CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

Nº 500-11-048114-157

SUPERIOR COURT
Commercial Division
(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. 36, as amended)

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

BLOOM LAKE GENERAL PARTNER LIMITED

QUINTO MINING CORPORATION

8568391 CANADA LIMITED

CLIFFS QUEBEC IRON MINING ULC

WABUSH IRON CO. LIMITED

WABUSH RESOURCES INC.

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

Mises en cause

-and-

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

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

MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON

UNITED STEEL WORKERS, LOCALS 6254 AND 6285

RETRAITE QUÉBEC

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

VILLE DE SEPT-ÎLES

Mis en cause

-and-

FTI CONSULTING CANADA INC.

Monitor

CONTESTATION OF THE MIS EN CAUSE
THE SUPERINTENDANT OF FINANCIAL INSTITUTIONS
of the *Amended Motion by the Monitor for Directions with Respect to the Pension Claims*

INTRODUCTION

1. In the context of business restructuring, situations involving pension plans often give rise to disputes;

2. In this case, the issue is essentially whether the beneficiaries of the plans are entitled to the proceeds from the liquidation of assets to the extent of the unpaid monthly and catch up special payments;

3. It is important to note that the Superintendent of Financial Institutions, as Mis en cause in this proceeding is acting not as a creditor, but as a regulator, and that this dispute is therefore not subject to the principles developed by the Courts concerning deemed trusts in favour of the Crown;

4. We will demonstrate below that the Superintendent of Financial Institutions' position, which seeks to provide some measure of protection to the pension plan beneficiaries, is the one that should be adopted by the Court. This position is an appropriate application of the relevant legislative provisions in the present circumstances; i.e. where the pension plan has already been terminated by the regulators and where no restructuring plan has been filed to the creditors in general, or to the beneficiaries of the pension plan in particular. Moreover, this position is most appropriate considering, on the one hand the unique nature of pension plans, and on the other hand the appropriate balance of social and economic inconvenience that the parties are suffering as a result of the debtors' financial collapse;

1. OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS

A - OSFI's mandate

5. The Office of the Superintendent of Financial Institutions, hereinafter OSFI, was established under section 4 of the *Office of the Superintendent of Financial Institutions Act,* R.S.C., 1985, c. 18 (3rd Supp.) ("OSFI Act");

> **4.** (1) There is hereby established an office of the Government of Canada called the Office of the Superintendent of Financial Institutions over which the Minister shall preside and for which the Minister shall be responsible;

6. Its mandate with respect to pension plans specifically is defined at subsection 4(2.1) of the OSFI Act;

> **4.** (2.1) The objects of the Office, in respect of pension plans, are
>
> (a) to supervise pension plans to determine whether they meet the minimum funding requirements and are complying with the other requirements of *the Pension Benefits Standards Act, 1985* and the *Pooled Registered Pension Plans Act* and their regulations and supervisory requirements under that legislation;
>
> (b) to promptly advise the administrator of a pension plan in the event that the plan is not meeting the minimum funding requirements or is not complying with other requirements of the *Pension Benefits Standards Act, 1985* or the *Pooled Registered Pension Plans Act* or their regulations or supervisory requirements under that legislation and, in such a case, to take, or require the administrator to take, the necessary corrective measures or series of measures to deal with the situation in an expeditious manner; and
>
> (c) promote the adoption by management and boards of directors of financial institutions of policies and procedures designed to control and manage risk."

7. In pursuing its legislated objectives, OSFI must strive to protect the rights and interests of plan members and other beneficiaries.

> **4.** (3) In pursuing its objects, the Office shall strive
>
> (a) in respect of financial institutions, to protect the rights and interests of depositors, policyholders and creditors of financial institutions, having due regard to the need to allow financial institutions to compete effectively and take reasonable risks; and
>
> (b) in respect of pension plans, to protect the rights and interests of members of pension plans, former members and any other persons who are entitled to pension benefits or refunds under pension plans.

B - OSFI's interest in this proceeding

8. Under section 5(1) of the *Pension Benefits Standards Act,1985*, R.S.C. 1985, c. 32 (2nd Supp.), hereinafter the PBSA, the Superintendent is responsible for the administration of this Act;

9. Section 5.(1) states:

> The Superintendent, under the direction of the Minister, has the control and supervision of the administration of this Act and has the powers conferred by this Act.

