquidation entreprise sous le régime de la LACC, tel que mentionné ci-dessus;

B. La fiducie réputée législative créée par la LNPP

27. C'est l'article 8 de la *Loi de 1985 sur les normes de prestation de pension, L.R.C. (1985), ch. 32 (2e suppl.)* (ci-après la « **LNPP** ») (**Onglet #2**) qui crée une fiducie réputée pour les régimes de retraite en droit fédéral, principalement aux paragraphes 1 et 2 :

> « **8.** (1) L'employeur veille à ce que les montants suivants soient gardés séparément de ceux qui lui appartiennent et est réputé les détenir en fiducie pour les participants actuels ou anciens ainsi que pour toutes autres personnes qui ont droit à des prestations de pension ou à des remboursements au titre du régime :
>
> a) les sommes versées au fonds;
>
> b) le montant correspondant à la somme des paiements, accumulés à la date en cause, prévus par règlement ou par un accord de sauvetage;
>
> c) les montants suivants qui n'ont pas été versés au fonds de pension :
>
> (i) les montants déduits par l'employeur sur la rémunération des participants,
>
> (ii) les autres sommes que l'employeur doit au fonds de pension, notamment celles visées aux paragraphes 9.14(2) ou 29(6).

(2) En cas de liquidation, de cession des biens ou de faillite de l'employeur, un montant correspondant à celui censé détenu en fiducie, au titre du paragraphe (1), est réputé ne pas faire partie de la masse des biens assujettis à la procédure en cause, que l'employeur ait ou non gardé ce montant séparément de ceux qui lui appartiennent ou des actifs de la masse. »

28. Cet article doit être lu en parallèle avec l'article 29(6) de la LNPP qui définit les sommes qui doivent être versées à la terminaison d'un régime :

« **29.** [...]

(6) S'il y a cessation totale d'un régime de pension, l'employeur est tenu de verser sans délai au fonds de pension toutes les sommes qu'il aurait fallu par ailleurs payer pour satisfaire aux critères et normes de solvabilité visés au paragraphe 9(1) et notamment :

a) une somme correspondant aux coûts normaux accumulés à la date de la cessation;

b) une somme correspondant aux paiements spéciaux prévus par règlement qui sont exigibles à la cessation ou qui seraient devenus exigibles, en l'absence de cessation, entre la date de celle-ci et la fin de l'exercice du régime où elle survient;

c) une somme correspondant aux paiements prévus par l'accord de sauvetage qui sont exigibles à la cessation ou qui seraient devenus exigibles, en l'absence de cessation, entre la date de celle-ci et la fin de l'exercice du régime où elle survient;

d) les sommes ci-après qui n'ont pas été versées au fonds de pension à la date de la cessation :

(i) les sommes déduites par l'employeur de la rémunération des participants,

(ii) les autres sommes que l'employeur doit au fonds;

e) une somme correspondant aux paiements exigibles en vertu du paragraphe 9.14(2). »

29. Il faut également tenir compte des articles 29(6.4) et 29(6.5) de la LNPP :

«**29.** [...]

(6.4) En cas de liquidation du régime de pension ou de liquidation, de cession de biens ou de faillite de l'employeur, est immédiatement exigible la somme nécessaire pour permettre au régime de

> s'acquitter de toutes ses obligations à l'égard des droits à pension déterminés à la date de la cessation.
>
> (6.5) Le paragraphe 8(1) ne s'applique pas à l'égard de la somme que l'employeur est tenu de verser en application du paragraphe (6.4). Il s'applique toutefois à l'égard de tout paiement accumulé avant la liquidation, la cession de biens ou la faillite, selon le cas, qui n'a pas été versé au fonds conformément aux règlements d'application du paragraphe (6.1).»

30. Selon les Opposants, l'interprétation qui se dégage de ces articles permet de conclure que ce sont uniquement les cotisations normales et les cotisations spéciales qui sont visées par la fiducie réputée créée par la LNPP;

31. En effet, les Opposants estiment que l'article 29(6.5) LNPP exclut expressément le déficit de terminaison de la fiducie réputée créée par l'article 8 LNPP, ce qui empêche d'étendre l'application dégagée sous la PBA à la LNPP;

C. La fiducie réputée législative créée par la LRCR

32. C'est l'article 49 de la *Loi sur les régimes complémentaires de retraite*, RLRQ, c. R-15.1 (ci-après la « **LRCR** ») (**Onglet #3**) qui crée une fiducie réputée pour les régimes de retraite en droit québécois :

> « **49.** Jusqu'à leur versement à la caisse de retraite ou à l'assureur, les cotisations et les intérêts accumulés sont réputés détenus en fiducie par l'employeur, que ce dernier les ait ou non gardés séparément de ses biens. »

33. Cet article doit être lu en parallèle avec l'article 228 de la LRCR qui définit les sommes qui doivent être versées à la terminaison d'un régime :

> « **228.** Constitue une dette de l'employeur le manque d'actif nécessaire à l'acquittement des droits des participants ou bénéficiaires visés par le retrait d'un employeur partie à un régime interentreprises ou par la terminaison d'un régime de retraite. Ce manque d'actif doit être établi à la date de la terminaison.
>
> Si l'employeur a, à la date de la terminaison, omis de verser des cotisations à la caisse de retraite ou, selon le cas, à l'assureur, cette dette est l'excédent du manque d'actif sur ces cotisations.
>
> Dans le cas d'un régime interentreprises, le présent article s'applique à chaque employeur partie au régime et auquel se rapporte un groupe de droits formé en application de la sous-section

3 et composé des droits de participants ou bénéficiaires visé par le retrait ou la terminaison. »

34. Selon les termes de ces articles, la fiducie réputée créée par la LRCR ne vise que les cotisations à verser au régime et les intérêts accumulés, et non la dette qui est constituée lors de la terminaison;

35. Ainsi, les Opposants soumettent que les cotisations de service courant et les cotisations spéciales sont visées par la fiducie réputée de l'article 49 LRCR, mais non l'ensemble du déficit de terminaison;

Timminco ltée (Arrangement relatif à), 2014 QCCS 174, para. 132, 166 et 167 (**Onglet #4**);

D. L'interaction des différentes fiducies réputées

36. La considération de l'interaction possible entre les différentes fiducies réputées appelle une analyse globale du droit applicable au régime de retraite des salariés syndiqués (R-24);

37. À ce sujet, chacune des lois provinciales sous étude prévoit son application à un régime qui vise des salariés qui sont employés dans la province :

a) Article 5 de la PBA :

« **5.** This Act applies to all pension plans for persons employed in the province, except those pension plans to which an Act of the Parliament of Canada applies. »

b) Article 1 de la LRCR :

« **1.** La présente loi s'applique aux régimes de retraite relatifs:

1° à des travailleurs qui, pour leur travail, se présentent à un établissement de leur employeur situé au Québec ou, à défaut, reçoivent leur rémunération de cet établissement pourvu que, dans ce dernier cas, ils ne se présentent à aucun autre établissement de leur employeur;

2° à des travailleurs non visés au paragraphe 1° qui, domiciliés au Québec et travaillant pour un employeur dont l'établissement principal y est situé, exécutent un travail hors du Québec, pourvu que ces régimes ne soient pas régis par une loi émanant d'une autorité législative autre que le Parlement du Québec et accordant droit à une rente différée. »

38. LA LNPP prévoit pour sa part à son article 4(4) qu'elle s'applique à un régime visant des emplois rattachés à l'exploitation d'une entreprise de

compétence fédérale, dont les entreprises déclarées à l'avantage général du Canada (paragraphe h) de l'article 4(4)) comme la Compagnie de chemin de fer Arnaud et Wabush Lake Railway;

39. Le régime prévoit à son article 12.06 qu'il doit être interprété conformément aux lois applicables dans la province de Terre-Neuve-et-Labrador et prévoit, à l'article 14, des dispositions additionnelles pour se conformer à la LRCR lorsque nécessaire;

40. À noter qu'au moment de l'entrée en vigueur du régime (R-24) et jusqu'à l'accréditation syndicale fédérale du 12 décembre 2013, il n'y avait aucun participant considéré fédéral ce qui pourrait expliquer l'absence de termes exprès visant la conformité à la LNPP;

41. À la lumière de ces principes, les Opposants soumettent que les trois lois trouvent application à l'égard du régime de retraite (R-24) et établissent des dispositions minimales ou d'ordre public devant le régir;

Article 3 PBA, article 3 LNPP et article 5 LRCR (Onglets #1 à 3);

42. Les législateurs avaient la possibilité de devenir partie à une convention multilatérale pour simplifier le régime législatif applicable à un tel régime de retraite multi juridictionnel s'ils le souhaitaient, mais ils ne l'ont pas fait;

Article 8(2) PBA, article 6.1 LNPP et article 249 LRCR (Onglets #1 à 3);

43. En l'espèce, la seule entente applicable vise à centraliser les rôles des différents organismes de surveillance auprès d'un seul d'entre eux, mais toutes les obligations prévues par chacune des lois demeurent applicables;

Pièce R-22;

44. Ainsi, la Cour devra conclure que la fiducie réputée la plus généreuse s'applique pour le régime de retraite (R-24) afin de respecter l'ensemble des dispositions minimales d'ordre public;

E. L'impact des procédures LACC sur ces fiducies réputées

45. Les Opposants soumettent que le début des procédures en vertu de la Loi ne doit pas avoir d'effet sur l'étendue et l'effectivité des fiducies réputées constituées par la PBA, la LNPP et la LRCR;

46. De plus, la suspension des paiements telle qu'ordonnée par le jugement de cette Cour du 26 juin 2015 n'affecte par l'étendue des fiducies réputées qui continue de s'accroitre parce que les cotisations s'accumulent;

Timminco ltée (Arrangement relatif à), 2014 QCCS 174, para. 154 (Onglet #4);

47. Les fiducies réputées constituées en vertu de lois provinciales n'entrent pas en conflit avec la *Loi* et ne déclenchent donc pas la prépondérance fédérale qui pourrait faire échec à l'application de ces fiducies réputées;

48. En effet, la jurisprudence récente de la Cour Suprême est claire à l'effet qu'il doit y avoir un conflit véritable qui empêche de respecter simultanément les deux lois ou encore que la loi provinciale vienne entraver la réalisation de l'objet de la loi fédérale, ce qui est un fardeau difficile à rencontrer;

Saskatchewan (Procureur général) c. *Lemare Lake Logging Ltd.*, 2015 CSC 53, para. 17 à 23, 26 et 27 (**Onglet #5**);

49. En l'espèce, aucune des deux conditions est présente :

a) La *Loi* ne prévoit pas expressément un ordre de priorités détaillé qui serait contraire à la possibilité d'existence d'une fiducie réputée;

b) L'objet de la *Loi*, dans un contexte de liquidation tel que celui de l'espèce où l'on vise uniquement la disposition ordonnée des biens des Parties LACC, n'est aucunement affecté par le rang que pourrait prendre la créance associée au régime de retraite vis-à-vis les autres créanciers;

50. Ainsi, les fiducies réputées provinciales ne sont pas affectées par l'arrivée des procédures en vertu de la *Loi* et rien ne justifie un traitement différent de celles-ci pour la période postérieure à l'ordonnance initiale;

F. Les biens visés par ces fiducies réputées

51. Les Opposants soumettent que l'ensemble des biens détenus par les Parties LACC Wabush ou les sommes qui en découlent sont visés par les fiducies réputées, et ce, peu importe leur localisation;

52. L'article 1262 du *Code civil du Québec*, RLRQ c. CCQ-1991 (ci-après le « **Code** ») reconnait qu'une fiducie peut être constituée par les termes d'une loi :

« **1262.** La fiducie est établie par contrat, à titre onéreux ou gratuit, par testament ou, dans certains cas, par la loi. Elle peut aussi, lorsque la loi l'autorise, être établie par jugement. »

53. C'est précisément l'effet des articles 32 PBA, 8 LNPP et 49 LRCR, qui sont toutes des lois ayant pour effet de constituer des fiducies reconnues par le droit québécois;

54. L'argument développé par le Contrôleur en lien avec l'application de l'article 3097 du Code n'est d'aucune utilité dans le présent litige puisque le conflit potentiel de lois se situe au niveau du droit applicable pour le régime de retraite (voir la section D) et non au niveau du droit applicable pour déterminer l'existence d'une fiducie qui affecterait la propriété des biens;

55. En effet, nul ne conteste que c'est le droit québécois (désigné par l'article 3097 CCQ) qui devra déterminer si les fiducies créées par la PBA et la LNPP sont valides et effectives sur la propriété des biens qui étaient situés au Québec;

56. Les Opposants soumettent à la Cour que la PBA, la LNPP et la LRCR créent des fiducies législatives au sens de l'article 1262 du Code et qui visent l'ensemble des sommes provenant de la vente des biens des Parties LACC, peu importe leur localisation;

Timminco ltée (Arrangement relatif à), 2014 QCCS 174 (Onglet #4);

G. Questions accessoires soulevées par la Requête

i) Le prorata effectué pour le mois de Décembre 2015

57. Tel que mentionné au paragraphe 32 de la Requête déposée par le Contrôleur, le paiement pour le service courant du mois de Décembre 2015 a été effectué sur la base d'un prorata pour les jours qui se sont écoulés avant que la terminaison du régime ne soit ordonnée;

58. Les Opposants sont en désaccord avec cette façon de faire;

59. En effet, il n'y avait pas lieu d'effectuer un tel prorata en vertu des termes du régime de retraite des salariés syndiqués (R-24) puisque le mois entier devait être crédité aux participants actifs;

Article 2.10 a) de la pièce R-24;

Tableau #1 de la pièce R-17;

60. Ainsi, puisque le régime doit créditer aux participants la valeur complète d'un mois de service, la cotisation équivalente au service courant doit nécessairement être entière aussi;

61. Par conséquent, les cotisations au régime de retraite en fonction du service courant sont en déficit d'au moins 21 462$, contrairement à ce qui est indiqué dans la Requête[2];

62. Cette somme doit nécessairement faire l'objet d'une priorité, tant suivant les dispositions des différentes lois sur les régimes de retraite que suivant les articles 6(6) et 36(7) de la *Loi*;

ii) Les cotisations spéciales accumulées à la date du début des procédures

63. Dans l'éventualité où la Cour conclurait qu'il y aurait une distinction à faire entre les cotisations accumulées à la date du début des procédures versus les cotisations accumulées après cette date, les Opposants soumettent que les montants déterminés par le Contrôleur ne sont pas exacts quant aux cotisations spéciales de rattrapage;

64. Le Contrôleur prétend que l'entièreté des 3 525 120$ que l'actuaire du régime a établi à titre de cotisation spéciale de rattrapage constitue des cotisations accumulées après le début des procédures (Paragraphe 43 de la Requête);

65. Au contraire, les Opposants soumettent qu'il y a seulement 2 350 080$ qui a été accumulé après le début des procédures[3];

66. En effet, le rapport actuariel produit en Juillet 2015 constitue une évaluation du régime au 1er janvier 2015;

67. Ainsi, des sommes au titre de cette cotisation spéciale s'accumulent mensuellement depuis le début de l'année 2015, bien qu'elles ne soient pas exigibles à ce moment;

68. Le dépôt de l'évaluation actuarielle, qui intervient postérieurement au début des procédures, ne vient qu'en définir l'exigibilité;

69. Il s'agit d'une interprétation conforme avec ce que la Cour Suprême a dégagé dans l'affaire *Indalex*, soit que c'est l'accumulation qui doit être considérée sans regard à la détermination précise des sommes ou leur exigibilité;

> *Sun Indalex Finance, LLC* c. *Syndicat des Métallos*, 2013 CSC 6, para. 34 et 37 (**Onglet #6**);

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[2] Sous réserve de la détermination finale des sommes.
[3] Sous réserve de la détermination finale des sommes.

