



# **SUPERIOR COURT**

*(Commercial Division)*

CANADA  
PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

No: 500-11-048114-157

DATE: June 26, 2015

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**BY THE HONOURABLE STEPHEN W. HAMILTON**

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

**BLOOM LAKE GENERAL PARTNER LIMITED  
QUINTO MINING CORPORATION  
8568391 CANADA LIMITED  
CLIFFS QUÉBEC IRON MINING ULC  
WABUSH IRON CO. LIMITED  
WABUSH RESOURCES INC.**

Petitioners

And

**THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP  
BLOOM LAKE RAILWAY COMPANY LIMITED  
WABUS MINES  
ARNAUD RAILWAY COMPANY  
WABUSH LAKE RAILWAY COMPANY LIMITED**

Mises-en-cause

And

**FTI CONSULTING CANADA INC.**

Monitor

And

**HER MAJESTY IN RIGHT OF NEWFOUNLAND AND LABRADOR,  
AS REPRESENTED BY THE SUPERINTENDENT OF PENSIONS,**

**THE ATTORNEY GENERAL OF CANADA,**

**SYNDICAT DES MÉTALLOS, SECTION LOCALE 6254,**

**SYNDICAT DES MÉTALLOS, SECTION LOCALE 6285,**

**MICHAEL KEEPER, TERENCE WATT, DAMIEN LABEL AND NEIL JOHNSON, AS  
REPRESENTATIVES OF THE SALARIED/NON-UNION EMPLOYEES AND  
RETIRES**

Objecting parties

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**JUDGMENT ON THE MOTION OF THE WABUSH CCAA PARTIES TO GRANT  
PRIORITY TO THE INTERIM LENDER CHARGE AND TO SUSPEND THE  
PAYMENT OF CERTAIN PENSION AMORTIZATION PAYMENTS AND POST-  
RETIREMENT EMPLOYEE BENEFITS (#144), AND RELATED MATTERS**

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**INTRODUCTION**

[1] These proceedings raise essentially three issues:

1. Can and should the Court order that the charge in favour of the interim lender rank ahead of the statutory deemed trusts for payments due by the debtors to the pension plan?
2. Can and should the Court suspend the debtors' obligation to pay the special amortization payments to the pension plan?
3. Can and should the Court suspend the debtors' obligation to pay the other post-employment benefits for the retirees?

**BACKGROUND**

**The parties**

[2] On May 20, 2015, the Petitioners Wabush Iron Co. Limited and Wabush Resources Inc. and the Mises-en-cause Wabush Mines (a joint venture of Wabush Iron and Wabush Resources), Arnaud Railway Company and Wabush Lake Railway

Company Limited (the “Wabush CCAA Parties”) filed a motion for the issuance of an initial order under the *Companies’ Creditors Arrangement Act*<sup>1</sup> (CCAA), which was granted on that date by the Court (the “Wabush Initial Order”).

[3] Prior to the filing of the motion, Wabush Mines operated the iron ore mine and processing facility located near the Town of Wabush and Labrador City, Newfoundland and Labrador, and the port facilities and a pellet production facility at Pointe-Noir, Québec. Arnaud and Wabush Lake Railway are both federally regulated railways that are involved in the transportation of iron ore concentrate from the Wabush mine to the Pointe-Noir port.

### **The pension plans and other post-employment benefits**

[4] The Wabush CCAA Parties have two defined benefit pension plans for their employees:

- The pension plan for salaried employees at the Wabush mine and the Pointe-Noire port hired before January 1, 2013, called the Contributory Pension Plan for Salaried Employees of Wabush Mines JV, Cliffs Mining Company, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company; and
- The pension plan for unionized hourly employees at the Wabush mine and Pointe-Noire port, called the Pension Plan for Bargaining Unit Employees of Wabush Mines JV, Cliffs Mining Company, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company.

[5] Wabush Mines is the administrator of both plans.

[6] Because some of the employees covered by the plans work in Newfoundland and Labrador and because others work in federally regulated industries, the plans are subject to regulatory oversight by both the federal pension regulator, the Office of the Superintendent of Financial Institutions (“OSFI”), and the provincial regulator in Newfoundland and Labrador, the Superintendent of Pensions (the “N&L Superintendent”).

[7] The monthly normal cost payments for the plans for 2015 based on a valuation as at January 1, 2014 are \$50,494.83 for the hourly plan and \$41,931.25 for the salaried plan, for a total monthly normal cost payment of \$92,46.08. All monthly normal cost payments in respect of the plans for January through April, 2015 have been paid in full.

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<sup>1</sup> R.S.C. 1985, c. C-36, as amended.

[8] The plans are underfunded. Based on estimate received from the Wabush CCAA Parties' pension consultant, the Wabush CCAA Parties believe the estimated wind-up deficiencies for the plans as at January 1, 2015 to be a total of approximately \$41.5 million, consisting of approximately \$18.2 million for the salaried plan and approximately \$23.3 million for the hourly plan.

[9] The Wabush CCAA Parties are required to pay monthly amortization payments based on the 2014 valuation of \$393,337.00 for the hourly plan and \$273,218.58 for the salaried plan, for a total monthly amortization payment of \$666,555.58. All monthly amortization payments in respect of the plans for January through April, 2015 have been paid in full, save for a shortfall of approximately \$130,000.

[10] In addition to the monthly amortization payments, the Wabush CCAA Parties are also required to make a lump sum "catch-up" amortization payment for the plans estimated to be approximately \$5.5 million due in July 2015.

[11] The Wabush CCAA Parties currently provide other post-employment benefits ("OPEBs"), including life insurance and health care, to former hourly and salaried employees hired before January 1, 2013, which vary based on whether retirees were formerly members of a bargaining unit or were non-unionized salaried employees.

[12] As of December 31, 2014, accumulated benefits obligations for the OPEBs totalled approximately \$52.1 million. The premiums required to fund the foregoing OPEBs are approximately \$182,000 a month.

[13] In addition to the foregoing, there is a supplemental retirement arrangement plan for certain current and former salaried employees of Wabush Mines JV. The obligations under this plan are approximately \$1.01 million.

### **The Interim Financing**

[14] Prior to filing the motion for the issuance of an initial order, the Wabush CCAA Parties entered into the Interim Financing Term Sheet with Cliffs Mining Company (the "Interim Lender"). The Interim Lender is a subsidiary of the ultimate parent of the Wabush CCAA Parties.

[15] The cash flow statement filed with the motion for the issuance of an initial order showed that the Wabush CCAA Parties had run out of cash and were not anticipating any receipts from operations other than two small rental payments, with the result that they needed the Interim Financing to continue even their limited operations for the duration of the CCAA process.

[16] The Interim Financing Term Sheet provided that the Interim Lender would advance a maximum principal amount of US\$10,000,000 to provide for short-term liquidity needs of the Wabush CCAA Parties while they are under CCAA protection. The

Interim Lender's obligation to advance funds is subject to a number of conditions and covenants, including the following:

- The Interim Lender will have a charge in the principal amount of CDN\$15,000,000 which will have priority over all charges against the Wabush CCAA Parties' property except for certain specified charges;<sup>2</sup> and
- The Wabush CCAA Parties will not make any special payments in relation to the pension plans or any payments in respect of OPEBs.<sup>3</sup>

### CCAA proceedings

[17] As a result of the foregoing, the Wabush CCAA Parties asked the Court as part of the Wabush Initial Order on May 20, 2015 to approve the Interim Financing Term Sheet and to create the Interim Lender Charge, but not to give the Interim Lender Charge priority over the existing secured creditors until they had the chance to be heard.

[18] The Monitor filed its Fifth Report in which it recommended that the Court approve the Interim Financing Term Sheet and the granting of the Interim Lender Charge.

[19] Based on the evidence presented at the hearing on May 20, 2015,<sup>4</sup> the Court granted the Wabush Initial Order, including the approval of the Interim Financing Term Sheet and the create of the Interim Lender Charge ranking after the existing secured creditors.

[20] The Wabush Initial Order provided for a comeback hearing on June 9, 2015.

[21] On May 29, 2015, the Wabush CCAA Parties filed their "Motion for the issuance of an order in respect of the Wabush CCAA parties (1) granting priority to certain CCAA charges, (2) approving a Sale and Investor Solicitation Process *nunc pro tunc*, (3) authorizing the engagement of a Sale Advisor *nunc pro tunc*, (4) granting a Sale Advisor Charge, (5) amending the Sale and Investor Solicitation Process, (6) suspending the payment of certain pension amortization payments and post-retirement employee benefits, (7) extending the stay of proceedings, (8) amending the Wabush Initial Order accordingly", in which they sought various conclusions including (1) an order granting priority to the Interim Lender Charge over all charges against the Wabush CCAA

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<sup>2</sup> Sections 7(1) and 8(2) of the Interim Financing Term Sheet

<sup>3</sup> Section 25(h), which does specify that the Wabush CCAA Parties shall be entitled to make normal cost payments under defined benefit plans.

<sup>4</sup> The Court heard the evidence of Clifford Smith, an officer of the Wabush CCAA Parties, and Nigel Meakin, a representative of the Monitor.

Parties' property, subject to certain exceptions not relevant here, and (2) an order suspending the payment of the special payments and the OPEBs.

[22] In addition, the Wabush CCAA Parties sent a letter on May 29, 2015 to 2,092 retirees and to the union representatives to advise them of the hearing on June 9, 2015 and to advise them that they would present on June 9, 2015 requests that the Interim Lender Charge be given priority over the deemed trusts relating to pension payments and that the special payments and the payment of the OPEBs be suspended.

[23] Prior to the comeback hearing, the Wabush CCAA Parties and the Monitor received various notices of objection, which can be classified into two categories as follows:

- (a) the first category of notices of objection were filed on behalf of (1) the Administration Portuaire de Sept-Îles/Sept-Iles Port authority ("SIPA"), (2) the Iron Ore Company of Canada ("IOC"), and (3) MFC Industrial Ltd., and pertained to the reservation of certain contractual rights;
- (b) the second category of notices of objection were filed on behalf of (1) the N&L Superintendent, (2) OSFI, (3) United Steelworkers Locals 6254 and 6285 (the "Union"), and (4) Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson in their personal capacity and as the proposed representatives of all non-union employees and retirees of the Wabush CCAA Parties. These notices of objection will be described more fully below.

[24] On June 9, 2015, the Court granted the Wabush comeback motion in part and issued an order, which reserved the rights of SIPA, IOC and MFC as follows:

[10] **DECLARES** that this Order approving the SISP as it relates to the Wabush CCAA Parties *nunc pro tunc* is without prejudice to the rights, if any, of the Administration Portuaire de Sept-Îles/Sept-Iles Port Authority (hereinafter the "SIPA"), vis à vis the Wabush CCAA Parties, including: (i) the rights of the SIPA, acting as successor in the rights of the National Harbours Board, pursuant to the agreement referred to and communicated as Exhibit O-1 in support of SIPA's Notice of objection dated April 13, 2015; and (ii) the rights of SIPA, acting as successor in the rights of the Canada Ports Corporation, pursuant to the agreement referred to and communicated as Exhibit O-7 in support of SIPA's Notice of objection already filed in the Court record and dated April 13, 2015;

[11] **DECLARES** that this Order approving the SISP as it relates to the Wabush CCAA Parties *nunc pro tunc* is without prejudice to the rights, if any of the Iron Ore Company of Canada or its related companies (hereinafter the "IOC"), vis-à-vis the Wabush CCAA Parties, including, but not limited to, the rights pursuant to the Subscription Agreement dates August 3, 1959 referred to

in IOC's Notice of objection already filed in the Court record and dated April 13, 2015;

[12] **DECLARES** that this Order approving the SISP as it relates to the Wabush CCAA Parties *nunc pro tunc* is without prejudice to the rights, if any, of MFC Industrial Ltd. ("MFC") if any, vis-à-vis the Wabush CCAA Parties, including pursuant to an Amendment and Consolidation of Mining Leases dated September 2, 1959 and related sub-leases (as amended from time to time) as it relates to the property of Wabush CCAA Parties.

