

SUPERIOR COURT

(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

No: 500-11-048114-157

DATE: July 25, 2017

PRESIDED BY THE HONOURABLE STEPHEN W. HAMILTON, J.S.C.

**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 LIMITED
WABUSH LAKE RAILWAY COMPANY LIMITED**

Mises en cause

And

FTI CONSULTING CANADA INC.

Monitor

And

VILLE DE FERMONT
Objecting Party

JUDGMENT ON THE CCAA PARTIES' MOTION
FOR THE ISSUANCE OF AN ORDER APPROVING THE ALLOCATION
METHODOLOGY AND OTHER RELIEF (#516)
AND THE NOTICE OF OBJECTION OF VILLE DE FERMONT

INTRODUCTION

[1] The Court is asked to approve an allocation methodology developed by the Monitor to allocate the proceeds of realization from asset sale transactions and the costs of the CCAA proceedings on a principled basis among the CCAA Parties and, where necessary, among their assets. The Court is also asked to authorize the repayment of some post-filing inter-company indebtedness and the payment of undisputed outstanding property taxes.

[2] One secured creditor opposes the allocation methodology because it argues that the methodology produces an inequitable result when it is applied to the proceeds of sale of certain assets over which the secured creditor claims priority.

CONTEXT

[3] The CCAA Parties initiated proceedings under the *Companies' Creditors Arrangement Act*¹ on January 27, 2015 for the Bloom Lake Parties and May 20, 2015 for the Wabush Mines Parties.

[4] Since those dates, the CCAA Parties entered into sixteen asset sale transactions in which they sold substantially all of their assets.

[5] With respect to each asset sale transaction, the Court issued an Approval and Vesting Order which generally provided, *inter alia*, the following provisions:

- The assets vested in the purchaser free and clear of any security;
- The security attached to the net proceeds from the sale; and
- The net proceeds were held by the Monitor on behalf of the creditors, pending further order of the Court.

[6] As of June 16, 2017, the total amount held by the Monitor from the asset sales and from other sources was \$157,989,000.² With the sale of the Wabush Mine, that amount now exceeds \$160 million.

¹ R.S.C. 1985, c. C-36 (« CCAA »).

[7] The Monitor developed the Proposed Allocation Methodology to allocate the proceeds of realization and the costs on a principled basis. The Monitor summarizes his methodology as follows:

- (a) Realizations from transactions would be allocated amongst specific assets and specific CCAA Parties as set out in each transaction agreement, which, in each case, are the allocations proposed by an arm's length purchaser;
- (b) Non-transaction related realizations specifically attributable to a CCAA Party would be allocated to that CCAA Party. For example cash on hand at the commencement of the CCAA Proceedings and collection of accounts receivable;
- (c) Non-transaction related realizations not specifically attributable to a CCAA Party would be allocated pro-rata based on total realizations. For example, interest on funds held by the Monitor;
- (d) Costs specifically attributable to an asset or asset category would be applied to that asset or category. For example, railcar storage fees would be applied against railcar proceeds;
- (e) Costs specifically attributable to a CCAA Party would be allocated to that CCAA Party. For example, Bloom Lake mine and Wabush Mine direct operating costs would be allocated to BLLP and to Wabush Mine JV respectively;
- (f) Costs not specifically attributable to a CCAA Party would be allocated pro-rata based on net realizations after specifically attributable costs. For example, costs of management and legal and professional costs. Within this category, legal and professional fees billed on the Bloom Lake accounts will be allocated amongst the Bloom Lake CCAA Parties, legal and professional fees billed on the Wabush accounts will be allocated amongst the Wabush CCAA Parties and legal and professional fees billed on the joint Bloom/Wabush accounts will be allocated amongst all of the CCAA Parties; and
- (g) As the Wabush Mines joint venture is not a legal entity, it does not have assets and liabilities in its own right. Accordingly any realizations and costs notionally allocated to Wabush Mines in the foregoing steps would be allocated to the joint venturers, WICL and WRI, based on their respective joint venture interests.³

² Thirty-Eighth Report to the Court Submitted by FTI Consulting Canada Inc., in its Capacity as Monitor, dated June 21, 2017, par. 12.

³ Thirty-Sixth Report to the Court Submitted by FTI Consulting Canada Inc., in its Capacity as Monitor, dated May 26, 2017, par. 36.

[8] The CCAA Parties asked the Court to approve the Proposed Allocation Methodology and to authorize the repayment of some post-filing inter-company indebtedness and the payment of undisputed outstanding property taxes.