70. Ainsi, il faut conclure que 1 175 040$ proviennent d'une accumulation pour la période antérieure au début des procédures (soit 293 760$ par mois sur quatre (4) mois, janvier à avril 2015)[4];

iii) La « Priority no.2 »

71. À des fins de clarification seulement, les Opposants souhaitent indiquer à la Cour dès maintenant qu'ils sont d'avis que les sommes associées à cette priorité de rang inférieur devraient être incluses au total du déficit de terminaison du régime;

72. Ainsi, la distinction effectuée aux paragraphes 42.4 et 43 de la Requête n'a pas lieu d'être;

73. En effet, cette priorité de rang inférieur vaut uniquement entre les participants dans un contexte où le régime est sous-capitalisé;

74. L'administrateur du régime, les Opposants, l'Employeur et les organismes de régulation se sont entendus sur cette solution permettant de préserver l'équité entre les participants dans la mesure où les sommes seraient insuffisantes pour couvrir l'ensemble des obligations du régime;

75. La « Priority no.2 » entrainait une disproportion importante entre les valeurs actuarielle des membres fédéraux et provinciaux ayant des états de service équivalents;

76. En aucun temps les participants n'ont renoncé aux sommes associées à cette prestation qui pourra être octroyée advenant que les actifs du régime le permettent;

77. Ainsi, le total du déficit de terminaison devrait correspondre à ce qui est nécessaire pour couvrir l'ensemble des obligations du régime de retraite et ainsi inclure les sommes nécessaires à la « Priority no.2 »;

78. Toutefois, nous comprenons que le quantum des sommes ne sera pas déterminé par la Cour à cette étape, ce qui devrait par conséquent inclure cette question qui serait repoussée à une étape ultérieure;

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[4] Sous réserve de la détermination finale des sommes.

iv) L'impact de la procédure devant la Cour d'appel de Terre-Neuve-Labrador

79. Le 27 mars 2017, le gouvernement de Terre-Neuve-et-Labrador référait à la Cour d'appel de Terre-Neuve-et-Labrador trois (3) questions en application de l'article 13 du *Judicature Act*;

80. Ces trois questions se rapprochent grandement de certaines questions qui devront être tranchées par la Cour dans le présent dossier, bien qu'une des questions référées à la Cour d'appel de Terre-Neuve-et-Labrador ne vise que le régime de retraite des salariés non-syndiqués;

81. Toutefois, la principale préoccupation des Opposants pour la suite du dossier est de procéder avec la plus grande diligence et dans le meilleur intérêt des participants au régime de retraite (R-24) qu'il représente;

82. En conservant cette considération à l'esprit, les Opposants s'en remettent à la Cour quant à l'opportunité de trancher immédiatement l'ensemble des questions soulevées par la Requête du Contrôleur ou de plutôt surseoir sur certains aspects dans l'attente de l'arrêt de la Cour d'appel sur la référence qui lui a été faite;

POUR CES MOTIFS, PLAISE À LA COUR :

ACCUEILLIR la contestation formulée par les Opposants;

DÉCLARER que la fiducie réputée prévue par l'article 32 de la *Pension Benefits Act*, S.N.L. 1996, c. P-4.01 est applicable en l'espèce pour l'ensemble du déficit de terminaison du régime de retraite des salariés syndiqués (R-24);

DÉCLARER que la fiducie réputée prévue à l'article 8 de la *Loi de 1985 sur les normes de prestation de pension*, L.R.C. (1985), ch. 32 (2e suppl.) est applicable en l'espèce pour l'ensemble des cotisations de service courant et des cotisations spéciales dues au régime de retraite des salariés syndiqués (R-24);

DÉCLARER que la fiducie réputée prévue à l'article 49 de la *Loi sur les régimes complémentaires de retraite*, RLRQ, ch. R-15.1 est applicable en l'espèce pour l'ensemble des cotisations de service courant et des cotisations spéciales dues au régime de retraite des salariés syndiqués (R-24);

DÉCLARER que la fiducie réputée la plus généreuse sera celle qui devra être appliquée pour l'ensemble du régime de retraite en raison du caractère d'ordre public des lois en matière de régime de retraite;

DÉCLARER que la localisation des biens et la date de début des procédures en vertu de la Loi n'ont aucun impact dans le présent dossier;

DÉCLARER que l'entièreté de la cotisation pour le service courant du mois de décembre 2015 aurait dû être versée au régime de retraite et non seulement un prorata;

DÉCLARER que, sauf à parfaire, 1 175 040$ des 3 525 120$ de cotisations spéciales de rattrapage sont accumulées avant le début des procédures en vertu de la Loi;

RENDRE toute autre ordonnance nécessaire à sauvegarder les droits des participants au régime de retraite (R-24);

LE TOUT, avec frais de justice.

Montréal, le 12 mai 2017.

Philion Leblanc Beaudry

Philion Leblanc Beaudry, avocats s.a.
Procureurs des Opposants – Syndicat des Métallos, sections locales 6254 et 6285

N° : 500-11-048114-157

COUR SUPÉRIEURE
(chambre commerciale)
District de Montréal

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

Débitrices

c.

SOCIÉTÉ EN COMMANDITE MINE DE FER DU LAC BLOOM, BLOOM LAKE RAILWAY COMPANY LIMITED, WABUSH MINES, ARNAUD RAILWAY COMPANY, WABUSH LAKE RAILWAY COMPANY LIMITED

Mise en causes

ET ALS.

PLAN D'ARGUMENTATION DES OPPOSANTS, SYNDICAT DES MÉTALLOS, SECTIONS LOCALES 6254 ET 6285 QUANT À LA *AMENDED MOTION BY THE MONITOR FOR DIRECTIONS WITH RESPECT TO PENSION CLAIMS*

ORIGINAL

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Code juridique : BM-2719

SUPERIOR COURT

(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-048114-157

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

REPRESENTATIVES-Mis-en-cause

UNITED STEELWORKERS, LOCAL 6254, UNITED STEELWORKERS, LOCAL 6285

MORNEAU SHEPELL

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

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

RÉGIE DES RENTES DU QUÉBEC

Mis-en-cause

ARGUMENTATION OUTLINE OF REPRESENTATIVES OF THE SALARIED/NON-UNION EMPLOYEES AND RETIREES
(Sections 11 and 23(k) of the Companies' Creditors Arrangement Act)

INTRODUCTION

1. This is the Outline of Law and Argument of the Representatives of the Salaried/Non-Union Employees and Retirees in response to the Monitor's Amended Motion for Directions with respect to Pension Claims.

Background

2. Since 1965, Wabush Mines operated an open-pit iron ore mine in Wabush, Newfoundland. It transported the concentrated iron ore via rail to processing and shipment facilities at Pointe Noire on the St. Lawrence River in Québec where it would be pelletized and ultimately transported to customers, such as steel mills.

3. In 2013, the parent company of Wabush Mines, Cliffs Natural Resources ("**CNR**"), based in Cleveland, Ohio, decided it would disengage and shut down CNR's mining operations in Eastern Canada.[1] To avoid the estimated $650MM - $750MM that CNR estimated for the closure costs, CNR chose to use the CCAA as its disengagement tool (in its own press release).

4. Since the head office of Wabush Mines is located in Montreal, pursuant to section 9 of the CCAA, Wabush Mines applied for CCAA protection from the Québec Superior Court.

5. On May 20, 2015, Wabush Iron Co. Limited, Wabush Resources Inc., Wabush Mines, Arnaud Railway Company, and Wabush Lake Railway Company Limited (collectively, "**Wabush Mines**") obtained protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C 1985, c. C-36 ("**CCAA**").[2]

6. While under CCAA protection, Wabush Mines shut down all mining operations, terminated the employees (other than four who are monitoring the idled open-pit Wabush Mine), and is liquidating all of its assets in a sales process in the CCAA proceedings in order to eventually pay toward creditors' claims.

7. The Monitor has reported there will be substantial shortfall in paying creditors' claim.

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[1] Affidavit of Terence Watt, sworn December 14, 2016 ["**Watt Affidavit**"], at para 4, Exhibit REPS-1.
[2] Watt Affidavit, *supra* note 1 at para 3.

8. Shortly after obtaining CCAA protection, Wabush Mines requested that the Newfoundland Superintendent of Pensions appoint a replacement administrator over the Wabush pension plans because it said it no longer had the resources to administer the pension plans.

9. On December 16, 2015, the Superintendent declared that the Salaried Plan be terminated effective on that date (the "**Wind-up Date**").[3] The Plans are in the process of being wound up by Morneau Shepell, the actuarial consulting firm appointed by the Newfoundland Superintendent of Pensions on March 30, 2016 as the replacement pension plan administrator.

10. While it was operating, Wabush Mines sponsored two pension plans that are to pay its salaried and unionized employees their pension benefits on retirement that they earned during their employment years with Wabush Mines:

    (a) the Contributory Pension Plan for Salaried Employees of Wabush Mines, Cliffs Mining Company, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company (the "**Salaried Plan**"); and

    (b) the Pension Plan for Bargaining Unit Employees of Wabush Mines, Cliffs Mining Company, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company (the "**Union Plan**").[4]

The loss of health and life insurance benefits and the losses to monthly pension benefits

11. At the outset of the CCAA proceedings, in June, 2015, Wabush Mines terminated the employees' health benefits, life insurance benefits, and unfunded supplemental pension benefits (collectively, "other post-employment benefits" or "**OPEBs**") without prior notice.[5] Due to the loss of their health and life insurance benefits, this Court acknowledged that the retirees are suffering hardship.[6] As a result of the significant losses, this case is very sensitive for the retirees and their communities.

12. The Wabush Pension Plans are registered in the province of Newfoundland and Labrador and regulated under the *Pension Benefits Act*, 1997, SNL 1996, c P-4.01 (the "**NPBA**") by the Newfoundland Superintendent of Pensions (the "**Superintendent**"). All regulatory filings for the plan are made with the Superintendent.[7]

13. The Salaried Plan is a "contributory" defined benefit plan, meaning that employees were required to contribute a percentage of their regular pay into the plans. The company was

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[3] Watt Affidavit, *supra* note 1 at para. 18, Exhibit REPS-6.
[4] Monitor's Amended Motion for Directions with respect to Pension Claims dated September 20, 2016 at para. 21 ("Monitor's Motion").
[5] *Ibid.* at para. 27.
[6] *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCS 3064, Book of Authorities of Representative Counsel ("**BOA of Rep Counsel**") Tab 1, at para. 133.
[7] Watt Affidavit, *supra* note 1 at para. 13, Exhibit REPS-3.

required under the terms of the plans and statute law to contribute amounts so that the plans would pay the pension benefits earned by the employees.

14. Wabush Mines failed to fund the pension plans appropriately. The plans are underfunded.[8]

15. On January 26, 2016, the Salaried retirees received a letter from Wabush Mines notifying them that the Superintendent directed Wabush Mines to reduce the amount of monthly pension benefits of the Salaried Members by 25%.[9] Morneau has completed its wind-up reports for the pension plans as of the Wind-up Date. The Salaried Plan has a wind-up deficit of $27,450,000 and the Union Plan has a wind-up deficit of $27,486,548.

16. With claims for their terminated health benefits and losses to monthly pension benefits, the Salaried Members are a very significant creditor group:

Employee and Retiree Claims			
	Pension Wind-Up Deficit	**Terminated OPEBs***	**Terminated Supplemental Retirement Allowance**
Salaried	$27,450,000	$43,452,000	$1,483,182.35
USW	$27,486,548	$123,885,000	N/A
TOTAL	**$54,936,548**	**$167,337,000**	**$1,483,182.35**

*still subject to confirmation with actuaries for employees and monitor

The Monitor's Motion for Directions with respect to Pension Claims

17. On August 14, 2015, Representative Counsel wrote to the company and Monitor (copying the service list), asserting that the deemed trust in favour of pension plan beneficiaries in the NPBA apply as a priority claim for the Wabush Salaried Plan beneficiaries.[10]

18. Currently, the Monitor reports that there is approximately $70,231,000 in the estate of Wabush Mines.[11] Other than repaying the DIP Loan that had been provided by another subsidiary of CNR, Cliffs Mining Company, at the outset of the CCAA proceedings, there have not been any distributions to creditors.

19. On November 16, 2015, at the hearing of the motion by the Monitor for approval of the Claims Procedure Order, Representative Counsel advised the Monitor and this Court that

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[8] *Ibid.* at para 17.
[9] *Ibid.* at para 19, Exhibit REPS-7.
[10] *Ibid.* at para 24, Exhibit REPS-8.
[11] Cash balance as at April 14, 2017, per Thirty-Fourth Report of the Monitor dated April 26, 2017 at para 19.

it is the Representatives' position that any issue(s) regarding the interpretation of the NPBA Deemed Trust should be referred to the Supreme Court of Newfoundland and Labrador for adjudication.

20. Despite the communicated position of Representative Counsel, on September 20, 2016, the Monitor proceeded to file its Motion for Directions claiming to seek:

> ...directions with respect to the priority of Pension clams filed by the Plan Administrator...and the applicability and scope of deemed trusts under the *Pension Benefits Standards Act*, R.S.C. 1985, c. 32 (2nd Supp.) (PBSA) and the Newfoundland & Labrador *Pension Benefits Act*, S.N.L. 1996, c. P-401 (PBA)...[12]

21. Although styled as a "Motion for Directions", the Monitor's motion is in substance an advocacy piece seeking specific orders from this court and arguing strongly that the pension plan members should have the bulk of their statutory deemed trust priorities reduced to mere unsecured claims.