[13] **RESERVES** the right of IOC, SIPA and of MFC to raise any such rights at a later stage if need be;

[25] The Court scheduled a hearing on June 22, 2015 to deal with the remaining requests of the Wabush CCAA Parties in relation to the priority of the Interim Lender Charge and the suspension of the special payments and the OPEBs:

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

[...]

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

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

[23] **ORDERS** the Wabush CCAA Parties' request for an order for the suspension of payment by the Wabush CCAA Parties of other post-retirement benefits to former hourly and salaried employees of their Canadian subsidiaries



hired before January 1, 2013, including without limitation payments for life insurance, health care and a supplemental retirement arrangement plan, *nunc pro tunc* to the Wabush Filing Date is adjourned to June 22, 2015;

**THE POSITION OF THE OBJECTING PARTIES**

[26] Prior to the hearing on June 22, 2015, the parties exchanged outlines of their respective arguments. The four retirees also filed the “Motion for an order appointing the Petitioners-Mises-en-cause as representative of salaried/non-union and retired employees of the Wabush CCAA Parties” seeking to be appointed as representatives of salaried/non-union and retired employees of the Wabush CCAA Parties and to seek funding for their counsel. This motion was granted by consent on June 22, 2015.

[27] The positions taken by the objecting parties can be summarized as follows:

<u>Objection Raised/Objecting Parties</u>	<u>N&amp;L S.</u>	<u>OSFI</u>	<u>Union</u>	<u>Non-union retirees</u>
Suspension of Amortization Payments	Objects	Objects*	Objects	Object**
Suspension of OPEBs	—	—	Objects	Object
Superpriority of Interim Lender Charge	Objects*	Objects	Objects	—

\* Not in the notice of objection, but in the written argument

\*\* In the notice of objection and the written argument, but partly withdrawn at hearing

[28] Moreover, in its notice of objection and written argument, the Union requests that that one officer from each of the two locals be designated by the Court as the persons responsible for responding to questions from unionized retirees of the Wabush CCAA Parties and providing them with information about their rights and recourses, and that those persons be funded by the Wabush CCAA Parties.

**N&L Superintendent**

[29] The N&L Superintendent objects to the Wabush CCAA Parties’ request for a suspension of the special payments. He argues that the suspension of the special payments sought by the Wabush CCAA Parties contravenes Sections 32 and 61(2) of the Newfoundland and Labrador *Pension Benefits Act, 1997*<sup>5</sup> (the “N&L Act”).

[30] He does not raise any objection with respect to the suspension of the OPEBs.

[31] In his notice of objection, the N&L Superintendent also reserved his right to raise additional objections. In his written argument, he adds an argument with respect to the

<sup>5</sup> SNL 1996, c. P-4.01, as amended.

priority of the Interim Lender Charge, which he also claims would contravene Sections 32 and 61(2) of the N&L Act.

[32] In addition to the foregoing, the N&L Superintendent also claims in its written argument that the Wabush CCAA Parties are in a conflict of interest when it comes to the administration of the pension plans, and suggests that other, less stringent financing alternatives would have been available.

[33] Finally, the N&L Superintendent further claims that additional information with regards to paragraphs 83 to 91 of the Wabush Comeback Motion needs to be divulged in order for it to be able to properly carry out its statutory duties under the N&L Act, including to assess the financial status of the plans. However, at the hearing, representations were made that information had been provided and no specific order was sought. The Court reserves the N&L Superintendent's rights in this regard.

### **OSFI**

[34] In its notice of objection, OSFI objects solely to the granting of the priority of the Interim Lender Charge, and only inasmuch as this would result of a priming rank over the normal cost payments owing to the pension plans which benefit from priority under Sections 8 and 36(2) of the *Pension Benefits Standards Act, 1985*<sup>6</sup> ("PBSA").

[35] In its written argument, OSFI instead invokes the statutory deemed trust in connection with outstanding special payments.

[36] OSFI now also challenges the suspension of the special payments on the basis that the Wabush CCAA Proceedings would not constitute a restructuring, but rather a liquidation.

[37] According to OSFI, the impact of the deemed trust is to render any and all amount owing to the pension plans inalienable and exempt from seizure, such that, as a result, the Interim Lender Charge could not obtain a security on those assets.

### **The Union**

[38] In its notice of objection, the Union opposes the suspension of both the special payments and the OPEBs, and seeks an order that the Wabush CCAA parties be forced to make such payments notwithstanding the terms of the Interim Financing Term Sheet.

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<sup>6</sup> R.S.C. 1985, c. 32 (2<sup>nd</sup> Supp.), as amended.

[39] In doing so, the Union insists on the hardship such a suspension would cause for the retirees, whose claims are alimentary in nature.

[40] The Union also asks the Court to preserve the rank of the deemed trust for amounts owing to the pension plans, and seeks to have this deemed trust rank ahead of or equal with the Interim Lender Charge.

[41] The notice of objection and the written argument also argue for the appointment of a representative to handle the numerous queries of union members.

### **Non-union retirees**

[42] In their notice of objection, the non-union retirees object to the suspension of the OPEBs and the special payments sought by the Wabush CCAA Parties on the basis of the significant prejudice such relief would cause to the retirees.

[43] In their written argument, they argue that such a suspension would in fact amount to a disclaimer or resiliation of agreements, subject to the provisions of Section 32 CCAA, which it is argued were not respected in the case at hand.

[44] They add that the conditions of the Interim Lender Term Sheet should not allow the Wabush CCAA Parties to circumvent the requirements of said Section 32 CCAA.

[45] At the hearing, they indicated that they objected most strenuously to the suspension of the OPEBs, because of the impact on the retirees. They indicated that they would not object to a short-term suspension of the special payments, until the Wabush CCAA Parties collected the tax refunds they were expecting and therefore had funds other than the Interim Financing with which to make the special payments.

### **POSITION OF THE WABUSH CCAA PARTIES**

[46] The Wabush CCAA Parties argue that they do not have any funds or any source of funds and therefore that they need the Interim Financing.

[47] They also argue that even with the Interim Financing, they do not have any funds available to continue to pay the special payments or any of the OPEBs, as the Interim Financing Term Sheet prohibits such payments.

[48] On the law, they argue that the deemed trusts created under the PBSA and the N&L Act are not effective to protect the special payments or the OPEBs in the CCAA context. As a consequence, the Interim Lender Charge requested by the Wabush CCAA Parties does not prime any security under the PBSA or the N&L Act. Further, since those payments are unsecured and relate to pre-filing services, there is no reason for the Wabush CCAA Parties to make those payments.

[49] They therefore argue that the Court should exercise its discretion to give the Interim Lender Charge priority over the deemed trusts and to suspend the obligation to pay the special payments and the OPEBs.

## **POSITION OF THE MONITOR**

[50] The Monitor filed its Seventh Report for purposes of the comeback hearing.

[51] In its report, it supports the position taken by the Wabush CCAA Parties.

[52] Its legal argument supports the legal argument put forward by the Wabush CCAA Parties.

## **ISSUES IN DISPUTE**

[53] The issues in dispute can be outlined as follows;

- (a) Can and should the Court order that the Interim Lender Charge rank ahead of all encumbrances, including statutory deemed trusts?
- (b) Can and should the Court suspend the Wabush CCAA Parties' obligation to pay the special payments?
- (c) Can and should the Court suspend the Wabush CCAA Parties' obligation to pay the OPEBs?

## **ANALYSIS**

[54] The three issues have significant overlaps. The Court will nevertheless analyze them sequentially, and will adopt its previous reasoning to the extent it is relevant.

### **1. Super-priority of the Interim Lender Charge**

#### ***General***

[55] What is at issue is the conflict between the super-priority of the interim lender charge under Section 11.2 CCAA and the statutory deemed trusts created by Section 8 PBSA and Section 32 of the N&L Act.

[56] Section 11.2 CCAA allows the Court, after considering the factors set out in Section 11.2(4) CCAA, to create an interim lender charge and to give that charge priority over the claim of any secured creditor of the debtor:

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

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

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

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

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

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

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

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

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

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

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

(Emphasis added)

[57] OSFI and the N&L Superintendent, supported by the Union, argue that Section 11.2 CCAA does not allow the Court to give the interim lender charge priority over the deemed trusts in pension matters created by their respective legislations.

[58] The argument put forward by OSFI and the N&L Superintendent is essentially that the employer is deemed to hold the amounts in trust, and therefore they are not “part of the company’s property” and cannot be charged under Section 11.2 CCAA.

[59] The Wabush CCAA Parties argue that there is a conflict between the legislation creating the deemed trusts and the CCAA and that the CCAA must prevail:

- The CCAA prevails over the PBSA as a matter of statutory interpretation of two pieces of federal legislation, and
- The CCAA prevails over the N&L Act because of the constitutional doctrine of federal paramountcy.

[60] Because the arguments are different with respect to the PBSA and the N&L Act, the Court will deal with them separately.

[61] These are not new issues. The courts, including the Supreme Court, have been called upon to deal with the effect of federal and provincial deemed trusts in the insolvency context on numerous occasions. There have also been a number of statutory amendments, some designed to overturn the results of judgments.

[62] Because of the urgency of rendering judgment in this matter, the Court will not embark on an exhaustive analysis of all of these judgments and amendments.

### ***Effectiveness of the PBSA deemed trust in CCAA proceedings***

[63] OSFI relies on Sections 8(1) and (2) and 36(2) of the PBSA, which provide as follows:

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

(a) the moneys in the pension fund,

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

(i) the prescribed payments, and

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

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

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

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

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

**36.** (2) Any agreement or arrangement to assign, charge, anticipate or give as security

(a) any benefit provided under a pension plan, or

(b) any money withdrawn from a pension fund pursuant to section 26

is void or, in Quebec, null.

(Emphasis added)

[64] The deemed trust created by Section 8 PBSA is intended to cover all amounts due by the employer to the pension fund. These would include the normal payments, as well as the special payments.

[65] Section 8(1) PBSA requires the employer to keep the required amounts separate and apart from its own moneys, and deems the employer to hold them in trust. In the present matter, the required amounts have not been kept separate and apart and the assets subject to the trust have been comingled with other assets. Pursuant to the decision of the Supreme Court in *Sparrow Electric*, the consequence is that the trust created by Section 8(1) PBSA does not exist because the subject-matter of the trust cannot be and never was identifiable.<sup>7</sup>

[66] As a result, the relevant provision is Section 8(2) PBSA which provides that the amount shall be deemed to be separate and apart, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate.

<sup>7</sup> *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, par. 28.