10. Section 33.2(1) of the PBSA provides as follows:

> In addition to any other action that the Superintendent may take in respect of a pension plan, the Superintendent may bring against the administrator, employer or any other person any cause of action that a member, former member or any other person entitled to a benefit from the plan could bring.

11. In *Buschau v Rogers Communications Inc* 2006 SCC 28, the Supreme Court of Canada stated at paragraph 20:

> 20 In essence, the Superintendent plays a crucial role in the protection of beneficiaries. Although most of his interventions relate to supervision of the solvency requirements, he also acts as a gatekeeper for the distribution of a pension fund. The Superintendent has unique duties and responsibilities *vis-à-vis* beneficiaries that may make it possible to avoid resorting to a common law rule that was designed for an environment totally different from that of pension law.

2. QUESTIONS AND CONTESTED MATTERS

12. For the reasons discussed hereinafter, OSFI contests the April 13 Amended Monitor's Motion and, more specifically, the conclusions sought regarding the normal and special payments (including monthly and catch-up);

13. OSFI submits that the issues in dispute as submitted by the Monitor were not developed with the consent of the interested parties;

14. OSFI submits that the proper question before this Court should be:

> In the context where:
>
> a) The debtors obtain authorization from the Court to suspend the special payments to the pension plan;
>
> b) The assets have been liquidated under the CCAA;
>
> c) The pension plan has been terminated by the regulators following the Initial Order;

d) No plan has been offered (or will be offered) to the creditors and the beneficiaries of the pension plan

Does section 6(6) of the CCAA or any other section of this Act, allow the Court to not apply the protections granted by sections 8 and 29 of the PBSA?

15. OSFI also disagrees with the Monitor's method of calculating the normal payments for December 2015 as a fraction related to the termination date of December 16, 2015 (16 days out of 31 days) of the amount normally due. This calculation would be contrary to the pension plan itself, which provides that members receive credited service for the entire month in the event of plan termination prior to the end of the month;

16. OSFI contests the conclusion sought by the Monitor for a declaration that normal and special payments are ordinary claims;

17. Based on Exhibit R-26 filed by the Petitioner, the Towers Watson report "Plan Termination as at December 16, 2015", which is currently under review by the regulator, and as summarized in paragraph 43 of the Petitioner motion, the following amounts are due to the Salaried and Union DB Plans;

	Salaried DB Plan	**Union DB Plan**
Normal Cost Payments		
Pre-filing	$0	$0
Post-Filing	$0	$0
Total	**$0**	**$0**
Special Payments		
Pre-filing	$3	$146,776
Post-Filing	$2,185,753	$2,999,924
Total	**$2,185,756**	**$3,146,700**
Catch-up Special Payments		
Pre-filing	$0	$0
Post-Filing	$0	$3,525,120
Total	**$0**	**$3,525,120**
Estimated Wind-up Deficiency	$27,450,000	$27,486,548

18. While the normal cost payments made subsequent to the initial Order were all paid until the termination of the plan by the Superintendent on December 16, 2015, a *pro rata* calculation was made by the Monitor for the month of December 2015 pursuant to which the Debtors only paid 16/31 of the amount due for that month;

19. Since the initial Order, and in accordance therewith, the Debtors have suspended both special and catch-up payments, for a total amount of $8 857 576.00;

20. Considering that the pension plans expressly provide that in the event of termination, the entire current month must be paid, the amount of $44 356, not $22 893, should have deposited in the pension plans;