22. The Monitor's latest estimate of the ranges of potential distribution to unsecured creditors is 0.00% to 2.42% of claims.[13] Without expressly saying so, the Monitor's arguments in its motion are that the pension plan members should recover a *de minimus* amount from the estate under the deemed trusts in respect of only pre-CCAA filing unpaid going-concern and pre-wind-up special payments owing "as of the CCAA filing date", and become unsecured creditors for the large balance of their claims, including for wind-up liability owing. On the other hand, the Monitor's arguments, if accepted, would result in claims for unpaid municipal taxes accepted as secured claims and be paid in full.

23. The significant hardship that is currently suffered by the Salaried retirees would be exacerbated by the orders and the results sought by the Monitor, which, if granted, would crystallize the hardships for the Salaried retirees for the rest of their lives.

24. On October 7, 2016, Representative Counsel, Morneau Shepell, and the Superintendent of Pensions of Newfoundland & Labrador (the "**Superintendent**") each filed Notices of Objection to the Monitor's Motion for Directions. The Notices of Objection, *inter alia*, disagreed with the formulation of the Monitor's questions and proposed alternate questions. After extensive negotiations with the Monitor and the company on alternate questions, the Monitor and company did not accept any changes to their questions.

25. In a decision dated January 30, 2017, this Court dismissed a joint request by Representative Counsel, the Superintendent, and Morneau to transfer the issues relating to the interpretation of the NPBA to the Newfoundland Court. The Monitor's motion was set down for hearing on June 28 and 29, 2017.

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[12] Monitor's Notice of Motion dated September 20, 2016 at para. 9.
[13] Thirty-Fourth Report of the Monitor dated April 26, 2017 at p. 26.

Reference by the Newfoundland and Labrador Government to the Newfoundland Court of Appeal

26. In the CCAA court's decision declining to transfer the issues of interpretation of the NPBA, this Court held at paragraph 89:

> [89] Finally, the Court does not consider the question of whether its decision will or will not be treated as a precedent to be a relevant consideration. Similarly, the Court does not consider the possibility of intervenants to be relevant. The Court's focus is on resolving the difficulties of the parties appearing before it. ***If the government of Newfoundland and Labrador wishes to obtain a judgment from the courts of the province on the interpretation of the NLPBA, it can refer a matter to the Court of Appeal and Labrador***.[14] [emphasis added]

27. On March 27, 2017, the government of Newfoundland & Labrador issued an Order in Council directing that a reference be brought before the Newfoundland & Labrador Court of Appeal and setting out questions (the "**Reference**").[15]

28. On May 5, 2017, the Chief of Justice of Newfoundland issued an order setting down for the timetable for the filing of materials in the Reference and notices.[16] The Reference hearing is expected to be heard around September, 2017.

Concerns with the Monitor's arguments and positions on its motion

29. The Monitor does not argue that the NPBA does not apply in the Wabush CCAA proceedings.

30. As discussed below, the Monitor is essentially arguing that the provisions of the NPBA should be construed in such a way as to make the deemed trusts contained therein apply to only a small fraction of the amounts owing by the company to the pension plan (i.e., for only pre-filing unpaid going-concern and pre-wind-up special payments). The Monitor argues for interpretation of the NPBA to render the bulk of amounts owing by the employer exempt from the NPBA deemed trust. Not only are such interpretations entirely unsupported by the provisions of the NPBA, the Monitor's interpretation, if accepted, defeats the very purpose of the lengthy deemed trust provisions of the NPBA, and is contrary to the intention of the legislation, and introduces inconsistency into the caselaw. Such interpretations cannot be supported.

31. Moreover, as part of its arguments to defeat the deemed trusts, the Monitor advances incorrect interpretations of the NPBA and PBSA, and introduces irrelevant concepts and that would not only lead to wrong legal results and inconsistent legal outcomes, but also unnecessarily complicate the analyses for this court.

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[14] *Arrangegement relatif à Bloom Lake*, 2017 QCCS 284, BOA of Rep Counsel, Tab 2, at para. 89.
[15] Newfoundland Labrador, Cabinet Secretariat, *Orders in Council Database*, OC2017-103 (27 March 2017).
[16] *Reference re Pension Benefits Act, s. 32* (May 5, 2017), St. John's 2017 01H 0029 (Nfld CA).

32. This Argumentation Outline is divided into three main parts:

(a) The law relating to deemed trusts in CCAA proceedings;

(b) The law relating to which statutes – the NPBA, PBSA, or SPPA – apply to the Wabush pension plan members with respect to the deemed trust priorities in Wabush CCAA proceedings; and

(c) Responding to the Monitor's questions in its motion.

LEGAL PRINCIPLES FROM THE SUPREME COURT OF CANADA

33. At the outset, it is important to bear in mind the principles laid down by the Supreme Court of Canada, which provide important rules for this case:

(a) Pension benefits are the deferred wages of employees that they earned during their employment service for an employer;[17]

(b) A registered pension plan is the vehicle by which an employer delivers those pension benefits – the deferred wages - on the retirement of their employees. Employees "almost invariably agree to accept lower wages and fewer employment benefits in exchange for the employer's agreeing to set up the pension trust in their favour";[18]

(c) One of the purposes of pension legislation is to protect employees who have earned pension benefits to ensure that they receive all of the pension benefits they earned;[19]

(d) Property deemed to be held in trust does not form part of the debtor's estate, and therefore operates as a priority payment in favour of the trust beneficiaries; and [20]

(e) Provincial laws, such as provincial deemed trusts in favour of pension plan beneficiaries, continue to apply in CCAA proceedings, subject only to the doctrine of paramountcy.[21]

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[17] *IBM Canada Limited v. Waterman*, 2013 SCC 70, [2013] 3 S.C.R. 985, BOA of Rep Counsel, Tab 3, para 4,

[18] *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611, BOA of Rep Counsel, Tab 4, para. 66.

[19] *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54 BOA of Rep Counsel, Tab 5, at paras 14, 50

[20] *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 (S.C.C.) BOA of Rep Counsel, Tab 6, para 38; *Alternative granite & marbre inc., Re*, 2009 SCC 49, BOA of Rep Counsel, Tab 7, para 15.

[21] *Re Indalex*, 2013 SCC 6, BOA of Rep Counsel, Tab 8, para. 44.

PART I - THE LAW AND ARGUMENT RELATING TO PENSION DEEMED TRUSTS IN CCAA PROCEEDINGS

Provincial Deemed Trusts

a) The Ontario PBA deemed trusts

34. The leading case on pension deemed trusts in CCAA proceedings is *Indalex*.[22] The Supreme Court of Canada confirmed that provincial laws continue to apply in CCAA proceedings, subject only to paramountcy.

35. The next step of the analysis is to review the language of the particular deemed trust provisions (in that case the Ontario PBA), to determine which amounts owing to the pension plan by the employer (i.e., unpaid going-concern, pre-wind-up special payments, or wind-up liability) are covered by the deemed trusts.

36. The Supreme Court held that in addition to the deemed trusts over unpaid going-concern and pre-wind-up special payments the Ontario *Pension Benefits Act* wind-up deemed trust applies (i.e., declared or ordered to be wound up) to create a trust over the wind-up liability owing by the employer:

> [46]...[Section] ***57(3), which provides that the deemed trust protecting employer contributions exists while a plan is ongoing, s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up.*** This is a choice made by the Ontario legislature. I would not interfere with it. Thus, the deemed trust entitlement arises only once the condition precedent of the plan being wound up has been fulfilled. This is true even if it is certain that the plan will be wound up in the future. [emphasis added].[23]

37. In this case, there is no longer any issue of paramountcy. Paramountcy was invoked by the CCAA court in Wabush Mines in the granting of the priority to the DIP lender at the outset of the CCAA proceeding. Accordingly, just like the application of the Ontario PBA in the CCAA proceedings of *Indalex*, the NPBA deemed trusts apply to the CCAA proceedings of Wabush Mines.

38. The facts of *Indalex* involved a priority dispute between the pension plan members and the guarantor of the DIP loan over funds in a reserve fund. The Supreme Court held that the DIP priority granted by the CCAA Judge in that case subordinates the Ontario PBA

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[22] *Re Indalex*, 2013 SCC 6 [2013] 1 S.C.R. 271, BOA of Rep Counsel, Tab 8.
[23] *Ibid*, at para. 46

deemed trust priority. As a result, the DIP lender received the money being held in a reserve fund that was established while the litigation was underway. [24]

39. However, following the payment to the DIP lender, the salaried and unionized pension plan members claimed next-in-line priority over the remaining funds in the estate based on the Ontario PBA wind-up deemed trust confirmed by the Supreme Court. That dispute was ultimately settled among the pension plan members and a party claiming as a secured creditor. The settlement was approved by the CCAA court.[25]

40. Two years later, in the *Timminco* CCAA proceedings with respect to the Ontario Timminco estate[26], and based on *Indalex*, the monitor of Timminco accepted the wind-up deemed trust priority claim of the Ontario pension plan administrator, and paid a distribution of all amounts in the estate to the pension plan administrator in priority to other creditors. This payment is recorded in that monitor's report:

> As previously reported, there is a deemed trust claim in respect of the solvency deficit of the Timminco pension plan (the "Haley Deemed Trust"), which was estimated to be approximately $5.1 million as at January 1, 2012. The Administrator estimates the solvency deficit to be approximately $4.3 million as at February 28, 2014. While the Monitor has not yet agreed the quantum of the Haley Deemed Trust Claim, absent a bankruptcy of Timminco overturning the Haley Deemed Trust and subject to the costs of the completion of the Timminco CCAA Proceedings, ***the remaining Timminco Estate Funds would be payable to the Administrator of the Haley Plan*** unless the Haley Deemed Trust Claim was less than $1.17 million (the amount of funds available to the Timminco estate).[27] [emphasis added]

41. ***Conclusion:*** In CCAA proceedings, the Ontario PBA deemed trust applies to unpaid going-concern payments, special payments, and wind-up liability, to generate a priority recovery for the pension plan members.

b) The Québec SPPA deemed trusts

42. The Québec SPPA pension deemed trusts came before the Québec courts in two CCAA cases: *White Birch* and *Timminco* before the same judge of the Québec Superior Court. In *Timminco*, Mr. Justice Robert Mongeon, reversed his decision in *White Birch* and held that the SPPA deemed trusts apply to unpaid going-concern payments and unpaid special

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[24] (in reality, it was the debtor company's parent corporation, as *guarantor* of the DIP loan, that was the DIP lender, as the actual DIP lenders (a consortium led by JP Morgan, that was repaid the DIP loan years prior to the Supreme Court decision. The DIP lender participated in the court proceedings)

[25] *Indalex Limited (Re)*, 2013 ONSC 7932, BOA of Rep Counsel, Tab 9.

[26] (not the Québec Timminco estate that led to the decision of Mr. Justice Mongeon of this Court, who reversed his deemed trust decision in *White Birch* and found that the SPPA deemed trust applies in favour of Québec pension plan beneficiaries claiming into the Québec Timminco estate)

[27] *Timminco Limited* (CV-12-9539-00CL), Twenty-Fifth Report of the Monitor dated June 9, 2014, BOA of Rep Counsel, Tab 10, at para. 60.

payments. However, based on the language of the SPPA, he held that the deemed trust did not extend to the wind-up liability owing.

43. Justice Mongeon concluded that section 49 of the SPPA created a deemed trust over all contributions owing by the debtor company, including pre-wind-up special payments but excluded wind-up liability. He held that the deemed trust takes effect as soon as the contributions and accrued interest become due and payable. In *Timminco*, the deemed trust had arisen after the hypothec held by Investissement Québec had been perfected. Justice Mongeon referred to section 264 of the SPPA which states that *all contributions* to be paid to the pension fund cannot be assigned or seized. He held:

> [135] Serait donc insaisissable ou incessible toute cotisation versée ou qui doit être versée à la caisse de retraite des employés syndiqués on [*sic*] non-syndiqués de SBI. S'il faut donner un sens à cet article, il faut conclure que les cotisations ... « à être versées » ... sont littéralement hors de la portée des autres créanciers de SBI, que ces derniers soient garantis ou non, qu'ils bénéficient d'une garantie antérieure à la date d'exigibilité des cotisations payées ou non.
>
> [translation] [para 135] Any contribution paid or payable to the pension fund established for the unionized or the non-unionized employees of SBI would therefore be unseizable or unassignable. In order to give meaning to this provision, it must be concluded that contributions..."payable"...are literally beyond the reach of the other creditors of SBI, whether they are secured or unsecured creditors, whether their security interest arose prior to the date when the contributions became due, whether paid or not.[28]

44. The decision in *Timminco* indicates that even though the assets covered by the deemed trusts were already charged by a hypothec when the deemed trust came into effect, a secured creditor could no longer exercise its right against such secured assets because they have become exempt from assignment and seizure due to sections 49 and 264 of the SPPA.

45. ***Conclusion:*** In CCAA proceedings, the SPPA deemed trust applies to unpaid going-concern and pre-wind-up special payments, but not wind-up liability, and generates a priority recovery for the pension plan members.

c) The federal PBSA

46. As a federal statute, there is no dispute that the PBSA applies in CCAA proceedings. There is no issue of paramountcy.

47. The PBSA also contains deemed trust provisions. It has been considered in two cases: *Aveos* and, to a limited extent, the Wabush CCAA proceedings in the context of a motion

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[28] *Timminco ltée (Arrangement relatif à)*, 2014 QCCS 174, BOA of Rep Counsel, Tab 11, at para. 135.

brought by Wabush Mines to grant apriority to the DIP lender ahead of deemed trust provisions and subordinating the PBSA deemed trust.

48. The deemed trust provisions of the PBSA initially created deemed trusts over all amounts owing to a pension plan by an employer (i.e., unpaid going-concern, pre-wind-up special payments, and wind-up liability). However, in 2011, the PBSA was amended by Parliament to expressly exclude the application of the deemed trust over wind-up liability. The introductory words of the federal budget in 2009 described the background for that amendment, at the same time the CCAA changes were coming into effect, as does the legislative debate surrounding the amendments in 2010:

> (a) The Government is acting to address issues facing federally regulated private pension plans by:
>
> ...
>
> Consulting on the legislative and regulatory framework for federally regulated pension plans with a view to making permanent improvements before the end of 2009. [29]
>
> (b) Another key element of the jobs and economic growth act is the important changes to strengthen federally regulated private pension plans. I am proud to say I was personally very involved in the development of these changes. By way of background, in early 2009, our Conservative government announced we would review issues related to pensions under federal jurisdiction, regulated by way of the Pension Benefits Standards Act, 1985.
>
> This represented the first comprehensive review in nearly three decades. We started that process in January 2009 when we released for public comment a major research paper on legislative and regulatory regimes for federally regulated private pension plans. We followed that up with extensive cross-country and online public consultations open to all Canadians. We asked for input on the legislative and regulatory framework for federally regulated private pension plans.
>
> From March until May 2009, I travelled across Canada from Halifax to Vancouver to Whitehorse and many places in between. What is more, despite the challenging timelines and logistical challenges, we never once left anyone at the microphone who wanted to speak. Every single person who wanted to have his or her voice heard on this very important file was offered that opportunity.[30]
>
> (c) Canadians need to know what is at stake here. On one item alone, there are amendments that are required in order to put in place regulations to implement reforms that were announced by the

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[29] House of Commons, *Budget 2009*, 40th Parl, 2nd Sess (January 28, 2009).
[30] *House of Commons Debates*, 40th Parl, 3rd Sess, No 21 (March 31, 2010) at 1705 (Ted Menzies).