[67] However, Section 8(2) PBSA only applies “[i]n the event of any liquidation, assignment or bankruptcy of an employer”. It attaches to any property which lawfully belongs to the employer when the triggering event occurred.<sup>8</sup>

[68] The issue of the triggering event could be determinative in the present case. If the triggering event has not occurred, then there is no deemed trust and no obstacle to the Court granting the priority required by the Interim Lender.

[69] It is clear that there has been no assignment or bankruptcy in the present matter. Further, there is no liquidation under Part XVIII of the *Canada Business Corporations Act*<sup>9</sup> or equivalent provincial legislation. A CCAA proceeding does not appear to trigger the application of Section 8(2) PBSA. However, OSFI argues that these CCAA proceedings are really a liquidation, because it is very likely that the ongoing sale process will result in the sale of all of the assets of the Wabush CCAA Parties.

[70] In interpreting the word “liquidation” in Section 8(2) PBSA, and in particular whether it includes a liquidation under the CCAA,<sup>10</sup> the Court will consider more generally how the deemed trust under Section 8(2) PBSA is dealt with under the CCAA.

[71] It must be emphasized at the outset that the deemed trust under Section 8(2) PBSA is not a deemed trust in favour of the Crown. This is a fundamental distinction. Section 37(1) CCAA, which renders all deemed trusts in favour of the Crown ineffective in the CCAA context, subject to certain exceptions, has no application to the deemed trust under Section 8(2) PBSA. As a result, many of the cases cited to the Court, which deal with the effectiveness of deemed trusts in favour of the Crown, must be applied with caution in the present circumstances.

[72] In particular, the Wabush CCAA Parties rely on language in the Supreme Court’s judgment in *Century Services*<sup>11</sup> that must be read carefully. Justice Deschamps refers in paragraph 45 to “the general rule that deemed trusts are ineffective in insolvency”. There is no such general rule, other than Section 37(1) CCAA (and Section 67(2) of the *Bankruptcy and Insolvency Act*<sup>12</sup>) which applies only to deemed trusts in favour of the Crown. She begins the paragraph with a reference to the predecessor of Section 37(1) CCAA and she refers throughout the paragraph to Crown claims and Crown priorities. She must be referring to Crown deemed trusts in that sentence as well. Justice Fish’s comments in paragraph 95 must be similarly limited. The Court respectfully disagrees

<sup>8</sup> *Ibid*, par. 38.

<sup>9</sup> R.S.C. 1985, c. C-44, as amended.

<sup>10</sup> In *Aveos Fleet Performance Inc./Aveos Performance aéronautique inc. (Arrangement relatif à)*, 2013 QCCS 5762, par. 66, Justice Schragger (then of this Court) leaves open the possibility that the liquidation of Aveos under the CCAA may have triggered Section 8(2) PBSA.

<sup>11</sup> *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379.

<sup>12</sup> R.S.C. 1985, c. B-3, as amended.



with Justice Schragger in *Aveos*<sup>13</sup> on this issue and concludes that there is no general rule that deemed trusts in favour of anyone other than the Crown are ineffective in insolvency. Deemed trusts will be interpreted restrictively as exceptions to the general principle that the assets of the debtor are available for all of the creditors,<sup>14</sup> but there is no general rule that they are ineffective.

[73] However, other provisions of the CCAA deal expressly with pension obligations. Sections 6(6) and 36(7) CCAA were added to the CCAA in 2009. They provide that an arrangement can only be sanctioned or an asset sale approved by the Court, if provision is made for the payment of certain enumerated pension obligations, including deductions from employee salaries and normal cost contributions of the employer, but not including special payments.

[74] It is difficult to reconcile Sections 6(6) and 36(7) CCAA with a broad interpretation of Section 8(2) PBSA. Why would the legislator give specific protection to the normal payments by amending the CCAA in 2009 if the deemed trust protecting not only the normal payments but also the special payments was effective in the CCAA context? Why would the legislator not protect the special payments under Sections 6(6) and 36(7) CCAA if they were already protected under a deemed trust? What happens to the deemed trust for the special payments if there is an arrangement or an asset sale? Because both statutes were adopted by the same legislator, we must try to determine the legislator's intent.

[75] In *Century Services*, the Supreme Court was faced with a conflict between the deemed trust for GST and the CCAA. Justice Deschamps adopted "a purposive and contextual analysis to determine Parliament's true intent".<sup>15</sup> She concluded that the deemed trust for GST did not apply in a CCAA proceeding, even though the language in the *Excise Tax Act*<sup>16</sup> provided that the deemed trust was effective notwithstanding any law of Canada other than the BIA. She attached importance to the "internal logic of the CCAA".<sup>17</sup>

[76] Moreover, in *Indalex*, Justice Deschamps referred to the conclusions of a Parliamentary committee which had considered extending the protection afforded the beneficiaries of pension plans. The committee made the policy decision not to extend that protection. Justice Deschamps concluded that "courts should not use equity to do what they wish Parliament had done through legislation."<sup>18</sup>

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<sup>13</sup> *Aveos*, *supra* note 10, par. 74-75.

<sup>14</sup> *White Birch Paper Holding Company (Arrangement relatif à)*, 2012 QCCS 1679, par. 141-142.

<sup>15</sup> *Century Services*, *supra* note 11, par. 44.

<sup>16</sup> R.S.C. 1985, c. E-15, as amended.

<sup>17</sup> *Century Services*, *supra* note 11, par. 46.

<sup>18</sup> *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 272, par. 81-82. See also *Aveos*, *supra* note 10, par. 77.

[77] The Court therefore adopts the following reasoning to resolve the conflict in the present case:

Given that the pension provisions of the *BIA* and *CCAA* came into force much later than s. 8 of the *PBSA*, normal interpretation would require that the later legislation be deemed to be remedial in nature. Likewise, since those provisions of the *BIA* and *CCAA* are the more specific provisions, normal interpretation would take them to have precedence over the general. Finally, the limited scope of the protection given to pension claims in the *BIA* and the *CCAA* would, by application of the doctrine of implied exclusion, suggest that Parliament did not intend there to be any additional protection. In enacting *BIA* subs. 60(1.5) and 65.13(8) and ss. 81.5 and 81.6 and *CCAA* subs. 6(6) and 37(6), while not amending subs. 8(2) of the *PBSA* (by adding explicit priority language or by removing the insolvency trigger), Parliament demonstrated the intent that pension claims would have protection in insolvency and restructurings only to the limited extent set out in the *BIA* and the *CCAA*.<sup>19</sup>

(Emphasis added)

[78] For all of these reasons, the Court concludes that Parliament's intent is that federal pension claims are protected in insolvency and restructurings only to the limited extent set out in the *BIA* and the *CCAA*, notwithstanding the potentially broader language in the *PBSA*.

[79] In the alternative, the Court could conclude that a liquidation under the *CCAA* does not fall within the term "liquidation" in Section 8(2) *PBSA* such that there has been no triggering event.

[80] Either way, the Court concludes that the deemed trust under Section 8(2) *PBSA* does not prevent the Court from granting priority to the Interim Lender Charge, if the conditions of Section 11.2 *CCAA* are met.

### ***Effectiveness of the N&L Act deemed trust in CCAA proceedings***

[81] The N&L Superintendent relies on the combined effect of Sections 32 and 61(2) of the N&L Act:

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

(a) the money in the pension fund;

<sup>19</sup> Sam Babe, "What About Federal Pension Claims? The Status of *Pension Benefits Standards Act, 1985* and *Pooled Registered Pension Plans Act* Deemed Trust Claims in Insolvency" (2013), 28 N.C.D.Rev. 25, p. 30.

- (b) an amount equal to the aggregate of
  - (i) the normal actuarial cost, and
  - (ii) any special payments prescribed by the regulations, that have accrued to date; and
- (c) all
  - (i) amounts deducted by the employer from the member's remuneration, and
  - (ii) other amounts due under the plan from the employer that have not been remitted to the pension fund

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

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

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

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

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

- (a) an amount equal to the aggregate of
  - (i) the normal actuarial cost, and
  - (ii) special payments prescribed by the regulations, that have accrued to the date of termination; and

- (b) all
  - (i) amounts deducted by the employer from members' remuneration, and
  - (ii) other amounts due to the pension fund from the employer that have not been remitted to the pension fund at the date of termination.

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

(Emphasis added)

[82] The key provision, Section 32(2) of the N&L Act, 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) of the N&L Act 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 N&L Act 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.

[88] The Supreme Court in *Indalex* held in the circumstances of that case, that the interim lender charge had priority over the provincial deemed trust by reason of the application of the doctrine of federal paramountcy, because the CCAA's purpose would be frustrated without the interim lender charge.<sup>20</sup> The trial judge in *Indalex* had rejected the deemed trust and therefore had not considered the doctrine of paramountcy. However, in granting the interim lender charge, he had considered the factors in Section 11.2(4) CCAA and had concluded that the interim lender charge was necessary and in the best interest of *Indalex* and its stakeholders. The Supreme Court held that these findings were sufficient for paramountcy to apply.

[89] As a result, the Court can give priority to the Interim Lender Charge over the deemed trust under the N&L Act if the test for federal paramountcy is met. The Court will consider the paramountcy issue as part of its analysis of the factors under Section 11.2(4) CCAA.

#### **Factors under Section 11.2(4) CCAA**

[90] Section 11.2(4) CCAA sets out a non-exhaustive list of the factors the Court should consider before it creates an interim lender charge:

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

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

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

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

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

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

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

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

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<sup>20</sup> *Indalex*, supra note 18, par. 60. See also *White Birch*, supra note 14, par. 217; *Timminco Itée (Arrangement relatif à)*, 2014 QCCS 174, par. 85.

[91] The Court already considered those factors when it decided to create the Interim Lender Charge on May 20, 2015.

[92] In his Fifth Report dated May 19, 2015, the Monitor provided the following comments on the factors listed in Section 11.2(4) CCAA:

*The period during which the company is expected to be subject to proceedings under the CCAA*

(a) While the deadline for the submission of binding offers pursuant to the SISP has yet to be set, based on the Wabush May 18 Forecast and preliminary discussions regarding the potential timeline for the completion of the SISP, it is believed that the Interim Financing Term Sheet provides sufficient liquidity to enable the Wabush CCAA Parties to complete the SISP;

*How the company's business and affairs are to be managed during the proceedings*

(b) The Wabush CCAA Parties' senior personnel and Boards of Directors remain in place to manage the business and affairs of the Wabush CCAA Parties. The Wabush CCAA Parties and their management will also have the benefit of the expertise and experience of their legal counsel and the Monitor;

*Whether the company's management has the confidence of its major creditors*

(c) The largest creditors of the Wabush CCAA Parties are affiliated companies who the Monitor understands to have confidence in the Wabush CCAA Parties' management. Other major creditors include the pension plans described in the May 19 Motion, employee groups in respect of other post-retirement benefits and various contract counterparties. None of the major creditors has to date expressed any concern to the Monitor in respect of the Wabush CCAA Parties' management;

*Whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company*

(d) Based on the Wabush May 18 Forecast, without the Interim Facility the Wabush CCAA Parties would be unable to pay their obligations, maintain their assets or complete the SISP. The Wabush CCAA Parties and the Monitor are of the view that approval of the Interim Facility would likely enhance the prospects of generating recoveries for stakeholders, whether through a sale or a restructuring plan;

*The nature and value of the company's property*

(e) The Wabush CCAA Parties' assets are described in the May 19 Motion, and consist primarily of real estate, equipment, inventory and income tax receivables. The value of the Wabush CCAA Parties' property will be determined through the

SISP. Nothing has come to the attention of the Monitor in respect of the nature of the Wabush CCAA Parties' property that, in the Monitor's view, ought to be given particular consideration in connection with the Interim Lender Charge;

*Whether any creditor would be materially prejudiced as a result of the proposed Charge*

(f) The proposed Interim Facility will provide the Wabush CCAA Parties the opportunity to complete the SISF and to maximize recoveries for stakeholders. Borrowings under the Interim Financing Term Sheet are limited to a maximum of US\$10 million. The Interim Lender Charge secures only the Interim Financing Obligations and is limited to \$15 million. The Monitor is of the view that any potential detriment caused to the Wabush CCAA Parties' creditors by the Interim Lender Charge should be outweighed by the benefits that it creates; and

*Other potential considerations*

(g) The Monitor has researched the terms of recent interim financings based on information publicly available, a summary of which is attached hereto as Appendix C. Based on this research and Monitor's experience, the Monitor believes that the terms of the Interim Financing Term Sheet are in line with or better than market. The Monitor is of the view that the Interim Financing Term Sheet represents the best alternative available in the circumstances that would provide access to financing within the necessary timeframe.

