File No. 38156

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL OF QUÉBEC)

BETWEEN:

VILLE DE FERMONT

APPLICANT
(Appellant)

- and -

BLOOM LAKE GENERAL PARTNER LIMITED

QUINTO MINING CORPORATION

8568391 CANADA LIMITED

CLIFFS QUÉBEC IRON MINING ULC

WABUSH IRON CO. LIMITED

WABUSH RESOURCES INC.

RESPONDENTS
(Respondents)

- and -

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP

BLOOM LAKE RAILWAY COMPANY LIMITED

WABUSH MINES

ARNAUD RAILWAY COMPANY LIMITED

WABUSH LAKE RAILWAY COMPANY LIMITED

RESPONDENTS
(Mis en cause)

- and -

FTI CONSULTING CANADA INC.

RESPONDENT
(Mis en cause)

- and -

SYNDICAT DES MÉTALLOS, SECTIONS LOCALES 6254 ET 6285

RESPONDENT
(Mis en cause)

RESPONDENT FTI CONSULTING CANADA INC.'S RESPONSE

(Rule 27 of the *Rules of the Supreme Court of Canada*)

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TABLE OF CONTENTS

Respondent's Response **Page**

TABLE OF CONTENTS

Respondent's Response **Page**

RESPONDENTS' MEMORANDUM OF ARGUMENT

PART I – BACKGROUND, OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Application for Leave to Appeal brought by the Applicant, City of Fermont, raises no issue of national importance or of general interest to the insolvency practice. In fact, nothing in the case gives rise to any uncertainty, an issue of principle or a matter of public interest requiring the Supreme Court's examination.

2. In determining the reasonableness of the Allocation Methodology (as defined below[1]), the CCAA Supervising Judge (as defined below[2]) undertook an extensive and detailed factual analysis and concluded that the contractual price allocation for certain assets sold during an insolvency proceeding was reasonable and that the City of Fermont has failed to meet its burden of proving otherwise.

3. Unsatisfied with the weight given by the CCAA Supervising Judge to various factors discussed below, which were nevertheless all fully considered by him, the City of Fermont now seeks to relitigate on appeal (for a second time) issues that were properly addressed and weighted by the CCAA Supervising Judge exercising his wide judicial discretion under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**").

4. It follows that the present appeal intends to contest a fact-based determination by the CCAA Supervising Judge (i.e. the reasonableness of the contractual price allocation for specific categories of assets), wherein the factual context is so specific to the Bloom Lake Mine that the outcome of the present appeal is solely of interest to the City of Fermont.

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1 *Infra* para. 17.
2 *Infra* para. 10.

5. The standard of review in such matters is well established under Canadian law. Indeed, given the high degree of deference owed to the CCAA Supervising Judge in the circumstances, the Québec Court of Appeal rightfully concluded that intervention will only be justified in the presence of a palpable and overriding error and, given the absence of one, dismissed the appeal.

6. In fact, an even greater deference is owed to a trial judge exercising his wide discretionary authority under the CCAA and acting as the supervising judge with carriage of a restructuring process. Moreover, when evaluating of the evidence and the factors to be balanced, the CCAA Supervising Judge was fully justified to rely on the recommendation of the Respondent, FTI Consulting Canada Inc., in its capacity as the court-appointed monitor.

7. The Québec Court of Appeal broke no new legal ground in recognizing and applying this uncontroversial standard of review, which standard is not being contested by the City of Fermont. Consequently, nothing in this case gives rise to any error of law or any uncertainty requiring the Supreme Court's intervention.

B. Specific Facts Leading to the Allocation Judgment

8. The Respondent, FTI Consulting Canada Inc., is acting as the court-appointed monitor (the "**Monitor**") to Bloom Lake General Partner Limited ("**Bloom Lake GP**"), Quinto Mining Corporation ("**Quinto**"), 8568391 Canada Limited and Cliffs Québec Iron Mining ULC ("**CQIM**"), as Petitioners, and Bloom Lake Iron Ore Mine Limited Partnership ("**Bloom Lake LP**") and Bloom Lake Railway Company Limited (collectively, the "**Bloom Lake CCAA Parties**"), who, on January 27, 2015, sought and obtained an initial order (as amended, restated or rectified from time to time, the "**Bloom Lake Initial Order**")[3] under the CCAA from the Superior Court of Québec (the "**CCAA Court**"). The proceedings commenced under the CCAA by the Bloom Lake CCAA Parties will be referred to herein as the "**CCAA Proceedings**".

