|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:

WABUSH RESOURCES INC. *ET AL*

Petitioners

-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

MOTION BY THE MONITOR FOR DIRECTIONS WITH RESPECT TO PENSION CLAIMS (#385)

POSITION OF THE MONITOR ON JURISDICTIONAL AND OTHER PRELIMINARY MATTERS

I. INTRODUCTION

1. The Monitor's Motion for Directions with respect to Pension Claims (the **Motion**) was notified to the Service List on September 20, 2016.

2. In the Motion, the Monitor seeks instructions with respect to the adjudication of the Pension Claims (as defined therein) arising out of the DB Plans (as defined therein), more specifically to establish the priority rank, if any, to be afforded to said Pension Claims as a result of the application of "deemed trust" provisions in the applicable pension legislation.

3. The relevant provisions, reproduced at paragraphs 46 and following of the Motion, are found in the Newfoundland & Labrador *Pension Benefits Act*, S.N.L. 1996, c. P-4.01 (the **PBA**) as well as the federal *Pension Benefits Standards Act*, R.S.C. 1985, c. 32 (2nd supp.) (the **PBSA**).

4. The Motion was first served without a return date so as to allow the parties to discuss and agree on a timetable, as appears from paragraph 79 thereof:

> 79. The Notice of presentation in support of the present Motion states that it will be returnable at a future date to be determined by the Court. The Monitor will seek to agree a timetable for the filing of materials and the presentation of the Motion with the CCAA Parties, Representative Counsel, the USW, the Pension Administrator and the relevant regulators that would allow relevant parties sufficient opportunity to respond and ensure the efficient hearing of the present Motion. If the Monitor is unable to reach agreement on a mutually acceptable timetable, it will seek the assistance of the Court in setting an appropriate timetable;

5. Following discussions amongst the Monitor and various interested parties[1], the Motion was first made returnable on a *pro forma* basis on October 28, 2016.

6. 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 Representatives of the Salaried Employees and Retirees (the **Representatives**);

   (b) Notice of Objection dated October 7, 2016, filed by the United Steel Workers, Locals 6254 and 6285 (**USW**); and

   (c) Notice of Objection dated October 7, 2016, filed by Morneau Shepell acting as Replacement Plan Administrator (**Morneau**, and collectively with the Representatives and USW, the **Objecting Parties**).

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[1] The proposed agenda (prepared by the undersigned attorneys) for the second such telephone conference is appended hereto as Appendix A.

7. No additional objection had been filed before the date hereof, although the Monitor understands that the following parties also intend to take position with respect to the issues raised in the Motion:

   (a) Superintendant of Pensions of Newfoundland and Labrador[2];

   (b) Office of the Superintendant of Financial Institutions (**OSFI**);

   (c) Régie des Rentes du Québec; and

   (d) City of Sept-Îles.

8. The Representatives' Notice of Objection argues, *inter alia*, that the interpretation of the relevant provisions with respect to the conditions of existence and/or scope of any deemed trust arising out of the PBA and protecting the Pension Claims should be referred to the courts of Newfoundland & Labrador.

9. No such jurisdictional issue is raised in the Notices of Objection of either USW or Morneau, although both argue that at least some of the issues raised by the Monitor in the Motion are premature and/or ought to be bifurcated at a later stage.

10. While all three Notices of Objection also raised the issue of the Motion being an improper procedural mechanism to adjudicate the issues raised therein, the Monitor understands that this ground of objection is no longer argued.

11. As stated above, the issues raised in the Motion will require the interpretation not only of the PBA provisions, but also of the PBSA. Moreover, the Monitor notes that Notice of Objection filed by the USW raises the potential applicability of the *Loi sur les regimes complémentaires de retraite* (Québec), L.R.L.Q., c. R-15.1 (at para. 31), and that Retraite Québec has appeared in these proceedings following the service of the Motion and manifested its intention to make representations with respect to the adjudication of the Motion.

12. The Monitor is of the view that this Court is competent to hear the Motion as a whole and that it should deal with all the issues and questions raised therein by way of a single decision, unless the Objecting Parties can show valid reasons and sufficient cause to either split the hearing and/or defer some of the issues to another forum.

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[2] A formal Notice of Objection was filed on the date hereof.

II. JURISDICTION: GOVERNING PRINCIPLES

A. JURISDICTION OF QUEBEC COURTS TO APPLY "FOREIGN LAW"

13. The Québec Superior Court indisputably has jurisdiction to apply foreign law and adjudicate issues arising thereunder. Section 2809 of the Civil Code of Québec expressly provides:

> 2809. Judicial notice may be taken of the law of other provinces or territories of Canada and of that of a foreign state, provided it has been pleaded. The court may also require that proof be made of such law; this may be done, among other means, by expert testimony or by the production of a certificate drawn up by a jurisconsult.
>
> Where such law has not been pleaded or its content has not been established, the court applies the law in force in Québec.

14. Contrary to what is alleged in the Representatives' Notice of Objection, expert evidence is not necessary in such instances, as judicial notice may be taken of foreign law.

15. The applicability of foreign law does not disqualify Québec courts from having jurisdiction over a matter. Even in the context of a *forum non conveniens*[3] analysis under Section 3135 of the Civil Code, Québec courts will only consider the applicable substantive law as one of many relevant factors (see *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 SCR 205, at para. 71 for a non-exhaustive list of such factors):

> 3135. Even though a Québec authority has jurisdiction to hear a dispute, it may, exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another State are in a better position to decide the dispute.

16. In *Stormbreaker Marketing and Productions Inc. v. Weinstock*, 2013 QCCA 269 (***Stormbreaker***), a professional liability matter, the Court of Appeal, in reversing a first instance ruling having granted the defendant's motion to dismiss the action on the basis of the *forum non conveniens* doctrine, discussed the relevant factors to be analyzed thereunder.