[9] A number of creditors objected, principally on the basis that they did not have sufficient information or time to take a position. Concerns were also raised as to whether the Proposed Allocation Methodology and the proposed payments were prejudicial to the potential deemed trusts relating to Pension claims.⁴

[10] The hearing originally scheduled for May 31, 2017 was postponed to June 26, 2017. During that period, the concerns raised by the creditors other than Ville de Fermont were resolved and their objections were withdrawn.

[11] Ville de Fermont maintained its objection and refined its position. It no longer objects to the Proposed Allocation Methodology generally, but it argues that the Proposed Allocation Methodology produces an inequitable result when it is applied to the proceeds of the sale of the Bloom Lake mine and related assets to Québec Iron Ore Inc. and that it should be varied in that instance. It does not contest the repayment of the post-filing inter-company indebtedness and the payment of undisputed outstanding property taxes but argues that the payment that it receives should be greater.

ANALYSIS

1. Proposed Allocation Methodology generally

[12] The Proposed Allocation Methodology is intended to allocate all realizations and costs among the various CCAA Parties and, to the extent necessary, among various assets or asset categories.

[13] The Monitor has developed the Proposed Allocation Methodology on a principled basis, without reference to the result for any specific creditor. In other words, the Monitor developed rules that would be applied in the same way to each realization and cost as opposed to allocating each realization and cost on a case-by-case basis.

[14] Allocating realizations and costs on a case-by-case basis would inevitably lead to disputes as different creditors are treated differently. The better approach is to develop a methodology applicable to all situations.

[15] However, it is important to recognize that a general methodology may not work in all circumstances and that the parties have the right to challenge the general methodology if it produces an inequitable result in particular circumstances.

⁴ Notices of Objection were filed by the Superintendent of Financial Institutions, the Union, Ville de Fermont, the Representative Employees, the Replacement Plan Administrator and the Superintendent of Pensions for Newfoundland and Labrador.

[16] The Court will review the Proposed Allocation Methodology in a general way in this section, and will review the particular application to the Bloom Lake mine proceeds in a separate section. The Court has the power to intervene, whether at the general level or in a specific matter, to ensure that the creditors are treated equitably.⁵

[17] To the extent that it is necessary to allocate the proceeds of a single transaction among different CCAA Parties (in the event of multiple vendors) or different assets or categories of assets (in the event that there are multiple assets or categories of assets and different secured creditors with claims against different assets or categories of assets), the Proposed Allocation Methodology uses as a starting point the contractual allocation of the purchase price among the vendors and among the assets.

[18] The contractual allocation of the purchase price is a reasonable starting point, on the assumption that it is an allocation done by an arm's length third party who has no interest in the allocation of the proceeds.

[19] However, the contractual allocation will not be given the same weight if the creditor can demonstrate that (1) that the purchaser is not at arm's length, (2) that the purchaser has an interest in the allocation of the proceeds, either because it or a related party is a creditor or because it made a deal with a creditor, or (3) that the CCAA Parties negotiated the allocation.

[20] In the present matter, the Monitor testified that the purchasers were typically asked to provide allocations and that the vendors accepted the allocations without negotiation. In those circumstances, we can assume that the purchaser's allocation of the purchase price reflects the purchaser's assessment of the relative value of the assets purchased.

[21] However, even if the purchaser is an arm's length third party with no interest in the allocation of the proceeds, it will nevertheless be open to a creditor to demonstrate that a particular contractual allocation is not reasonable.

[22] Typically, there will be two ways to demonstrate that the purchaser's contractual allocation of the price is not reasonable (1) the purchaser had a reason to allocate the purchase price in a way that does not reflect its assessment of the relative value of the assets, or (2) the purchaser's assessment of the relative value of the assets is clearly wrong.

[23] The burden will be on the creditor challenging the contractual allocation. It will generally not be sufficient to simply say that the purchaser's allocation was tax-driven in the sense that the purchaser may want to allocate more or less of the purchase price to certain assets or categories of assets because of the tax treatment of certain categories of assets, first because there are always tax considerations and second because, even

⁵ *Métaux Kitco inc. (Arrangement relatif à)*, 2016 QCCS 444, par. 48.

then, the allocation must be reasonable in order to withstand scrutiny by the taxation authorities.

[24] To establish that the purchaser's assessment of the relative value of the assets is clearly wrong, the creditor will have to demonstrate a significant departure from the relative value of the assets.