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[3] Bloom Lake Initial Order, **Exposé de l'appelante ("E.A."), vol. 1, p. 67.**

9. On May 20, 2015, the CCAA Proceedings were extended to include Wabush Iron Co. Limited, Wabush Resources Inc., Wabush Mines, Arnaud Railway Company and Wabush Lake Railway Company Limited (collectively the "**Wabush CCAA Parties**"). The Bloom Lake CCAA Parties and the Wabush CCAA Parties will be referred to collectively herein as the "**CCAA Parties**".

10. On April 17, 2015, Mr. Justice Hamilton J.S.C. (the "**CCAA Supervising Judge**") granted an Order (as amended and restated on June 9, 2015, in order to include the Wabush CCAA Parties, the "**SISP Order**")[4] approving a sale and investor solicitation process (as may be amended from time to time, the "**SISP**") involving the business and assets of the CCAA Parties.

11. Since the issuance of the Bloom Lake Initial Order, seventeen asset sale transactions have been entered into by the CCAA Parties in consultation with the Monitor. Each of these transactions were subject to and approved by an Approval and Vesting Order by the CCAA Supervising Judge.[5]

12. The present appeal solely concerns a narrow application of the Allocation Methodology (as defined below) to the proceeds of certain categories of assets, pursuant to only one of such sale transaction, namely the sale of the Bloom Lake Mine and related assets pursuant to an agreement dated December 11, 2015 (the "**Bloom Lake APA**"), by and between CQIM, Quinto, Bloom Lake GP, Bloom Lake Railway Company Limited and Bloom Lake LP as vendors (collectively, the "**Bloom Lake Vendors**"), Québec Iron Ore Inc. as purchaser (the "**Bloom Lake Purchaser**"), and Champion Iron Limited as guarantor ("**Champion**").[6]

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4 SISP Order, **Mis en cause Monitor's Memorandum ("M.M."), vol. 1, p. 49.**

5 Motion for Approval of Allocation Methodology and Other Relief (the "**Allocation Motion**"), **E.A., vol. 1, p. 340** at para. 7; *Arrangement relatif à Bloom Lake*, 2017 QCCS 3529 (the "**Allocation Judgment**"), ***Demande d'autorisation d'appel de la Ville de Fermont* ("D.A."), p. 7** at para. 7.

6 Bloom Lake APA, **E.A., vol. 1, p. 92.**

1. The Bloom Lake AVO

13. On December 23, 2015, the CCAA Parties filed their *Motion for the Issuance of an Approval and Vesting Order* with respect to the Bloom Lake APA (as amended on January 4, 2016, the "**Bloom Lake AVO Motion**").[7]

14. On January 27, 2016, the CCAA Supervising Judge granted the Bloom Lake AVO Motion and rendered the Approval and Vesting Order (the "**Bloom Lake AVO**")[8] on the basis of the Monitor's 15th and 16th Reports, which Reports contained detailed comments and analysis concerning:

i. the key proposed terms and conditions of the Bloom Lake APA;[9]

ii. the court-approved SISP and its adequacy as it relates specifically to the Bloom Lake APA;[10]

iii. the impact of the SISP and the Bloom Lake APA on creditors and interested parties, including the City of Fermont;[11]

iv. the reasonableness and fairness of the consideration received in the Bloom Lake APA;[12]

v. the sharing of confidential information with respect to the SISP, including information regarding the Bloom Lake APA, with interested parties having signed a non-disclosure agreement;[13]

vi. the alternatives open to the creditors, described by the Monitor as Option A, B and C, and comments of the Monitor with respect to same in view of the carrying costs of the

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7 Bloom Lake AVO Motion, **M.M., vol. 1, p. 288.**
8 Bloom Lake AVO, **E.A., vol. 1, p. 289**.
9 Monitor's 15th Report, **M.M., vol. 1, p. 52** at paras. 51-54 and 62-67.
10 Monitor's 15th Report, *supra* note 9 at paras. 57-62.
11 Monitor's 15th Report, *supra* note 9 at paras. 65-67; Monitor's 16th Report, **M.M., vol. 2, p. 312** at paras. 63-69.
12 Monitor's 15th Report, *supra* note 9 at paras. 68-71.
13 Monitor's 15th Report, *supra* note 9 at paras. 39 and 63.