3. PURPOSE OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT (CCAA)*

21. As stated by the authors Houlden & Worawetz[1]:

> « The decided cases have identified the following purposes of the legislation:
>
> - to permit an insolvent company to avoid or be discharged from bankruptcy by making a composition or arrangement with its creditors : *Browne* v. *Southern Canada Power Co.* (1941), 23 C.B.R. 131, 71 Que. K.B. 136 (Que. C.A.); *Multidev Immobilia Inc.* v. *S.A. Just Invest.* (1988), 1988 CarswellQue 38, 70 C.B.R. (N.S.) 91, [1988] R.J.Q. 1928 (Que. S.C.);
> - to preserve the insolvent company as a viable operation and to reorganize its affairs to the benefit not only of the debtor but of the creditors : *Quintette Coal Ltd.* v. *Nippon Steel Corp.* (1990), 80 C.B.R. (N.S.) 98, 1990 CarswellBC 425 (B.C. S.C.); *Milner Greenhouses, supra; Re D.W. McIntosh Ltd.* (1939), 1939 CarswellOnt 87, 21 C.B.R. 206 (Ont. S.C.); *Re Avery Construction Co.* (1942), 1942 CarswellOnt 86, 24 C.B.R. 17, [1942] 4 D.L.R. 558 (Ont. S.C.) *Re Arthur Flint Co.* (1944), 1944 CarswellOnt 59, 25 C.B.R. 156, [1944] O.W.N. 325, [1944] 3 D.L.R. 13 (Ont. S.C.); *Citibank Canada* v. *Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3d) 165, 1991 CarswellOnt 182, 2 P.P.S.A.C. (2d) 21 (Ont. Gen. Div.);
> - to maintain the *status quo* for a period to provide a structured environment in which an insolvent company can continue to carry on business and retain control over its assets while the company attempts to gain approval of its creditors for a proposed arrangement that will enable the company to remain in operation for the future benefit of the company and its creditors: *Meridian Dev. Inc.* v. *Toronto Dominion Bank, supra; Quintette Coal Ltd.* v. *Nippon Steel Corp.* (1990), 80 C.B.R. (N.S.) 98, 1990 CarswellBC 425 (B.C. S.C.); *Re Canadian Airlines Corp. (2000),* 19 C.B.R. (4th) 1, 2000 CarswellAlta 622 (Alta. Q.B.); *Milner Greenhouses Ltd.* v. Saskatchewan (2004), 2004 CarswellSask 280, [2004] 9 W.W.R. 310, 50 C.B.R. (4th) 214, 2004 SKQB 160 (Sask Q.B.); *Re Blue Range Resource Corp.* (2000), 192 D.L.R. (4th) 281, 2000 ABCA 239, 20 C.B.R. (4th) 187, 2000 CarswellAlta 1004 (Alta. C.A.);
> - to protect the interests of creditors and to permit an orderly administration of the debtor company's affairs: *Meridian Development Inc.* v. *Toronto Dominion Bank* (1984), 1984 CarswellAlta 259, 52 C.B.R. (N.S.) 109, 32 Alta L.R. (2d) 150, [1984] 5 W.W.R. 215, 53 A.R. 39 (Q.B.);
> - to protect an insolvent company from proceedings by creditors that would prevent it from carrying out the terms of a compromise or arrangement: *Feifer* v. *Frame Manufacturing. Corp.* (1947), 1947 CarswellQue 15, 28 C.B.R. 124, [1947] Que. K.B. 348 (Que. C.A.);

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[1] Bankruptcy and Insolvency Law of Canada (p 11.6.1)

- to permit equal treatment of creditors of the same class: *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1, 1990 CarswellNS 33, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (T.D.);
- to permit a broad balancing of stakeholder interests in the insolvent corporation: *Nova Metal Products Inc.* v. *Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, 41 O.A.C. 282, 1990 CarswellOnt 139, 1 O.R. (3d) 289 (Ont. C.A.); *Re Air Canada [Greater Toronto Airport Authority re gates at new terminal (Toronto)]* (2004), 47 C.B.R. (4th) 189, 2004 CarswellOnt 870 (Ont. S.C.J.) [Commercial List]);
- in appropriate circumstances to effect a sale, winding-up or liquidation of a debtor company and its assets: *Re Anvil Range Mining Corp.* (2002), 34 C.B.R. (4th) 157, 2002 CarswellOnt 2254 (Ont. C.A.).»

22. The authors add (page 11-8):

> « The Supreme Court of Canada held that Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected, notably creditors and employees; and that a workout that allowed the company to survive was optimal. It held that courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed. The Supreme Court of Canada has held that reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs: *Re Ted Leroy Trucking Ltd.,* 2010 CarswellBC 3419, 2010 CarswellBC 3420, [2010] 3 S.C.R. 379, 72 C.B.R. (5th) 170, 2010 SCC 60 (S.C.C.). For a full discussion of this case see No 101 "Claims under the *Excise Tax Act".* »

23. As pointed out by Justice Gascon, then of the Superior Court, in *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 2152:

