C A N A D A

PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

N^{o} 500-09-
C.S. 500-11-048114-157

COURT OF APPEAL

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED:

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

APPLICANT (Mise-en-cause)

v.

FTI CONSULTING CANADA INC.

RESPONDENT (Monitor-Petitioner)

-and-

BLOOM LAKE GENERAL PARTNER LIMITED, QUINTO MINING CORPORATION, 8568391 CANADA LIMITED, CLIFFS QUEBEC IRON MINING ULC, WABUSH IRON CO. LIMITED AND WABUSH RESOURCES INC.

RESPONDENTS (Debtors)

-**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

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

MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON

UNITED STEEL WORKERS, LOCALS 6254 AND 6285

RETRAITE QUÉBEC

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

VILLE DE SEPT-ÎLES

Mises-en-cause

NOTICE OF APPEAL
(Article 352 *C.C.P.*)
Appellant
October 2, 2017

A. INTRODUCTION

1. The Superintendent of Pensions of Newfoundland & Labrador appeals the decision of Mr. Justice Stephen Hamilton (the "**Motion Judge**") of the Superior Court of Quebec on the Amended Motion by the Monitor for Directions with Respect to Pension Claims in *Arrangement relatif à Bloom Lake*, 2017 QCCS 4057 (Court File S.C. No. 500-11-048114-157) (the "**Motion Decision**") dated September 11, 2017, and attached hereto as Annex A. The hearing before the Motion Judge was held on June 28 and 29, 2017.

2. The Motion Judge granted the Amended Motion for Directions by the Monitor, FTI Consulting Canada Inc., and declared that the deemed trusts created by the *Pension Benefits Act, 1997,* SNL 1996, c. P-4.01 ("***NLPBA***"), the *Supplemental Pension Plans Act,* CQLR c. R-15.1 ("***SPPA***"), and the *Pension Benefits Standards Act*, 1985, R.S.C., 1985, c. 32 ("***PBSA***"), are not enforceable in proceedings under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 ("***CCAA***"). The Motion Judge likewise concluded that the deemed trust created by the *NLPBA*

could not in any event attach to the proceeds of property formerly located in the Province of Quebec.

B. CONTEXT

3. The facts of the matter are uncontested and are detailed in the Motion Decision at paragraphs 3-31.

4. Since 1965, the Wabush Mines JV (a joint venture of Wabush Iron Co. Limited and Wabush Resources Inc.) operated an iron ore mine near the Town of Wabush, Newfoundland & Labrador, as well as a port facility and a pellet production facility in Pointe-Noire, Québec. The ore was transported from Wabush to Pointe-Noire by the Arnaud Railway Company and the Wabush Lake Railway Company, Limited (collectively, the "**Wabush CCAA Parties**").

5. The Wabush CCAA Parties, in addition to Cliffs Mining Company, Managing Agent, sponsor two pension plans with defined benefit provisions for their salaried and unionized employees and retirees (the "**Union DB Plan**" and the "**Salaried DB Plan**", respectively). Both plans originally included a majority of employees who reported for work in Newfoundland & Labrador, although many members reported for work in Québec, or on the two federally-regulated railways.[1] The two DB Plans include over two thousand members; their membership breakdown by jurisdiction is detailed at paragraph 6 of the Motion Decision.

6. On May 19, 2015, the Wabush CCAA Parties filed a motion for the issuance of an initial order under the *CCAA.* On June 26, 2015, the Superior Court ordered the suspension of payment by the Wabush CCAA Parties of their monthly amortization payments and their annual lump sum "catch-up" payments coming due under the two DB Plans. The Court also ordered the suspension of payment of other post-

[1] The two railways have been declared to be works for the general advantage of Canada: see *An Act respecting Wabush Lake Railway Company Limited and Arnaud Railway Company*, (1960) 8-9 Eliz. II, ch. 63, s. 3.

retirement benefits, including life insurance, health care and a supplemental retirement arrangement plan.[2]

7. On December 16, 2015, the Superintendent and the Office of the Superintendent of Financial Institutions ("**OSFI**") terminated both plans, effective immediately. As of March 2016, the monthly benefits being paid to the retirees of the Salaried DB Plan were reduced by 25%, and the benefits being paid to the retirees of the Union DB Plan were reduced by 21%.

8. During the course of the present CCAA proceedings, all or substantially all of the assets were sold, and the proceeds are now held by the Monitor. These assets were located in both the Provinces of Newfoundland & Labrador and Quebec.

9. There are significant amounts still owed to the Salaried and Union DB Plans. $6,671,820 is still owed to the Union DB Plan as special payments and catch-up special payments, while $2,185,756 is still owed in special payments to the Salaried DB Plan. The wind-up deficiencies of the Union and Salaried DB Plan are valued at $27,486,548 and $27,450,000, respectively.