Bloom Lake Mine, the current commodity price of iron ore and the prospects over time of an eventual recovery of the worldwide market of iron ore;[14]

vii. the objection filed on behalf of Groupe UNNU-EBC s.e.n.c. and EBC Inc. and formally supported by various other construction legal hypothec holders (the "**UNNU Objection**"), as supported by a report prepared by PricewaterhouseCoopers Inc. (the "**PwC Report**");[15]

viii. the consultation process with the creditors[16], the carrying costs and the environmental liabilities of the mine[17] and the impact of iron ore price on the potential value of the Bloom Lake Mine[18].

15. The UNNU Objection and the supporting PwC Report were commented on in the Monitor's 16th Report, wherein the Monitor further commented on PwC Report's proposed holding strategy based on its analysis of historical data, market and analyst forecasts of the iron ore market and review of Bloom Lake Mine's operating and carrying costs.[19]

16. The Bloom Lake APA and the recommendation of the Monitor with respect to same were subsequently approved by the CCAA Court in accordance with Section 36 of the CCAA.[20] Moreover, it shall be noted that the City of Fermont formally supported the Bloom Lake APA (while reserving its right to contest the allocation of the purchase price at a later stage) and the Monitor's conclusions that not only the Bloom Lake APA offered the best chance for the possibility of operations being restarted

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14 Monitor's 15th Report, *supra* note 9 at paras. 71-75; Exhibit R-20 to the Bloom Lake AVO Motion, **M.M., vol. 2, p. 410**; Exhibit R-21 to the Bloom Lake AVO Motion, Chart summarizing the financial analysis with respect to the price of iron ore by both the Petitioners and PwC, **M.M., vol. 2, p. 709**.

15 Monitor's 16th Report, *supra* note 11 at paras. 6(g) and 37.

16 Monitor's 16th Report, *supra* note 11 at paras. 45-54.

17 Monitor's 16th Report, *supra* note 11 at paras. 77-91.

18 Monitor's 15th Report, *supra* note 9 at paras. 71-74; Monitor's 16th Report, *supra* note 11 at paras. 68 and 97-119.

19 Monitor's 16th Report, *supra* note 11 at paras. 77-121. The PwC Report itself was never produced into the Court Record, as the UNNU Objection was ultimately withdrawn.

20 Bloom Lake AVO**, E.A., vol. 1, p. 288.**

in the future,[21] but that it also represented the highest and the best offer (obtained through a fair, transparent and reasonable process carried in accordance with the SISP Order in which the opportunity to acquire the Bloom Lake Mine and related assets was widely marketed).[22]

2. The Allocation Judgment and Methodology

17. On May 19, 2017, the CCAA Parties filed their *Motion for Approval of Allocation Methodology and Other Relief* (the "**Allocation Motion**")[23], which set out the Monitor's proposed methodology to allocate proceeds and costs amongst the CCAA Parties (the "**Allocation Methodology**"). The Allocation Motion was granted by the CCAA Supervising Judge on July 25, 2017 (the "**Allocation Judgment**"), which decision is the subject of the present leave to appeal.

18. As noted in the Allocation Judgment at para. 7 and the Monitor's 36th Report, the Allocation Methodology was developed by the Monitor on a principled basis, without reference to the result for any specific creditor and with a view to enabling proceeds of realization and the costs of the CCAA Proceedings to be allocated on a fair and reasonable basis consistent with the allocation methodology approved in other CCAA proceedings.[24]

19. Pursuant to the Allocation Methodology, realizations from the Bloom Lake APA would be allocated amongst specific assets and specific CCAA Parties as set out in the Bloom Lake APA. This contractual allocation, determined by an arm's length purchaser (Québec Iron Ore Inc.) with no vested interest in eventual recoveries by different classes of creditors, was accepted by the CCAA Parties without negotiation.[25]

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21 Monitor's 15th Report, *supra* note 9 at paras. 67; City of Fermont's Notice of objection to the re-amended motion of the Groupe UNNU-EBC S.E.N.C. and EBC INC., **M.M., vol. 2, p. 366** at paras. 16-27 ("**City of Fermont's Notice of Objection**").