17. The Court emphasized that, while relevant, the law applicable to the matter at hand (in that case, that of the State of Georgia) is far from determinative. This is so, stated Justice Vézina for the Court, because most if not all instances triggering issues of private international law will also involve foreign law. The Court added that Québec judges are familiar with the common law and that, in any event, proving the law of a foreign jurisdiction does not constitute too heavy a burden:

> [98] Si on revoie les considérations du Juge, portant sur dix points, pour conclure que le for géorgien est préférable, deux aspects principaux en ressortent, soit les coûts et la loi applicable.

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[3] The *forum non conveniens* exception is not raised in any of the Notices of Objection filed to date.

> [99] Quant à cette dernière considération, elle n'est pas d'un grand poids, à mon avis. Parce que le débat porte sur les faits plutôt que sur le droit. Parce que la *common law* est tout de même familière aux tribunaux québécois. Parce que faire la preuve de la loi d'un État américain n'est pas un grand défi, c'est même chose courante.
>
> [100] Et surtout, parce que le critère de la loi applicable ne constitue pas en soi un facteur important. Dans tout litige international, les conflits de lois sont l'ordinaire et non l'exception. [Emphasis added.]

18. Based on the foregoing, the Monitor submits that the mere fact that an issue is to be governed by foreign law cannot, in and of itself, lead to the conclusion that the Court should decline jurisdiction in favour of the foreign Courts (see also the cases of *Sam Levy*, *Nortel Networks* and *Montréal, Maine & Atlantic Canada* discussed below).

B. THE "SINGLE CONTROL" PRINCIPLE

19. The "single control" principle provides that all issues relating to a debtor's insolvency should be decided before a single forum despite the fact that, under different circumstances, in the absence of insolvency considerations, such issues might have been properly disposed of in multiple jurisdictions.

- ***Sam Lévy***

20. The single control principle applicable in insolvency matters was first set out by the Supreme Court of Canada in *Sam Lévy & Associés Inc.* v. *Azco Mining Inc.*, [2001] 3 S.C.R. 978 (***Sam Lévy***), in a matter governed by the *Bankruptcy and Insolvency Act* (**BIA**). Eagler River had been adjudged bankrupt by the Superior Court of Québec. The jurisdictional dispute arose further to the trustee's petition to recoup assets belonging to the debtor and allegedly unduly withheld by Azco Mining Inc. (**Azco**), based in British Columbia.

21. Azco had argued that the Québec Superior Court should refer the trustee's petition before the bankruptcy division of the Supreme Court of British Columbia, which the first judge refused to do. This ruling was subsequently affirmed by the Québec Court of Appeal, and went on to be confirmed by the Supreme Court of Canada as well.

22. In so doing, the Supreme Court relied on the "single control" principle. Justice Binnie, writing for the Court, emphasized the judicial efficiency considerations underpinning the legislative policy favoring the adjudication of all matters arising out of a business' bankruptcy before the same forum:

> [25] The Act establishes a nationwide scheme for the adjudication of bankruptcy claims. As Rinfret J. pointed out in *Boily v. McNulty*, [1928] S.C.R. 182, at p. 186, [translation] "This is a federal statute that concerns the whole country, and it considers territory from that point of view". [...].
>
> [26] The trustees will often (and perhaps increasingly) have to deal with debtors and creditors residing in different parts of the country. They cannot do that efficiently, to borrow the phrase of Idington J. in *Stewart v. LePage* (1916), 53 S.C.R. 337, at p. 345, "if everyone is to be at liberty to interfere and pursue his own notions of his rights of litigation". *Stewart* dealt with the winding up of a federally incorporated trust company in

> British Columbia. As a result of the winding up, a client in Prince Edward Island instituted a proceeding in the superior court of that province for a declaration that certain moneys held by the bankrupt trust company were held in trust and that the bankrupt trust company should be removed as trustee. This Court held that the dispute, despite its strong connection to Prince Edward Island, could not be brought before the court of that province without leave of the Supreme Court of British Columbia. Anglin J. commented at p. 349:
>
> > "No doubt some inconvenience will be involved in such exceptional cases as this where the winding-up of the company is conducted in a province of the Dominion far distant from that in which persons interested as creditors or claimants may reside. But Parliament probably thought it necessary in the interest of prudent and economical winding-up that the court charged with that duty should have control not only of the assets and property found in the hands or possession of the company in liquidation, but also of all litigation in which it might be involved. The great balance of convenience is probably in favour of such single control though it may work hardship in some few cases."
>
> [27] *Stewart* was, as stated, a winding-up case, but the legislative policy in favour of "single control" applies as well to bankruptcy. There is the same public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse. Section 188(1) [BIA] ensures that orders made by a bankruptcy court sitting in one province can and will be enforced across the country. [...] [Emphasis added]

23. The Supreme Court ruled that the *forum non conveniens* doctrine codified as Section 3135 of the *Civil Code* was not relevant in determining whether the matter ought to be tried before the courts of British Columbia. Rather, the proper test is that set out in Section 187(7) BIA, which requires evidence that a proceeding would be "more economically administered" in another forum:

> [62] As to the legal issue, the question is whether arts. 3148 or 3135 of the *Civil Code of Québec* have any application to this proceeding at all. These provisions will only apply in bankruptcy court "[i]n cases not provided for in the [BIA] or these Rules" (*Bankruptcy and Insolvency General Rules*, s. 3). The fact is that s. 187(7) specifically provides that a transfer will be ordered only where there is satisfactory proof that a proceeding will be "more economically administered" in another division or district, which the appellant did not allege, or "for other sufficient cause". The appellant argues that such general words need to be "supplemented" by the more specific provisions of the *Civil Code of Québec*. But this is incorrect. Resort is to be had to the provincial rules only "[i]n cases not provided for". Here, provision has been made. The door is therefore not open to these particular provisions of the *Civil Code of Québec*. This interpretation of s. 3 is not only inevitable, it is desirable. The *Civil Code of Québec* applies across a vast range of subjects. When s. 187(7) speaks of "sufficient cause", it does so in the specific context of bankruptcy. [Emphasis added]