> « [4] Si la familiarité des nombreux intervenants avec le processus varie grandement, l'objectif de cette loi est tout de même bien connu. La *LACC* vise à permettre à AbitibiBowater de restructurer ses affaires, ses opérations et sa dette.
>
> [5] Le moyen que la loi met à sa disposition est l'élaboration, la négociation et la mise en œuvre d'un plan d'arrangement juste et raisonnable avec ses créanciers et sur lequel ils seront appelés à voter.
>
> [6] Le processus est avant tout celui des débitrices et de ses créanciers. Le rôle du Tribunal en est un de supervision. Le but ultime recherché est la conclusion d'un plan d'arrangement fructueux dans une perspective de continuité des opérations et de survie de l'entreprise. Il en va de l'intérêt de tous les intervenants, voire celui de la société en général selon certains. Pour paraphraser les propos du juge Blair dans l'arrêt *Metcalfe*[4], l'on parle ici d'une loi qui comporte un « *broader social economic purpose* » et un « *wider public interest* ». »

24. Justice Deschamps in *Century Services Inc.* v *Canada (AG)* [2010] 3 SCR 379, summarized the restructuring procedure under the CCAA as follows:

> [14] Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

25. The CCAA, contrary to the *Bankruptcy and Insolvency Act*, does not contain a scheme of distribution and, consequently, does not contain a priority plan;

26. Section 6(6) of the CCAA provides that the Court may not sanction a plan that does not provide for the payment of certain amounts to a prescribed pension plan, such as the plans at issue here. Specifically, in the context of a defined benefit pension plan, the court must be satisfied, at a minimum, that an arrangement provides for the payment of normal cost amounts owed to the fund and amounts deducted from employees' remuneration. By definition, this provision is only applicable in situations where the debtor has in fact submitted a plan to its creditors;

27. In such a scenario, it is the creditors themselves who will decide whether to accept or refuse the proposal presented to them;

4. ABSENCE OF PRIORITY RANKING IN THE *CCAA* AND CONSEQUENCE OF THAT ABSENCE WHERE PLAN NOT PROVIDED

28. The debtors, with the monitor's consent, opted to liquidate their assets under the CCAA, when it was clear from the outset that no restructuring would be possible given that the employees were dismissed and the mines were closed even before the beginning of the process. Although a debtor can choose to liquidate its assets under the CCAA instead of the BIA, this choice is not without consequence: the result for the respondent that authorizes the debtor to proceed with liquidation under the CCAA is that the deemed trust created by section 8(2) of the PBSA continues to apply;

29. Justice Deschamps, in fact, held in *Indalex*:

> [51] In order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements. Yet this does

> not mean that courts may read bankruptcy priorities into the *CCAA* at will. Provincial legislation defines the priorities to which creditors are entitled until that legislation is ousted by Parliament. Parliament did not expressly apply all bankruptcy priorities either to *CCAA* proceedings or to proposals under the *BIA*. Although the creditors of a corporation that is attempting to reorganize may bargain in the shadow of their bankruptcy entitlements, those entitlements remain only shadows until bankruptcy occurs. At the outset of the insolvency proceedings, Indalex opted for a process governed by the *CCAA*, leaving no doubt that although it wanted to protect its employees' jobs, it would not survive as their employer. This was not a case in which a failed arrangement forced a company into liquidation under the *BIA*. Indalex achieved the goal it was pursuing. It chose to sell its assets under the *CCAA*, not the *BIA*.
>
> [52] The provincial deemed trust under the *PBA* continues to apply in *CCAA* proceedings, subject to the doctrine of federal paramountcy (*Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, [2004] 1 S.C.R. 60, at para. 43). The Court of Appeal therefore did not err in finding that at the end of a *CCAA* liquidation proceeding, priorities may be determined by the *PPSA*'s scheme rather than the federal scheme set out in the *BIA*.
>
> *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6

30. Applying that principle to this case, it follows that, by operation of the PBSA, a federal statute that continues to apply during the procedures, amounts owed to the plan under section 8(1) of the PBSA, which includes accrued special payments, attach to the proceeds of the liquidation of assets and are deemed not to form any part of the estate. Consequently, the amounts owed as normal and special payments after the Wabush Initial Order must be deposited into the pensions plans;