22 Monitor's 15th Report, *supra* note 9 at paras. 68-70; Monitor's 16th Report, *supra* note 11 para. 13; City of Fermont's Notice of Objection, *supra* note 21 at paras. 16.

23 Allocation Motion, *supra* note 5.

24 Monitor's 36th Report, **E.A., vol. 2, p. 355** at paras. 36 to 38; Testimony of Nigel Meakin, **E.A., vol. 2, pp. 526-527**/15-18.

25 Allocation Judgment, *supra* note 5 at para. 37; Testimony of Nigel Meakin, **E.A., vol. 2, p. 526**/20, lines 16 to 25.

20. As noted by the CCAA Supervising Judge, allocating realizations and costs on a case-by-case basis with respect to each transaction in the CCAA Proceedings would inevitably lead to disputes as different creditors are treated differently.[26] The approach taken by the Monitor was therefore to develop a methodology applicable to all situations, consistent with similar methodologies which had previously been implemented in other CCAA proceedings.

21. The City of Fermont did not contest the SISP, the purchase price or the Allocation Methodology at large. Its only contestation, which forms the present appeal, is limited to the contractual allocation by the Bloom Lake Purchaser as between three categories of assets in the total amount of $6.9 million, namely $1.5 million for the Bloom Lake Mine's fixed assets, $1.4 million for the mining and real property leases and $4 million for the real properties related to housing.[27]

3. The Appeal Judgment

22. In a succinct, yet thorough judgment, the Québec Court of Appeal upheld the CCAA Supervising Judge's decision. Having considered each of the Applicant's issues on appeal, which issues are being once again raised in front of this Honourable Court, the Court of Appeal noted that the CCAA Supervising Judge had considered all of the pertinent factors, and that in the absence of a palpable and overriding error, the Court of Appeal owed a high degree of deference to the exercise of judicial discretion by the CCAA Supervising Judge:

> [22] In the present case, the judge considered all of the pertinent factors, including public interest, and his decision to accept the contractual allocation is not marked by a palpable and overriding error.
>
> [23] The exercise of judicial discretion in matters subject to the provisions of the *CCAA* is accorded a high degree of deference and the role of an appellate court is largely supervisory. Here, the judge made no palpable and overriding errors in assessing the evidence and the reasonableness of the contractual allocation, even though it differed significantly from the municipal evaluation.[28]

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[26] Allocation Judgment, *supra* note 5 at para. 14.
[27] Allocation Judgment, *supra* note 5 at paras. 37 to 38.
[28] *Arrangement relatif à Bloom Lake*, 2018 QCCA 551, **D.A., p. 26** at paras. 14-17 (the "**Appeal Judgment**").

PART II – QUESTIONS IN ISSUE

23. The City of Fermont lists the following three (3) questions as raising issues of public importance that ought to be addressed by this Court:

i. Did the Court of Appeal err in concluding that the public interest has been sufficiently taken into account, considering that the losses in tax revenue resulting from the contractual price allocation by the purchaser, by emphasizing that the Applicant had neither opposed the sale nor the purchase price, whereas the Claimant was in no position to oppose?

ii. Has the Québec Court of Appeal erred in its analysis of the reasonableness of the value accorded to residential assets, which are incidental to the mineral operation at issue?

iii. Did the Québec Court of Appeal err in totally disregarding the relevance of the City of Fermont's assessment role in determining the reasonableness of the price allocation between the various real estate assets of the Bloom Lake Mine?

24. Regardless that *prima facie* the answers to these questions require a factual analysis that solely concerns the local reality of the City of Fermont, and are hence of no national interest or public importance, the answers to these questions are also self-evident, and have already been adjudicated twice by the CCAA Supervising Judge the Court of Appeal:

i. The public interest is amongst the many interests that must be balanced by the CCAA Court;

ii. The value of one class of assets (the housing) need not track the value of another class of assets (the mine); and

iii. The assessment role is (at the very least) evidently outdated and cannot be used as a basis of the value of the assets sold under the Bloom Lake APA.

PART III – STATEMENT OF ARGUMENT

A. The Application for Leave to Appeal Raises No Issue of Public Importance

25. The questions raised by the Applicant manifestly do not raise any issue of public importance justifying this Court's attention. On the contrary, this matter involves the application of settled law to very specific set of facts.