[93] In his testimony before the Court on May 20, 2015, Clifford Smith testified that the Wabush CCAA Parties had attempted to obtain financing elsewhere, but that only a related party was willing to provide financing.

[94] The Court makes the following findings:

- The Sale and Investor Solicitation Process (SISP) is in the interests of the Wabush CCAA Parties and their stakeholders because it should lead to greater recovery;
- Without new financing, the Wabush CCAA Parties do not have enough cash to complete the SISF. The cash flow projection attached to the Fifth Report shows the Wabush CCAA Parties running out of cash in the week ending May 22, 2015;
- Without new financing, it is therefore likely that the Wabush CCAA Parties will go bankrupt;
- The Wabush CCAA Parties and the Monitor have not identified any other sources of new financing;

- The terms and conditions of the Interim Financing are reasonable, and the security is limited to the amount of the new financing.

[95] This is sufficient for the Court to conclude that the Interim Financing should be approved and the Interim Lender Charge should be granted with priority over the deemed trust under the PBSA, if it is effective in the CCAA context.

[96] With respect to the deemed trust under the N&L Act, there is the added issue of whether giving effect to the deemed trust would frustrate the federal purpose under the CCAA. Under the Interim Lender Term Sheet, the super-priority is a condition precedent to the Interim Lender's obligation to advance the funds. That condition will not be met if the Court gives effect to the deemed trust under the N&L Act, which puts the financing at risk.

[97] The objecting parties argue that the Court's jurisdiction to make appropriate orders should not be ousted by the terms of the Interim Lender Term Sheet. However, there is nothing peculiar about this provision in the Interim Lender Term Sheet. The importance of the super-priority to interim lenders has consistently been recognized by the courts. As stated by the Supreme Court in *Indalex*:

... case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act (2007)*, at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries.<sup>21</sup>

(Emphasis added)

[98] Similarly, Justice Morawetz stated in *Timminco*:

[49] In the absence of the court granting the requested super priority, the objectives of the CCAA would be frustrated. It is neither reasonable nor realistic to expect a commercially motivated DIP lender to advance funds in a DIP facility without super priority. The outcome of a failure to grant super priority would, in all likelihood, result in the Timminco Entities having to cease operations, which would likely result in the CCAA proceedings coming to an abrupt halt, followed by bankruptcy proceedings. Such an outcome would be prejudicial to all stakeholders, including CEP and USW.<sup>22</sup>

(Emphasis added)

<sup>21</sup> *Indalex*, *supra* note 18, par. 59

<sup>22</sup> *Timminco Limited (Re)*, 2012 ONSC 948, par. 49. This passage was quoted with approval in *White Birch*, *supra* note 14, par. 215.



[99] The objecting parties also plead that the Interim Lender is related to the Wabush CCAA Parties and therefore has interests which might be different than those of an arm's length lender.

[100] However, there is no evidence that gives credence to the suggestion that the Interim Lender will advance funds without the super-priority. To the contrary, the attorney representing the Interim Lender made it clear at the hearing that there would be no advance of funds if the super-priority was not confirmed. Further, the Court is not satisfied that it has the jurisdiction to order the Interim Lender to advance the funds on terms other than those that it has accepted.

[101] In all of these circumstances, the Court concludes that giving effect to the deemed trust under the N&L Act carries a serious risk of frustrating the CCAA process. The Court therefore concludes that the doctrine of federal paramountcy is engaged, and it concludes that the N&L Act is not effective to that extent.

[102] The Court will therefore order that the Interim Lender Charge shall have priority over the deemed trusts under the PBSA and the N&L Act.

## 2. Suspension of special payments

[103] Further, the Wabush CCAA Parties asked that their obligation to make the special payments to the pension plans be suspended.

[104] The Courts have consistently recognized a jurisdiction to suspend the obligation to make special payments and OPEB payments "when necessary to enhance liquidity to promote the survival of a company in financial distress."<sup>23</sup>

[105] Several reasons underlie the existence of this jurisdiction.

[106] First, the normal pension payments that the employer is required to make relate to the current services rendered by the current employees and the Court's jurisdiction to affect those payments is limited by the principle that the debtor must pay for current services. However, the special payments relate to a deficit that has accumulated in the pension plan. Pension benefits are deferred compensation for services that were provided by the retiree while he or she was an employee.<sup>24</sup> As a result, the special

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<sup>23</sup> *Aveos*, *supra* note 10, par. 88. See also *White Birch Paper Holding Company (Arrangement relatif à)*, 2010 QCCS 764, par. 94-100; *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 2028, par. 27, 31-32; *Papiers Gaspésia Inc., Re*, 2004 CanLII 40296 (QC CS), par. 87-92; *Collins & Aikman Automotive Canada Inc. (Re)*, 2007 CanLII 45908 (ON SC), par. 90-92; *Fraser Papers Inc. (Re)*, 2009 CanLII 39776 (ON SC), par. 20; *Timminco Limited (Re)*, 2012 ONSC 506, par. 61-63.

<sup>24</sup> *IBM Canada Limited v. Waterman*, 2013 SCC 70, [2013] 3 S.C.R. 985, par. 4.

payments relate to services provided to the employer before the filing, and as such, they can be qualified as pre-filing obligations.<sup>25</sup>

[107] Second, the special payments are unsecured in the CCAA context. Sections 6(6) and 36(7) create a priority in the CCAA context for the normal payments but not for the special payments. As discussed above, the deemed trust under Section 8(2) PBSA has no effect in a CCAA proceeding, and the deemed trust under Section 32(2) of the N&L Act, in purporting to create a security interest not recognized under the CCAA, is not effective to the extent that it conflicts with the CCAA.<sup>26</sup>

[108] As a result, the payment of the special payments would constitute payments to an unsecured pre-filing creditor, which could be qualified as preferential in the sense that no other unsecured pre-filing creditor is being paid.

[109] In any event, even without this characterization, the courts have a broad discretion under the CCAA to render orders that are necessary to allow the debtor to make a proposal to its creditors.

[110] In the exercise of this discretion, it is important to consider the facts.

[111] The special payments for the two plans are made up of monthly amortization payments in the amount of \$666,555.58 per month and a lump sum “catch-up” amortization payment of approximately \$5.5 million due in July 2015.

[112] The Wabush CCAA Parties do not have the funds available to make these payments. The cash flow statements filed with the Court show that the Wabush CCAA Parties need the funds from the Interim Financing to meet their current obligations other than the special payments. The Interim Lender Term Sheet expressly requires the Wabush CCAA Parties not to make any special payments. As a result, forcing the Wabush CCAA Parties to make the special payments would lead to a default under the Interim Financing and a likely bankruptcy.<sup>27</sup>

[113] The objecting parties criticize the position taken by the Interim Lender in prohibiting the payment of the special payments.

[114] However, the position taken by the Interim Lender in this file is consistent with the position taken by other interim lenders in other files:

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<sup>25</sup> *White Birch*, *supra* note 23, par. 97; *Fraser Papers*, *supra* note 23, par. 20; *Sroule v. Nortel Networks Corporation*, 2009 ONCA 833, par. 20-21. In *Aveos*, *supra* note 10, par. 86-88, Justice Schragger concluded that this characterization was not necessary for the court to have jurisdiction to suspend the payments.

<sup>26</sup> *Indalex*, *supra* note 18, par. 56.

<sup>27</sup> See a similar argument in *Collins & Aikman*, *supra* note 23, par. 91-92; *Fraser Papers*, *supra* note 23, par. 21;

[55] *Fairfax* [the interim lender] a indiqué au Tribunal que ce financement avait été octroyé pour financer les activités courantes de *Bowater* et ne pouvait ainsi être utilisé pour payer les cotisations d'équilibre aux régimes de retraite. Le financement est aussi sujet au respect de différents ratios de solvabilité.<sup>28</sup>

[115] Moreover, the Interim Lender's position makes sense as a commercial matter. Why should the Interim Lender advance funds that will be used to pay someone else's debt, particularly one which is pre-filing and unsecured? It is the Interim Lender's intention to fund the Wabush CCAA Parties with the amount required to get them through the SISP so that they can repay the loan. It is not in the Interim Lender's interest to fund preferential payments to unsecured pre-filing creditors. The language cited above about the harsh commercial realities of interim financing applies here as well.

[116] Moreover, the Court is being asked to suspend the obligation to make the special payments, and is not being asked to alter the collective agreement or extinguish the obligation to pay these amounts.<sup>29</sup>

[117] As a result, the beneficiaries of the pension plans would not be prejudiced by this suspension. The wind-up deficiencies for the two pension plans as at January 1, 2015 are estimated to be a total of approximately \$41.5 million. The purpose of the special payments is to reduce that deficiency and to improve the situation over time such that the beneficiaries will receive the full amounts to which they are entitled. The suspension of the special payments means that their position is not improved, but it is not worsened. Their debt remains and benefits from whatever priority it is entitled to at law.

[118] For all of these reasons, the Court will order the suspension of the special payments to the pension funds.

### 3. Suspension of the OPEBs

[119] The Wabush CCAA Parties currently provide OPEBs, including life insurance and health care, to former hourly and salaried employees.

[120] As of December 31, 2014, accumulated benefits obligations for the OPEBs totalled approximately \$52.1 million. The premiums required to fund the foregoing OPEBs are approximately \$182,000 a month.

[121] In addition to the foregoing, there is a supplemental retirement arrangement plan for certain current and former salaried employees of Wabush Mines JV. The obligations under this plan are approximately \$1.01 million.

<sup>28</sup> *AbitibiBowater*, *supra* note 23, par. 55. See also *Ivaco Inc. (Re)*, 2006 CanLII 34551 (Ont.C.A.), par. 17; *Fraser Paper*, *supra* note 23, par. 23.

<sup>29</sup> Section 33 CCAA; *Syndicat national de l'amiante d'Asbestos inc. c. Mine Jeffrey inc.*, [2003] R.J.Q. 420 (C.A.), par. 57-58.