31. The powers granted to the Court under the CCAA are broad enough to allow it to order, now, that the amounts due be deposited into the pension plan;

32. Neither the debtor, the creditors, nor the regulators can remain in limbo about an arrangement under the CCAA that is not an arrangement;

33. Although it is acknowledged that a debtor may, with the Court's approval, liquidate its assets under the CCAA. This law does not permit a debtor to avail himself of the advantages of the *CCAA*, such as the writing-off of debts, without also respecting the *sine qua non* obligation imposed by the *CCAA,* that is, to submit a plan or arrangement to his creditors;

5- PRE- AND POST- CLAIMS AND THE NECESSITY TO FILE A PLAN TO THE BENEFICIARIES

34. Pursuant to sections 19 and 2 of the *CCAA* and sections 2 and 121 of the *BIA*, all payments, other than normal cost payments, that were due at the time of the initial Order may be the

objects of a compromise through the filing of a Plan of Arrangement, but only insofar as such a Plan is actually filed;

35. Indeed, the Debtors, with the approval of the Monitor, followed this reasoning: on one hand, they made the normal cost payments after the Order until the termination of the plan and on the other hand, they asked the Court for leave to suspend the special and catch-up payments subsequent to the Order;

36. Under paragraph 12 (a) of the Rectified Initial Order, the debtors were authorized to stay its monthly special payments to the pension plans;

37. This authorization, usually granted in the course of a business restructuring under the CCAA, was intended to permit a debtor to restructure. Although the Debtors were authorized under the terms of the initial order to stay the payment of their special payments, the fact remains that the debtors remain subject to the PBSA during the process;

38. From the time when the assets were sold and it became clear that there would be no Plan of Arrangement presented to the creditors, and given that the amounts due to the pension fund belong, by virtue of the wording of the *PBSA*, to neither the Debtors nor the estate, it became unfair to deprive the pension plan beneficiaries of these amounts;

39. Moreover, an authorization to stay payments to a pension plan does not in any way imply that those payments are set aside or expunged;

40. As Justice Mayrand wrote in *AbitibiBowater Inc. (Arrangement retatif à)*, 2009 QCCS 2028:

> [TRANSLATION]
>
> 51 Moreover, *Abitibi*, in conjunction with all its creditors, employees, lenders and suppliers may successfully overcome the impasse by agreeing to an arrangement to put the business back on the right track in the short or medium term. Terms and conditions for the repayment of the stayed contributions can be agreed on with the approval of the appropriate authorities. This will be done at another stage.

41. Justice Mayrand authorized a stay of payments to the pension plan, taking care to state that the terms and conditions for the repayment of those amounts could ultimately be agreed on once the restructuring was completed and in a context where not staying these payments would jeopardize the chances of restructuring and, as a result, the closing of the business and the loss of jobs;

> [TRANSLATION]
>
> 49 The consequences of the measures sought and disputed by both groups are substantial. If Abitibi cannot restructure its affairs because it is making amortization payments and, in doing so, its survival is at risk, the first spectre arises, the closure of the business, loss of jobs and the termination and winding-up of pension plans.

42. *A fortiori,* in this case, where the debtor has already dismissed its employees, liquidated its assets, where no recovery plan will be presented to the creditors and the pension plans have already been terminated, and where the sale proceeds of the assets are more than enough to pay the amortization payments, the total amount due should be deposited in the pension plan;

43. Justice Pepall came to a similar conclusion in *Fraser Papers Inc. (Re)*, 2009 Can LII 39776:

> [21] The relief requested by the Applicants, importantly in my view, does not extinguish or compromise or even permit the Applicants to compromise their obligations with respect to special payments. Indeed, the proposed order expressly provides that nothing in it shall be taken to extinguish or compromise the obligations of the Applicants, if any, regarding payments under the pension plans. Failure to stay the obligation to pay the special payments would jeopardize the business of the Applicants and their ability to restructure. The opportunity to restructure is for the benefit of all stakeholders including the employees. That opportunity should be maintained.