24. As for the import of the applicability of foreign law (in that case, that of British Columbia, pursuant to a stipulation in the agreement entered into between Azco and the debtor prior to the bankruptcy), the Court said:

> [61] The choice of forum objection fails, with respect, both on the facts and on the law. In terms of facts, the only relevant agreements are those to which Eagle was a party. Clause 28 in the June 7, 1996 financing agreement and clause 20 of the management services agreement are both no more than choice of law provisions. The Quebec courts are perfectly able to apply the law of British Columbia. [...] [Emphasis added]

25. The Supreme Court concluded:

> [76] In the present case, we are confronted with a federal statute that *prima facie* establishes one command centre or "single control" (*Stewart*, supra, at p. 349) for all proceedings related to the bankruptcy (s. 183(1)). Single control is not necessarily inconsistent with transferring particular disputes elsewhere, but a creditor (or debtor) who wishes to fragment the proceedings, and who cannot claim to be a "stranger to the bankruptcy", has the burden of demonstrating "sufficient cause" to send the trustee scurrying to multiple jurisdictions. Parliament was of the view that a substantial connection sufficient to ground bankruptcy proceedings in a particular district or division is provided by proof of facts within the statutory definition of "locality of a debtor" in s.2(1). The trustee in that locality is mandated to "recuperate" the assets, and related proceedings are to be controlled by the bankruptcy court of that jurisdiction. The [BIA] is concerned with the economy of winding up the bankrupt estate, even at the price of inflicting additional cost on its creditors and debtors. [Emphasis added]

- ***Century Services***

26. Approximately ten years later, the Supreme Court of Canada revisited the single control principle in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 (***Century Services***), in which the Court was called upon to resolve an operational conflict between provisions of the *Excise Tax Act* and of the *Companies' Creditor's Arrangement Act* (**CCAA**).

27. In doing so, the Supreme Court reiterated the importance of resolving all issues relating to a debtor's insolvency before a single forum:

> [22] While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in Bankruptcy and Insolvency Law:
>
> > They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

> The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. [...] [Emphasis added.]

28. In her reasons for the majority, Justice Deschamps also emphasized the need to strive to harmonize both statutory schemes in interpreting the CCAA and the BIA:

> [24] With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation [References omitted] [...]
>
> [47] Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (Gauntlet, at para. 21). If creditors' claims were better protected by liquidation under the BIA, creditors' incentives would lie overwhelmingly with avoiding proceedings under the CCAA and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the CCAA can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert. [Emphasis added]

- ***AbitibiBowater***

29. The Supreme Court of Canada released another decision of prime importance in 2012 in the matter of *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67 (***AbitibiBowater***).

30. In that matter, the Minister of Environment of Newfoundland & Labrador had issued various orders under the Newfoundland & Labrador *Environmental Protection Act* against AbitibiBowater while the latter was under the protection of the CCAA.

31. The Minister took the position that the orders were not "claims" within the meaning of the CCAA and that, therefore, they were not subject to the stay of proceedings ordered by the Québec Superior Court pursuant to the CCAA.

32. In first instance, Justice Gascon dismissed the argument and held that the Minister's orders were indeed subject to the stay of proceedings. In so doing, he interpreted the provisions of the *Environmental Protection Act*, i.e. a Newfoundland & Labrador statute, to characterize the orders as monetary claims by nature.

33. Leave to appeal to the Court of Appeal was dismissed and the matter eventually escalated to the Supreme Court of Canada.

34. The Supreme Court confirmed the reasoning of Gascon J. and once again mentioned that one of the central features of the CCAA scheme is the single proceeding model:

> [21] One of the central features of the CCAA scheme is the single proceeding model, which ensures that most claims against a debtor are entertained in a single forum. Under this model, the court can stay the enforcement of most claims against the debtor's assets in order to maintain the status quo during negotiations with the creditors. When such negotiations are successful, the creditors typically accept less than the full amounts of their claims. Claims have not necessarily accrued or been liquidated at the outset of the insolvency proceeding, and they sometimes have to be assessed in order to determine the monetary value that will be subject to compromise.

35. Recent case-law stemming from lower courts further evidences the great reluctance of Canadian Courts to allow the fragmentation of insolvency proceedings for the mere reason that foreign law may govern certain issues.

- ***Nortel Networks***

36. For example, in *Nortel Networks Corp. (Re)*, 2015 ONSC 1354, a creditor of Nortel moved for an order to lift the stay to file an action before U.S. Courts.

37. The position of the creditor was grounded on the fact that the agreement to which it was a party contained a forum and choice of law clause providing that New York law was applicable and that any dispute was to be heard before U.S. Courts.

38. The Ontario Superior Court dismissed the motion. In so doing, the Court relied on the "single control" principle and referred to the decisions of the Supreme Court of Canada in *Sam Levy* and *Century Services*.

39. The Court also noted that Canadian Courts often apply foreign law in the context of insolvency proceedings. According to Newbould J., the mere fact that foreign law may be applicable to an issue should not be considered as an important factor in deciding whether insolvency proceedings should be scattered before multiple jurisdictions:

> [27] Another factor referred to by Justice Jurianz [in *Expedition Helicopters v. Honeywell,* 2010 ONCA 351] was if enforcing the forum selection clause would frustrate some clear public policy. I think it follows from *Sam Lévy* that public policy in this country at least precludes a forum selection clause from being controlling in an insolvency situation. A CCAA insolvency proceeding serves a wider spread of interests than the parties to the agreement, including in this case the interests of pension and other claims asserted by the former employees of Nortel. A method that results in the most expeditious and fair determination of the claims of SNMPRI is clearly in the interests of all stakeholders in this CCAA process. [...]