[122] The Wabush CCAA Parties do not have any funding available to continue to pay any of the foregoing OPEBs, as the Interim Financing Term Sheet prohibits such payments. They seek an order from the Court suspending the payment of the OPEBs *nunc pro tunc* to the Wabush Filing Date.

[123] The reasoning as to the existence and the exercise of the discretion to suspend these payments is much the same as for the special payments. The Wabush CCAA Parties do not have the funds to make the payments, and the Interim Lender Term Sheet does not allow them to make these payments. These amounts relate to services provided pre-filing and they are unsecured. They are in a sense even less secured than the special payments because the deemed trusts created by the PBSA and the N&L Act do not purport to cover these payments.

[124] The retirees plead that there are two important differences.

[125] First, the amount at issue is only \$182,000 per month. The retirees suggest that the Wabush CCAA Parties should be able to find this amount somewhere. The Wabush CCAA Parties continue to argue that they do not have the funds with which to make these payments, and the Interim Lender Term Sheet in any event prevents them from making these payments. Given the cash flow statement filed with the Court and the language of the Interim Lender Term Sheet, the Court accepts that the Wabush CCAA Parties do not have the funds.

[126] The second difference pleaded by the retirees is that they suffer a clear prejudice. The OPEBs are provided through an insurance policy, and if the Wabush CCAA Parties fail to pay the premium, the policy will be cancelled, leaving the retirees with no health insurance and only a claim against the insolvent Wabush CCAA Parties. The Court assumes this to be correct and accepts that this will cause hardship to the retirees.

[127] The retirees argue that this is equivalent to a disclaimer or rescission of the insurance contract by the Wabush CCAA Parties, which is invalid because the formalities under Section 32(1) CCAA were not followed, and the test under Section 32(4) CCAA for the Court to authorize the disclaimer or rescission was not met. Section 32(4)(c) provides that one of the factors to be considered is “whether the disclaimer or rescission would likely cause significant financial hardship to a party to the agreement.”

[128] This argument does not withstand scrutiny.

[129] There is a tri-partite relationship. The employer has obligations to the beneficiaries, and has entered into an insurance policy with the insurer so that the insurer provides those benefits to the beneficiaries. If the employer stops paying the premiums, the insurer will terminate the insurance policy. This does not affect the

employer's obligations to the beneficiaries,<sup>30</sup> but the beneficiaries will be left with an insolvent debtor instead of the insurer.

[130] However, the contract that is being terminated is the contract between the Wabush CCAA Parties and the insurer for the benefit of the beneficiaries. The counter-party is the insurer. It is not suggested that the insurer will suffer any significant financial hardship as a result of the termination of the contract. The contract between the Wabush CCAA Parties and the beneficiaries is not being terminated.

[131] Moreover, the Wabush CCAA Parties are not disclaiming or resiliating the contract. The Wabush CCAA Parties are seeking authorization to stop paying under a contract, just as they have undoubtedly stopped paying under a number of other contracts. When the debtor defaults, the counter-party has a number of options, including terminating the contract. Even if termination by the counter-party is the likely result, as in this case, it does not mean that the debtor has disclaimed or resiliated the contract. Otherwise, the debtor would have to follow the formalities and pass the test in Section 32 CCAA every time it defaulted under a contract.

[132] At the end of the day, the answer is the same as for the special payments, and the payment of the OPEBs should also be suspended.<sup>31</sup>

[133] The Court is very mindful of the hardship that the suspension of the OPEB payments and the termination of the insurance policy will cause to the beneficiaries. Unfortunately, that hardship appears to be inevitable. Even if the Court ordered the Wabush CCAA Parties to keep paying the premium during the SISP, that would be only a temporary solution and it is very likely if not inevitable that following the conclusion of the SISP, the Wabush CCAA Parties will cease their operations and the insurance policy will be terminated.

#### **4. Breach of fiduciary duties**

[134] The objecting parties also pleaded that Wabush Mines is in a situation of conflict of interest because it is both the administrator of the pension plans and one of the Wabush CCAA Parties seeking relief with respect to the pension plans.

[135] The PBSA and the N&L Act allow the employer to act as administrator, and the insolvency of the employer inevitably leads to the type of potential conflict in which Wabush Mines finds itself.

[136] Consistent with the views expressed by the Supreme Court in *Indalex*, the Court concludes that the giving of notice to the regulators, the Union and the retirees, the postponement of the hearing from June 9, 2015 to June 22, 2015 to allow the objecting

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<sup>30</sup> *Ibid*, par. 58.

<sup>31</sup> See also *White Birch*, *supra* note 23, par 40.

parties to present their arguments, and the consent to the motion presented by the four retirees for a representation order allowing them to represent all salaried/non-union employees and retirees and related beneficiaries at the expense of the Wabush CCAA Parties, all show that the employer acted in good faith in a way consistent with its fiduciary duties to the beneficiaries of the pension plans.<sup>32</sup>

## 5. Representation order sought by the Union

[137] The Union requests that one officer from each of the two locals be designated by the Court as the persons responsible for responding to questions from unionized retirees of the Wabush CCAA Parties and providing them with information about their rights and recourses. Further, the Union asks that those persons be funded by the Wabush CCAA Parties.

[138] The individuals that the Union proposes are officers of the two locals. The Union is essentially asking the Court to designate these individuals and to order that a portion of their salary be paid by the Wabush CCAA Parties. At the present time, the Union estimates that the two individuals spend one half of their time responding to calls, although that time seems to be decreasing. The admissions filed in lieu of the testimony of Frank Beaudin refer to the volume of calls received by the Union since the May 29, 2015 letter was sent to the retirees.

[139] The Monitor is a Court officer whose duties include providing information of this nature. However, the Court also recognizes that the Union has received and will continue to receive calls from the unionized retirees. It is appropriate for the Union to provide information to its retired members and to designate specific individuals to provide the information in order to ensure that there is consistency in the information provided.

[140] However, this is not a matter that requires the intervention of the Court. The Union can handle matters of communications with its former members without a Court order. The Union does not seek an order that it be authorized to represent these unionized retirees. If the Union were to make such a motion, the Court would have to consider whether there is a potential conflict between the current employees and the retirees.

[141] Further, the Court does not consider it appropriate that the Wabush CCAA Parties be ordered to pay part of the salary of the two individuals. They are salaried union officers. Providing information of this nature is within their functions.

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<sup>32</sup> *Indalex, supra* note 18, par. 73.

[142] For these reasons, the Union's motion will be dismissed.

**FOR THESE REASONS, THE COURT:**

[143] **DISMISSES** the contestations by Her Majesty in right of Newfoundland and Labrador, represented by the Superintendent of Pensions, the Attorney General of Canada and the Syndicat des Métallos, Section Locale 6254 and the Syndicat des Métallos, Section Locale 6285 to the priority of the Interim Lender Charge over deemed trusts, as set out in paragraph 47 of the Wabush Initial Order, as amended on June 9, 2015, and **CONFIRMS** the priority of the Interim Lender Charge over deemed trusts, as set out in paragraph 47 of the Wabush Initial Order, as amended on June 9, 2015;

[144] **ORDERS** the suspension of payment by the Wabush CCAA Parties of the monthly amortization payments coming due pursuant to the Contributory Pension Plan for Salaried Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company and the Pension Plan for Bargaining Unit Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company, *nunc pro tunc* to the Wabush Filing Date;

[145] **ORDERS** the suspension of payment by the Wabush CCAA parties of the annual lump sum "catch-up" payments coming due pursuant to the Contributory Pension Plan for Salaried Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company and the Pension Plan for Bargaining Unit Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company, *nunc pro tunc* to the Wabush Filing Date;

[146] **ORDERS** the suspension of payment by the Wabush CCAA Parties of other post-retirement benefits to former hourly and salaried employees of their Canadian subsidiaries hired before January 1, 2013, including without limitation payments for life insurance, health care and a supplemental retirement arrangement plan, *nunc pro tunc* to the Wabush Filing Date.

[147] **DISMISSES** the Motion to Modify the Initial Order presented by the Syndicat des Métallos, Section Locale 6254 and the Syndicat des Métallos, Section Locale 6285;

[148] **WITHOUT COSTS.**

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STEPHEN W. HAMILTON, J.S.C.

Mtre Bernard Boucher  
Mtre Steven Weisz  
BLAKE CASSELS & GRAYDON S.R.L.  
For the Petitioners Bloom Lake General Partner Limited et al

Mtre Matthew Gottlieb  
LAX O'SULLIVAN SCOTT LISUS LLP  
Independent Counsel for the Board of Directors of Petitioners

Mtre Sylvain Rigaud  
Mtre Chrystal Ashby  
NORTON ROSE FULLBRIGHT LLP  
For the Monitor FTI Consulting Canada Inc.

Mtre Doug Mitchell  
Mtre Leslie-Anne Wood  
IRVING MITCHELL KALICHMAN  
For Her Majesty in right of Newfoundland and Labrador, as represented by the  
Superintendent of Pensions

Mtre Pierre Lecavalier  
DEPARTMENT OF JUSTICE - CANADA  
For the Attorney General of Canada

Mtre Jean-François Beaudry  
PHILION, LEBLANC, BEAUDRY, AVOCATS  
For the Syndicat des Métallos, Section Locale 6254 and the Syndicat des Métallos,  
Section Locale 6285

Mtre Nicholas Scheib  
SCHEIB LEGAL  
And  
Mtre Andrew J. Hatnay  
Mtre Ari Kaplan  
KOSKIE MINSKY LLP  
For Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson, as representatives  
for the salaried/non-union employees and retirees

Mtre Gerry Apostolatos  
LANGLOIS KRONSTROM DESJARDINS



For the Creditors Quebec North Shore and Labrador Railway Company Inc., Air Inuit Ltd, Metso Shared Services Ltd, Iron Ore Company of Canada, and WSP Canada Inc.

Mtre Louis Dumont

DENTON

For the Interim Lender Cliffs Quebec Iron Mining ULC

Hearing date: June 22, 2015

## COURT OF APPEAL

CANADA  
PROVINCE OF QUEBEC  
REGISTRY OF MONTREAL

No: 500-09-025441-155  
500-09-025469-156  
(500-11-048114-157)

DATE: AUGUST 18, 2015

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**PRESIDING: THE HONOURABLE NICHOLAS KASIRER, J.A.**

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

**500-09-025441-155**

**MICHAEL KEEFER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON, as  
representatives of the salaried / non-union employees and retirees  
APPLICANTS – objecting parties**

v.

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

RESPONDENTS – petitioners

and

**THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP  
BLOOM LAKE RAILWAY COMPANY LIMITED  
WABUSH MINES**

**ARNAUD RAILWAY COMPANY  
WABUSH LAKE RAILWAY COMPANY LIMITED  
IMPLEADED PARTIES – impleaded parties**

and

**FTI CONSULTING CANADA INC.**

IMPLEADED PARTY – monitor

and

**HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR, as represented  
by THE SUPERINTENDENT OF PENSIONS**

**THE ATTORNEY GENERAL OF CANADA**

**SYNDICAT DES MÉTALLOS, SECTION LOCALE 6254**

**SYNDICAT DES MÉTALLOS, SECTION LOCALE 6285**

IMPLEADED PARTIES – objecting parties

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**500-09-025469-156**

**SYNDICAT DES MÉTALLOS, SECTION LOCALE 6254**

**SYNDICAT DES MÉTALLOS, SECTION LOCALE 6285**

APPLICANTS – objecting parties

v.

