C A N A D A
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

No: 500-11-048114-157

SUPERIOR COURT
(Commercial Division)
(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.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 QUEBEC IRON MINING ULC, WABUSH IRON CO. LIMITED AND WABUSH RESOURCES INC.

Petitioners

-and-

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

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

REPLY OF THE SUPERINTENDENT OF PENSIONS OF NEWFOUNDLAND & LABRADOR

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1. After reviewing the other submissions, the Superintendent of Pensions of Newfoundland & Labrador would briefly reply as follows.

LIQUIDATION

2. The Monitor has gone to great technical lengths to avoid what, in the Superintendent's respectful view, is a simple and inevitable conclusion: that the present CCAA proceedings have constituted, from the very beginning, a liquidation of the Wabush CCAA parties.

3. The Monitor appears to subscribe to the view that, in order to qualify as a "liquidation", the process must be (1) formal and irrevocable; and (2) the employer's property as a whole must vest with a third-party officer tasked with the realization and distribution of proceeds to creditors (paragraph 135 of the Monitor's Outline of Argument).

4. There are a number of problems with this interpretation.

5. To begin, the Monitor's interpretation simply ignores the plain meaning of the word "liquidation".

6. This term's plain meaning has not changed since the Supreme Court's decision in *Dauphin Plains v. Xyloid Industries Ltd. and the Queen*, [1980] 1 S.C.R. 1182 [Tab 20 of the Monitor's Authorities] was rendered. In that case, Pigeon J., writing for the majority, was tasked with deciding whether the sale

of all the assets of an insolvent debtor by a receiver was a "liquidation, assignment or bankruptcy".

7. In canvassing the plain meaning of the term liquidation, Pigeon J. quoted with approval the following statement by Middleton J.A. in *Davey v. Gibson* (1930), 65 O.L.R. 379:

> 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."

- *Dauphin Plains v. Xyloid Industries Ltd. and the Queen*, [1980] 1 S.C.R. 1182 [Tab 20 of the Monitor's Authorities], at pp. 1202.

8. In that case, Pigeon J. concluded that there was "no reason not to give the word 'liquidation' its wide meaning in usual language". This approach has never since been questioned, and the Superintendent submits that it represents the correct approach to interpreting the term "liquidation" in this context.

- *Dauphin Plains v. Xyloid Industries Ltd. and the Queen*, [1980] 1 S.C.R. 1182 [Tab 20 of the Monitor's Authorities], at pp. 1200-1201.

9. Second, the Monitor has attempted to draw unduly technical distinctions that are meaningless when judged from the perspective of the deemed trust's protective purpose. Under the modern method of statutory interpretation, this protective purpose must inform section 32's interpretation.

10. What was of concern to the legislature is the possibility that all of a corporation's assets are sold and the proceeds are distributed, leaving certain vulnerable creditors with no viable route to seek relief. Judged from this perspective, it matters not whether the liquidation is overseen by a third-party officer or not. And it matters not whether the corporate entity is dissolved after its own liquidation, or whether it is simply left as an empty shell.

11. Third, the Monitor's restrictive interpretation might actually exclude *most* liquidation proceedings under business corporations legislation. Typically, a liquidating company will proceed with *its own* liquidation.

    - See e.g. sections 210(3) and 211(1)-(7) of the *Canada Business Corporations Act*.

12. The company's assets are traditionally not vested with a third-party tasked with selling the company's assets and distributing the proceeds, as the Monitor's definition of the term "liquidation" requires.

13. Fourth, the Monitor's interpretation – which requires that the liquidation process be "formal and irrevocable" – would also exclude liquidations that occur in the context of a receivership. In this, the Monitor is essentially asking this Honourable Court to overturn the Supreme Court of Canada's decision in *Dauphin Plains v. Xyloid Industries Ltd. and the Queen*, [1980] 1 S.C.R. 1182 [Tab 20 of the Monitor's Authorities]. In that case, the majority concluded that a liquidation in the context of receivership proceedings can trigger the deemed trust then posited by the *Income Tax Act*, notwithstanding the fact that a receivership may not necessarily result in a liquidation.