[25] For the non-transaction related realizations, the Methodology divides them into those specifically attributable to a CCAA Party (such as cash on hand at the commencement of the proceedings and accounts receivable collected), and those which are not (such as interest). Those which are specifically attributable to a CCAA Party are attributed to that party, and those which are not specifically attributable to a CCAA Party are allocated pro rata to the realizations. That seems reasonable.

[26] For costs, the approach is similar:

- Costs specifically attributable to an asset or asset category (e.g. storage fees) are applied to that asset or category;
- Costs specifically attributable to a CCAA Party (e.g. mine operating costs) are allocated to that CCAA Party; and
- Costs not specifically attributable to a CCAA Party (e.g. management and legal and professional fees) are allocated pro rata based on net realizations.

[27] The Monitor represented that the Proposed Allocation Methodology is consistent with the allocation methodology approved in the Timminco Limited and Bécancour Silicon Inc. CCAA proceedings.⁶

[28] For all of the foregoing reasons, the Court will approve the Proposed Allocation Methodology, subject to the objection by Ville de Fermont.

2. Proposed repayment and payments

[29] The CCAA Parties also ask the Court to authorize the repayment of certain inter-company funding and the payment of uncontested property taxes due.

[30] These conclusions are not contested by any creditor, except that Ville de Fermont suggests that more of its claim should be paid.

[31] The proposed repayment to Bloom Lake LP by CQIM relates to advances in the amount of approximately \$4.1 million made by Bloom Lake LP to CQIM pursuant to the Bloom Lake Initial Order. The Court is satisfied that the Monitor holds sufficient funds to

⁶ Ontario Court File No.: CV-12-9539-00CL

repay those amounts and that it is appropriate to repay those amounts now to avoid further interest charges.

[32] The partial payment of property taxes relates to amounts that (1) are not contested,⁷ (2) have priority, and (3) are not subject to any prior security including the potential deemed trusts relating to Pension claims.

[33] The Monitor explains that he will not know how much is payable until the Proposed Allocation Methodology is approved and the billing information is updated. He anticipates that there will be amounts payable by Bloom Lake LLP to Ville de Fermont and by CQIM to Ville de Sept-Îles.

[34] Given the preconditions to any such payment and given that the payment will be in the interest of the estate because interest will stop running, the Court will authorize the payments.

[35] It is in the interest of the estate that these amounts be paid or repaid notwithstanding any appeal. The Court will order provisional execution of this portion of its judgment.

3. Allocation of the Bloom Lake mine sale proceeds

[36] The Bloom Lake CCAA Parties sold the Bloom Lake mine and related assets to Québec Iron Ore Inc. on December 11, 2015. The Court issued an Approval and Vesting Order on January 27, 2016, and the transaction closed on April 11, 2016.

[37] The cash portion of the purchase price was \$10.5 million. The purchaser also assumed certain liabilities. The Asset Purchase Agreement included at Schedule R an allocation of the cash portion of the purchase price as between the various sellers. At the request of the Monitor, the purchaser provided a more detailed allocation of the cash portion of the purchase price among the various assets or categories of assets.⁸ The Monitor testified that the contractual allocation was accepted by the CCAA Parties without negotiation.

[38] Ville de Fermont did not contest the sale and it does not now contest the purchase price. Its contestation is limited to the contractual allocation as between three categories of assets in the total amount of \$6.9 million.⁹

⁷ There are substantial unpaid municipal taxes owed to Ville de Fermont, but, as described below, the municipal evaluations are challenged. As a result, the undisputed amount is only \$3.4 million (see 36th Report, par. 45).

⁸ Exhibit OF-1.

⁹ *Ibid.*

Bloom Lake mine fixed assets (buildings and constructions on the site pertaining to the Mining Rights)	\$1,500,000
Bloom Lake Mining Lease and Real Property Leases	\$1,400,000
Bloom Lake Real Property Fermont housing	\$4,000,000
TOTAL	\$6,900,000

[39] The first two categories of assets, to which the purchaser allocated \$2,900,000, represent the mine. The third category, Fermont housing, includes a property referred to as the "hotel" and 28 residences Fermont, divided as follows:¹⁰

"Hotel"	\$2,909,489.77
28 residences (values varying between \$15,718.95 and \$56,168.43)	\$1,090,510.23
TOTAL	\$4,000,000

[40] The purchaser allocated the \$4,000,000 among the residential properties pro rata to their municipal evaluations: the portion of the purchase price allocated to each residential property is equal to 15.8% of the municipal evaluation of that property.¹¹

[41] Ville de Fermont argues that the contractual allocation of the \$6.9 million between the mine and the residential properties is unreasonable and that the purchaser undervalued the mine. It argues that the Court should substitute an allocation of the \$6.9 million which is proportional to the municipal evaluations of the properties:¹²

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Exhibit OF-2.