**BLOOM LAKE GENERAL PARTNER LIMITED**

**QUINTO MINING CORPORATION**

**8568391 CANADA LIMITED**

**CLIFFS QUEBEC IRON MINING ULC**

**WABUSH IRON CO. LIMITED**

**WABUSH RESOURCES INC**

RESPONDENTS – petitioners

and

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

**BLOOM LAKE RAILWAY COMPANY LIMITED**

**WABUSH MINES**

**ARNAUD RAILWAY COMPANY**

**WABUSH LAKE RAILWAY COMPANY LIMITED**

IMPLEADED PARTIES – impleaded parties

and

**FTI CONSULTING CANADA INC.**

IMPLEADED PARTY – monitor

and

**HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR, as represented  
by**

**THE SUPERINTENDENT OF PENSIONS**

**THE ATTORNEY GENERAL OF CANADA**

**MICHAEL KEEFER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON, as  
representatives of the salaried / non-union employees and retirees**

IMPLEADED PARTIES – objecting parties  
and  
**QUEBEC NORTSHORE AND LABRADOR RAILWAY COMPANY INC.  
IRON ORE COMPANY OF CANADA**  
IMPLEADED PARTY – impleaded parties

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## JUDGMENT

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[1] Sitting as judge in chambers pursuant to sections 13 and 14 of the *Companies' Creditors Arrangement Act*<sup>1</sup> ("CCAA") and articles 29, 511 and 550 C.C.P., I am seized of two motions for leave to appeal from a judgment of the Superior Court, District of Montreal (the Honourable Stephen Hamilton), rendered on June 26, 2015. The Superior Court dismissed contestations made on behalf of the petitioners, who are, respectively, representatives of non-union employees and retired employees (petitioners in court file C.A.M. 500-09-025441-155 and hereinafter designated the "Salaried Members") and the Syndicat des Métallos, sections locales 6254 and 6285 (in court file C.A.M. 500-09-025469-156, hereinafter referred to together as the "Union"). In so doing, the Superior Court confirmed the respondent's request to grant priority to an interim lender charge over claims made by the petitioners based on deemed trusts in pension legislation. The Court also suspended certain payments due under pension plans as well as for post-retirement benefits.

[2] The Union filed an amended motion prior to the hearing. Both motions for leave also ask for orders to suspend provisional execution of the judgment notwithstanding appeal.

### **I Background**

[3] The facts are usefully and completely recounted in the judgment *a quo*.<sup>2</sup>

[4] On May 20, 2015, the CCAA Judge Hamilton, J. granted a motion for the issuance of an initial order to commence proceedings under the CCAA to respondents Wabush Iron Ore Co. Ltd., Wabush Resources Inc., Wabush Mines, Arnaud Railway Company and Wabush Railway Co. Ltd. (the "Wabush CCAA Parties"). The CCAA proceedings as they concern the Wabush CCAA Parties were joined to CCAA proceedings started some four months earlier involving the "Bloom Lake CCAA Parties".<sup>3</sup>

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<sup>1</sup> R.S.C. 1985, c. C-36.

<sup>2</sup> 2015 QCCS 3064.

<sup>3</sup> The pre-existing CCAA proceedings were commenced on January 27, 2015, by an initial order issued by Castonguay, J. of the Superior Court, in respect of Bloom Lake General Partner Ltd., Quinto

[5] Prior to the filing of the motion, Wabush Mines operated an iron ore mine located near the Town of Wabush and Labrador City, in the province of Newfoundland and Labrador, with facilities at Pointe-Noire, Quebec.

[6] The Wabush CCAA Parties are currently involved in a court-ordered sales process, originally commenced in the Bloom Lake CCAA proceedings, whereby they seek to sell assets with a view either to concluding a plan of compromise with their creditors (including the petitioners) or disposing of assets and distributing the proceeds to creditors (including the petitioners).

[7] The Wabush CCAA Parties have two defined pension plans for their employees, one for salaried employees and the other for unionized employees paid an hourly wage. Because some employees work in a provincially-regulated setting in Newfoundland and Labrador and others work in federally-regulated industries, the plans are subject to oversight by both the federal Office of Superintendent of Financial Institutions and the Newfoundland and Labrador Superintendent of Pensions.

[8] Both plans are underfunded. The CCAA Judge set forth estimated amounts to be paid as winding-up deficiencies, monthly amortization payments and lump-sum “catch-up” amortization payments. He noted as well that the Wabush CCAA Parties provide other post-employment benefits (“OPEB”), including health care and life insurance, to certain retired employees. Accumulated benefits’ obligations for the OPEBs, as well as monthly premiums required to fund those benefits, are to be paid by the Wabush CCAA Parties. In addition, amounts are due pursuant to a supplemental retirement arrangement plan for certain salaried employees (see paras [4] to [13] of the judgment).

[9] The Wabush CCAA Parties arranged for interim financing (a debtor-in-possession or “DIP” loan) from Cliffs Mining Company, a related company. The CCAA Judge was of the view that the Wabush CCAA Parties’ cash-flow was compromised and that the interim financing was necessary to continue operations during restructuring. The Wabush initial order approved an interim financing term sheet pursuant to which the interim lender would provide US\$10M of interim financing, on conditions, for the Wabush CCAA Parties short-term liquidity needs during the CCAA proceedings. These conditions included, as the CCAA Judge recorded in paragraph [16] of his reasons, a requirement that the interim lender have a charge in the principal amount of CDN \$15M, with priority over all charges, against Wabush CCAA Parties’ property, subject to some exceptions. There is a further condition that Wabush CCAA Parties may not make any special payments in relation to the pension plans or any payments in respect of the OPEBs. The initial order granted the interim lender charge of \$15M but did not give priority to that charge over existing secured creditors in order to allow the parties to make representations at a comeback hearing.

[10] At that comeback hearing, the Wabush CCAA Parties sought, *inter alia*, priority for the interim lender charge ahead of deemed trusts created by pension legislation and a suspension of obligations to pay amortization payments in relation to the pension plans and payments for OPEBs. The Salaried Members and the Union contested these matters. The CCAA Judge issued an order on June 9, 2015 granting priority to the interim lender charge, subject to the rights of, *inter alia*, the Salaried Members, the Union and the federal and provincial pension authorities to be determined at a later hearing.

[11] That hearing on June 22, 2015 gave rise to the judgment *a quo* in which the CCAA Judge granted the Wabush CCAA Parties' comeback motion and dismissed the contestations brought by the Salaried Members and the Union.

## II The judgment of the Superior Court

[12] The CCAA Judge made numerous findings and rendered different orders, not all of which concern the motions before me. I will limit my comments to those aspects of the judgment relevant here.

[13] After setting forth the context and the arguments of the parties, the CCAA Judge considered the conflict between the super-priority of the interim lender charge and the deemed trusts created by federal and provincial legislation. (His findings in respect of the provincial rules do not concern us directly at this stage).

[14] As to the impact of CCAA proceedings on the deemed trust created by subsection 8(2) of the *Pension Benefits Standards Act, 1985*,<sup>4</sup> the judge wrote “there is no general rule that deemed trusts in favour of anyone other than the Crown are ineffective in insolvency” (para. [72]). He then considered the effect of subsection 8(2) PBSA on the provisions of the CCAA that deal with pension obligations, including subsections 6(6) and 36(7) CCAA that were added to the Act in 2009. Based on his interpretation of the general rule in subsection 8(2) PBSA and the particular rules in the CCAA, the judge concluded, as an exercise of statutory interpretation, that “Parliament’s intent is that federal pension claims are protected in [...] restructurings only to the limited extent set out in the [...] CCAA, notwithstanding the potentially broader language in the PBSA” (para. [78]). In the alternative, he wrote, “the Court could conclude that a liquidation under the CCAA does not fall within the term “liquidation” in Subsection 8(2) PBSA such that there has been no triggering event” (para. [79]). Either way, he observed, the deemed trust in subsection 8(2) PBSA did not prevent him from granting a priority to the interim lending charge if the conditions of section 11.2 CCAA were met.

[15] After considering the relevant factors under the CCAA to the facts of the case, the CCAA Judge decided that the proposed sale was in the interests of the Wabush CCAA Parties and their stakeholders as it should lead to a greater recovery. The sale

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<sup>4</sup> R.S.C. 1985, c. 32 (2<sup>nd</sup> Supp.).

required new financing and, without that financing, it is likely that the Wabush CCAA Parties would go bankrupt. The judge also expressed his view that the terms and conditions of the interim financing were reasonable, and that the security is limited to the amount of the new financing. He then wrote that “[t]his is sufficient for the Court to conclude that the Interim Financing should be approved and the interim lender charge should be granted with priority over the deemed trust under the PBSA, if it is effective in the CCAA context” (para. [95]). He also found that the terms of the interim lending sheet, including the requirement that the interim lender be granted super priority, were not unusual and that he was not satisfied that the Superior Court had jurisdiction to order the lender to advance the funds on other terms (para. [100]).

[16] The CCAA Judge then gave reasons for his decision to grant the Wabush CCAA Parties’ request that their obligation to make special and OPEB payments be suspended. He held that forcing the Wabush CCAA Parties to make special payments would lead to a default under the interim financing arrangement and a likely bankruptcy (para. [112]). He came to the same conclusion in respect of the OPEBs (para. [122]). In so doing, he rejected the argument that the suspension of the OPEBs amounted to a rescission of the insurance contract under which the benefits are provided, rescission which would have required notice under section 32 CCAA (paras [127] to [131]).

[17] The CCAA Judge rejected all other grounds for contestation. He confirmed the priority of the interim lending charge over the deemed trusts as set out in the initial order; he ordered the suspension of payment by the Wabush CCAA Parties of monthly amortization payments, of the annual lump sum catch-up payments, and of other post-retirement benefits.

### III The motions for leave

[18] The two motions raise some similar issues but are different in scope.

[19] The Salaried Members ask for leave to appeal in respect of conclusions relating to two aspects of the judgment.

[20] First, the Salaried Members seek to reverse the CCAA Judge’s approval of what they characterize as the termination of OPEBs and of payment of supplemental pension benefits imposed by the Wabush CCAA Parties without proper notice as required by section 32 CCAA. In this regard, the Salaried Members object to the following paragraph in the judgment *a quo*:

[146] ORDERS the suspension of payment by the Wabush CCAA Parties of other post-retirement benefits to former hourly and salaried employees of their Canadian subsidiaries hired before January 1, 2013, including without limitation payments for life insurance, health care and a supplemental retirement arrangement plan, *nunc pro tunc* to the Wabush Filing Date.

[21] In argument, the Salaried Members also contended that the CCAA Judge's finding that the Wabush CCAA Parties did not have the funds to meet the \$182,000 monthly payments for the premiums to fund the OPEBs and the supplemental pension benefits was mistaken.

[22] Second, the Salaried Members seek to reverse that portion of the CCAA Judge's reasons bearing on the ineffectiveness of the federal statutory deemed trust in CCAA proceedings. They say that to hold the deemed trust priority under the PBSA to be "of no force and effect in CCAA Proceedings on a wholesale basis" is wrong in law. Specifically they state that the deemed trust priority should continue to apply for the benefit of Salaried Members over the assets of the company in future priority distributions (after the DIP and CCAA-ordered priorities). For this second argument, the Salaried Members target the following paragraphs of the CCAA Judge's reasons as they pertain to the effectiveness of the PBSA deemed trust in CCAA proceedings:

[78] For all of these reasons, the Court concludes that Parliament's intent is that federal pension claims are protected in insolvency and restructurings only to the limited extent set out in the *BIA* and the *CCAA*, notwithstanding the potentially broader language in the PBSA.