> government in October 2009, that were targeted at Canadians who are members of pension plans.[31]
>
> (d) We have heard many comments in this House about pensions. It is critical and time sensitive that we get this legislation passed because we have made improvements to the federally regulated private pension plans in the bill.[32]

49. As noted earlier, this Court discussed the PBSA deemed trusts in the context of the motion brought by the company to approve a priority to the DIP lender at the outset of the Wabush CCAA proceedings. The subordination of the deemed trust was opposed by the USW, the federal Superintendent of Financial Services, and the Newfoundland Superintendent.[33] In this Court's decision approving the priority to the DIP lender and subordinating the PBSA deemed trust priority, this Court commented on the interaction between the PBSA deemed trust, and the limited pension secured claim that was introduced into the CCAA in the 2009 amendments.

50. This Court wrote that despite the broader deemed trust coverage in the PBSA, the PBSA deemed trusts are effectively of no force or effect due to the inclusion of the pension secured claim in the CCAA. Respectfully, it is submitted that this Court's comments at paragraph 78 of its DIP priority decision is not conclusive of the priority issues in this case.

51. The statements from this Court were in the context of opposition to the Court granting a priority to the DIP lender and thereby subordinating the PBSA deemed trust (and NPBA deemed trust) to the DIP priority. Section 11.2 of the CCAA, which was inserted into the CCAA with the 2009 amendment, expressly authorizes a CCAA court to grant a priority to a DIP lender in CCAA proceedings. This Court invoked section 11.2 of the CCAA to dismiss the objections to the DIP priority. The Court was correct in its conclusion at paragraph 80. This Court's reliance on section 11.2 of the CCAA is sufficient to dispose of the objections to that motion. It is respectfully submitted that this Court's statement with respect to the secured claim for unpaid going-concern payments in the CCAA amendments of 2009 as "occupying the field", and thereby neutralizing the PBSA deemed trust provisions, was incorrect and in any event was obiter dicta and not binding law because it was not essential to the disposition of the matters at issue.

52. The Québec Court of Appeal held that this area of law is not settled:

> 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 "[these are not new issues", respondent has, it seems to me, quoted the judge out of context.

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[31] *House of Commons Debates*, 40th Parl, 3rd Sess, No 55 (June 3, 2010) at 1530 (Hon Stockwell Day).
[32] *House of Commons Debates*, 40th Parl, 3rd Sess, No 56 (June 4, 2010) at 1030 (Ted Menzies).
[33] Representative Counsel to the non-USW employees and retirees did not oppose the priority sought by the company for the DIP lender on that motion

> 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 Service* relating to the conflict between the deemed trust for the GST and the CCRA, in *Sparrow Electric* dealing with a deemed trust in favour of the Crown in respect of payroll deductions for taxation, as well as *Indalex* 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 the interaction between deemed trust rules for pensions and the CCAA persist, notwithstanding the jurisprudence of the Supreme Court on point. 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.[34]

53. As noted above, Parliament amended the PBSA in 2010 – two years after it amended the CCAA - to expressly remove the PBSA deemed trust from applying to wind up liability. The same legislator – Parliament – could have readily amended the CCAA at the same time to make clear that the PBSA deemed trust provisions no longer apply on a wholesale basis in a CCAA proceeding. Parliament did not do so. Parliament obviously turned its mind to pension deemed trust priorities by amending the PBSA to remove its application for wind-up liability, but Parliament did not make any amendment to the CCAA to exclude the remaining PBSA deemed trusts from CCAA proceedings. Parliament left the PBSA deemed trusts in place.

54. The conclusion is that Parliament deliberately intended to keep the deemed trust pension priorities in place in the PBSA (i.e., the deemed trusts for going-concern and pre-wind-up special payments) ***and*** have those continue to co-exist with the limited pension priority for unpaid current service in the CCAA. While this result may appear to be anomalous, it is not. The CCAA creates a ***secured*** claim for unpaid going-concern payments, while the PBSA creates a ***deemed trust*** over that same category of unpaid amounts **and** unpaid special payments. Parliament must have intended the pension protections of these statutes to work together, and they do.

55. Here is the difference. Section 6(6) of the CCAA requires that no Plan of Compromise can be sanctioned without payment of the super-priority amount for unpaid going-concern payments being recognized. The PBSA's deemed trust priorities are not linked to a Plan of Compromise. If a Plan of Compromise is accepted by creditors, there is no need for the PBSA deemed trusts to operate. But, in the absence of a Plan of Compromise, Parliament's intention is that the PBSA deemed trusts will apply to unpaid

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[34] *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCA 1351, BOA of Rep Counsel, Tab 12, at para. 35.

going-concern and pre-wind-up special payments by keeping those provisions in the PBSA. Parliament also makes clear in the PBSA that these deemed trusts apply in "liquidation" situations. The two statutes can readily co-exist. There is no conflict.

56. ***Conclusion:*** In CCAA proceedings, the federal PBSA deemed trust applies to unpaid going-concern and special payments, but not wind-up liability, and generates a priority recovery for the pension plan members.

57. A summary of the application of the deemed trusts in Ontario PBA, PBSA, and SPPA are as follows:

	DEEMED TRUST APPLICABILITY		
	Going-Concern Payments owing	**Special Payments owing**	**Wind-up Payments owing**
Ontario PBA	✓	✓	✓
PBSA	✓	✓	
SPPA	✓	✓	

58. As submitted herein, the following is a summary of the applicability of the NPBA deemed trusts:

	DEEMED TRUST APPLICABILITY		
	Going-Concern Payments owing	**Special Payments owing**	**Wind-up Payments owing**
NPBA	✓	✓	✓

PART II – THE LAW AND ARGUMENT RELATING TO WHICH PENSION STATUTE'S DEEMED TRUST APPLIES TO THE WABUSH PENSION PLAN MEMBERS

59. The Wabush Salaried Plan is governed by the NPBA, registered in Newfoundland, and regulated by the Newfoundland Superintendent. All regulatory filing are in Newfoundland. The funding of the plan was in accordance with the NPBA.[35]

60. Nevertheless, due to the differing geographic work locations of some Wabush Mines employees, three pension statutes – the NPBA, PBSA, and SPPA - are potentially engaged. Which statute's deemed trust provisions apply for the Wabush Salaried Plan members? The answer is the NPBA.

61. The geographic location of employees who performed work for Wabush Mines were in two provinces: Newfoundland and Labrador (the location of the open-pit mines) and the Town of Sept-Iles, Québec (the location of the processing facilities and railway to transport the ore to customers).

62. The geographic location of the Wabush pension plan members in Québec *prima facie* engages the SPPA (which in section 1(1) says that it applies to pension plan members who report for work in Québec).

63. Since some Wabush plan members reportedly worked on railways – a federally-regulated undertaking – this *prima facie* engages the PBSA, which in section 4(4) applies to pension plan members that work in a federally-regulated undertaking.

a) The NPBA applies to all the members of the Salaried Plan

Multi-Jurisdictional Pension Plans

64. A multi-jurisdictional pension plan ("**MJPP**") refers to a pension plan that covers employees in more than one province. Commencing in 1968, in order to simplify pension plan administration for MJPPs, various provinces entered into the Memorandum of Reciprocal Agreement (the "**Reciprocal Agreement**") that directs one province to regulate a pension plan that has members in more than one province. The concept in the Reciprocal Agreement is the "major authority". Once a jurisdiction is identified as the "major authority", that jurisdiction governs the pension plan, and not any other jurisdiction.

65. The preambles of the 1968 Reciprocal Agreement state:

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[35] Watt Affidavit, *supra* note 1 at para. 13.

> WHEREAS each signatory hereto has statutory functions and powers with respect to pension plans covering employees in the jurisdiction represented by such signatory;
>
> AND WHEREAS, by reason of some pension plans covering employees in more than one jurisdiction, more than one signatory may have statutory functions and powers in respect of the same pension plan;
>
> AND WHEREAS the said signatories have deemed it desirable ***that statutory functions and powers in respect of any one pension plan be exercised by one signatory only***, acting both on its own behalf and on behalf of any other signatory having statutory functions and powers in respect of such plan;
>
> AND WHEREAS each signatory has accordingly agreed with each other signatory to the effect hereinafter set forth. [36]

66. Section 1 defines "authority" as:

> b) "authority" means a person or body having statutory functions and powers with respect to registration, ***funding***, vesting, ***solvency***, audit, obtaining information, inspection, ***winding up***, and other aspects, of plans; [emphasis added]

67. Section 2 defines "major authority" as:

> d) "major authority" means, with respect to a plan, the participating authority of the province ***where the plurality of the plan members are employed***... [emphasis added]

68. Once the major authority is established, section 2 of the Reciprocal Agreement states that the major authority shall exercise all functions for the regulation of the plan:

> 2. The major authority for each plan shall exercise both its own statutory functions and powers and the statutory functions and powers of each minor authority for such plan.

69. Québec signed the Reciprocal Agreement in 1968. Newfoundland signed it in 1986.

70. As noted above, Newfoundland is the major authority for the Wabush Salaried Plan and has continued to be the major authority ever since.

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[36] *Provincial Memorandum of Reciprocal Agreement*, 1968, BOA of Rep Counsel, Tab 13; where the parties have not signed the 2016 agreement, the earlier Memorandum of Reciprocal Agreement would apply to the plan in respect of those members: see Financial Services Commission of Ontario, *Questions and Answers on 2016 Agreement Respecting Multi-jurisdictional Pension Plans* (26 September 2016) online: < www.fsco.gov.on.ca/en/pensions/administrators/pages/mjppaqanda.aspx>.

71. Since the Newfoundland Superintendent regulates the NPBA, the deemed trust provisions in the NPBA apply to both the Newfoundland and Québec members of the Wabush Salaried Plan, irrespective of which province they were employed.

72. Further, the Wabush Salaried Plan was registered by the company with the Newfoundland Superintendent of Pensions *only* and not any other regulatory authority.

73. Finally, section 12.06 of the Salaried Plan expressly directs that the Plan be interpreted pursuant to the laws applicable in the province of Newfoundland. The express intention of the company was that the NPBA would apply to and govern the Wabush Salaried Plan. Section 12.06 of the Wabush Plan provides that:

> **Applicable Law**
>
> The Plan shall be interpreted pursuant to the laws applicable in the province of Newfoundland.

74. In *Dinney v. Great-West Life*,[37] the Manitoba Court of Queen's Bench found that the proper law of the plan was Manitoba and as a result Manitoba's PBA would apply to the pensioners outside of Manitoba. The plan provision concerning the proper law of the plan is not cited in the court's decision, but the court did comment that it was unlike the provision in *McColl Frontenac (Leco)* which stated that the plan was to be construed and administered in accordance with the laws of Québec, Ontario, and the rules of the Department of National Revenue.

75. In recognition of the need for the major authority to govern the funding of the pension plans, the regulator's multi-jurisdictional agreements have evolved to expressly provide the major authority with the power to deal with substantive legal issues in its own pension legislation. Under the 2016 Agreement Respecting Multi-Jurisdictional Pension Plans (the "**2016 Agreement**"), there is no question that the deemed trust provisions of the majority authority would apply to all beneficiaries, irrespective of where they were employed.[38]

76. The 2016 Agreement replaced the Agreement Respecting Multi-Jurisdictional Pension Plans that was signed in 2011 by the governments of Ontario and Québec (the "**2011 Agreement**"). The provisions of the 2011 Agreement concerning the application of the major authority's deemed trust provisions to the entire plan are identical to those under the 2016 Agreement. Commentary about the 2011 Agreement indicates that it reflects the general practice in the pension industry that, for a multi-jurisdictional pension plan, the rules of the major authority's legislation apply to the entire plan.

77. In addition, a Client Advisory published by Towers Watson in June of 2011 advised that the 2011 Agreement largely reflected industry practice:

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[37] *Dinney v. Great-West Life* [2002] M.J. No. 466, BOA of Rep Counsel, Tab 14.

[38] See in particular section 6(1) and Schedule B of the 2016 Agreement, Monitor's Amended Pension Direction Motion, Exhibit R-21.

> A convention has developed whereby the major authority applies the rules of the jurisdiction of employment to a member's benefit entitlements and ***the rules of the major authority govern the funding of the plan.***
>
> ....
>
> The Agreement will not substantially change how pension standards apply to MJPPs. Its major benefit is to confirm that most multi-jurisdictional issues are already being handled appropriately. Moreover, the Agreement eliminates much uncertainty in the application of some pension standards.[39] [emphasis added]

78. The 2011 and 2016 Agreements explicitly codified what had been industry practice even before those Agreements were entered into by the various pension regulators. In these circumstances, the Newfoundland & Labrador Superintendent, as the major authority for the Wabush Salaried Plan, should apply the deemed trust provisions in the NPBA to all members of the Salaried Plan.

79. ***Conclusion:*** The NPBA applies to all the member of the Wabush Salaried Plan, including the members who worked for Wabush Mines in Québec and on the railways.

b) The NPBA deemed trusts apply to any member of the Salaried Plan who also worked on the Wabush Mines railway

80. OSFI did not sign the Reciprocal Agreement. However, the NPBA is still the governing statute for the following reasons:

(a) OSFI acknowledges in its own policy statement that "OSFI is the lead regulator [only] when the plurality of members of the plan is in included employment".[40]

(b) The NPBA has paramountcy over the PBSA. Pension regulation falls under the provincial head of power of property and civil rights. A 1961 amendment to the Constitution Act, 1867, made with unanimous consent from the provinces, created s. 94A, which reads:

> The Parliament of Canada may make laws in relation to old age pensions and supplementary benefits, including survivors' and disability benefits irrespective of age, but no such law shall affect the operation of any law present or future of a provincial legislature in relation to any such matter.

This was done for limited purposes and created the federal government's only purview into the realm of pensions. Thus, the federal government has express

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[39] Tower Watson, *Ontario and Quebec Announce Signing of Agreement Respecting Multi-Jurisdictional Pension Plan* (Tower Watson: 20 June 2011), BOA of Rep Counsel, Tab 15, at pp.1,3.