	Municipal evaluations	Allocation of price
Mine buildings	\$314,710,000 ¹³	\$6,324,370
Mine immoveable	\$3,299,000 ¹⁴	\$66,296
"Hotel"	\$18,435,400 ¹⁵	\$509,334
28 Residences	\$6,909,800	
TOTAL	\$343,354,200	\$6,900,000

[42] The Monitor argued that it was reasonable for the purchaser to place relatively little value on the mine and more value on the residential properties, because the mine is more of a liability than an asset in that it is not operational and has costs of \$1.5 million per month and significant environmental obligations. In any event, the Monitor argues that all parties agree that the residential properties are worth more than \$4 million such that allocating \$4 million to the residential properties cannot be unreasonable.

[43] The two positions lead to very different results. The taxes owing to Ville de Fermont on the mine are in the range of \$16-18 million and the taxes owing on the residential properties are only \$500,000-600,000. As a result, using the contractual allocation, Ville de Fermont receives \$2.9 million from the mine and \$500,000-600,000 from the residential properties, for a total of \$3.4-3.5 million. Using Ville de Fermont's proposed allocation, it receives the full \$6.9 million. In other words, Ville de Fermont receives an additional \$3.4-3.5 million on its proposed allocation.

[44] As mentioned above, the purchaser was asked to provide the contractual allocation and it was accepted by the CCAA Parties without negotiation. There is no suggestion that the purchaser is not at arm's length or that the purchaser has any interest in the allocation of the proceeds. As a result, the Court will presume that the contractual allocation is reasonable and the burden is on Ville de Fermont to prove that it is not.

¹³ Exhibit OF-3.

¹⁴ *Ibid.*

¹⁵ Exhibit OF-4.

[45] Ville de Fermont first suggests that the purchaser had an interest in skewing the contractual allocation to give less value to the mine and more value to the residential properties. It suggests that the purchaser was motivated by tax considerations – it would improve its position in a subsequent sale. However, there was no proof of this interest. Moreover, if, as the CCAA Parties suggest, the purchaser's assessment was that the houses were more likely to be sold and it was trying to reduce the capital gain on a subsequent sale of the houses, that would suggest that allocating more value to the houses was reasonable.

[46] Ville de Fermont also suggests that the contractual allocation may be intended to help the purchaser with its challenge of the municipal evaluation of the mine. Again there is no proof of any such intent. Further, whether the purchaser allocates \$2.9 million or \$6.3 million of the purchase price to the mine will not likely make much difference when it is attempting to reduce the municipal evaluation from \$318,009,000 to \$50,000,000.

[47] The principal argument put forward by Ville de Fermont is that the allocation should be proportional to the municipal evaluations.¹⁶

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

[49] Further, the municipal evaluation of the mine is contested. The CCAA Parties seek to reduce the municipal evaluation of the mine properties from a total of \$318,009,000 to \$105,000,000 for 2013-14-15 and to \$50,000,000 for 2016-17-18. That challenge is being continued by the purchaser. The CCAA Parties also seek a reduction of the municipal evaluation of the hotel from \$12,786,600 to \$6,393,000 in 2013-14-15, and the purchaser seeks a reduction from \$18,435,400 to \$2,500,000 in 2016-17-18.¹⁷ The CCAA Parties and the purchaser do not seek any reduction for the houses.

¹⁶ The *Skeena* case cited by Ville de Fermont does not support its position. In that case, the City of Prince Rupert, as secured creditor for unpaid property taxes, objected to the allocation of costs to the unsold property based on its appraised value, because the appraisal (which was substantially lower than the municipal evaluation) overstated the value of the property (*New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 192, par. 250.

¹⁷ Exhibit OF-8.

[50] The CCAA Parties put forward arguments as to why they contest the municipal evaluation of the mine: the evaluation was established in 2011 and was not adjusted since then to take into account changes in the price of iron ore; and the evaluation was increased by \$140 million because of Phase II, which was never completed. Moreover, as set out above, the mine is not operational, and has costs of \$1.5 million per month and significant environmental liabilities.

[51] The Court can only conclude that the municipal evaluation of the mine is not a reliable indication of its value.

[52] In any event, Ville de Fermont does not argue that the mine is worth \$318 million. In arguing for a pro rata allocation, Ville de Fermont is arguing instead for the notion of relative evaluations: if the mine is worth only 2% of its municipal evaluation, then the residential properties should be worth only 2% of their municipal evaluations.