> [29] So far as the forum selection clause providing that the license is to be governed by and construed in accordance with New York law and the federal laws of the United States applicable therein, no evidence has been filed as to what those laws are or to indicate that those laws are in any substantial way different from the laws of this country. Even if they were, Canadian courts can and often have applied foreign law. The recent UKPC claims against NNC and NNL is but one such example. I do not consider this much of a factor, if any, in favour of lifting the stay of proceedings. [...]
>
> [35] A CCAA court should not lightly lose control of the process whereby claims against the debtor are to be determined. [...]
>
> [36] Is SNMPRI a stranger to the bankruptcy in the sense articulated by Binnie J. in *Sam Lévy*? I think not. SNMPRI has participated in and objected to the sales of Nortel's lines of business and it has filed a CCAA proof of claim against the Canadian Debtors. It has not met its burden of demonstrating sufficient reason to displace this Court's jurisdiction to keep all of the SNMPRI claims against the Canadian Debtors within a single proceeding. Even if the onus were on the Monitor and the Canadian Debtors to prevent the stay from being listed, I am of the view that they would have met that onus. [Emphasis added]

- ***Essar Algoma***

40. A similar decision was rendered in *Re: Essar Steel Algoma Inc. et al.,* 2016 ONSC 595. In that case, the debtor sought an order before the Ontario Superior Court declaring that the termination of a contract entered into with a creditor was ineffective and that the latter remained bound to execute its obligations.

41. In response to that motion, the creditor argued that the Ontario Superior Court lacked jurisdiction to determine issues relating to the contract since the latter was governed by Ohio law.

42. The Court relied on the "single control" model to dismiss the creditor's argument and confirmed its jurisdiction over issues relating to the contract:

> [29] The "single control" model also favours a CCAA court to deal with the issues between Essar Algoma and Cliffs. In [*Sam Lévy*] Binnie J. referred to and adopted a "single control" model that favours litigation involving an insolvent company to be dealt with in one jurisdiction. [...]
>
> [30] *Sam Lévy* involved a BIA proceeding. In it, Binnie J. referred to *Stewart*, a winding-up application. I see no reason why the principles in *Sam Lévy* should not be applicable in a CCAA proceeding. In *Century Services* it was noted that the harmonization of insolvency law common to the BIA and CCAA is desirable to the extent possible. The central nature of insolvency and the resolution of issues caused by insolvency are common to both BIA and CCAA proceedings and so too should the underlying principles. [References omitted]

43. As for the fact that the dispute was to be governed by Ohio law, Justice Newbould wrote:

> [80] Ontario courts can and do often apply foreign law. In this case I do not consider the fact that the law to be applied is Ohio law much of a factor, if any.

- ***MMA***

44. Another very interesting case is the decision rendered by Dumas J. in *Montréal, Maine & Atlantic* Canada *Co./Montréal, Maine & Atlantique Canada Cie (Arrangement relatif à)*, 2013 QCCS 5194 (***MMA***).

45. In that case, the insurer of the debtor was seeking leave to file a motion for declaratory relief before U.S. Courts on the ground that the insurance policy was governed by U.S. law.

46. The Québec Superior Court dismissed that argument and refused to lift the stay of proceedings. According to Dumas J., the Québec Superior Court should only decline jurisdiction in exceptional circumstances and the potential application of foreign law is nothing exceptional when it comes to private international law, relying in doing so on *Stormbreaker*, cited above:

> [20] Travelers' main argument is that the legislation governing its insurance policy would be Maine law. But, as recently reiterated by the Court of Appeal [in *Stormbreaker*]:
>
> > [100] Et surtout, parce que le critère de la loi applicable ne constitue pas en soi un facteur important. Dans tout litige international, les conflits de lois sont l'ordinaire et non l'exception.

47. Justice Dumas also referred to the "single control" principle as set out by the Supreme Court in *Sam Lévy* and *AbitibiBowater*, cited above (see paras. 24-25 of his reasons) as further justification of his decision not to allow the insurer to resort to U.S. Courts.

C. DISCRETION TO REFER CERTAIN ISSUES TO A DIFFERENT FORUM

48. As mentioned above, the Court enjoys the discretion to decline jurisdiction in proper circumstances. However, a review of the few cases in which the Court agreed to decline jurisdiction confirms the exceptional nature of such remedy.

- ***Timminco***

49. The first case that comes to mind is the decision upon which the Salaried Members heavily rely i.e. the decision of Morawetz J. in the *Timminco* matter, CV-12-9939-00CL.

50. In that case, Investissement Québec had received interim distributions subject to a reimbursement agreement providing that it might have to reimburse it if certain pension claims were determined to rank ahead of its security.

51. The protocol negotiated and entered into between the parties expressly provided that the decision as to whether the pension claims ranked in priority to Investissement Québec's claim was to be determined by the Québec Superior Court.

52. In its ruling, Morawetz J. merely approved the protocol negotiated between the parties and gave effect to it by referring to the Québec Superior Court the issue of whether the pension claims ranked in priority to Investissement Québec's security charging property located in Québec.

53. As such, the Timminco matter was very different than the situation at hand, inasmuch as the Ontario judge referred the matter to the Québec Superior Court by consent of all interested parties.

54. More importantly, the referral of the pension claims priority dispute to another forum was not ordered on the basis that the Ontario Superior Court of Justice lacked jurisdiction or that it ought to decline jurisdiction in favour of the Québec Superior Court because the matter was governed by Québec law. The order issued by Morawetz J. is silent of these questions, which needed not be debated by the parties, as all stakeholders consented to the change of forum.