[40] Office of the Superintendent of Financial Institutions Canada, *Knowledge of Plan and Identification of Significant Activities: Risk Assessment Framework Pension Supervisory Guidance Note RAF 1* (Ottawa: OSFI, 31 July 2014), BOA of Rep Counsel, Tab 16, at p. 3.

constitutional authority to regulate pensions, subject to provincial authority. According to *Hislop v. Canada (Attorney General)*, this law created a "reverse paramountcy" in relation to pension regulation:

> Section 94A of the Constitution Act, 1867, resolves conflicts between federal and provincial "laws in relation to old age pensions and supplementary benefits". This section enacts a reverse paramountcy rule, assigning predominance to provincial laws contrary to the usual preferential place accorded federal laws.[41]

Where both a provincial statute and the PBSA could apply, the provincial statute will have paramountcy.

(c) Any conflicts between benefits conferring legislation should be resolved in favour of the members. As stated in *Champagne v. Atomic Energy of Canada Ltd.*, "It is evident that where the conflict between the parties raises issues of statutory interpretation, with respect to "benefits-conferring legislation" such as those granted under Part *III* of the *Code*, that it must not only be interpreted in a broad and generous manner but also "be resolved in a favour of the claimant".[42] Here, the PBSA and the NPBA should be construed in such a way as to allow for the extension of its protections to as many employees as possible. This interpretation should be favoured over one that does not.

Supplementary Submissions

81. In this Outline of Argument, Representative Counsel submits that the NPBA deemed trust provisions apply to unpaid current service payments, special payments, and wind-up liability. Representative Counsel also submits that the NPBA, and its deemed trust provisions, apply to all Wabush pension plan members, including those who performed work in Sept-Iles, Québec, and those who worked on Wabush Mines railways.

82. In the event this Court finds that the NPBA deemed trust provisions do not apply to unpaid current service payments, special payments, and/or wind-up liability, Representative Counsel wishes to reserve the right to make supplementary submissions on the applicability of the deemed trust provisions in the SPPA and PBSA relating to the affected Wabush Mines Salaried Plan members.

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[41] *Hislop v. Canada (Attorney General)*, 2009 ONCA 354, BOA of Rep Counsel, Tab 17, at para 61.
[42] *Champagne v. Atomic Energy of Canada Ltd.*, 2012 CarswellNat 708, BOA of Rep Counsel, Tab 18, at para. 18.

PART III - RESPONSES TO THE MONITOR'S QUESTIONS

The NPBA deemed trust priority applies for the pension plan beneficiaries

83. The liquidation proceedings of Wabush Mines with its underfunded pension plans and pension benefit reductions for retirees, is exactly the type of case to which the NPBA is intended to apply to provide a remedy to the members for their pension losses.

84. In its motion, the Monitor advances incorrect interpretations of the NPBA and PBSA that attempt to undermine the deemed trust priorities and generate no meaningful recoveries for the pension plan members. The Monitor at paragraph 70 of its motion wants the following orders:

> 70. The Monitor accordingly seeks an Order determining the priority of the various components of the Salaried DB Plan Claim (R-18) and the Union DB Plan Claim (R-19) to be as follows:
>
> a) normal costs and special payments outstanding as at the date of the Wabush Initial Order to be subject to a limited deemed trust;
>
> b) normal costs and special payments payable after the date of the Wabush Initial Order, including additional special payments and Catch Up Payments established on the basis of actuarial reports issued after the Wabush Initial Order to constitute an unsecured Claim;
>
> c) wind-up deficiency to constitute an unsecured Claim;
>
> d) any trust created pursuant to the PBA may only charge property located in Newfoundland & Labrador;

85. Representative Counsel objects to all those requested orders as unsupportable in the language of the statutes and contrary to caselaw.

86. In order to obtain the Monitor's requested orders from this court, the Monitor states at paragraph 76 of its motion that "the Court will need to deal with the following questions":

1. Liquidation giving rise to a liquidation deemed trust

(a) What is the proper meaning of "liquidation" pursuant to subsections 8(2) PBSA and 32(2) PBA?

(b) Did a "liquidation" within the meaning of subsections 8(2) PBSA and 32(2) PBA occur prior or since the Wabush Initial Order?

(c) Would such a liquidation deemed trust (...) be effective if triggered by a "liquidation" occurring after the Wabush Initial Order?

2. Deficit upon termination

(d) Absent CCAA or BIA proceedings with respect to an employer, could the full amount of the deficit upon termination of a defined benefit pension plan be subject to a deemed trust pursuant to either of the PBSA or the PBA?

(e) Would such a wind-up deficit deemed trust be effective if triggered by a termination occurring after the Wabush Initial Order?

3. Enforcement or recognition of a PBA deemed trust charging assets located in Québec

(f) Is the deemed trust arising under the PBA specifically or implicitly limited to assets of the employer located in Newfoundland & Labrador?

(g) Could this Court nonetheless recognize and enforce a PBA deemed trust against assets located in this Province (or the sale proceeds standing in their stead)?

Monitor's question in paragraph 76(a): What is the proper meaning of "liquidation" pursuant to subsections 8(2) PBSA and 32(2) NPBA?

87. The term "liquidation" is not defined in either the NPBA or the PBSA. Nevertheless, it is a common term and has been interpreted by the courts in a number of cases to mean "the act or operation of winding up the affairs of a firm or company by getting in the assets, settling with its debtors and creditors".

88. In *Davey* v *Gibson,* the Ontario Court of Appeal states:

> The term "gone into liquidation" is not anywhere defined; the language is more or less colloquial, for there is not, at the present time, any legal proceeding known as liquidation. At one time there was, but it has long since been obsolete. The technical term used in the *Companies Act* is "wind-up," although the officer appointed to conduct the winding-up is designated a liquidator.
>
> If one searches dictionaries, it is not hard to find a definition of liquidation wide enough to include bankruptcy. In the Century Dictionary this is given: ***"Liquidation: the act or operation of winding up the affairs of a firm or company by getting in the assets, settling with its debtors and creditors, and apportioning the amount of each partner's or shareholder's profit or loss, etc."*** In the Oxford Dictionary is the following: "Liquidate: Law and commerce: To ascertain and set out clearly the liabilities of (a company or firm) and to arrange the apportioning of the assets; to wind up." In Corpus Juris, that mine of information, is this definition: "Liquidation, a word of French origin, is not a technical term, and, therefore, can have no fixed legal meaning; but it has a fairly defined legal meaning, and it is said to be a term of jurisprudence, of finance, and of commerce. It is defined as the act of settling, adjusting debts, or ascertaining their amounts or balance due; settlement or adjustment of an unsettled account. ... ***Applied to a***

> ***partnership or company, the act or operation of winding up the affairs of a firm or company by getting in the assets, settling with its debtors and creditors, and appropriating the amount of profit or loss."*** ...[43]
> [emphasis added]

b) A liquidation can readily occur while a company is under CCAA protection

89. The courts have held that the CCAA has at least eight purposes, one of which is to effect a liquidation:

> a) to permit an insolvent company to avoid bankruptcy by making a compromise or arrangement with its creditors;
>
> b) to permit a company to carry on business and where possible avoid the social and economic costs of liquidating its assets;
>
> c) to maintain the status quo for a period to provide a structured environment in which an insolvent company can continue to carry on business and retain control over its assets while the company attempts to gain the approval of its creditors for a proposed arrangement that will enable the company to remain in operation for the future benefit of the company and its creditors;
>
> d) to protect an insolvent company from proceedings by creditors that would prevent it from carrying out the terms of a compromise or arrangement;
>
> e) to permit equal treatment of creditors of the same class;
>
> f) to permit a broad balancing of stakeholder interests in the insolvent corporation; and
>
> g) in appropriate circumstances, ***to effect a sale, winding-up or liquidation of a debtor company and its assets.***[44]

90. Where a company under CCAA protection is not restructuring and is instead selling its assets, that process is without question a "liquidation".[45]

91. Courts and academics have long recognized that a CCAA proceeding can involve a liquidation.[46] As recently stated by the court in the *Nortel* CCAA proceedings,

> It is quite common now for there to be liquidating CCAA proceedings in which there is no successful restructuring of the business but rather a sale

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[43] *Davey* v *Gibson*, [1930] 65 O.L.R. 379, BOA of Rep Counsel, Tab 19, at paras 6-7.
[44] *The 2016-2017 Annotated Bankruptcy and Insolvency Act*, Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, BOA of Rep Counsel, Tab 20, page 1246.
[45] *Target Canada Co. (Re)*, 2015 ONSC 303, BOA of Rep Counsel, Tab 21, paras. 32-33.
[46] *Ibid* at paras. 32-33; *Re Nortel Networks Corporation et al*, 2014 ONSC 5274, BOA of Rep Counsel, Tab 22, at paras 21-23; Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Carswell, 2013) BOA of Rep Counsel, Tab 23, at p. 167.

> of the assets and a distribution of the proceeds to the creditors of the business.[47]

78% of CCAA proceedings are liquidations

92. Not only do liquidations occur in CCAA, a recent academic study has shown that the *vast majority* of recent CCAA proceedings are in fact liquidations:

> From 1 January 2014 to 1 November 2016, 100 CCAA proceedings were commenced, of which one was terminated as *void ab initio* because it was revealed that the debtor did not qualify under the statute. Twenty-seven proceedings were ongoing as of 1 November 2016. Out of the 72 completed proceedings, 78 percent were "liquidating CCAA proceedings", in that the outcome was a sale.[48]

93. The learned author also raised concerns with the disproportionate number of liquidations in CCAA proceedings and the increased risk of misconduct in those cases:

> In Canada, a result of changes to debt markets has been that the CCAA has become largely a senior creditors' statute with increasing liquidations driven not by the local creditors of early bankruptcy legislation, but often by foreign creditors....
>
> ...
>
> Courts are confronted with *fait accompli* applications before them, in effect bypassing many of the checks and balances of the system. Sales under these conditions often do not have the protections built into a CCAA plan that prevent misconduct.[49]

94. Moreover, the interpretation of the term "liquidation" submitted by Representative Counsel herein is consistent with a contextual and purposive reading of subsections 8(2) of the PBSA and 32(2) of the NPBA, which are minimum standards legislation, the purpose of which is to protect vulnerable pension plan members and retirees. The correct approach to interpreting such provisions is one which is broad, purposive, and recognizes the remedial nature of the pension deemed trusts, not a narrow or technical interpretation that would defeat the intention of the legislators.[50]

95. This Court has previously written that a liquidation under the CCAA does not fall within the term "liquidation" in subsection 8(2) of the PBSA. With respect, and bearing in mind that this issue was neither fully briefed nor fully argued before this Court at the DIP priority motion hearing on June 22, 2015, this Court erred in limiting the interpretation of "liquidation" only to a "liquidation under Part XVIII of the *Canada Business*

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[47] *Re Nortel Networks Corporation et al,* 2014 ONSC 5274, BOA of Rep Counsel, Tab 21, at para 23.

[48] Janis Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law" (2017) *Annual Review of Insolvency Law 2016,* BOA of Rep Counsel, Tab 24, at p.21.

[49] *Ibid.* at pp. 23-24.

[50] *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, BOA of Rep Counsel, Tab 25, para. 21.

Corporations Act or equivalent provincial legislation" is an error.[51] The Québec Court of Appeal later commented that "the matter of the effectiveness of the federal deemed trust in CCAA proceedings is not settled law."[52]

Monitor's question at paragraph 76(b): Did a "liquidation" within the meaning of subsections 8(2) PBSA and 32(2) PBA occur prior or since the Wabush Initial Order?

Answer: Yes, a liquidation has occurred within the meaning of sections 8(2) of the PBSA and section 32(2) of the NPBA.

96. This question by the Monitor actually contains two sub-questions. The first is a factual question: Did a liquidation occur? The second question is temporal about whether the liquidation occurred "prior or since" the Wabush Initial Order.

97. The second temporal sub-question is irrelevant. The temporal aspect has no basis in the statutes, only confuses the analysis, and is invented by the Monitor to help drive its fallacious argument that a liquidation must occur prior to the CCAA proceeding commencing in order for "liquidation deemed trust" (also a fallacious interpretation) to apply.

98. Whether the liquidation occurred "prior or since" the Wabush Initial Order is neither a qualifier nor a condition to the applicability of the deemed trusts in the language of section 8(2) of the PBSA nor section 32(2) of the NPBA. Once a liquidation has occurred, both section 8(2) of the PBSA and section 32(2) of the NPBA make clear that the amounts owing to the pension plan that are deemed to be held in trust are to form no part of the estate for distribution to creditors.

99. The first sub-question, whether a liquidation has occurred is a factual analysis. The facts in this case readily demonstrate that a liquidation has occurred within the meaning of the term in section 8(2) of the PBSA and section 32(7) of the NPBA.

<u>The facts of the Wabush CCAA proceedings readily confirm a liquidation</u>

100. As noted earlier, in 2013, CNR, the parent company of Wabush Mines, announced that it would be disengaging from its Eastern Canada operations at Bloom Lake and Wabush Mines. CNR publicly states that it is exiting those businesses.

101. CNR is a solvent, multi-national mining and natural resources company based in Cleveland, Ohio.

102. As early as March 2013, CNR's intention to shutdown Wabush Mines was documented in a number of its own Press Releases.

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[51] *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCS 3064, BOA of Rep Counsel, Tab 1, at para. 69.
[52] *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCA 1351, BOA of Rep Counsel, Tab 11, at para .36.

103. For example, on March 11, 2013, CNR announced that it would idle its Wabush Pointe Noire pellet plant within the city of Sept-Iles in Québec by the end of the second quarter of 2013. In order to "minimize cash outflows and associated liabilities", CNR also idled its Wabush Scully Mine by the end of the first quarter of 2014. The February 11, 2014 CNR Press Release states:

> Cliffs Natural Resources Inc. (NYSE: CLF) (Paris: CLF) announced today it expects its full-year 2014 capital expenditures to be in a range of $375 - $425 million, a greater than 50% year-over-year reduction from its full-year 2013 capital spending of $862 million. This decrease is driven by a significant reduction in the Company's expansion and tailings and water management capital spending at its Bloom Lake Mine in Québec. ***Cliffs also announced that it will idle production at its Wabush Mine in the Province of Newfoundland and Labrador by the end of the first quarter of 2014.***
>
> ...
>
> **Wabush Mines**
>
> Cliffs' Wabush Scully Mine in Newfoundland and Labrador will be idled by the end of the first quarter of 2014. With costs unsustainably high, including fourth-quarter 2013 cash costs of $143 per ton, ***it is not economically viable to continue running this operation***. As previously disclosed, Cliffs idled Wabush Mine's Pointe Noire pellet plant in June of 2013. ***Approximately 500 employees at both the Wabush Scully Mine and the Pointe Noire rail and port operation in Québec will be impacted by these actions.*** [53]

104. CNR knew that its disengagement from and shutdown of Bloom Lake and Wabush Mines would be costly. In a CNR Press Release of November 19, 2014, Mr. Goncalves, the new CEO of CNR, said that the closure costs of Wabush Mines (and Bloom Lake) were seven times the previous estimate and were actually "in the range of $650-$700 million".[54]

CNR directs Bloom Lake to file for CCAA protection

105. In order to avoid those high shutdown costs, CNR opted to disengage from its Bloom Lake and Wabush Mines operations by rendering those entities insolvent, and then directing them to apply for CCAA protection.[55]

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[53] Watt Affidavit, *supra* note 1, Exhibit REPS-1.
[54] *Ibid.*
[55] Andrew J. Hatnay, "Restructuring, Liquidating, Now Disengagement: The Use of the *CCAA* by Corporate Parents to Disengage from Canadian Operations", (2017) *Annual Review of Insolvency Law 2016*, BOA of Rep Counsel, Tab 26, at pp. 132-139.