10. On September 20, 2016, the Monitor filed a Motion for Directions – later amended on April 13, 2017 – seeking a determination of various issues relating to potential pension claims, including:

    1) What law applies to determine each DB Plan member's pension rights;

    2) Whether a "liquidation" had occurred triggering the deemed trusts outlined in section 32 of the *NLPBA* and section 8 of the *PBSA*;

    3) Whether the *NLPBA's* liquidation deemed trust encompasses the full wind-up deficiency owed to the two DB Plans after termination, or whether it was limited to simply the normal costs and special payments which have accrued;

[2] 2015 QCCS 3064; motion for leave to appeal dismissed, 2015 QCCA 1351.

4) Whether the trust outlined in section 49 of the *SPPA* constitutes a valid deemed trust;

5) Whether the deemed trusts in the *NLPBA* and the *SPPA* are rendered inoperative as a result of an alleged conflict with the federal *CCAA*;

6) Likewise, whether the deemed trust outlined in the federal *PBSA* was in conflict with the federal *CCAA* and, if so, how ought that conflict be resolved;

7) Whether the deemed trust created by the *NLPBA* could charge property located outside the Province of Newfoundland & Labrador, specifically in the Province of Quebec;

8) Whether the deemed trust under the *SPPA* could take priority over the Ville de Sept-Îles' claim for unpaid property taxes.

11. The Amended Motion for Directions is attached as Annex B to the present Notice.

C. MOTION DECISION

12. On the issues put to him in the Monitor's Motion for Directions, the Motion Judge concluded as follows:

1) The law that applies to any given plan member will depend on where that plan member reported for work (paras. 61-81).

2) There was "liquidation" of the insolvent debtors in this case, thereby giving rise to the liquidation deemed trusts outlined in the *NLPBA* and the *PBSA* (paras. 155-175). This liquidation, in his view, would have begun at the very outset of the insolvency proceedings, on May 19, 2015 (para. 173).

3) The Motions Judge also assumed that the deemed trust under the *NLPBA* applies to the full wind-up deficits owed to the two DB pension plans.

4) As for the Quebec members, the Motions judge concluded that the Quebec *SPPA* does not create a valid deemed trust that is enforceable against third

parties, since it lacks the "key language" that deems certain amounts "to be separate from and form no part of the estate in liquidation, assignment or bankruptcy" (paras. 90-91).

5) The Motion Judge concluded that the *NLPBA*'s deemed trusts and concurrent lien and charge conflict with the *CCAA*, and are therefore rendered inoperative by virtue of the doctrine of paramountcy (paras. 177-210).

6) Finally, the Motions Judge concluded that the *NLPBA*'s deemed trust of the *NLPBA* could not attach to property located in the Province of Quebec (paras. 144-154).

D. GROUNDS FOR APPEAL

13. The Superintendent seeks leave to appeal on the basis that the Motion Judge erred in concluding a) that the *NLPBA*'s deemed trusts conflict with the *CCAA* and are thereby rendered inoperative, and b) that the *NLPBA*'s deemed trusts could not attach to the proceeds of sales currently held by the Monitor.

a) The *NLPBA* does not conflict with the *CCAA*

14. Sections 6(6), 6(7) and 36(7) *CCAA* enshrine certain minimal protections for pension liabilities, specifically the normal costs and the unremitted employee contributions deducted at source. These guarantees must be satisfied before a CCAA court may authorize a sale of assets or approve a plan of arrangement.

15. Section 32 of the *NLPBA* does not expressly conflict with these – or any other – sections of the *CCAA.* Section 32 simply provides for a deemed trust and a lien and charge that confer additional protection for pensioners. This is constitutionally inoffensive: cooperative federalism indeed recognizes that provincial laws can supplement and add to the protections envisioned in federal law.[3] This has

[3] See e.g. *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22, at para. 72; *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536, at

occurred in areas such as highway safety[4], the regulation of pesticides[5], tobacco advertising[6], and even in insolvency proceedings[7]. Respectfully, the Motion Judge discarded this settled jurisprudence when he concluded that section 32 *NLPBA* triggered the doctrine of paramountcy:

> It is clear that Parliament had weighed the competing interests and decided that this was the protection that all pension plan members across Canada would receive. It left no room for the provinces. (Para. 192, underlining added)

16. Respectfully, the Motion Judge's conclusion is inconsistent with the "guiding principle" of modern federalism jurisprudence, which stresses that courts should facilitate and encourage the overlap between both federal and provincial laws, so that both levels of government may pursue their own vision of the public good within their respective spheres of competence.[8]

17. Fundamentally, Parliament is presumed to be respectful of the Provinces' legislative authority.[9] As the Supreme Court of Canada has repeatedly insisted, courts should only impute to Parliament an intention to "cover the field" on a given question if Parliament employs "very clear statutory language to that effect".[10] Otherwise, the "fundamental rule of constitutional interpretation" requires that courts interpret federal legislation as if it welcomes the overlapping application of provincial law.[11]

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para. 66; and *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at para. 26.