55. Morawetz J. referred the matter to the Québec Superior Court in order to enforce a series of agreements entered into by the parties as part of the insolvency proceedings. This situation is completely different from the one at play in the present case and cannot be seen as authoritatively supporting the Representatives' position.

- ***Curragh***

56. A more relevant decision might be the one rendered by Farley J. in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.*, 1994 CanLII 7468 (ON SC) (***Curragh***).

57. In that case, the Ontario Supreme Court agreed to transfer issues relating to the Yukon *Miners Lien Act* before Yukon Courts. Justice Farley's decision was based on the fact that the Yukon statute provided for a unique legislative regime:

> [11] What do we have here regarding the lien claimants under the [*Miners Lien Act*, or MLA] ? [...] This legislation and its concept of the lien affecting the output of the mine or mining claim is apparently unique to the Yukon Territory. It was felt appropriate to have the courts of the Territory deal with the interpretation and entitlement of those provisions. Certainly their approach is the preferable one when looked at from the aspect of one court according due deference to another with a "closer" connection to the situation and this course alleviates the necessity of having to deal with the MLA through opinions on foreign law. It would appear to me on a cursory review that the nature of the lien is an in rem claim against real property interests in the Territory [...]
>
> "Enforcement of the lien is therefore an action *in rem* against the land or money standing in the place of the land" [references omitted]
>
> It would therefore seem to me that I should not do anything which would interfere with the determination of the rights which persons claiming under the MLA would have against the Faro mine (i.e. its output).

58. Justice Farley found that a final determination of all MLA claims and liens ought to be made as early as possible. The main reason behind the referral of these issues to the Yukon courts was that issues relating to the Yukon *Miners Lien Act* provided for *in rem* matter affecting real property interests in Yukon:

> [13] Clearly a solution which allows for the determination of the exact nature and amount of the claim against the Faro mine will be of assistance in marketing that asset. A prospective purchaser will know what he is facing when making an offer for the mine. It would therefore be of significant assistance if this determination could be made rather soon as to clarify the situation before offers are requested. [...]
>
> [16] [...] It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organized and operating under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability. [...] Given the conditions prevailing and these circumstances, it would appear to me that the best practical solution would be that a new owner take over care and custody of this asset through purchase.
>
> [17] Ought I to do anything to assist in this regard? As was stated in *Tezcan v. Tezcan* (1987), 46 D.L.R. (4th) 176 (B.C. C.A.) at p. 179:
>
> > 52. The general rule is that the courts of a country have no jurisdiction to adjudicate on the right and title to lands not situate within its borders. Only the courts of the jurisdiction in which lands are situate, may adjudicate on the rights and title to such lands [references omitted] [...]
>
> [18] However I do not see that these principles answer all the question. It must be recognized that Yukon law and the Yukon courts will determine the amount of the MLA claims and their priority; however this must interface with the general aspect of the defendant's insolvency. [...] [Emphasis added]

- ***Yukon Zinc***

59. A similar decision was made by Justice Fitzpatrick of the Supreme Court of British Columbia in the CCAA matter of *Yukon Zinc Corporation (Re)*, 2015 BCSC 1961, a case where the validity of liens invoked by certain creditors under the MLA was also at stake:

> [1] These applications concern the question of whether the British Columbia or Yukon court should resolve certain issues relating to lien claims advanced in these insolvency proceedings. [...]
>
> [17] Yukon Zinc takes issue with the validity of both the Hy's Lien and the Sidhu Lien. Firstly, it takes the position that the trucking services provided to Yukon Zinc are not lienable under s. 2(1) of the MLA. Secondly, it takes the position that the Claims of Lien were not filed within the prescribed period of time under the MLA, s. 6. [...]
>
> [20] With respect to the lifting of the stay, Hy's and Sidhu only seek to have the Yukon court adjudicate on certain discrete issues: namely, whether the services provided by them can be subject to a lien under the MLA; and, if so, whether their liens were filed within the statutory

deadline. [...] I also understood that both lien claimants submit that the relative priority of any other miners liens filed in the Yukon should be determined by the Yukon court.

[29] On the matter of the territorial competence of this Court, both Hy's and Sidhu have submitted to its jurisdiction in British Columbia [...]

[31] That said, Hy's and Sidhu argue that this Court should exercise its discretion and decline jurisdiction, in favour of certain issues relating to their miners liens claims being addressed by the Yukon Supreme Court as the "more appropriate forum" [...]

Law to be applied

[45] A more compelling circumstance arises from the law to be applied in the determination of this dispute. [...]

[47] Hy's and Sidhu argue that the issues relating to the validity of their miners lien involves the interpretation and application of the MLA, which is a statute unique to the Yukon. I agree with this statement. [...]

[48] Hy's and Sidhu further argue that since the issues arise under the MLA alone, the preferable approach is to have the Yukon court address the issues. Again, there is no dispute that this Court has jurisdiction to apply statutes from other Canadian provinces and territories, just as I did in the Procon Reasons. The issue is, however, whether this Court should decline to exercise its jurisdiction to do so. [...]

[54] Sidhu and Hy's submit that the issues they seek to be addressed before the Yukon court are only related to the application of the MLA and do not interfere with the issues before this Court in these CCAA proceeding. These issues do not involve any priority determinations with other creditors, any property located outside of the Yukon, or engage contract law where British Columbia law might apply. This last point is particularly important in Sidhu's case, as their agreement with Yukon Zinc states that British Columbia law will apply to any dispute under the contract. [...]