106. On January 27, 2015, Bloom Lake General Partner Ltd., Quinto Mining Corp., 8568391 Canada Ltd., Cliffs Québec Iron Mining ULC, The Bloom Lake Iron Ore Partnership and Bloom Lake Railway Co. Ltd. (the "**Bloom Lake CCAA Parties**") sought and obtained CCAA protection from the Québec Superior Court. The supporting affidavit was sworn by Clifford Smith, a senior V.P. of CNR. The CCAA filing and the intention to "sell assets" was documented in CNR Press Release:

> On January 27, 2015, Cliffs Natural Resources Inc. announced that Bloom Lake General Partner Limited and certain of its affiliates, including Cliffs Québec Iron Mining ULC (collectively, "Bloom Lake Group") commenced restructuring proceedings in Montreal, Québec, under the *Companies' Creditors Arrangement Act* (Canada) ("CCAA"). ***The Bloom Lake Group had recently suspended operations and for several months has been exploring options to sell certain of its Canadian assets***, among other initiatives. [56] [emphasis added]

CNR then directs Wabush Mines to file for CCAA protection

107. Four months later, on May 20, 2015, Wabush Mines brought a motion to extend the existing Bloom Lake CCAA proceedings to five additional CNR-owned entities: Wabush Iron Co. Limited, Wabush Resources Inc. and certain of their affiliates, including Wabush Mines JC, Arnaud Railway Corporation and Wabush Lake Railway Company Limited.[57] The supporting affidavit was again sworn by Clifford Smith, the Executive V.P. of CNR. This Court extended the CCAA order originally issued in the Bloom Lake CCAA proceedings to the Wabush CCAA Parties.

The Sales Processes for Bloom Lake and Wabush Mines

108. In April 2015, the company brought a motion to appeal to commence a sales process. This Court approved the sale and investor solicitation process (**"SISP"**) in respect of the Bloom Lake CCAA Parties.

109. Following the addition of Wabush Mines to the Bloom Lake CCAA proceeding, Wabush Mines brought a motion to amend the existing SISP to apply to the Wabush CCAA Parties pursuant to an Order granted June 9, 2015.

110. The sale and liquidation of assets by both the Bloom Lake CCAA Parties and the Wabush CCAA Parties have been underway for the past two years since the granting of the SISP Order.

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[56] *Cliffs Natural Resources Inc. Announces Decision on Bloom Lake Mine*, Cliffs Natural Resources, News Release, January 27, 2015, Watt Affidavit, *supra* note 1, Exhibit REPS-1.

[57] *Bloom Lake, g.p.l. (Arrangement relatif à)* (20 May 2015), No. 500-11-048114-157 (Qc SCJ), BOA of Rep Counsel, Tab 27.

111. A summary of the 18 sale transactions (to date) of Wabush Mines' assets as reported in the various Monitor's Reports in the two-year period are summarized in the chart below:

	Date	Transaction	Seller	Purchaser	Price	Additional Details
1	Apr 5, 2012	Mason Graphite Deal	Quinto	Mason Graphite	US$5.5M	Mining claims
2	Apr 28, 2015	CQIM Chromite Transaction	Bloom Lake	Noront	US$27.5 M	CQIM's Amalco Shares
3	Dec 8, 2015	Bunker C Fuel Transaction	Bloom Lake/ Wabush	CDC Exports	CAD $2M	Fuel
4	Jan to Mar, 2016	8 employee houses in Sept-Iles	Wabush		Approx. $880,000	
5	Mar 8, 2016	Pointe-Noire	Wabush	Investissement Québec	$68M	Lease for lot mining lot in Sept-Iles and all structures, buildings, work infrastructure or equipment, used to handle, transport, store; Wabush mine land adjacent to Sept-Iles (12 lots) with all constructions erected thereon
6	Mar 10, 2016	Block Z lots in Sept-Iles	Wabush	Administration Portuaire de Sept-Ile/Sept-Iles Port Authority	$1.25M	3 Lots in Québec
7	Apr11, 2016	Bloom Lake	Bloom Lake	Québec Iron Ore	$10.5M	Mining Lease number 877, 9 Lots in Normanville, 25 residential homes in Fermont, mobile home, 2 Crown grants, 2 indentures, 50% ownership of bridge
8	Jul 8, 2016	Rio Tinto Railcar	Bloom Lake	Rio Tinto fer et Titane Inc.	Confidential	27 Gondola Railcars

	Date	Transaction	Seller	Purchaser	Price	Additional Details
9	Jul 25, 2016	Toromont Generator Transaction	Wabush	Toromont Industries Ltd.	$425,000	3 Generators related to Wabush Mine
10	Aug 2016	30/55 Conditional Sale Employee Homes	Wabush			15 conditional sale employee homes had been agreed/were in progress; one being negotiated; 3 offers to purchase of vacant homes accepted; further 17 sales closed, 8 remain occupied; 21 lots and superficies created thereon forming Arnaud Railway
11	Sept 2, 2016	First IOC Railcar Transaction	Bloom Lake	Iron Ore Company of Canada	Confidential	159 Gondola Railcars
12	Sept 23, 2016	Ritchie Bros Transaction	Wabush	Ritchie Brothers Auctioneers (Canada) Ltd.	Confidential	9 Komatsu 830 E Haul Trucks; Engine and auxiliary parts located next to one of the trucks
13	Oct 21, 2016	Ritchie Bros Transaction	Bloom Lake	Ritchie Brothers Auctioneers (Canada) Ltd.	Confidential	5 Komatsu 830 E Haul Trucks and accessories and attachments attached thereto
14	Oct 28, 2016	Ritchie Bros Transaction II	Bloom Lake/ Wabush	Ritchie Brothers Auctioneers (Canada) Ltd.	Confidential	7 Rock Trucks, 2 Front Shovels, Blast Hole Rotary, Electric Rope Shovel, 9 Wheel Loaders, 4 Crawler Tractors, Long Reach, Crawler Blast Hole, 2 Ford F150, 2 Motor Graders, 2 Tool Carriers, 19 Ford F250, 2 Ford F350, Ford F550, Ford F450Truck Tractor, Service

	Date	Transaction	Seller	Purchaser	Price	Additional Details
						Truck, Bucket Truck, GMC C7500, 2 Boom Trucks, Flatbed Truck w/ Crane, Ford Escape, T800 Truck, T300 Truck, 2 Aceterra Trucks, Air Compressor, 849 S Truck
15	Nov 18, 2016	Second IOC Railcar APA	Bloom Lake	Iron Ore Company of Canada	Confidential	190 railcars (National Steel Car built ore gondolas) from North Bay assets; 63 railcars (National Steel Car built ore gondolas) from Québec City assets
16	Dec 5, 2016	Tata Railcar APA	Bloom Lake	Tata Steel Minerals Canada Limited	Confidential	310 Gondola Railcars
17	Dec 14, 2016	Nalcor Transaction	Wabush	Newfoundland and Labrador Hydro	$425,004	6 Parcels of Land in Wabush
18	May, 2017	Mont Wright Camp	CQIM (Bloom Lake)	Mise-en-cause 10165581 Canada Inc.	Confidential	Certain buildings, including the main building of the Mont Wright Camp, and related assets located on or about Mont Wright Camp

112. The sale of the Wabush open-pit mine is also on-going. As stated in the Monitor's Twenty-Fourth Report:

> The Wabush CCAA Parties, in consultation with the Monitor, are considering various alternatives with respect to the Wabush Mine, which alternatives could involve continuing to hold all or parts of the Wabush Mine ***to effect the realization of the remaining assets as described below***...[emphasis added]

Monitor's question in paragraph 76 (c): Would such a liquidation deemed trust (...) [sic] be effective if triggered by a "liquidation "occurring after the Wabush Initial Order?

Answer: The deemed trust applies and is effective as soon as an amount owing by Wabush Mines is owing and not paid, regardless if a liquidation occurred after the Wabush Initial CCAA Order. The date of the Initial CCAA Order is irrelevant for the application of section 32(2) of the NPBA and section 8(2) of the PBSA

113. This question by the Monitor again introduces a temporal question, i.e., would the "liquidation deemed trust" be effective if triggered by a liquidation "after" the Wabush Initial CCAA Order?

114. First, it is incorrect to refer to a "liquidation deemed trust", as suggesting it is a separate stand-alone deemed trust. As set out below, the deemed trusts arise from the broad language granting deemed trusts over *all* the amounts owing by an employer to a pension plan in the opening sections of both section 32(1) of the NPBA and section 8(1) of the PBSA.

115. Section 32(2) of the NPBA and section 8(2) of the PBSA then both refer to "liquidation" scenarios to add extra provisions to ensure the effectiveness of the deemed trusts so that the amounts that are subject to the deemed trusts do not form part of the estate and thereby prevent distributions of those amounts to other creditors.

116. The preambles of both section 32(2) of the NPBA and section 8(2) of the PBSA begin with the phrase "In the event of a liquidation...". There is no additional qualification that the liquidation must occur before or after the CCAA filing date anywhere in the statute or caselaw in order for the deemed trust to be effective. Therefore, whether the liquidation occurs pre-CCAA filing date or post-CCAA filing date is irrelevant.

Pension deficit upon pension plan termination

Monitor's question in paragraph 76(d): Absent CCAA or BIA proceedings with respect an employer, could the full amount of the deficit upon termination of a defined benefit pension plan be subject to a deemed trust pursuant to either of the PBSA or the PBA?

Answer: First this question is moot. Second, yes. The NPBA and PBSA deemed trusts apply even in the absence of CCAA or BIA proceedings

117. First, in the context of the Monitor's motion seeking orders from the court, this question introduces a factual proposition that does not exist in the Wabush Mines CCAA proceeding: "absent CCAA or BIA proceedings". Wabush Mines is insolvent and in CCAA proceedings. Answering this alternative-fact question Monitor will not resolve the dispute between the parties. A matter that does not affect the practical rights of the parties and which is instead hypothetical or theoretical is moot. In *Borowski v. Canada (Attorney General)*, the Supreme Court held:

> ***The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question.*** The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. ***If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision.*** [58] [emphasis added]

118. The Wabush Mines CCAA proceedings commenced on May 20, 2015 and are ongoing. While the NPBA and PBSA deemed trusts apply even in the absence of CCAA or BIA proceedings, the Monitor's question in paragraph 76(d) relate to a fact situation that does not exist in this case.

119. Second, in the event this Court chooses to answer the Monitor's question, the answer is that the NPBA and PBSA deemed trusts also apply in the absence of CCAA or BIA proceedings, as well as applying in CCAA proceedings.

120. The sections of the NPBA and PBSA and how they operate are explained below.

The Newfoundland *Pension Benefits Act*

121. Section 32 of the NPBA states:

> **Amounts to be held in trust**
>
> **32.** (1) An employer or a participating employer in a multi-employer plan ***shall ensure***, with respect to a pension plan, that
>
> (a) the money in the pension fund;
>
> (b) ***an amount equal to the aggregate of***
>
> (i) the ***normal actuarial cost***, and
>
> (ii) any ***special payments*** prescribed by the regulations, that have accrued to date; ***and***
>
> (c) ***all***
>
> (i) amounts deducted by the employer from the member's remuneration, and
>
> (ii) ***other amounts due under the plan from the employer that have not been remitted*** to the pension fund
>
> are kept separate and apart from the employer's own money, ***and shall be considered to hold the amounts referred to in paragraphs (a) to (c) in trust*** for members, former members, and other persons with an entitlement under the plan.

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[58] *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342, BOA of Rep Counsel, Tab 28, at p. 353.

> (2) In the event of a liquidation, assignment or bankruptcy of an employer, ***an amount equal to the amount that under subsection (1) is considered to be held in trust shall be considered to be separate from and form no part of the estate in liquidation, assignment or bankruptcy***, whether or not that amount has in fact been kept separate and apart from the employer's own money or from the assets of the estate.
>
> (3) ***Where a pension plan is terminated in whole or in part, an employer who is required to pay contributions to the pension fund shall hold in trust*** for the member or former member or other person with an entitlement under the plan ***an amount of money equal to employer contributions due under the plan to the date of termination***.
>
> (4) An administrator of a pension plan has a lien and charge on the assets of the employer in an amount equal to the amount required to be held in trust under subsections (1) and (3).[emphasis added]

The intention of the legislator is to protect pensions by creating trusts

122. Section 32 was debated by the Newfoundland Legislature. The purpose of section 32 is clearly to protect the security of pensions:

> Mr. Speaker, I am pleased to be able to introduce to second reading this legislation, which will provide increased pension benefits for workers in the Province ... ***Mr. Speaker, this act certainly secures the future for people in the Province who are looking to obtain funds from a pension***. This act provides enhanced pension benefit coverage for the people of the Province through the increased payments, procedures and conditions, as well as improved investment regulations and monitoring requirements, and ***the act promotes increased security of pension benefits promised***.[59] [Emphasis added]

The NPBA deemed trust provisions create broad deemed trusts and then make clear they apply in liquidation, bankruptcy, and wind-up situations

123. The Monitor is incorrect in its argument that the NPBA provisions provide for only two types of "limited" deemed trusts: (1) a "limited" deemed trust that covers only unpaid and accrued normal costs or special costs owing at the date of the Initial Order; and (2) a "liquidation" deemed trust. That is an incorrect interpretation of the statute.

124. Section 32 of the NPBA is expansively drafted. This section contains three inter-related deemed trust protections.

Section 32(1): A broad requirement that all the amounts owing to the pension plan by an employer are deemed to be held in trust

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[59] Newfoundland and Labrador, Legislative Assembly, Hansard, 43rd General Assembly, 1st Sess, No 55 (17 December 1996) (Ernie McLean), BOA of Rep Counsel, Tab 29.