> The remaining question is whether the realization by the receiver is a "liquidation, assignment or bankruptcy" within the meaning of the provisions under consideration. This question was considered by Osler J. in *Royal Trust Co. v. Montex Apparel Industries Ltd.* [...]:
>
> > Although no authority on this branch of the case was cited to me, it is trite law that taxing statutes are to be strictly construed and, in my view, a receivership by order of the Court is not a liquidation, assignment or bankruptcy and hence, neither s. 40 of the *Unemployment Insurance Act* nor s. 24 of the *Canada Pension Plan* have application, regardless of the above reasons. On the facts of the present case, it appears that the receiver has in reality been engaged in liquidating the defendant's enterprise. However, as

> was pointed out by counsel for the trustee, liquidation is not the inevitable result of a receivership and indeed, there have been many successful receiverships which have resulted in the enterprise being handed back to its owner as a going concern. It cannot be known with any degree of certainty at the moment of the appointment of a receiver whether in fact liquidation is inevitable and the effect of the various statutes must be assessed as at that moment. The task of the receiver might well be made an impossible one if the application of these statutes were made to await the outcome of his endeavours rather than being ascertainable upon his appointment.
>
> With respect, I am unable to agree. We are not concerned with a situation where the receivership does not end up in a liquidation, just as when considering a distribution in bankruptcy one is not concerned with the situation where the receiving order is discharged. We are here dealing with a receivership which was completed by the sale and distribution of all the assets of the employer company.
>
> [...]
>
> It appears to me that there is no reason not to give the word "liquidation" its wide meaning in usual language.

- *Dauphin Plains v. Xyloid Industries Ltd. and the Queen*, [1980] 1 S.C.R. 1182, at pp. 1200-1201.

14. As authority for its interpretation, the Monitor relies on the judgment of Osler J. in *Royal Trust Co.* which was explicitly rejected by the Supreme Court in *Dauphin Plains* (see paragraph 166 of the Monitor's Outline of Argument).

15. As a final resort, the Monitor has also attempted to argue that the meaning of the term "liquidation" has changed since *Dauphin Plains*, since there are now defined liquidation processes in federal and provincial business corporations statutes. These voluntary liquidation processes inevitably end with the company in question being dissolved. Therefore, the Monitor concludes, in order to qualify as a liquidation, the process must end with the dissolution of the company.

16. With respect, this too is unconvincing, both because the relevant phrasing of Newfoundland & Labrador*'s PBA* was likely modelled off of older legislation - whose meaning remains unchanged –, and because business corporations

statutes generally refer to liquidation and dissolution as two *distinct* legal processes.

- See e.g. section 211(1) of the *CBCA*, which provides as follows:

  > The directors may propose, or a shareholder who is entitled to vote at an annual meeting of shareholders may, in accordance with section 137, make a proposal for, the voluntary liquidation and dissolution of a corporation.

17. Simply put, the Monitor has failed to advance a definition of the term "liquidation" that could even *plausibly* be supported by the term's plain meaning, read in light of its context and purpose.

PARAMOUNTCY

18. The Monitor and the CCAA Parties first submit that a provincial deemed trust can only take effect if it is expressly recognized in the CCAA.

19. This proposition is directly at odds with the guiding principle of cooperative federalism, which promotes the overlap and interplay between federal and provincial legislation enacted in the pursuit of public interests.

- *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22, at para. 36.

- *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at para. 22.

20. Put simply, provincial law applies regardless of whether or not it is explicitly recognized and incorporated into the CCAA, and continues to apply until it is ousted by the doctrine of federal paramountcy. This represents the opinion of a unanimous Supreme Court of Canada in *Indalex*:

> [51] [...] Provincial legislation defines the priorities to which creditors are entitled until that legislation is ousted by Parliament. Parliament did not expressly apply all bankruptcy priorities either to *CCAA* proceedings or to proposals under the *BIA*. [...] This was not a case in which a failed arrangement forced a company into liquidation under the *BIA*. Indalex achieved the goal it was pursuing. It chose to sell its assets under the *CCAA*, not the *BIA*.
>
> [52] The provincial deemed trust under the *PBA* continues to apply in *CCAA* proceedings, subject to the doctrine of federal paramountcy (*Crystalline Investments Ltd. v. Domgroup Ltd.*,

2004 SCC 3 (CanLII), [2004] 1 S.C.R. 60, at para. 43). The Court of Appeal therefore did not err in finding that at the end of a *CCAA* liquidation proceeding, priorities may be determined by the *PPSA*'s scheme rather than the federal scheme set out in the *BIA*.

- *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271 [Tab 35 of the Superintendent's Book of Authorities], paras. 51-52, per Deschamps and Moldaver JJ., with the concurrence of McLachlin C.J., Cromwell and Rothstein JJ. at para. 242, and LeBel and Abella JJ. at para. 265.