[57] In my view, the above factor supports that the Yukon court is the more appropriate forum to adjudicate the very specific issues raised by Hy's and Sidhu on this application. These issues are confined to the interpretation and application of the MLA, a unique piece of legislation that the Yukon courts have familiarity and expertise with. Assessing the validity of the miners liens should not require an application of British Columbia law or involve any CCAA considerations. [...]

[70] In substance, the issue here is to determine which court can better conduct a fair and efficient process to determine the validity of Hy's and Sidhu's lien claims. Needless to say, both courts can undertake that matter, but after considering all of the circumstances, I am satisfied that the Yukon court is clearly the more appropriate forum to achieve that result. [Emphasis added]

60. It bears noting that in an earlier ruling also issued in the Yukon Zinc matter, *Yukon Zinc Corporation (Re)*, 2015 BCSC 836, Justice Fitzpatrick had reached the opposite decision and, in that instance, refused to decline jurisdiction and refer a matter involving MLA liens before the courts of Yukon.

61. In that earlier ruling (referred to in the above excerpt as the **Procon Reasons**), the issues at stake were not limited to the interpretation of the MLA, but rather entailed the interrelationship between the mining liens and other secured creditors' interests, in addition to involving assets located within British Columbia.

62. The Court distinguished the *Curragh* decision on these basis and ultimately retained jurisdiction over the dispute at hand:

> [85] The result in *Canada v. Curragh* can be distinguished on the basis that Farley J. applied the general rule that a court should not adjudicate the right or title to real property not situated within its borders [...] [references omitted]
>
> [86] Further, the issues that arise do not relate to the validity of the 2015 Procon Lien (which is presumed for the purpose of this application), but on the interrelationship between any lien rights and the rights asserted by others, namely Transamine and BCV Bank. [...]
>
> [88] It is not disputed that these types of issues are well within the jurisdiction of the court in these restructuring proceedings. The relief sought by Transamine relates to its status in relation to Yukon Zinc, and the outcome of its application has the potential to substantively affect the course of these proceedings.
>
> [89] As for the law to be applied to the various issues, it is clear that whatever forum is used to resolve these issues, there will be a blend of both British Columbian contract law and Yukon miner's lien law. The majority of the concentrate is located in British Columbia and was in this Province well before the 2015 Procon Lien was registered. Further, the contract rights are to be decided in accordance with British Columbian law, particularly as to if, and if so, when, title to the concentrate passed from Yukon Zinc to Transamine. [...]
>
> [92] It would be impossible in the circumstances to bifurcate the issues based on the applicable law. Even if bifurcation was available, it would be neither a practical nor an efficient strategy in resolving the issues between Yukon Zinc, Procon and Transamine. [...]
>
> [99] However, with respect to this dispute, I do not consider that the Yukon court is the more appropriate forum. I would not exercise my discretion to refuse to exercise this Court's jurisdiction to decide the issues raised on this application. [Emphasis added]

63. The Court went on to conduct the necessary analysis of the relevant provisions of the MLA (paras. 100*ff*).

- ***Smoky River***

64. Another interesting case is the decision rendered by the Alberta Court of Appeal in *Luscar Ltd. v. Smoky River Coal Limited*, 1999 ABCA 179. This decision provides for a good illustration of the general attitude of Canadian Courts towards declining jurisdiction in an insolvency context.

65. In that case, the Court was asked to determine whether the provisions of the CCAA allowed for the establishment of a procedure for resolving a dispute between parties who had previously agreed to refer any dispute arising out of a contract to arbitration pursuant to an arbitration clause.

66. The Court reviewed the case law dealing with the possibility for a CCAA court to decline jurisdiction in favour of another forum, but ultimately opted not to decline jurisdiction. The Court mentioned that its decision was not affecting the substantive rights of the parties, but merely the forum in which such rights would be assessed:

> [63] The Appellants point to cases where a specific issue arising under the CCAA has been sent for resolution to a forum other than the CCAA court. In each of those cases, however, it has been determined that resolution in the other forum would promote the objectives of the CCAA. In each such case, moreover, the CCAA judge has retained control over the impact of the outside determination.
>
> [64] For example, in *Re Philip's Manufacturing Ltd.* (1991), 9 C.B.R. (3d) 1 (B.C. S.C.), the debtor company's landlord alleged that its leases were about to expire since the company had not given requisite notice. The judge noted that it was essential to the reorganization plan that the company be able to remain in the leased premises. He permitted the landlord to pursue proceedings under the *Commercial Tenancy Act*, R.S.B.C. 1979, c. 54. But that legislation contained a summary procedure for determining the issue at hand (whether the landlord was entitled to a writ of possession). The judge, moreover, maintained some control over the process by ordering that, if an order of possession was granted, it would be stayed for as long as the CCAA stay, "to be dealt with in the context of any reorganization plan ultimately brought before the court" (para. 44). Additionally, the summary procedure was to occur in the B.C. Supreme Court, the same court that supervised the CCAA.
>
> [65] Similarly, in *Re Cadillac Fairview Inc.* (1995), O.J. No. 138 (Ont. Gen. Div.), an issue arose about the quantification of a claim affecting the debtor company. Farley J. permitted this issue to be determined by a court in Chicago, because that court undertook to resolve the matter expeditiously and in coordination with the CCAA proceedings.
>
> [66] On the other hand, in *Landawn Shopping Centres Ltd. v. Harzena Holdings Ltd.* (1997), 44 O.T.C. 288 (Ont. Gen. Div.), a plan of arrangement was already in effect when a landlord sought to proceed to arbitration with its claim against the debtor company. Instead, the court ordered that the claim be dealt with by the court under the terms of the plan of arrangement.
>
> [67] <u>These cases compel the conclusion that a judge has the discretion under the CCAA to permit issues to be determined in another forum but is under no obligation to do so. The proper exercise of the discretion will be very fact-dependent</u>.