125. Under sections 32(1)(b) and 32(1)(c)(ii), an employer is required to "ensure" that, *inter alia*, the amount equal to the normal actuarial (i.e., going concern) funding costs, special payments, and "***all other amounts*** due under the plan from the employer that have not been remitted to the pension fund…are to be kept separate and apart from the employer's own money, and shall be considered to hold the amounts referred to in paragraphs (a) to (c) in trust for [plan] members". These sections on their own language create a deemed trust for *all amounts* owing by an employer to a pension plan.

Section 32(2): Additional provisions relating to liquidation and bankruptcy situations

126. Section 32(2) contains additional express language dealing with liquidation and bankruptcy situations. This subsection also states that the amounts in section 32(1) (i.e., normal costs, special payments, and all other amounts due) are "considered to be held in trust" and to *add clarity in liquidation and bankruptcy situations*, where payments to other creditors are possible, section 32(2) makes clear that the amounts deemed to be held in trust "shall form no part of the estate in liquidation, assignment, or bankruptcy". This is to ensure that the amounts subject to the deemed trust are not to be distributed to other creditors other than the pension plan beneficiaries.

Section 32(3): Additional provisions for wind-up situations

127. Section 32(3) contain additional language to deal with situations where a plan is wound up. It states that an employer who is required to pay contributions to the pension fund on wind-up "shall hold in trust for the member or former member….an amount of money equal to employer contributions due under the plan to the date of termination". This section is directed to a situation where the employer continues to exist (i.e., not in bankruptcy) and would therefore also apply to the Wabush CCAA proceeding.

Section 61: Provisions relating to the wind up of a pension plan

128. Section 61 of the NPBA sets out the payment requirements on an employer when a plan is wound up. This section ties back to subsection 32(1)(a)(b) and (c), and specifically subsection 32(3), all of which, as discussed above, create deemed trusts over the amounts owing by an employer to a pension plan:

> **Termination payments**
>
> **61.** (1) ***On termination of a pension plan, the employer shall pay into the pension fund all amounts*** that would otherwise have been required to be paid to meet the requirements prescribed by the regulations for solvency, including
> (a) an amount equal to the aggregate of
> (i) the ***normal actuarial*** cost, and
> (ii) ***special payments*** prescribed by the regulations,
> that have accrued to the date of termination; ***and***
> (b) ***all***

> (i) amounts deducted by the employer from members' remuneration, and
> (ii) ***other amounts due to the pension fund from the employer that have not been remitted to the pension fund at the date of termination.***
>
> (2) Where, ***on the termination, after April 1, 2008***, of a pension plan, other than a multi-employer pension plan, ***the assets in the pension fund are less than the value of the benefits provided under the plan, the employer shall,*** as prescribed by the regulations, ***make the payments into the pension fund, in addition to the payments required under subsection (1), that are necessary to fund the benefits provided under the plan.***[emphasis added]

129. Section 61(1) states that on the termination of the pension plan, the employer shall pay into the pension fund all amounts required under the regulations for insolvency including normal costs contributions, special payments, ***and*** in addition, "all…other amounts due to the pension fund from the employer that have not been remitted to the pension fund at the date of termination".

130. Section 61(2) directs an employer to make all payments into the pension fund "in addition to the payments required by subsection 61(1) "that are necessary to fund the benefits provided under the plan".

131. Thus, section 61 specifies that employers are required to contribute all amounts to a plan on wind-up "that are necessary to fund the benefits provided under the plan". Section 32(3) then specifies that those unpaid amounts are "held in trust for the members".

The Federal *Pension Benefits Standards Act* ("PBSA")

132. Like the NPBA, the PBSA is also minimum standards legislation which governs the funding and administration of pension plans of employers in federal by regulated industries. Since some Salaried employees worked at the Wabush Mines railways in Sept-Iles to transport the iron ore obtained from the Wabush Mine, the PBSA would also be engaged for those employees, in addition to the NPBA.

133. Section 8 of the PBSA, set out in full below, like the NPBA, creates the "deemed trust" over the property of the employer for amounts the employer owes to the pension plan.

134. Section 8(1) and (2) of the PBSA state:

> **8 (1)** An employer shall ensure, with respect to its pension plan, that the following amounts are kept separate and apart from the employer's own moneys, and ***the employer is deemed to hold the amounts referred to in paragraphs (a) to (c) in trust for members of the pension plan***, former members, and any other persons entitled to pension benefits under the plan:
>
> (a) the moneys in the pension fund,

(b) an amount equal to the aggregate of the following payments that have accrued to date:

(i) ***the prescribed payments***, and

(ii) the payments that are required to be made under a workout agreement; and

(c) all of the following amounts that have not been remitted to the pension fund:

(i) amounts deducted by the employer from members' remuneration, ***and***

(ii) other amounts due to the pension fund from the employer, including any amounts that are required to be paid under subsection 9.14(2) [amounts unpaid by a letter of credit should be paid by the employer] or 29(6). [amounts owing by employer on wind up]

(2) In the event of ***any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (1) is deemed to be held in trust shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy***, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate. [emphasis added]

The PBSA deemed trust provisions create deemed trusts over three categories of amounts owing, but then exempt the deemed trust from wind-up liability

135. Like section 32(2) of the NPBA, section 8 of the PBSA is expansively drafted and contains three inter-related deemed trust provisions.

Section 8(1): A broad requirement that all the amounts owing to the pension plan by an employer are deemed to be held in trust

136. Under section 8(1)(b)(i), an employer is "deemed to hold… in trust for the members of the pension plan, former members, and any other persons entitled to pension benefits under the plan" the prescribed payments [which, under the Regulation of the PBSA, encompass going-concern payments and special payments],[60] and under section 8(1)(c)(ii) "other amounts due to the pension fund from the employer, including amounts required to be paid under subsection 29(6) [which mandates payments by an employer on a wind-up] "

137. By its expansive breadth, this section creates deemed trusts over all amounts owing by the employer to the pension plan (subject only to an exception for wind-up payments in section 29(6.4), discussed below).

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[60] Section 9 of SOR/97-19.

Section 8(2): Additional provisions relating to liquidation, and bankruptcy situations

138. Similar to section 32(2) of the NPBA, section 8(2) of the PBSA contains additional language to reinforce the effect of deemed trusts in liquidation and bankruptcy situations. The subsection states that the amounts owing in subsection 8(2) (i.e., normal costs, special payments, and all other amounts owing) are "deemed to be held in trust and shall be deemed to be separate from *and form no part of the estate in liquidation, assignment, or bankruptcy*".

139. Section 29(6.4) of the PBSA states:

> (6.4) On the winding-up of the pension plan or the liquidation, assignment or bankruptcy of the employer, the amount required to permit the plan to satisfy any obligations with respect to pension benefits as they are determined on the date of termination is payable immediately.

140. Section 29(6) of the PBSA sets out requirements on an employer when a plan is wound up. This section ties that to subsection 8(1)(c)(ii) which, as discussed above, creates deemed trust over the amounts owing by an employer to a pension plan:

> **Payments by employer to meet solvency requirements**
>
> (6) If the whole of a pension plan is terminated, the employer shall, without delay, pay into the pension fund all amounts that would otherwise have been required to be paid to meet the prescribed tests and standards for solvency referred to in subsection 9(1) and, without limiting the generality of the foregoing, the employer shall pay into the pension fund
>
> (a) an amount equal to the normal cost that has accrued to the date of the termination;
>
> (b) the amounts of any prescribed special payments that are due on termination or would otherwise have become due between the date of the termination and the end of the plan year in which the pension plan is terminated;
>
> (c) the amounts of payments that are required to be made under a workout agreement that are due on termination or would otherwise have become due between the date of the termination and the end of the plan year in which the pension plan is terminated;
>
> (d) all of the following amounts that have not been remitted to the pension fund at the date of the termination:
>
> (i) the amounts deducted by the employer from members' remuneration, and
>
> (ii) other amounts due to the pension fund from the employer; and

> (c) the amounts of all of the payments that are required to be made under subsection 9.14(2).

Section 29(6.5): The deemed trust is excluded for wind-up payments

141. However, in contrast to the NPBA, section 29(6.5) of the PBSA, was added to the PBSA in 2011, and specifically excludes the application of the section 8(1) deemed trust from amounts owing on the wind up of the pension plan, the section does however make clear that the deemed trust continues to apply to all amounts owing before the wind up and before a liquidation, assignment, or bankruptcy:

> (6.5) ***Subsection 8(1) [deemed trust] does not apply in respect of the amount that the employer is required to pay into the pension fund under subsection (6.4) [wind-up payment].*** However, it applies in respect of any payments that have accrued before the date of the winding-up, liquidation, assignment or bankruptcy and that have not been remitted to the fund in accordance with the regulations made for the purposes of subsection (6.1).

Summary: The PBSA creates a deemed trust over unpaid going-concern payments and special payments but exempts the deemed trust for the amount owing from the wind up deficit.

Monitor's question in paragraph 76(e): Would such a wind-up deficit deemed trust be effective if triggered by a termination occurring after the Wabush Initial Order?

Answer: For NPBA: Yes. For PBSA: No, but not based on any temporal factor

142. Again, this question by the Monitor introduces a temporal qualification that does not exist in the NPBA nor the PBSA deemed trust provisions.

143. The deemed trusts in the NPBA arise as soon as an amount owing to a pension plan by an employer is not paid. For the applicability of the wind up deemed trust, whether the plan was wound up after the date of the Initial Order is irrelevant. The only condition for a wind-up deemed trust to be applicable is the event of the plan wind up.

144. The Supreme Court decision in *Indalex* makes clear that the effectiveness of the PBA wind up deemed trust is to be determined *as of the date of the sale/distribution motion*. The only condition precedent is that the plan must be wound up for the wind-up deemed trust to apply. There is no condition or significance of the date of the Initial CCAA Order for the effectiveness of the wind up deemed trust:

> [46] Unlike s. 57(3), which provides that the deemed trust protecting employer contributions exists while a plan is ongoing, s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up. This is a choice made by the Ontario legislature. I would not interfere with it. Thus, ***the deemed trust entitlement arises only once the condition precedent of the plan being wound up has been fulfilled. This is true even if it is certain that the plan will be wound up in the future.***

> ***At the time of the sale***, the Executive Plan was in the process of being, but had not yet been, wound up. Consequently, the deemed trust provision does not apply to the employer's wind-up deficiency payments in respect of that plan. [emphasis added] [61]

Priority contests involving statutory PBA deemed trusts are determined at the time when there is a conflict with another creditor over a distribution – the date on which the company obtains a CCAA Order is irrelevant

145. The date on which a CCAA order is issued follows the application of the company that it brought before the court. There is no legal significance to that date for the purposes of the effectiveness the deemed trust priority – the CCAA filing date is merely the date chosen by the company to apply to the court for CCAA protection.

146. Creditor priorities continue to evolve during CCAA proceedings, as they would under normal company operations. In relation to priority contests between the beneficiaries of the PBA deemed trust and another creditor, the relevant time for deciding that contest will be at the time of the distribution of assets, either during the CCAA proceeding or when the CCAA is effectively completed, and a dispute arises among creditors as to whom the assets should be paid. Prior to those points in time, the CCAA contemplates that creditors' priority rights continue to evolve during the course of the CCAA proceeding. This approach to the determination of priority contests is supported for at least two reasons:

(a) In *Indalex*, the majority of the Supreme Court analyzed the rights of the competing creditors *as of the date of sale approval/distribution motion* (i.e., not as of the date of the CCAA filing);

(b) The Ontario Superior Court of Justice has held that priority contests between competing secured creditors "must be resolved as of the time when their respective security interests came into conflict"[62] (i.e., not as of the date of the filing of an insolvency proceeding); and

147. Therefore, based on *Indalex*, caselaw, insolvency practices, and recognizing the practical process of how a pension plan wind up occurs in a CCAA proceeding where the company has abandoned the pension plan, the PBA deemed trust/PPSA priority can readily become applicable if a pension plan is wound up *after* the CCAA filing date. There should be no surprise or uncertainty with such a result.

148. Any "uncertainty" in the CCAA process stems from the company's own uncertain conduct about whether it will restructure or liquidate, and whether the pension plans will be wound up or not. That uncertainty as a result of company conduct, not pension plan administration nor the words of the NPBA.

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[61] *Indalex Limited (Re)*, 2013 SCC 6 [2013] 1 S.C.R. 271, BOA of Rep Counsel, Tab 8, at para. 46

[62] *Textron Financial Canada Limited v. Beta Limitee/Beta Brands Limited*, 2007 CanLII 43908, BOA of Rep Counsel, Tab 30, at para. 38.

Enforcement or recognition of a PBA deemed trust charging assets located in Québec

Monitor's question in paragraph 76(f): Is the deemed trust arising under the PBA specifically or implicitly limited to assets of the employer located in Newfoundland & Labrador?

149. The NPBA deemed trusts apply to all assets of the employer, regardless if the assets are located in Québec. The Monitor's proposition at paragraph 70(d) that the NPBA deemed trusts are limited only to the employer's assets in Newfoundland & Labrador is not grounded in legislation nor case law support. Their submission should be rejected.

150. The NPBA creates a deemed trust over funds which should have been or should have been remitted to the employees' pension plan. The deemed trust is impressed upon the employer's assets, regardless of where the assets are held. A deemed trust, like other trusts, effects a transfer of a property ownership interest in the relevant assets of the settlor (i.e., the CCAA parties as employers) to the benefit of the beneficiaries of the trust. This is not the same as simply creating a real right via security over the property/collateral of the debtor/grantor that continues to be owned by such debtor/grantor. In the BIA, the legislator makes clear at section 67 that the property of a bankrupt divisible among its creditors does not include property held in trust by the bankrupt for another person(s). In the context of a CCAA proceeding, its effect is to remove the amounts over which the deemed trust extends from the property of the insolvent entity. There is no limitation, express or otherwise, in the NPBA that requires that the deemed trust provisions charge only property located in Newfoundland & Labrador.

Monitor's question in paragraph 76(g): Could this Court nonetheless recognize and enforce a PBA deemed trust against assets located in this Province (or the sale proceeds standing in their stead)?

151. Article 1262 of the *Civil Code of Québec* ("**CCQ**") recognizes the establishment of trusts by operation of law, such as deemed trusts. Article 1262 of the CCQ serves as the basis for the recognition and enforcement of the NPBA deemed trust against assets located in Québec:

> 1262 ***A trust is established by*** contract, whether by onerous or gratuitous title, by will or, in certain cases, ***by law***. Where authorized by law, it may also be established by judgment.[emphasis added]

152. Section 32 of the NBPA unequivocally creates a trust by operation of law within the meaning of article 1262 CCQ and has legal recognition under article 3079 of the CCQ.

153. In the absence of express statutory language in the CCQ providing that a deemed trust created by another province is not to be recognized or enforced in Québec law, giving effect to the deemed trust provisions in the NPBA does not "override Québec law" as suggested by the Monitor.