21. The Monitor and CCAA Parties also argue that the provincial deemed trusts would disturb the priorities outlined in the CCAA. However, as Justice Deschamps recognized in *Indalex*, the CCAA does not set out an exhaustive scheme of priorities, as does section 136(1) of the *BIA*. There is therefore no risk that giving effect to a provincial deemed trust will allow pensioners to "jump the queue" or that such provincial legislation would otherwise disturb a scheme of distribution set out under federal law.

22. Instead, the provincial deemed trusts would only supplement the super-priorities recognized in sections 6(6) and 36(7) of the CCAA, an acceptable form of overlap and interplay that modern federalism jurisprudence encourages.

23. Finally, the opposing parties argue that, through amendments that came into effect in 2009, Parliament decided to afford super-priority status to some pension obligations, but not to others. According to their argument, for a provincial deemed trust to disturb this choice in any way would amount to a frustration of purpose.

24. There are a number of issues with this final argument.

25. First, it relies essentially on the maligned doctrine of "covering the field" that is incompatible with a restrained approach to the doctrine of paramountcy. Most substantive statutory provisions can be framed as a legislative attempt to balance at least two competing interests. It will often be the case that Parliament *could* have afforded more protection for one particular constituency, but chose not to. To recognize a frustration of purpose in these circumstances would dramatically expand the circumstances in which paramountcy can be successfully invoked. It would amount to a repudiation of the Supreme Court of Canada's repeated insistence that paramountcy should be applied with great restraint, and that the interplay and overlap of federal and provincial legislation should be favoured.

- *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419 [Tab 33 of the Superintendent's Book of Authorities], at para. 21.

- *Bank of Montreal v. Marcotte*, [2014] 2 SCR 725, 2014 SCC 55 [Tab 16 of the Superintendent's Book of Authorities], at para. 72.

26. Just as troubling, the "covering the field" doctrine can unintentionally promote results which may be completely contrary to Parliament's intentions. For instance, Parliament appears to have limited its "super-priority" protection for pension funding because it was concerned that affording broader protection would adversely impact the cost of credit.

27. However, if this legislative decision renders inoperative any and all provincial deemed trusts, this may benefit other creditors such as municipalities without Parliament ever having desired so.

28. Fundamentally, what the Supreme Court of Canada's jurisprudence makes clear is that Parliament can only "cover the field" if it has the explicit intention of barring any provincial legislative action with regard to a specific question, an intention which must be manifested in "very clear statutory language".

- *Rothmans, Benson & Hedges Inc. v. Saskatchewan,* [2005] 1 SCR 188, 2005 SCC 13 [Tab 32 of the Superintendent's Book of Authorities], at para. 21.

- *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419 [Tab 33 of the Superintendent's Book of Authorities], at para. 27.

29. There is no such clear and explicit statutory language in sections 6(6) and 36(7). Moreover, none of the materials submitted to this Honourable Court suggest that Parliament intended its 2009 amendments bar provinces from legislating in an area which undoubtedly falls within its fulsome competence over property and civil rights.

30. Finally, there are ways of reconciling sections 6(6) and 36(7) of the CCAA with the provincial deemed trusts. According to Supreme Court's "fundamental rule of constitutional interpretation", when a "federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes".

- *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22 [Tab 19 of the Superintendent's Book of Authorities], at para. 75.

- *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419 [Tab 33 of the Superintendent's Book of Authorities], at paras. 20-22.

31. The evidence that the Monitor has submitted suggests only that Parliament decided not to afford "super-priority" status to an employer's obligations to fund pension plan deficiencies through special payments. Provincial deemed trusts can continue to afford lesser priority status to the balance of an employer's payment obligations without frustrating this decision.

LIEN AND CHARGE

32. It has been argued that the lien and charge described at section 32(4) of Newfoundland & Labrador's *PBA* cannot take effect in a CCAA proceeding because the Plan Administrator is not a "secured creditor" as defined in the CCAA.

33. Put simply, meeting the definition of "secured creditor" under the CCAA is not a prerequisite. In the context of a distribution following a CCAA liquidation, provincial law simply applies on its own, independently, and continues to do so until it is ousted by the doctrine of federal paramountcy.

34. On the Superintendent's reading of *Indalex*, the lien and charge created by provincial legislation does not need to meet the definition of secured creditor under the CCAA in order to take effect. Provincial legislation simply continues to operate on its own, independently, and continues to do so until it is ousted by the doctrine of federal paramountcy.