4 *O'Grady v. Sparling*, [1960] SCR 804, 1960 CanLII 70 (SCC).

5 *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40 (CanLII), [2001] 2 S.C.R. 241, at paras. 34-42 specifically.

6 *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13.

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

8 *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at para. 21, see also *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22, at paras. 22 and 37; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 15.

9 *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22, at para. 74.

10 *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13, at para. 21; *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22, at para. 74; *Bank of Montreal v. Marcotte*, [2014] 2 SCR 725, 2014 SCC 55, at para. 72; *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at para. 27.

11 *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at para. 20-22.

18. Parliament did not employ any of the "very clear statutory language" required to shut out any possible provincial action in sections 6(6) or 36(7) *CCAA.* These provisions are instead framed as minimum guarantees; section 6(6) even contemplates a situation in which an arrangement is concluded which provides for *more* protection than the minimum level envisioned in federal law. This absence of any legislative language ruling out provincial law is made all the more conspicuous by the fact that Parliament *actually did* rule out the continued application of provincial deemed trusts in favour of the Crown in section 37 of the *CCAA*.

19. What is more, the "extraneous evidence" the Motion Judge considered of Parliament's intent only demonstrates that Parliament considered affording more protection to pensioners when it amended the *CCAA* in 2009, but chose not to. On its own, this is insufficient and cannot meet the "high standard" for invoking paramountcy on the basis of a frustration of federal purpose.[12] Parliament will often consider different policy alternatives – and different ways of balancing competing interests – before settling on its preferred choice. If these everyday legislative choices implied that Parliament "covered the field" and definitively decided a given question, the Provinces would be significantly handicapped from pursuing their own vision of the public good in their own areas of competence. Paramountcy must instead be applied with restraint.[13]

20. Moreover, while it is not determinative, paramountcy arguments rarely succeed without the express support of the federal government, speaking through its Attorney General.[14] In this case, the AGC's submissions dovetail with the Superintendent's. Only the Monitor and the Wabush CCAA Parties seek to invoke paramountcy.

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[12] *Marine Services International Ltd. V. Ryan Estate*, [2013] 3 SCR 52, 2013 SCC 44, at para. 84.
[13] *Bank of Montreal v. Marcotte*, [2014] 2 SCR 725, 2014 SCC 55, at para. 74, *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at para. 27.
[14] *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13, at para. 26, citing *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31 (CanLII), at paras. 72-73.

21. The Motion Judge's alternative basis for invoking paramountcy is more tenuous still. The Motion Judge decided that the *Bankruptcy and Insolvency Act*'s comprehensive scheme of collocation applies, in its totality, to a *CCAA* liquidation (paras. 202-210). In his view, the "bottom line is that a liquidating CCAA requires a scheme of distribution and the only one which makes sense is the scheme of distribution under the BIA" (para. 208).

22. In this, the Motion Judge relies on *Century Services Inc. v. Canada*, [2010] 3 S.C.R. 379, 2010 SCC 60, where Deschamps J. noted that the rights conferred under the *CCAA* should be interpreted harmoniously with the rights provided under the *BIA*, so as to avoid giving secured creditors a strategic incentive to seek the debtor's bankruptcy.[15]

23. However, *Century Services* only directs courts on how they ought to *interpret* provisions of the *CCAA* and the *BIA*: it provides no legal basis to graft the *BIA*'s entire scheme of collocation into a *CCAA* liquidation. This was confirmed in *Sun Indalex Finance LLC v. United Steelworkers*, [2013] 1 SCR 271, 2013 SCC 6, where this very argument was put before the Supreme Court. Deschamps J. rejected it in clear and emphatic terms:

> [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*. Although the creditors of a corporation that is attempting to reorganize may bargain in the shadow of their bankruptcy entitlements, those entitlements remain only shadows until bankruptcy occurs. At the outset of the insolvency proceedings, Indalex opted for a process governed by the *CCAA*, leaving no doubt that although it wanted to protect its employees' jobs, it would not survive as their employer. 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*.

[15] *Century Services Inc. v. Canada*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 47.

24. The Motions Judge never addresses this portion of Deschamps J.'s reasons, although he was repeatedly made aware of it in oral and written submissions. This apparent repudiation of *Indalex* is an error of law in its own right. More fundamentally, it is unclear what authority *any court* would have to re-write the *CCAA* in this way. If there are indeed "gaps" in the *CCAA*, then provincial law continues to apply unimpeded, since it "defines the priorities to which creditors are entitled until that legislation is ousted by Parliament".[16] The Motions Judge erred by concluding that provincial law was ousted simply because it "makes sense" to do so (para. 208).