26. The City of Fermont alleges that the Court of Appeal did not give sufficient weight to the following factors: (i) the public interest served by the fiscal revenue of the City of Fermont; (ii) the contradiction between the value of the residential properties and the mine; and (iii) the values in the municipal assessment role.

27. The City of Fermont omits to mention, however, that each of these factors were fully considered by the CCAA Supervising Judge in a decision in which public interest was only one factor amongst many that had to be evaluated and balanced against other factors. The Appeal Judgment therefore involved no more than a straightforward review of whether the CCAA Court committed a palpable and overriding error in its consideration of the aforementioned factors. After a diligent analysis, the Court of Appeal concluded in the negative. The Court of Appeal properly discharged its institutional role of a court of error. The Appeal Judgment raises no issue requiring this Court's guidance. Leave to appeal should be denied.

B. The Standard of Review: Palpable and Overriding Error

28. Indeed, the City of Fermont does not contest the Court of Appeal's determination that the standard of review is palpable and overriding error when an appellate tribunal is asked to review a CCAA Supervising Judge's finding of facts and inferences made from those facts.[29] As noted by the Court of Appeal in the Appeal Judgment, it is well established that great deference is owed to the discretion of a supervising judge exercising his powers under the CCAA:

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[29] *Ibid*. at paras. 22-23

> [14] On the standard of review, the exercise of judicial discretion in matters subject to the provisions of the *CCAA* is accorded a high degree of deference. Appellate courts across the country have agreed that, absent an error of law (reviewed for correctness), intervention will only be justified in the presence of a palpable and overriding error.
>
> [15] Fermont invokes two such errors: (1) that the judge erred by failing to apply the presumption that the property assessment roll is accurate and (2) that he erred in holding that the residential properties were of greater value to the purchaser than the mine.
>
> [16] These submissions must be dismissed.
>
> [17] The judge made no palpable or overriding error in retaining the contractual allocation of the purchase price for the Bloom Lake Properties. He also did not err in holding that the residential properties were of greater value to the purchaser than the mine.[30]

29. The standard of review applicable to a decision made by a CCAA court was explained at length by Mr. Justice Rosenberg, J.C.A., in the following terms:

> [16] […] In my view, the usual standard of review in appeal proceedings applies and this court is required to give deference to the findings of the motions judge even where, as here, the decision is based on a paper record. The fact that there is no right of appeal and the appeal is only with leave under s. 13 of the Act only reinforces that conclusion. Decisions in the CCAA context must often be made quickly. They are, as in this case, usually made by a judge with considerable expertise in the area who has been managing the CCAA proceedings and is intimately familiar with the context and the issues at stake. […]
>
> [18] More recently the Supreme Court in *Housen v. Nikolaisen* discussed at some length the standard of appellate review where the appellate court is called upon to review inferences from facts. The court concluded that the standard is one of considerable deference. Iacobucci and Major JJ. described the standard at para. 23 as follows:
>
> > We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate

30 *Ibid.* at paras. 14-17.

> court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts.
>
> [20] […] The motions judge's decision about the application of legal set-off turned exclusively on the inferences to be drawn from the undisputed facts in the affidavits. His decision that Union had not shown the rebate as a debt was fact specific. Although Union argues that the motions judge overlooked important facts and misapprehended certain facts, I am not persuaded that the motions judge made any palpable or overriding error. To the contrary, I am satisfied that his decision is supported by the evidence.[31]
>
> [References omitted, emphasis added]

30. As evidenced by the factual matrix above, the CCAA Supervising Judge has overseen the CCAA Proceedings for the past two years and has intimate knowledge of the intricate details of this file and the interests of the various stakeholders at play. Given the careful and delicate balancing of numerous interests, this an appellate court must exercise its power cautiously when asked to interfere with the authority and discretion of the CCAA Court.