[53] This argument carries more weight when the properties are more similar. In fact, in its contractual allocation, the purchaser applied the notion of proportionality to the residential properties: they were each allocated 15.8% of their municipal evaluations.

[54] However, in principle, the factors that determine the value of a mine (quantity of remaining iron ore, price of iron ore, operating costs) are very different from the factors that determine the value of a house (characteristics of the house and the local housing market). The value of one need not track the other.

[55] Ville de Fermont argued that the local housing market was closely tied to the mine: if the mine reopens, the residential properties have value, but if the mine does not reopen, the residential properties are worth nothing since there is no demand for them. As a result, Ville de Fermont argues that either both the mine and the residential properties have value or neither has value. In either event, Ville de Fermont argues that the residential properties cannot be worth more than the mine.

[56] This led to a debate between the two witnesses as to the potential market for the residential properties if the mine does not reopen. The Monitor testified that the residential properties have value even if the mine stays shut, because the Fire Lake North project is only 40 kilometres away and the government has announced that the road link to Fermont is being improved. The evaluator for Ville de Fermont testified that the Fire Lake North project will not create a demand for housing in Fermont: it is 90 kilometres away on a bad road, there are already 140 housing units in Fire Lake, and Arcelor purchased the Mont Wright camp which has additional residential units.

[57] This proof is inconclusive. In the absence of better proof, Ville de Fermont has not satisfied its burden of showing that the contractual allocation is unreasonable. As a result, the objection of Ville de Fermont will be dismissed, and the Proposed Allocation Methodology will be approved without any modification.

FOR THESE REASONS, THE COURT:

[58] **GRANTS** the CCAA Parties' Motion for the Issuance of an Order Approving the Allocation Methodology and Other Relief (#516).

[59] **APPROVES** the following allocation methodology, including the purchase price allocations in the purchase and sale transactions approved by the Court:

- (a) Realizations from transactions would be allocated amongst specific assets and specific CCAA Parties as set out in each transaction agreement, which, in each case, are the allocations proposed by an arm's length purchaser;
- (b) Non-transaction related realizations specifically attributable to a CCAA Party would be allocated to that CCAA Party. For example cash on hand at the commencement of the CCAA Proceedings and collection of accounts receivable;
- (c) Non-transaction related realizations not specifically attributable to a CCAA Party would be allocated pro-rata based on total realizations. For example, interest on funds held by the Monitor;
- (d) Costs specifically attributable to an asset or asset category would be applied to that asset or category. For example, railcar storage fees would be applied against railcar proceeds;
- (e) Costs specifically attributable to a CCAA Party would be allocated to that CCAA Party. For example, Bloom Lake mine and Wabush Mine direct operating costs would be allocated to BLLP and to Wabush Mine JV respectively;
- (f) Costs not specifically attributable to a CCAA Party would be allocated pro-rata based on net realizations after specifically attributable costs. For example, costs of management and legal and professional costs. Within this category, legal and professional fees billed on the Bloom Lake accounts will be allocated amongst the Bloom Lake CCAA Parties, legal and professional fees billed on the Wabush accounts will be allocated amongst the Wabush CCAA Parties and legal and professional fees billed on the joint Bloom/Wabush accounts will be allocated amongst all of the CCAA Parties; and
- (g) As the Wabush Mines joint venture is not a legal entity, it does not have assets and liabilities in its own right. Accordingly any realizations and costs notionally allocated to Wabush Mines in the foregoing steps would be

allocated to the joint venturers, WICL and WRI, based on their respective joint venture interests.

[60] **PERMITS** the repayment of approximately \$4.1 million advanced by Bloom Lake LP to CQIM since the start of the CCAA Proceeding.

[61] **PERMITS** the payment on account of outstanding property taxes owed by the CCAA Parties for any portion of the outstanding property taxes that are not in dispute or otherwise contested, provided that:

- (a) there exists no competing claim which may rank equal or higher to the outstanding property taxes pursuant to a security or priority (including the Pension Claims at stake in the Monitor's Motion for Directions with respect to Pension Claims); and
- (b) the proceeds of sale available further to the application of the allocation methodology are sufficient to do so.

[62] **ORDERS** the provisional execution of conclusions 60 and 61 of this Judgment, notwithstanding any appeal and without the necessity of furnishing any security.

[63] **WITHOUT COSTS.**



Stephen W. Hamilton, J.S.C.

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Superintendent of pensions

Date of hearing: June 26, 2017