25. It is worth adding that the Motion Judge's argument on this front sits poorly with his insistence on respecting Parliament's choices. Parliament did not choose to apply the *BIA*'s scheme of distribution to *CCAA* proceedings, even though *CCAA* liquidations were already common during the first decade of this century.[17]

b) The NLPBA's deemed trust and lien and charge may attach to the proceeds of assets formerly located in the Province of Quebec

26. Respectfully, the Motion Judge erred in not giving direct effect to the *NLBA*'s deemed trust and lien and charge directly in Quebec through article 3079 of the *Civil Code of Québec*. Section 32 *NLPBA* is clearly a mandatory provision of another "State" which is closely connected to the insolvency of the Wabush CCAA Parties. Furthermore, there are "legitimate and manifestly preponderant interests" for doing so. The Wabush CCAA Parties' business straddled the provincial border, and their multijurisdictional pension plan included members from both jurisdictions. In these circumstances, the "integrating character of our constitutional arrangement"[18] required the Motion Judge to give full effect to the law of a sister province, especially in the context of national insolvency proceedings.

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16 *Sun Indalex Finance LLC v. United Steelworkers*, [2013] 1 SCR 271, 2013 SCC 6, at para. 51.
17 Alfonso Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada" (2014) 56 CBLJ 73, at p. 8.
18 See *Morguard Investments Ltd. V. De Savoye,* 1990 CanLII 29 (SCC), [1990] 3 S.C.R. 1077, at pp. 1100.

27. That the Quebec legislature did not see fit to confer similar protections on Quebec employees and retirees should not have compelled the Motion Judge to decline to apply Newfoundland & Labrador law to property in Quebec.

28. The Superintendent reserves its right to make submissions on any other issues for which leave may be granted in the present matter.

MAY IT PLEASE THIS HONOURABLE COURT TO:

I. **GRANT** the Superintendent's appeal with costs;

II. **DISMISS** the Monitor's Motion for Directions;

III. **DECLARE** that the deemed trust posited by the *NLPBA* is enforceable and operative during the course of *CCAA* proceedings**;**

IV. **DECLARE** that the *NLPBA*'s deemed trust may attach to the proceeds held by the Monitor from the sale of assets formerly located in the Province of Québec**.**

THE WHOLE RESPECTFULLY SUBMITTED.

MONTREAL, this October 2, 2017

(s) IMK s.e.n.c.r.l. / LLP

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AFFIDAVIT OF EDWARD BÉCHARD-TORRES
(October 2nd, 2017)

I, EDWARD BÉCHARD-TORRES, attorney, practicing law at IMK LLP, 3500 de Maisonneuve Boulevard West, Suite 1400, Montreal, Quebec, H3Z 3C1, solemnly affirm as follows:

1. I am an associate at the law firm IMK LLP. Our firm has represented the Superintendent of Pensions of Newfoundland & Labrador since the outset of the present Wabush CCAA proceedings.

2. Mr. Doug Mitchell and I represented the Superintendent before Mr. Justice Stephen Hamilton on the Monitor FTI Consulting Canada Inc.'s Motion for Directions, the hearing being held on June 28 and 29, 2017.

3. All of the facts alleged in the within *Notice of Appeal* are true and correct to the best of my knowledge.

AND I HAVE SIGNED THIS 2nd DAY OF OCTOBER, 2017 IN MONTRÉAL, QUÉBEC:

Edward Béchard-Torres

EDWARD BÉCHARD-TORRES

Solemnly affirmed before me at Montréal, this 2nd day of October 2017

Roxanne Rioux

Commissioner of Oaths for Québec

Commissaire à l'assermentation
ROXANNE RIOUX
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Pour le Québec

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN OF THIS APPEAL to the following parties:

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PLEASE ACT ACCORDINGLY.

MONTREAL, this October 2, 2017

(s) IMK s.e.n.c.r.l. / LLP

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C A N A D A

PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

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COURT OF APPEAL

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED:

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

APPLICANT (Mise-en-cause)

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

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RETRAITE QUÉBEC

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

VILLE DE SEPT-ÎLES

Mises-en-cause

LIST OF ANNEXES
October 2, 2017

Annexe A: Judgment of the Superior Court of Quebec on the Amended Motion by the Monitor for Directions with Respect to Pension Claims in *Arrangement relative à Bloom Lake*, 2017 QCCS 4057 (Court File S.C. No. 500-11-048114-157).

Annexe B: Monitor FTI Consulting Canada Inc.'s Amended Motion for Directions with Respect to Pension Claims.

MONTREAL, this October 2, 2017

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ET AL.

Mises-en-cause

NOTICE OF APPEAL
(Article 352 C.C.P.)
Appellant
October 2, 2017

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