154. Article 3079 of the CCQ specifically supports the recognition of a mandatory provision of the law of another State with which the situation is closely connected where legitimate and manifestly preponderant interests so require:

> 3079 Where legitimate and manifestly preponderant interests so require, effect may be given to a mandatory provision of the law of another State with which the situation is closely connected.
>
> In deciding whether to do so, consideration is given to the purpose of the provision and the consequences of its application.

155. The Monitor suggests that the exception in article 3079 is not applicable as the "possible application of the PBA could have been properly achieved by way of a multi-jurisdictional agreement". However, the Agreement Respecting Multi-jurisdictional Pension provides a legal framework for the administration and regulation of multi-jurisdictional pension plans in Canada, but it does not answer the question of recognition and enforcement of a deemed trust created by one province against assets located in another province. Rather, the specific language in article 3079 sheds light on this question. This Court should consider the purpose of the NPBA deemed trust provisions and the consequences of their application in deciding whether to give effect to such provisions in Québec law.

156. The purpose of the NPBA deemed trust provisions and the hardship that is currently faced by the retirees of Wabush Mines, some of whom were employed in Sept-Îles, Québec has been discussed at length in this Argumentation Outline. The protection of pension benefits is precisely the kind of legitimate and manifestly preponderant interests that require effect to be given to the deemed trust provisions of the NPBA in Québec.

157. At paragraph 68, the Monitor also referenced articles 2644 and 2647 of the CCQ, the wording of which are as follows:

> 2644 The property of a debtor is charged with the performance of his obligations and is the common pledge of his creditors.
>
> 2647 The legal causes of preference are prior claims and hypothecs.

158. Section 32(2) of the NPBA specifically contemplates that the amounts under the deemed trust shall form no part of the estate (i.e., the amounts are not the "property of a debtor"). Therefore, these amounts covered under the deemed trust are neither part of the Wabush CCAA Parties' assets nor the common pledge of their creditors. One cannot and should not conflate the publication requirements that apply to the security of a secured creditor with the property transfer attributes that more readily describe the settlement of a trust. Were that possible, then the whole basis of commercial reality in Québec could be thrown into uncertainty, as anyone seeking to sell or transfer Québec-based movable property would not be permitted to do so in the absence of some title publication or Court authorization scheme. Québec (and the rest of Canada) long ago abandoned bulk sales rules and the like.

159. The Monitor, therefore, erred in its proposition at paragraph 69(f) that this Court should not recognize and enforce the NPBA against assets located in Québec or the sale proceeds thereof.

ORDERS REQUESTED

160. Representative Counsel respectfully requests this Court to dismiss the Monitor's requests for the orders in paragraph 70 of its Motion for Directions, and instead issue orders as follows:

(a) The NPBA deemed trusts apply to unpaid going-concern payments and special payments, and wind-up liability, and generate a priority recovery for the pension plan members in respect of those amounts;

(b) A "liquidation" has occurred within the meaning of subsections 8(2) of the PBSA and 32(2) of the NPBA;

(c) The Newfoundland Superintendent is the "major authority", and the NPBA deemed trust provisions apply to all the Wabush Salaried Plan members in the event of a conflict with the PBSA and SPPA; and

(d) The NPBA deemed trusts operate to cover assets located outside of Newfoundland & Labrador, and apply to charge the property of Wabush Mines located in Québec.

THE WHOLE RESPECTFULLY SUBMITTED.

Montreal and Toronto, this 12th day of May, 2017

KOSKIE MINSKY LLP
per: Andrew J. Hatnay and Amy Tang

SCHEIB LAW
per: Nicholas Scheib

Court-appointed Representative Counsel to the Applicants/Objecting Parties, Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson as Court-appointed Representatives of all non-union employees and retirees of the Wabush CCAA Parties

Schedule

Relevant Statutes

Companies' Creditors Arrangement Act **(R.S.C., 1985, c. C-36)**

Restriction — pension plan

6(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the *Pooled Registered Pension Plans Act*, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the *Pooled Registered Pension Plans Act*; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

(a) an agreement entered into on or after the day on which proceedings commence under this Act;

(b) an eligible financial contract; or

(c) a collective agreement.

Factors to be considered

(3) In deciding whether to make the order, the court is to consider, among other things,

(a) whether the monitor approved the proposed assignment;

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

Restriction

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order

(5) The applicant is to send a copy of the order to every party to the agreement.

Monitors

Duties and functions

23 (1) The monitor shall

(a) except as otherwise ordered by the court, when an order is made on the initial application in respect of a debtor company,

(i) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information, and

(ii) within five days after the day on which the order is made,

(A) make the order publicly available in the prescribed manner,

(B) send, in the prescribed manner, a notice to every known creditor who has a claim against the company of more than $1,000 advising them that the order is publicly available, and

(C) prepare a list, showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner;

(b) review the company's cash-flow statement as to its reasonableness and file a report with the court on the monitor's findings;

(c) make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency and file a report with the court on the monitor's findings;

(d) file a report with the court on the state of the company's business and financial affairs — containing the prescribed information, if any —

(i) without delay after ascertaining a material adverse change in the company's projected cash-flow or financial circumstances,

(ii) not later than 45 days, or any longer period that the court may specify, after the day on which each of the company's fiscal quarters ends, and

(iii) at any other time that the court may order;

(d.1) file a report with the court on the state of the company's business and financial affairs — containing the monitor's opinion as to the reasonableness of a decision, if any, to include in a compromise or arrangement a provision that sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* do not apply in respect of the compromise or arrangement and containing the prescribed information, if any — at least seven days before the day on which the meeting of creditors referred to in section 4 or 5 is to be held;

(e) advise the company's creditors of the filing of the report referred to in any of paragraphs (b) to (d.1);

(f) file with the Superintendent of Bankruptcy, in the prescribed manner and at the prescribed time, a copy of the documents specified in the regulations;

(f.1) for the purpose of defraying the expenses of the Superintendent of Bankruptcy incurred in performing his or her functions under this Act, pay the prescribed levy at the prescribed time to the Superintendent for deposit with the Receiver General;

(g) attend court proceedings held under this Act that relate to the company, and meetings of the company's creditors, if the monitor considers that his or her attendance is necessary for the fulfilment of his or her duties or functions;

(h) if the monitor is of the opinion that it would be more beneficial to the company's creditors if proceedings in respect of the company were taken under the *Bankruptcy and Insolvency Act*, so advise the court without delay after coming to that opinion;

(i) advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the company and its creditors;

(j) make the prescribed documents publicly available in the prescribed manner and at the prescribed time and provide the company's creditors with information as to how they may access those documents; and

(k) carry out any other functions in relation to the company that the court may direct.

Monitor not liable

(2) If the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

***SUPPLEMENTAL PENSION PLANS ACT*, chapter R-15.1**

49. Until contributions and accrued interest are paid into the pension fund or to the insurer, they are deemed to be held in trust by the employer, whether or not the latter has kept them separate from his property.

264. Unless otherwise provided by law, the following amounts or contributions are unassignable and unseizable:
all contributions paid or payable into the pension fund or to the insurer, with accrued interest;
all amounts refunded or pension benefits paid under a pension plan or this Act;
all amounts awarded to the spouse of a member following partition or any other transfer of benefits effected pursuant to Chapter VIII, with accrued interest, and the benefits deriving from such amounts.

Except as far as they derive from additional voluntary contributions or represent a portion of the surplus assets allocated after termination of the plan, any of the above-mentioned amounts that have been transferred to a pension plan contemplated by section 98, with accrued interest, any refunds of and benefits resulting from such amounts, and any pension or payment having replaced a pension pursuant to section 92 are also unassignable and unseizable.

PENSION BENEFITS ACT, 1997, SNL1996 CHAPTER P-4.01

Amounts to be held in trust

32. (1) An employer or a participating employer in a multi-employer plan shall ensure, with respect to a pension plan, that the money in the pension fund; an amount equal to the aggregate ofthe normal actuarial cost, and any special payments prescribed by the regulations, that have accrued to date; and all amounts deducted by the employer from the member's remuneration, and other amounts due under the plan from the employer that have not been remitted to the pension fund are kept separate and apart from the employer's own money, and shall be considered to hold the amounts referred to in paragraphs (a) to (c) in trust for members, former members, and other persons with an entitlement under the plan.

(2) In the event of a liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that under subsection (1) is considered to be held in trust shall be considered to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own money or from the assets of the estate.

Where a pension plan is terminated in whole or in part, an employer who is required to pay contributions to the pension fund shall hold in trust for the member or former member or other person with an entitlement under the plan an amount of money equal to employer contributions due under the plan to the date of termination.

An administrator of a pension plan has a lien and charge on the assets of the employer in an amount equal to the amount required to be held in trust under subsections (1) and (3).

Termination payments

61. (1) On termination of a pension plan, the employer shall pay into the pension fund all amounts that would otherwise have been required to be paid to meet the requirements prescribed by the regulations for solvency, including an amount equal to the aggregate of the normal actuarial cost, and special payments prescribed by the regulations, that have accrued to the date of termination; and all amounts deducted by the employer from members' remuneration, and other amounts due to the pension fund from the employer that have not been remitted to the pension fund at the date of termination.

(2) Where, on the termination, after April 1, 2008 , of a pension plan, other than a multi-employer pension plan, the assets in the pension fund are less than the value of the benefits provided under the plan, the employer shall, as prescribed by the regulations, make the payments into the pension fund, in addition to the payments required under subsection (1), that are necessary to fund the benefits provided under the plan.

***Pension Benefits Standards Act, 1985*, R.S.C., 1985, c. 32 (2nd Supp.)**

Amounts to be held in trust

8 (1) An employer shall ensure, with respect to its pension plan, that the following amounts are kept separate and apart from the employer's own moneys, and the employer is deemed to hold the amounts referred to in paragraphs (a) to (c) in trust for members of the pension plan, former members, and any other persons entitled to pension benefits under the plan:

(a) the moneys in the pension fund,

(b) an amount equal to the aggregate of the following payments that have accrued to date:

(i) the prescribed payments, and

(ii) the payments that are required to be made under a workout agreement; and

(c) all of the following amounts that have not been remitted to the pension fund:

(i) amounts deducted by the employer from members' remuneration, and

(ii) other amounts due to the pension fund from the employer, including any amounts that are required to be paid under subsection 9.14(2) or 29(6).

Where bankruptcy, etc., of employer

(2) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (1) is deemed to be held in trust shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate.

Termination and Winding-up of Pension Plans

Payments by employer to meet solvency requirements

29(6) If the whole of a pension plan is terminated, the employer shall, without delay, pay into the pension fund all amounts that would otherwise have been required to be paid to meet the prescribed tests and standards for solvency referred to in subsection 9(1) and, without limiting the generality of the foregoing, the employer shall pay into the pension fund

(a) an amount equal to the normal cost that has accrued to the date of the termination;

(b) the amounts of any prescribed special payments that are due on termination or would otherwise have become due between the date of the termination and the end of the plan year in which the pension plan is terminated;

(c) the amounts of payments that are required to be made under a workout agreement that are due on termination or would otherwise have become due between the date of the termination and the end of the plan year in which the pension plan is terminated;

(d) all of the following amounts that have not been remitted to the pension fund at the date of the termination:

(i) the amounts deducted by the employer from members' remuneration, and

(ii) other amounts due to the pension fund from the employer; and

(e) the amounts of all of the payments that are required to be made under subsection 9.14(2).

Payment by employer of pension benefits

(6.1) If the whole of a pension plan that is not a negotiated contribution plan is terminated, the employer shall pay into the pension fund, in accordance with the regulations, the amount — calculated periodically in accordance with the regulations — that is required to ensure that any obligation of the plan with respect to pension benefits, as they are determined on the date of the termination, is satisfied.

Application of subsection 8(1)

(6.2) Subsection 8(1) does not apply in respect of the amount that the employer is required to pay into the pension fund under subsection (6.1). However, it applies in respect of any payments that are due and that have not been paid into the pension fund in accordance with the regulations made for the purposes of subsection (6.1).

Overpayment

(6.3) If, on the winding-up of the pension plan, there remains in the pension fund an amount that is more than the amount required to permit the plan to satisfy all obligations with respect to pension benefits as they are determined on the date of termination, the portion of the remaining amount that is, according to the regulations, attributable to the payments made under subsection (6.1) does not constitute a surplus and, subject to subsection (7), is to revert to the benefit of the employer.

Winding-up or bankruptcy

(6.4) On the winding-up of the pension plan or the liquidation, assignment or bankruptcy of the employer, the amount required to permit the plan to satisfy any obligations with respect to pension benefits as they are determined on the date of termination is payable immediately.

Application of subsection 8(1)

(6.5) Subsection 8(1) does not apply in respect of the amount that the employer is required to pay into the pension fund under subsection (6.4). However, it applies in respect of any

payments that have accrued before the date of the winding-up, liquidation, assignment or bankruptcy and that have not been remitted to the fund in accordance with the regulations made for the purposes of subsection (6.1).

CIVIL CODE OF QUÉBEC, chapter CCQ-1991

1262. A trust is established by contract, whether by onerous or gratuitous title, by will or, in certain cases, by law. Where authorized by law, it may also be established by judgment.

2644. The property of a debtor is charged with the performance of his obligations and is the common pledge of his creditors.

2647. The legal causes of preference are prior claims and hypothecs.

3079. Where legitimate and manifestly preponderant interests so require, effect may be given to a mandatory provision of the law of another State with which the situation is closely connected.

In deciding whether to do so, consideration is given to the purpose of the provision and the consequences of its application.

***CONSTITUTION ACT, 1867*, 30 & 31 Victoria, c. 3 (U.K.)**

Old Age Pensions

Legislation respecting old age pensions and supplementary benefits

94A. The Parliament of Canada may make laws in relation to old age pensions and supplementary benefits, including survivors' and disability benefits irrespective of age, but no such law shall affect the operation of any law present or future of a provincial legislature in relation to any such matter.

N° / 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 & NEIL JOHNSON

REPRESENTATIVES-Mis-en-cause

- and -
UNITED STEELWORKERS, LOCAL 6254, UNITED STEELWORKERS, LOCAL 6285
- and -
MORNEAU SHEPELL
- and -
HER MAJESTY IN RIGHT OF NEWFOUNDLAND & LABRADOR, AS REPRESENTED BY THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS
- and -
THE ATTORNEY GENERAL OF CANADA, ACTING ON BEHALF OF THE OFFICE OF SUPERINTENDENT OF FINANCIAL INSTITUTIONS
- and –
REGIE DES RENTES DU QUEBEC

Mis-en-cause

ORIGINAL

ARGUMENTATION OUTLINE OF THE REPRESENTATIVES
of the Salaried Employees and Retirees in response to the Monitor's Amended Motion for Directions with respect to Pension Claims

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