31. The evaluation of the reasonableness of the purchase price allocation by CCAA Supervising Judge is one based on finding of facts and inferences made from those facts, founded in part on the uncontested testimony of the Monitor, Mr. Nigel Meakin, the Monitor's 36th Report and the testimony of Mr. Richard Chabot.[32]

32. The role of the Monitor, as an impartial officer of the court, who must act independently and in the interests of the debtor, its creditors and all of its stakeholders, is well established in Canadian

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31 *Algoma Steel Inc. v. Union Gas Ltd.*, 2003 CanLII 30833 (ON CA), **Respondent FTI Consulting Canada Inc.'s Response ("F.T.I.R."), pp. 22 and ff.**; see also *White Birch Paper Holding Company (Arrangement relatif à)*, 2013 QCCA 1302 at para. 48, **F.T.I.R., pp. 105 and 106.**

32 Mr. Richard Chabot acts as the municipal evaluator for the City of Fermont. He did not prepare an expert report and relied on assessed values determined as of 2011 to support the position of the City of Fermont, as explained more fully at *infra* paras. 47-57.

law.[33] Consequently, the courts accord a high level of deference to the recommendations of the Monitor.[34]

33. In light of these factors, the Superior Court of Ontario in *Hunjan* (affirmed by the Court of Appeal) held that a creditor challenging an allocation methodology proposed by a court-appointed monitor/receiver carried the onus of satisfying the court that the impugned allocation methodology was unfair or unreasonable in all of the circumstances.[35] *Hunjan* was accepted on this point and applied by Court of Queen's Bench of Manitoba in *Winnipeg* in the following terms:

> [48] I agree with the view expressed in *Hunjan International Inc*., that where the allocation is *prima facie* fair, the onus is on an objecting creditor to demonstrate that the proposal is unfair or prejudicial. The monitor, after all, is both court appointed and is intimately familiar with the details of the restructuring, including the particular costs incurred and what has transpired within the company's business operations during the restructuring period.[36]
>
> [Emphasis added]

34. As discussed above, the Allocation Methodology was developed by the Monitor on a principled basis and the allocation of the Bloom Lake APA purchase price was determined by an arm's length purchaser with no interest in its outcome. For reasons hereinafter set out, the Monitor respectfully submits that the City of Fermont seeks to relitigate for a third time an issue based fully on findings of fact that is only of interest to itself. It follows that the Court of Appeal correctly decided not interfere with the discretion of the CCAA Supervising Judge in the absence of a palpable and overriding error.[37]

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33 Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2d ed (Toronto: Carswell, 2013) at 587-591, **F.T.I.R., pp. 150-154.**

34 Sarra, *ibid.* at 573, **F.T.I.R., p. 148.**

35 *Hunjan International Inc. (Re)*, 2006 CanLII 63716 (ON SC) at paras. 58, 71 and 73, **F.T.I.R., pp. 50 and 52**, aff'd by 2006 CanLII 42577 (ON CA), **F.T.I.R., pp. 54 and ff.** [*Hunjan*].

36 *Winnipeg Motor Express Inc. et al.*, 2009 MBQB 204 at para. 48, **F.T.I.R., p. 124**, leave to appeal refused, 2009 MBCA 110, **F.T.I.R., pp. 131 and ff.** [*Winnipeg*].

37 Appeal Judgment, *supra* note 28 at para. 23.

C. The public interest is amongst the many interests that must be balanced by the CCAA Court

35. As its first ground of appeal, the City of Fermont alleges that the Court of Appeal has failed to sufficiently take into consideration that the price allocation specifically favours the Bloom Lake Purchaser to the detriment of the City of Fermont and consequently the public interest.[38]

36. As noted by the CCAA Supervising Judge, the City of Fermont bears the burden to prove that the Bloom Lake Purchaser had an interest in the allocation of the proceeds.[39] The CCAA Supervising Judge then further noted that the allegations of the City of Fermont to the effect that the allocation was intended to benefit the Bloom Lake Purchaser or that it intended to help the latter with its challenge of the municipal evaluation of the mine are without a factual basis.[40]

37. The CCAA Supervising Judge nonetheless made two just observations on this front:

i. "It will generally not be sufficient to simply say that the purchaser's allocation was tax-driven […] first because there are always tax considerations and second because, even then, the allocation must be reasonable in order to withstand scrutiny by the taxation authorities";[41] and

ii. "[If] the purchaser's assessment was that the houses were more likely to be sold and it was trying to reduce the capital gain on a subsequent sale of the houses, that would suggest that allocating more value to the houses was reasonable."[42]

38. The Monitor reiterates the CCAA Court's conclusion that the City of Fermont has failed to meet its burden of proof that the Bloom Lake Purchaser in determining the contractual allocation