[79] In the alternative, the Court could conclude that a liquidation under the CCAA does not fall within the term "liquidation" in Section 8(2) PBSA such that there has been no triggering event.

[23] It may be noted that the Salaried Members had initially contemplated objecting to the non-payment of other amounts owing by the Wabush CCAA Parties in respect of the pension plans. But given limits to the Wabush CCAA Parties' cash-flow and the significant amounts of these payments, the Salaried Members chose not to pursue the objections in these proceedings.

[24] As noted, the Salaried Members also ask to suspend provisional execution notwithstanding appeal of this order.

[25] The Union's proposed appeal is somewhat broader.

[26] In respect of the portion of the judgment regarding the deemed trust provided in the PBSA, the Union is of the view, like the Salaried Members, that the CCAA Judge erred in holding that the subsection 8(2) PBSA deemed trust is ineffective in CCAA proceedings. Moreover, the Union disagrees with the CCAA Judge that the pension amortization payments constitute ordinary, unsecured claims under the CCAA rather than trust claims (paras [103] to [118] of the judgment). The Union also says the CCAA Judge was mistaken in deciding that the financing conditions in respect of the interim financial loan were reasonable insofar as those conditions precluded the payment of OPEBs (paras [119] to [133]). The judge should have set aside the unreasonable conditions in the interim lending sheet. Had he done so, the judge would have found



that the Wabush CCAA Parties had the necessary funds to make the payments owed under the plans.

[27] The Union also seeks a stay of provisional execution of the judgment.

[28] It bears mentioning that the Union's motion was filed late. In keeping with section 14(2) CCAA, the Union obtained permission from the CCAA Judge to bring the late appeal, subject to the determination by a judge in chambers of this Court as to whether the appeal is a serious one.<sup>5</sup> None of the parties objected to this way of proceeding and I find the Union's amended motion to be correctly before me.

#### IV Criteria for granting leave

[29] The test for leave under the CCAA is well known. Writing for the Court of Appeal for Saskatchewan in *Re Stomp Pork Farm Ltd.*,<sup>6</sup> Jackson, J.A. wrote:

[15] In a series of cases emanating first from British Columbia and then from Quebec, Alberta and Ontario, there has developed a consensus among the Courts of Appeal that leave to appeal an order or decision made under the CCAA should be granted only where there are serious and arguable grounds that are of real significance and interest to the parties and to the practice in general. The test is often expressed as a four-part one:

1. whether the issue on appeal is of significance to the practice;
2. whether the issue raised is of significance to the action itself;
3. whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and,
4. whether the appeal will unduly hinder the progress of the action.

[30] Judges sitting in chambers of this Court have consistently applied this four-part test to measure the seriousness of a proposed appeal. As my colleague Hilton, J.A. observed in *Statoil Canada Ltd. (Arrangement relative à)*,<sup>7</sup> the above-mentioned four criteria are understood to be cumulative, with the result that if a petitioner fails to establish any one of them, the motion for leave will be dismissed. Hilton, J.A. alluded to the oft-repeated injunction that a petitioner seeking leave to appeal faces a heavy burden given the role of a CCAA judge, the discretionary character of the decisions he or she must make and the nature of the proceedings. He recalled the longstanding cautionary note that motions for leave should only be granted "sparingly".<sup>8</sup>

<sup>5</sup> 2015 QCCS 3584, paras [32] to [34] (*per* Hamilton, J.).

<sup>6</sup> 2008 SKCA 73 (footnotes omitted).

<sup>7</sup> 2013 QCCA 851, para. [4] (in chambers).

<sup>8</sup> *Ibid.*, para. [4].

[31] The grounds upon which a stay of provisional execution notwithstanding appeal may be granted by a judge in chambers are also well known.<sup>9</sup> Applying the principles developed pursuant to article 550 C.C.P. to this case, I note that the petitioners must show that the judgment suffers from a plain weakness; that failing to grant the stay would result in serious harm (sometimes characterized as irreparable harm) to them; and that the balance of inconvenience favours granting a stay.

#### IV Analysis

[32] Despite the importance of certain of the questions raised in the motions for leave to the practice and to this action, and notwithstanding the *prima facie* meritorious character of some arguments made by the petitioners, I am of the respectful view that both the Salaried Members and the Union have failed to meet the test for leave. In particular, they have not convinced me that an appeal would not unduly hinder the progress of the action.

[33] I shall make brief comments on each of the four criteria in turn.

##### IV.1 Importance of the questions to the practice

[34] Some questions raised in both motions, to varying degrees, have importance to the practice as that notion is understood in connection with applications for leave brought under sections 13 and 14 CCAA.

[35] The issue of the effectiveness of the PBSA deemed trust in CCAA proceedings raised in both motions meets this first criterion. This issue is not, as the respondent argued, a settled matter. In pointing to the CCAA Judge's comment in paragraph [61] to the effect that "[t]hese are not new issues", respondent has, it seems to me, quoted the judge out of context. It is of course true, as the CCAA Judge observed, that courts, including the Supreme Court, have been called upon to consider the effect of statutory deemed trusts in insolvency on numerous occasions. But as the CCAA Judge's own reasons make plain, the interpretation of the deemed trust protection in subsection 8(2) PBSA in light of amendments made to the CCAA in 2009, in particular subsections 6(6) and 36(7), involve a different exercise of statutory interpretation. In undertaking that work, the judge did have the benefit of principles set out in *Century Services*<sup>10</sup> relating to the conflict between the deemed trust for the GST and the CCRA, in *Sparrow Electric*<sup>11</sup> dealing with a deemed trust in favour of the Crown in respect of payroll deductions for taxation, as well as *Indalex*<sup>12</sup> in which a conflict between provincial deemed trust and federal insolvency law was in part at issue. But these settings were different from that of the case at bar. Others have observed that difficulties arising out of

<sup>9</sup> Recently summarized by the Court in *Imperial Tobacco Canada Ltd. v. Conseil québécois sur le tabac et la santé*, 2015 QCCA 1224, para. [14].

<sup>10</sup> *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379.

<sup>11</sup> *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411.

<sup>12</sup> *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 S.C.R. 272.

the interaction between deemed trust rules for pensions and the CCAA persist, notwithstanding the jurisprudence of the Supreme Court on point.<sup>13</sup> Moreover, the narrow issue would be new to this Court and the practice would have a precise consideration of the interaction between the federal deemed trust in subsection 8(2) and the CCAA by an appellate court.

[36] This is not to say that the CCAA Judge was the first to consider the problem. He had the benefit of *Aveos*<sup>14</sup>, decided by Schragar, J., as he then was, as well as a scholarly paper on the topic which he cited with approval in paragraph [77]. And while the CCAA Judge and Schragar, J. agree on central aspects of that interpretation exercise, they are not at ones on all points, including the importance of a Crown exception in this context (as the CCAA Judge himself noted at para. [72]). While I recognize the care with which the CCAA Judge examined the question of statutory interpretation, as well as the alternative argument as to whether “any liquidation” within the meaning of subs. 8(2) PBSA includes CCAA proceedings – a point not given full analysis in *Aveos* – the matter of the effectiveness of the federal deemed trust in CCAA proceedings is not settled law and remains important to CCAA practice.

[37] Is the issue raised by the Salaried Members of the proper scope of section 32 CCAA, and the prior notice rule, also of sufficient importance to the practice?

[38] As I will note below, I am of the respectful view that the merits of this argument are less strong. Nonetheless, the matter of the proper scope of section 32 in light of the kind of insurance contract that provided benefits here, and in particular of competing notions of suspension and termination of OPEBs, is one of importance to the practice.

[39] What about the Union’s argument that the judge erred in holding that the terms of the interim financing were reasonable?

[40] This decision was one that called upon the CCAA Judge to make a determination of fact and exercise discretion afforded him under the Act, matters generally viewed as less consequential to the practice. Moreover, it would seem to me that the ability of a lender to determine the basis of risk he or she is willing to tolerate in a restructuring is not a matter widely disputed. I have not been convinced that this point, viewed on its own, is important to the practice.

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<sup>13</sup> Scholars have alluded to the different permutations of the deemed trust problem in CCAA matters as important to the practice: see, e.g., Janis P. Sarra, *Rescue! The Companies’ Creditors Arrangement Act*, 2<sup>nd</sup> ed. (Toronto: Carswell, 2013) at 370 *et seq.* and a useful comment by Jassmine Girgis entitled “*Indalex*: Priority of Provincial Deemed Trusts in CCAA Restructuring” posted by the University of Calgary Faculty of Law on the website <http://ablawg.ca> in which the author comments on the on-going importance of the issue after *Indalex*.

<sup>14</sup> *Aveos Fleet Performance Inc. (arrangement relatif à)*, 2013 QCCS 5762.

## IV.2 Importance of the questions to the present action

[41] The decision not to apply the PBSA deemed trust in CCAA proceedings has meaningful negative consequences for both the Salaried Members and the Union. The importance to the action in this regard seems beyond serious dispute.

[42] I agree with the petitioners that the question relating to the suspension or termination of the OPEBs is also significant to the action. The CCAA Judge recognized at para. [126] and again at para. [133] of his reasons that if the Wabush CCAA Parties fail to pay the premiums on the insurance policy, the policy will be cancelled thereby causing hardship to the Petitioners. I agree too with the position of counsel to the Union who argued that aspects of the pension claims may usefully be compared to alimentary claims, and that the hardship in suspending them gives the question sufficient importance to the action.

## IV.3 The proposed appeals are *prima facie* meritorious and not frivolous

[43] The arguments brought in service of the petitioners' view that the deemed trust under the PBSA remains effective in CCAA proceedings are not frivolous. While the exercise of statutory interpretation undertaken by the CCAA Judge – which, it should be noted, is not a discretionary exercise in and of itself – shows no *prima facie* weakness, that is not to say that it precludes an arguable case for the other side.<sup>15</sup> There are, in my view, grounds for framing a statutory interpretation argument for the petitioners' position that have *prima facie* merit when one considers, for example, that the CCAA amendments are the product of a complicated evolution; that the CCAA and the PBSA have different policy objectives which may shape interpretation; that the relevance of principles developed by the Supreme Court in other settings to the deemed trusts problem faced in this case is the matter of fair debate; that comparisons might be made with deemed trust regimes from the provinces or other statutes, and more. All of these factors suggest to me that, notwithstanding the strength of the judgment *a quo*, there are *prima facie* meritorious lines of argument that might be pressed on appeal. The parties debated vigorously the scope of “any liquidation” in subs. 8(2) PBSA before me, for example, as they did the proper scope of amendments to the CCAA and the policy they reflect. On the question of the effectiveness of the PBSA deemed trust as raised by the Salaried Members and in the first three grounds of appeal in the Union's amended motion, I am of the view that this criterion is satisfied.