> [68] As noted by Gibbs J.A. in *Quintette Coal*, supra, at 312, the judicial exercise of discretion under s. 11 should "produce a result appropriate to the circumstances." The power under s. 11 should be exercised in a manner to give effect to the purpose of the CCAA, and not to "seriously ... impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period."
>
> [69] In this case, the chambers judge considered a number of matters in refusing to permit the arbitration. Among these were his view that the arbitration would compromise the CCAA process; that the effect of his order would not be to preclude or postpone the resolution of the dispute but to expedite it; that an expedited resolution of the dispute was critical to the CCAA proceedings given its possible impact on a plan of arrangement; and that it was desirable for Smoky's officers to focus on the re-organization.
>
> [70] These were all legitimate matters to consider. [...] [Emphasis added]

67. In sum, the Monitor submits that an analysis of the relevant case law leads to the conclusion that the Court may, in proper circumstances, decline jurisdiction in favor of another forum, but that such discretion can only be exercised in exceptional circumstances.

68. The "single control" principle strongly favours the resolution of all issues relating to the insolvency of a debtor before a single forum despite the fact that the debtor was conducting business in multiple jurisdictions and that foreign law may be applicable to certain issues.

III. INTERPRETATION OF "FOREIGN" PENSION LEGISLATION BY QUEBEC COURTS

69. A review of the relevant case law demonstrates that Québec Courts have not hesitated to apply statutes governing pension plans adopted by other Canadian legislatures.

70. The first example that comes to mind is obviously the decision rendered by this Court in this very file on June 26, 2015.

- ***Bloom Lake***

71. In *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCS 3064, this Court indeed examined Sections 32 and 61(2) PBA:

> Effectiveness of the N&L [PBA] deemed trust in CCAA proceedings
>
> [81] The N&L Superintendent relies on the combined effect of Sections 32 and 61(2) of the [PBA] [...]
>
> [82] The key provision, Section 32(2) [PBA], is virtually identical to Section 8(2) PBSA. As a result, much of the analysis set out above applies here as well.
>
> [83] However, the analysis takes a different turn once one reaches the conclusion that it is difficult to reconcile the broad deemed trust under Section 32(2) [PBA] with the more limited protection under Section 6(6) and 36(7) CCAA.

> [84] This is a conflict between provincial legislation and federal legislation. Constitutional doctrine instructs the courts to try to interpret the federal and provincial legislation in such a way as to avoid the conflict, but this is not the same exercise as trying to find the intent of a single legislator who adopted conflicting pieces of legislation.
>
> [85] For the purposes of this analysis, the Court will assume that the [PBA] is valid and is intended to be effective in an insolvency context. This means that the province granted greater protection to pension obligations than the federal legislator recognized in the CCAA. The principles of interpretation set out above do not apply to resolve a conflict between a federal statute and a provincial statute. There is no basis for interpreting the statutes in such a way as to make them consistent.
>
> [86] There is also a potential conflict with respect to the priority of the interim Lender Charge: under Section 11.2 CCAA, the Court can create an interim lender charge over all of the debtor's property and give it priority over all other charges, except that the province has created a deemed trust which, if it is effective, subtracts assets from the debtor's property and makes them unavailable to be charged in favour of the interim lender.
>
> [87] The question is therefore whether the province can create such a charge that could prevent the Court from granting priority to an interim lender charge.

72. Although they were not rendered in the context of insolvency proceedings, two decisions from the Québec Court of Appeal also provide worthy guidance inasmuch as they demonstrate that Québec courts will not shy away from interpreting extra-provincial statutes governing pension plans.

73. In both, the Court of Appeal analyzed the provisions of the Ontario *Pension Benefits Act*. More specifically, the Court interpreted what is commonly referred to as the "Rule of 55", although such rule does not exist under Québec law.

- ***Emerson Électrique***

74. In *Emerson Électrique du Canada ltée v. Chatigny*, 2013 QCCA 163, the Court of Appeal held that the "Rule of 55" was applicable to Québec employees as a result of certain representations by the employer to that effect :

> [1] The appellant Emerson Electric of Canada Limited seeks the reversal of a judgment of the Superior Court rendered on April 20, 2011 by the Honourable Mr. Justice Kevin Downs that condemned it to pay the seven respondents a total of $768,433 arising out of the entitlement they claimed under their pension plan for what is commonly referred to as the "Rule of 55". [...].
>
> [2] The Rule of 55 and its impact on terminated employees was conveniently described by Gascon, J., then a judge of the Superior Court, in a closely similar although not completely identical case involving Emerson and its unionized employees arising out of the same sequence of events, as follows:
>
> [8] Cette disposition traite de l'application potentielle de ce que les parties appellent la Règle du 55 et qu'elles décrivent ainsi :

> La règle de 55
>
> Normalement, lorsqu'un employé démissionne ou qu'il est licencié, il a droit à une rente différée, établie en fonction de son âge et de son ancienneté au moment de sa démission ou de sa cessation d'emploi. La rente commence à être versée lorsque l'employé atteint l'âge de 65 ans ou, moyennant une réduction, à partir du moment où il a 55 ans.
>
> La règle de 55 établie par la *Loi sur les régimes de retraite de l'Ontario* s'applique lorsqu'un régime de retraite est liquidé (le passif s'éteint) en totalité ou en partie et lorsque, au moment de la liquidation, la somme de l'âge de l'employé et de son ancienneté égale au moins 55.
>
> Si l'employé répond aux critères d'admissibilité ci-dessus, il reçoit une rente différée plus généreuse, étant donné que :
>
> a) La rente est calculée en fonction du plus bas âge auquel il aurait pu prendre sa retraite s'il n'avait pas été licencié.
>
> b) Il peut commencer à recevoir sa rente au plus bas âge auquel il aurait été admissible à la retraite.
>
> [9] Cette règle s'applique donc lorsque le régime de retraite est liquidé en totalité ou en partie et qu'au moment de cette liquidation, l'âge de l'employé combiné à son ancienneté égalent au moins 55. [Rule of 55] provient de l'article 74 du *Pension Benefits Act* de l'Ontario qui n'a pas d'équivalent dans la *Loi sur les régimes complémentaires de retraite* du Québec. L'impact de son application est majeur pour les salariés : la valeur de transfert de leur rente peut alors aisément passer du simple au double. [...]
>
> [16] [...] The trial judge was therefore right to conclude that Emerson had to apply the Rule of 55 to its employees in the same way that Nortel had done in the past. [Emphasis added]