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38 **D.A., pp. 37-41** at paras. 25-46.
39 Allocation Judgment, *supra* note 5 at para. 44.
40 Allocation Judgment, *supra* note 5 at paras. 45-46.
41 Allocation Judgment, *supra* note 5 at para. 23.
42 Allocation Judgment, *supra* note 5 at para. 45.

had an interest in the allocation of the proceeds to the detriment of the public interest and further notes that:

i. the Monitor and the CCAA Court have consistently considered the impact of the SISP and the Bloom Lake APA on all creditors and interested parties, including the City of Fermont;[43]

ii. the interests of the City of Fermont are amongst the many interests that must be balanced in the CCAA Proceedings; and

iii. under the proposed allocation by the City of Fermont, the latter stands to receive the entire $6.9 million value of the assets to the detriment of all other creditors and stakeholders of the Bloom Lake Vendors.[44]

39. It stands to reason that the City of Fermont's proposed allocation, which, as further explained below, relies on outdated and contested municipal assessed values to support a *prorata* allocation, is totally unwarranted in the circumstances.

40. It was not up to the Court of Appeal to replace the CCAA Court's conclusion on this matter with its own due to a difference of opinion over the weight to be assigned to the underlying facts. The Court of Appeal therefore rightfully determined that "[i]n the present case, the judge considered all of the pertinent factors, including public interest, and his decision to accept the contractual allocation is not marked by a palpable and overriding error."[45]

D. The value of one class of assets (the housing) need not track the value of another class of assets (the mine)

41. As its second ground of appeal, the City of Fermont argues that because the housing assets are an "accessory" to the operation of the Bloom Lake Mine, their values must therefore track one

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43 Monitor's 15th Report, *supra* note 13 at paras. 65 to 67; Monitor's 16th Report, *supra* note 11 at paras. 63 to 69.
44 Allocation Judgment, *supra* note 5 at para. 43.
45 Appeal Judgment, *supra* note 28 at para. 22.

another. Consequently, the City of Fermont alleges that the housing assets cannot be worth more than the mining assets. Hence, the City of Fermont claims to have met its burden of showing that the Allocation Methodology is *prima facie* unfair.[46]

42. As noted by the CCAA Supervising Judge, the City of Fermont asserts that either both the mine and residential properties have value or neither has value, as the residential properties do not have an alternative use if the mine is no longer in operation.[47] In support of this position, the City of Fermont wrongly deduces from the evidence that because of ArcelorMittal's expansion of its housing units at the Fire Lake Mine that there has never been any interest in using the Bloom Lake Mine housing units for a future expansion at the Fire Lake Mine.[48]

43. In reality, the Bloom Lake Purchaser is a subsidiary of Champion. Pursuant to the Monitor's uncontested testimony, Champion, not ArcelorMittal, considered the alternative use of the housing units regardless of whether the Bloom Lake Mine was reopened, namely in connection with its Fire Lake North Project, located at the northern limit of the Fire Lake Mine (which is operated by ArcelorMittal but is not to be confused with the Fire Lake North Project), 60 km south of the Bloom Lake Mine and about 40 km away from the residential properties in the City of Fermont (not 90 km as the City of Fermont wrongly alleges).[49]

44. The Monitor has also testified that as a part of the Government of Québec's *Plan Nord*, the road link between Fermont and Fire Lake is being improved so that approximately 40 minutes will separate the two towns.[50] Contrary to the City of Fermont's allegations, the testimony of Mr. Chabot makes no reference to the alternative uses that Champion could make out of the assets purchased under the Bloom Lake APA. Mr. Chabot's testimony, while confirming the existence of the project to improve the road between Fermont and Fire Lake, is inconclusive as to whether the new road is feasible.[51] Mr. Chabot's testimony only confirms that the Fire Lake iron deposits

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46 **D.A., pp. 41-45** at paras. 47-71.
47 Allocation Judgment, *supra* note 5 at paras. 52-57.
48 *Ibid*. at para. 25.
49 Testimony of Nigel Meakin, **E.A., vol. 2, pp. 529**/27 at lines 3-25.
50 *Ibid*.
51 Testimony of Richard Chabot, **E.A., vol. 2, pp. 541-542**/77 line 17 to 79 line 6.

are significantly more important than that of Fermont, and that Fire Lake is in constant need of housing units.[52]

45. Paragraph 54 of the Allocation Judgment, which the City of Fermont challenges, simply states the obvious: "in principle, the factors that determine the value of a mine (quantity of remaining iron ore, price of iron ore, operating costs) are very different from the factors that determine the value of a house (characteristics of the house and the local housing market). The value of one need not track the other."