35. There is indeed a vital distinction to be drawn between the present CCAA proceedings and the Monitor's principal authority, *Harbert Distressed Investment General Chemical Canada Ltd.*, 2007 ONCA 600 [Tab 10 of the Monitor's Book of Authorities].

36. In *Harbert*, a lien and charge was being asserted during the course of bankruptcy proceedings. As the Court of Appeal noted in *Harbert*, the *BIA* sets out a scheme of priorities governing the payment of creditors. Those creditors meeting the definition of "secured creditors" in s. 2 of the *BIA* are paid out first. Then s. 136(1) sets out a list of other creditors who, subject to the rights of secured creditors, are to be preferred and paid according to the priority listed in that subsection.

37. Thus, in *Harbert*, it was *essential* that the lien and charge fit within the definition of "secured creditor" under the *BIA* - which it ultimately did not.

38. The situation is vastly different under the *CCAA*. The CCAA does not set out a scheme of distribution akin to section 136(1) of the *BIA*. There is indeed very little federal law that directs how the proceeds of a CCAA liquidation are to be distributed. As such, there is simply no need, as a matter of law, for the holder of a lien and charge to fall within the definition of a "secured creditor" in order for the lien and charge to take effect at the end of a CCAA liquidation proceeding.

PRIORITIES AND SCOPE OF QUEBEC'S *SPPA*

39. As a subsidiary argument, the Ville de Sept-Îles has argued that amounts owed to it as unpaid property taxes constitute a priority that would rank ahead of any potential deemed trust created by Quebec's *SPPA*. This argument is founded on one of two alternate bases:

    a. First, that the unpaid property taxes constitute a prior claim which would rank ahead of any deemed trust created by the *SPPA*; or,

    b. Second, that the priority conferred on these unpaid property taxes precedes the deemed trust created by the *SPPA*, and ought to be preferred on that basis.

40. While these are matters of Quebec provincial law, the Superintendent respectfully disagrees and would submit as follows.

41. First, the deemed trust under section 49 of the *SPPA* was found to be a "true trust" in *Timminco ltée (Arrangement relative à)*, 2014 QCCS 174 [Tab 37 of the Superintendent's Book of Authorities]. This trust is further buttressed by section 264 of the *SPPA*, which provides that all contributions paid or payable into the pension fund are unassignable and unseizable.

> 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:
>
> (1) all contributions paid or payable into the pension fund or to the insurer, with accrued interest;

(2) all amounts refunded or pension benefits paid under a pension plan or this Act;
(3) 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.

- See *Timminco ltée (Arrangement relative à)*, 2014 QCCS 174 [Tab 37 of the Superintendent's Book of Authorities], see especially para. 132.

42. Sections 49 and 264 of the *SPPA* should prevail in the event of conflict over the general provisions regarding prior claims in the *Civil Code of Quebec*. The provisions of the *SPPA* are more specific, and relate explicitly to what security the legislator intended to confer on pension plan funding. Moreover, regardless of whether, as a matter of law, section 49 constitutes a "true trust" or simply a floating charge, it is clear that by invoking the concept of the trust, the Quebec legislator has signalled that it intends to afford these amounts the highest possible priority. It is in the very nature of a trust under Quebec civil law that the property in question falls outside of the debtor's own patrimony, and therefore cannot be the subject of a charge or prior claim from the debtor's creditors.

43. If the timing of these respective priorities is relevant, the Superintendent notes that the deemed trust arose before most of the unpaid property taxes became due. In the Superintendent's Outline of Argument, it was submitted that the deemed trust created by Newfoundland & Labrador's *PBA* and by the federal *PBSA* was triggered by a liquidation which would have begun at the outset of the Wabush CCAA proceedings on May 20, 2015. The deemed trust provided by section 49 of the *SPPA*, which is not subject to a triggering event such as a "liquidation", would have arisen earlier.

44. As this Honourable Court noted in its decision dated November 17, 2016, at the time of the initial Wabush orders, the Wabush parties owed $1,071,001.54 in unpaid property taxes to the City of Sept-Îles, including interest. From the

time of its initial order to the time the properties in question were sold in March 2016, another $9,211,693.40 became payable.

45. Any priority or real right which extends to these later amounts would have arisen *after* the *SPPA* and the *PBA*'s deemed trust would have been triggered.

THE WHOLE RESPECTFULLY SUBMITTED.

MONTREAL, June 21, 2017

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