44. Justice Farley in *United Air Lines Inc. (Re,)* 9 CBR (5th) 159, had even dismissed the application for authorization to stay payments to the pension fund, stating, in particular, that the debtor had the necessary funds and that these payments were not up against the ceiling of the DIP financing:

> **4** UAL has not run out of money nor of liquidity, albeit that it must husband its available funds and liquidity in a very prudent manner. However, there is no evidence before me that UAL either (i) does not have sufficient funds to make the pension funding payments or (ii) that its DIP arrangements are such that it cannot make such payments (in this latter (ii) situation, neither is there any evidence that even if it were up against the ceiling of its DIP requirements, that an application was made to the DIP lenders for consent to make such payments).

45. The Debtors cannot request, with the Monitor's assistance and approval, the protection of the Court in order to sell the Debtors' assets while asking that special payments due to the pension plan be stayed, and then have those very payments essentially expunged by remitting the proceeds of sale of its assets to the secure creditors who, by the very wording of section 8(2) of the PBSA, are not entitled to them, all in a context in which no plan is proposed to the creditors in general nor to the beneficiaries of the plans in particular;

46. Although everyone recognizes the general principle, often pointed out by the courts, that in a restructuring under the CCAA everyone must make sacrifices, we submit that this principle must be weighed where there is a liquidation under the CCAA that does not result in any restructuring plan, where almost all the employees were dismissed before the beginning of the process and where the plans have been terminated since. In addition to the loss of their jobs, these employees have lost the benefit of the continuation of their pension plan. Furthermore, members of the pension plan (as well as retirees with little if any future income

prospects) are facing large reductions in their pension entitlements, regardless of the outcome of this Motion. The special payments would make an important difference to the funded status of the pension plans, but these plans would still remain significantly underfunded. Full payment of the outstanding special payments to both the DB Union and DB Salaried Plans would still leave each plan funded (on a solvency basis) at only about 85.5% and 77%, respectively. Members' pensions, earned through their many years of service, have been sacrificed because of this situation. The amount at stake is, in short, minimal when compared to the totality of the companies' indebtedness;

47. OSFI finds it difficult to understand how the Debtors could ask the Court to suspend post-order special payments and, at the same time, make post-order normal cost payments, only to later assert that these claims constituted pre-order ordinary claims;

48. Furthermore, given that most of the employees had been laid off and that the Debtors had asked the Court to ratify their liquidation plan, the Regulators terminated the pension plans on December 16, 2015, several months after the initial Order;

49. Section 29(6.4) of the *PBSA* makes all amounts due on the date of the pension termination plan. Prior to plan termination, normal cost and special payments accrue on a month-to-month basis, as they become due. In this circumstance, the pension claim, which represents amounts that became payable or fully constituted after the Wabush Initial Order date, cannot be characterized as a "pre-order" claim;

50. As previously mentioned, the ultimate purpose of the CCAA is to enable a company in difficulty to recover in order to continue its activities;

51. As such, the CCAA safeguards for employees and pensioners are intended only to further this objective;

52. Although section 6(6) only addresses a compromise that preserves normal cost payments owing to a pension plan, it applies in the context of the ratification of a plan, which implies that the affected creditors voted in favour of the plan;

53. To the extent that this minimum provided for under section 6(6) of the *CCAA* can supersede the deemed trust protections over accrued special payments provided under the *PBSA*, it can only be accepted by the creditors and cannot be imposed on them before the filing of a plan;

54. The conclusion sought by the Monitor's Motion would have the effect, in the context of the *CCAA*, of depriving the beneficiaries of the pension plans of their rights without a plan even having been submitted to them;

55. The judgment of June 15, 2015 held that the Deemed Trust, pursuant to section 8 of the *PBSA,* does not apply;

56. However, with respect, this decision appeared to be made in light of the protections afforded by s. 6(6) of the CCAA. At the time of the judgment, some or all of the Debtors left open the possibility that they would file a plan to the creditors. This is no longer the case, or, at least, no plan had been proposed to the beneficiaries of the pension plans neither before, nor after the filing of the Monitor's Motion;

57. Furthermore, after the judgment of June 15, 2015, the pension plans were terminated by the Regulators;

58. It would be contrary to the spirit of the law, in a context where no plan is filed with the creditors, to now claim that the Deemed Trust cannot apply and that all the sums due to the pension plans, other than the normal cost payments outstanding as of the date of the Initial Order, constitute ordinary claims;

59. The Monitor, through the framing of the issues in dispute and through the conclusions sought, attempts to eliminate the PBSA Deemed Trust even in a context where no plan was submitted and without even knowing how the Debtors intend to leave the CCAA;

60. As mentioned by the Supreme Court of Canada in the decision *Century Services Inc v Canada (Attorney General)* 2010 SCC 60 :

> [60] Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).
>
> [...]