<sup>15</sup> The gradation between “*prima facie* meritorious” and “frivolous” is not always clear, and the better view may well be that “meritorious” and “frivolous” do not constitute a *summa division* for proposed appeals: see *Statoil, supra*, note 7, para. [11]. It is certainly true that the petitioners may have an arguable case – one with *prima facie* merit – but that the judgment *a quo* may still be said to suffer from no apparent weakness: see the helpful comments, albeit in another context, in *Droit de la famille – 081957*, 2008 QCCA 1541, para. [4] (Morissette, J.A., in chambers).

[44] The issue of the proper scope of section 32 CCAA, and the prior notice rule, strikes me, from my disadvantaged position, to be less compelling, but I would not say it is wholly lacking in merit.

[45] Counsel for the monitor argued, in support of the respondents' position that leave should be refused, that this ground of appeal was frivolous. He contended that the CCAA Judge rightly held that section 32 plainly did not apply to the resiliation of the Wabush CCA Parties' insurance contract. Like the respondents, the monitor said the CCAA Judge rightly relied on *Mine Jeffrey*<sup>16</sup> decided by this Court in 2003, and that his analysis of the "tri-partite relationship" between the employer, the insurer and the beneficiary in paragraphs [129] *et seq.* is free from error.

[46] The question as to the applicability of section 32 here is not frivolous, even if *Mine Jeffrey* presents a formidable obstacle to a successful appeal. While not equal in strength, arguments raised by counsel for the Salaried Members as to type of contract to which the rule applies and, in particular, to the distinction between the termination of a contract and the suspension of a contract, are not without some merit. While I recognize that the test of the relative merit of the arguments proposed can be construed in some circumstances as requiring more than "a limited prospect of success"<sup>17</sup> given the nature of CCAA proceedings, I would not dismiss the motions on this narrow issue on this basis alone.

[47] The Union says the interim lender's conditions should be set aside as unreasonable. I am not convinced that this argument is *prima facie* meritorious.

[48] Counsel for the Union argues strongly that the interim lender should not be allowed to dictate terms to the CCAA Judge or to the stakeholders as a whole by imposing conditions on financing that have the effect of exploiting the vulnerability of the employees and former employees. He says that if the interim lender's conditions were struck as unreasonable, the Wabush CCAA Parties would have access to those funds and that there would be no need to suspend the various payments due to the petitioners.

[49] With respect, this argument strikes me as flawed in two respects. First, it requires an overturning of the CCAA Judge's view – with all the advantages of perspective he has in so deciding – that as a matter of fact the conditions of the interim financing are reasonable. Secondly, the Union has left unanswered the questions raised by the judge concerning the "harsh commercial realities of interim financing" at paragraph [115]. Why indeed should the interim lender advance funds be used to pay someone else's debt, particularly one that is pre-filing and unsecured? Why should a condition of the financing be ignored, effectively forcing the lender to advance funds on disadvantageous terms to

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<sup>16</sup> *Syndicat national de l'amiante d'Asbestos inc. c. Mine Jeffrey Inc.*, [2003] R.J.Q. 420 (C.A.).

<sup>17</sup> *Doman Industries Ltd. v. Communications, Energy and Paperworkers' Union, Local 514*, 2004 BCCA 253, para. [15] (per Prowse, J.A., in chambers).

which it did not agree? It is not a matter of the CCAA Judge being callous or insensitive to hardship faced by vulnerable parties. In my view, the comment of Deschamps, J. for the majority in *Indalex*, as adapted to the setting of federal deemed trusts, is apposite here: “The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries”.<sup>18</sup>

#### IV.4 The appeal will not hinder the progress of the action

[50] The petitioners argue that the Wabush CCAA Parties are undergoing a court-supervised sales process in accordance with timelines and procedures that are supervised by the CCAA Judge with the oversight of the monitor. In the circumstances, they say, the proposed appeal, especially if it were placed on an accelerated roll, would not hinder the progress of the action. They contend, to differing degrees, that the CCAA Judge erred in his measure of the financial vulnerability of the Wabush CCAA Parties. Mindful no doubt of the difficulty that this aspect of the analysis presents to their leave application, the Salaried Members “part company” (to use the expression of counsel) with the Union in framing their appeal more narrowly, in particular in respect of the recognition that the DIP loan enjoys a wider priority than does the Union, and in limiting their claim in respect of the payments that should escape suspension.

[51] Given the findings of fact concerning the fragility of the Wabush CCAA Parties as observed by the CCAA Judge, I find the positions of both petitioners on this point unconvincing. Even the “strategic” decision of the Salaried Members to contest the judgment on a narrower basis does not satisfy this criterion. In my view, both proposed appeals would unduly hinder the action.

[52] My conclusion is based largely on the findings of fact arrived at by the CCAA Judge regarding the vulnerability of the Wabush CCAA Parties at this stage of the restructuring.

[53] In canvassing the circumstances in which the interim financing was put in place, the CCAA Judge observed that the cash-flow position of the Wabush CCAA Parties was compromised with the result that they needed the interim financing to continue even their limited operations during the CCAA process (para. [16]). The CCAA Judge made the following specific findings, which I consider to be findings of fact: (1) that the sale and investor solicitation process in progress are in the interests of the Wabush CCAA Parties and their stakeholders because they will likely lead to a greater recovery; (2) that without new financing, the Wabush CCAA Parties could not complete the sale; (3) that without new financing allowing them to complete the sale, it is likely that the Wabush CCAA Parties will go bankrupt; (4) that the Wabush CCAA Parties and the monitor have not identified any other source of new financing; and (5) that the terms of the interim financing are reasonable (para. [94]).

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<sup>18</sup> *Indalex*, *supra* note 12, para. [59].

[54] When discussing the suspension of special payments, the CCAA Judge observed, at para. [112]:

[112] The Wabush CCAA Parties do not have the funds available to make these payments. The cash flow statements filed with the Court show that the Wabush CCAA Parties need the funds from the Interim Financing to meet their current obligations other than the special payments. The Interim Lender Term Sheet expressly requires the Wabush CCAA Parties not to make any special payments. As a result, forcing the Wabush CCAA Parties to make the special payments would lead to a default under the Interim Financing and a likely bankruptcy.

[Footnote omitted.]

[55] In respect of the suspension of the OPEBs – including what the Salaried Members characterize as the modest premiums of \$182,000 per month and the supplemental retirement arrangement plan amount – the CCAA Judge recalled at para. [122] that “[t]he Wabush CCAA Parties do not have any funding valuable to continue to pay any of the foregoing OPEBs, as the Interim Financing Sheet prohibits such payments”. In para. [125], the CCAA Judge explained that it was not enough to say, as did the Salaried Members, that \$182,000 and the supplemental amount could be found elsewhere if the interim lending sheet prevents them from making the payments: “Given the cash flow statement filed with the Court and the language of the Interim Lender Sheet, the Court accepts that the Wabush CCAA Parties do not have the funds”.

[56] These findings of fact, while not immune from review, are deserving of deference on appeal. It is not enough to say, without more, that the amount is a small one in the grand scheme of things, as do the Salaried Members, or that another interim lender could be found without difficulty as the action proceeds. The CCAA Judge decided specifically otherwise. A reviewable error would have to be shown on this point to overcome the strong impression that comes from reading the judgment that granting leave and suspending provisional execution would hinder the action.

[57] In like circumstances, leave has been denied. Recently in *Bock inc. (arrangement relative à)*,<sup>19</sup> my colleague Bich, J.A. declined to grant leave, notwithstanding the presence of a question she characterized as “interesting” for the purposes of an eventual appeal and one in respect of which, like ours, there was a paucity of appellate court consideration. “Granting leave to appeal”, she wrote at para. [12] of her reasons, “would most likely jeopardize the course of the action and cause irreparable harm to the debtor company and, consequently, all other stakeholders (creditors, employees, etc.)”. Similarly, in *Re: Consumer Packaging Inc.*,<sup>20</sup> a bench of

<sup>19</sup> 2013 QCCA 851 (in chambers).

<sup>20</sup> 2001 CanLII 6708 (Ont. C.A.).

the Court of Appeal for Ontario declined to grant leave in circumstances where conditions set by the interim lender meant that the time and financial constraints that would have come with an appeal were prohibitive: “Leave to appeal should not be granted”, wrote the Court at para. [5], “where, as in the present case, granting leave would be prejudicial to restructuring the business for the benefit of stakeholders as a whole [...]”.<sup>21</sup>

[58] All told, the risk of default on the interim financing and of bankruptcy to the Wabush CCAA Parties is serious. Granting leave would, in this setting, risk hindering the action. If leave were granted, the petitioners would likely obtain, at best, a Pyrrhic victory if they succeeded on appeal.

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[59] Given my conclusion that leave should be denied, the motions seeking a stay of the judgment pursuant to article 550 C.C.P. are without further object and should be dismissed as well. In any event, the conditions necessary for a stay were not present. While the petitioners have, to be sure, shown that they have an arguable case, they have not pointed to something I would characterize as a weakness in the judgment *quo*. They did satisfy the burden of showing that the failure to grant a stay would cause them harm. However, the balance of inconvenience – considering the impact that lifting the stay would have on the Wabush CCAA Parties – would not have favoured granting a stay.

[60] Counsel should be commended for their helpful presentation of the matter in dispute.

[61] **FOR THE AFOREMENTIONED REASONS:** the undersigned:

[62] **DISMISSES** the Salaried Members motion for leave to appeal and for a stay, with costs;

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<sup>21</sup> As a final observation on this point, it may be recalled that, prudently, the CCAA Judge offered a further observation that gives weight, I think, to the conclusion that granting leave would be inopportune here. He suggested that even if the PBSA deemed trusts were effective in CCAA proceedings, he would have exercised his discretion under the CCAA to grant priority to the interim lender: see para. [95].



[63] **DISMISSES** the Union's amended motion for leave to appeal and for a stay, with costs.

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NICHOLAS KASIRER, J.A.

Mtre Andrew J. Hatnay  
Mtre Ari Nathan Kaplan  
KOSKIE MINSKY LLP  
Mtre Geeta Narang  
NARANG & ASSOCIÉS  
Mtre Nicholas Scheib (absent)  
SCHEIB LEGAL  
For Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson

Mtre Bernard Boucher  
BLAKE CASSELS & GRAYDON S.R.L. (MONTREAL)  
For Bloom Lake General Partner

Mtre Steven Weisz  
BLAKE CASSELS & GRAYDON S.R.L. (TORONTO)  
For Bloom Lake General Partner

Mtre Louis Dumont  
DENTONS CANADA LLP  
For Cliffs Quebec Iron Mining ULC

Mtre Sylvain Rigaud  
NORTON ROSE FULBRIGHT CANADA LLP  
For FTI Consulting Canada Inc.

Mtre Douglas Mitchell (absent)  
Mtre Leslie-Anne Wood (absent)  
IRVING MITCHELL KALICHMAN  
For Her Majesty in right of Newfoundland and Labrador, as represented by the Superintendent of Pensions

Mtre Pierre Lecavalier  
DEPARTMENT OF JUSTICE – CANADA  
For the Attorney General of Canada

Mtre Jean-François Beaudry  
PHILION, LEBLAND, BEAUDRY, AVOCATS, S.A.  
For the Syndicat des Métallos, Section Locale 6254 and Section Locale 6285

Mtre Gerald N. Apostolatos  
LANGLOIS KRONSTRÖM DESJARDINS  
For the Creditors Quebec North Shore and Labrador Railway Company Inc. and Iron  
Ore Company of Canada

Date of hearing: August 5, 2015