- ***Bourdon***

75. In *Bourdon v. Stelco inc.*, 2004 CanLII 13895 (QC CA), the majority of the Court reached a contrary decision and held that the "Rule of 55" provided under Ontario law was not applicable to the Québec employees of Stelco. In so doing, the Court once again interpreted the relevant provisions of the Ontario *Pension Benefits Act* in order to determine the scope of its application (see paras. 132-137 of the reasons of Morin J.A. for the majority, as well as paras. 78-85 of the reasons of Robert J.A., dissenting).

IV. CONCLUSION AND PROPOSED COURSE OF ACTION

76. In light of the foregoing, the Monitor is of the view that this Court is clearly competent to hear all of the questions raised by the Motion.

77. The Monitor also considers that all of these questions would be best adjudicated in the context of a single hearing on the basis of a joint set of facts to be agreed by the parties.

78. The facts are largely uncontested. The Monitor understands that the only outstanding questions of mixed facts and law are:

(a) the right of the Wabush CCAA Parties to prorate the normal cost contribution owing to the Union DB Plan for the month of December 2015 in light of the plan's termination as of December 15, 2015 (see para. 32 of the Motion); and

(b) the characterization of certain special payments (referred to in the Motion as Catch-Up Special Payments – see paras. 35-40), owing pursuant to an actuarial report dated July 2015, as pre- or post-filing.

79. While the Objecting Parties may not agree with the formulation of the questions of law raised in the Motion and/or argue in favour of a bifurcation of some of the questions to a later stage, the Monitor maintains that all issues identified at paragraph 76 of the Motion need to be resolved in order to allow a distribution to creditors.

80. As for additional questions of law, the Monitor is of the view that, other than those raised in the Motion, the only new questions of law stemming from the Notices of Objection filed as well as subsequent discussions between the Monitor and various stakeholders are:

(a) the potential application of the *Loi sur les régimes complémentaires de retraite* (Québec), including with respect to the minority of members not residing in Newfoundland & Labrador (see paras. 22-23 of the Motion);

(b) the ranking of the Pension Claims, should they be found to constitute secured claims by virtue of the "deemed trust" provisions, including in relation to pre-filing conventional secured creditors, as well as creditors benefiting from prior claims pursuant to Section 2651 of the Civil Code of Québec (should the deemed trust be found to be enforceable as against assets located in Québec or sale proceeds thereof); and

(c) the impact, if any, of the lien and charge in favour of Morneau in its capacity as plan administrator provided for at Section 32(4) PBA.

81. The Monitor remains open to consider any proposed reformulation of the questions set out at paragraph 76 of the Motion in order to streamline the adjudication process, but notes that:

(a) many of these questions will need to be answered by this Court either because they are "core" insolvency issues or because they impact assets located in this Province;

(b) any proposed referral of discrete questions to the courts of Newfoundland & Labrador will require the splitting of interrelated issues;

(c) any such birfurcation would bring about potential delays both in first instance and possibly on appeal, in addition to entailing significant costs for the estate if the issues are to be adjudicated before multiple forums;

(d) should it agree to hear all the issues stemming from the Motion as part of a single hearing, as the Monitor proposes, this Court would remain at liberty and may well decide in its discretion not to address or settle certain discrete issues it may deem fit to leave open.

82. As such, and as stated above, the Monitor continues to support a single hearing before this Court in order to adjudicate at once all questions of facts and/or law arising out of the Motion.

THE WHOLE RESPECTFULLY SUBMITTED.

Montréal, December 15, 2016

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APPENDIX A
Agenda to Conference Call

Follow-up on 18-10-16 call. Proposal to be circulated by "Pension Interests" later this week concerning questions to submitted to CCAA Court and possible reference to N&L Court. Need to clarify possible application of Quebec pension legislation and possible involvement of the RRQ.

1. Jurisdictional issues: what questions should be deferred to Newfoundland and what questions should remain with the CCAA Court? Is there a sequence in which these questions need to be addressed?

2. Procedural issues: do you insist that the Monitor issue Notices of Dismissal or Revision and bring a Motion upon receipt of Notices of dispute for adjudication for the Court?

3. Facts/Evidence: (i) identification of disputed facts in the Monitor's Motion; (ii) preparation of affidavits setting out additional relevant facts to be considered by the Court; (iii) need to adduce live testimony at the hearing on the merits.

4 Questions: (i) possible reformulation of questions as submitted by the Monitor; (ii) formulation of additional questions.

5. Proposed timeline: time needed to file Notices of Objection or other form proceedings concerning the merits, including Argumentation Outlines.

6. Expected duration of hearing on the merits: 1 or 2 days?

NO: 500-11-048114-157

SUPERIOR COURT
DISTRICT OF MONTREAL

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

WABUSH RESOURCES INC. *ET AL*

Petitioners

-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

MOTION BY THE MONITOR FOR DIRECTIONS WITH RESPECT TO PENSION CLAIMS (#385)

POSITION OF THE MONITOR ON JURISDICTIONAL AND OTHER PRELIMINARY MATTERS

ORIGINAL

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