> [70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.
>
> [71] It is well established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*'s purposes, the ability to make it is within the discretion of a *CCAA* court.

61. The objective of the Act and the intervention of the Court must be geared towards the restructuring of the company in difficulty and to the continuation of its business. The Debtors cannot be allowed to take refuge under the protection of the CCAA for over two years and sell virtually all their assets, and then evade their obligations under the PBSA without offering anything to the creditors or to the beneficiaries of the pension plans and without even informing the creditors on how they intend to terminate proceedings under the CCAA;

62. Even though section 6(6) provides a minimum, which must be approved by the creditors, there is nothing in the CCAA that authorizes the Court to apply this minimum in the absence of any restructuring plan to the creditors in general and to the beneficiaries of the pension plans in particular;

63. Moreover, the suspension of the special payments authorised by the Court did not have the effect of rendering the Deemed Trust pursuant to the *PBSA* inapplicable, it only delayed the requirement to pay into the Pension Plan until the filing of a plan, which, in this instance, has not occurred;

64. The termination of the pension plans on December 15, 2015 crystallized, at that date, all sums due to the pension plans until December 31, 2015;

65. Section 29 of the PBSA provides :

> (6) If the whole of a pension plan is terminated, the employer shall, without delay, pay into the pension fund all amounts that would otherwise have been required to be paid to meet the prescribed tests and standards for solvency referred to in

subsection 9(1) and, without limiting the generality of the foregoing, the employer shall pay into the pension fund

(a) an amount equal to the normal cost that has accrued to the date of the termination;

(b) the amounts of any prescribed special payments that are due on termination or would otherwise have become due between the date of the termination and the end of the plan year in which the pension plan is terminated;

(c) the amounts of payments that are required to be made under a workout agreement that are due on termination or would otherwise have become due between the date of the termination and the end of the plan year in which the pension plan is terminated;

(d) all of the following amounts that have not been remitted to the pension fund at the date of the termination:

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

(ii) other amounts due to the pension fund from the employer; and

(e) the amounts of all of the payments that are required to be made under subsection 9.14(2).

66. Since the pension plans have been terminated and no restructuring plan has been presented to the pension plan beneficiaries, the Monitor and the Debtors cannot claim that only the normal cost payments are protected. Nothing in the *CCAA* provides for this type of situation. On the contrary, section 29(6)(b) of the PBSA applies to capture unpaid special payments as of termination;

67. In similar circumstances, the *PBSA* continues to apply and the regular, special and catch-up payments that have become due by virtue of section 29 of the *PBSA* are protected by the Deemed Trust created by section 8 of the same Act;

68. In the absence of an agreement with the pension plan beneficiaries that is ratified by the Court, neither the Debtors, nor the Monitor may unilaterally impose on the beneficiaries an amount less than that which the *PBSA* provides for and protects;

CONCLUSIONS SOUGHT

THE OFFICE OF THE SUPERINTENDANT OF FINANCIAL INSTITUTIONS THEREFORE ASKS THAT THE COURT :

GRANTS the present Notice of Objection;

DECLARES that the amount of $8,857,576 (subject to change) are subject the deemed trust created by section 8 of the Pension Benefits Standards Act, 1985 RSC 1985 c 32 (2nd suppl);

THE WHOLE WITHOUT COSTS

MONTRÉAL, May 12, 2017

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Ref. : 8072696

N° 500-11-048114-157

SUPERIOR COURT
District of MONTREAL
Commercial Division
(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. 36, as amended)

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

BLOOM LAKE GENERAL PARTNER LIMITED *ET AL.*
Petitioners

-and-
THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP *ET AL.*
Mises en cause

-and-
HER MAJESTY IN RIGHT OF NEWFOUNDLAND & LABRADOR, AS REPRESENTED BY THE SUPERINTENDENT OF PENSIONS *ET AL.*
Mis en cause

-and-
FTI CONSULTING CANADA INC.
Monitor

CONTESTATION OF THE MIS EN CAUSE THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS
of the *Amended Motion by the Monitor for Directions with Respect to Pension Claims*

ORIGINAL

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