46. In short, the Court of Appeal rightfully stated that "[t]he judge made no palpable or overriding error in retaining the contractual allocation of the purchase price for the Bloom Lake Properties. He also did not err in holding that the residential properties were of greater value to the purchaser than the mine."[53]

E. The assessment role is (at the very least) evidently outdated and cannot be used as a basis of the value of the assets sold under the Bloom Lake APA

47. Pursuant to City of Fermont's third ground of appeal:

A) first, the Bloom Lake APA was the result of a "fire sale", which did not obtain the best possible price for the assets sold and that consequently it does not represent the fair market value of such assets; and

B) second, that there is a presumption of validity applicable to the municipal assessment role.

48. First, and as noted above,[54] the Bloom Lake APA represents the highest and the best offer obtained through a fair, transparent and reasonable process carried in accordance with the SISP Order in which the opportunity to acquire the Bloom Lake Mine and related assets was widely

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52 Testimony of Richard Chabot, **E.A., vol. 2, p. 537**/58-59.
53 Appeal Judgment, *supra* note 28 at para. 17.
54 *Supra* para. 16.

known. These conclusions were strongly supported by the City of Fermont at the time,[55] who has never, until this appeal process, contested the Bloom Lake APA purchase price.

49. In fact, the sale of Bloom Lake Mine was not the result of a "fire sale", nor was the Monitor "forced" to sell such assets as quickly as possible. The Bloom Lake APA was the result of a court approved sale process during which the Monitor had the duty to do everything reasonably possible in the circumstances to obtain the best price.[56]

50. Section 36 of the CCAA sets out a non-exhaustive list of factors for the court to consider in determining whether to approve a sale transaction, including (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances; (b) whether the monitor approved the process leading to the proposed sale or disposition; (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy; (d) the extent to which the creditors were consulted; (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.[57]

51. Consequently, the Bloom Lake APA not only represents the best possible offer, but is also the best indicator of the market value of the assets sold. The notion that a sale by the court-appointed monitor/receiver is the best indicator of the value of a particular property was recently upheld by the Superior Court of Ontario:

> Fourth, the material deficiencies in the evidentiary utility of the two appraisal reports referred to by Matson brings one back, then, to the general principle that where a receiver markets a property, appraisals cease to have much

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55 City of Fermont's Notice of Objection, *supra* note 21 at paras. 16-27.

56 *Tiger Brand Knitting Co. (Re)*, 2005 CanLII 9680 (ON SC) at para. 34, **F.T.I.R., p. 94**; *River Rentals Group Ltd. v. Hutterian Brethren Church of Codesa*, 2010 ABCA 16 at paras. 12-13, **F.T.I.R., pp. 61 and 62.**

57 *Terrace Bay Pulp Inc. (Re)*, 2012 ONSC 4247 at paras. 43-44, **F.T.I.R., pp. 84 and 85.**

> significance in the valuation process - a sale is always a better indication of value of a particular property than a valuation.[58]
>
> [emphasis added]

52. Second, the City of Fermont erroneously alleges that no evidence was administered in front of the CCAA Court for it to be able to overturn the presumption of validity of the municipal assessment role, and hence the CCAA Court was bound by the values in it.[59]

53. The actual facts of this file and the testimony of City of Fermont's witness, Mr. Chabot, however, paint a very different picture. In his testimony, Mr. Chabot confirmed that:

i. the values in the assessment role for the years 2013-2015 were determined on July 1, 2011, and were renewed without adjustment for the role of 2016-2018, even in the face of significant decline in the price of iron ore;[60] and

ii. the values assessed on July 1, 2011, included $140 million in anticipation of Phase II of the Bloom Lake Mine, which was ultimately never completed and for which significant investments are still required. These facts were also not taken into account upon the renewal of the assessment for the role of 2016-2018.[61]

54. Furthermore, and as noted by the CCAA Supervising Judge, the mine was not operational, had carrying costs of $1.5-1.8 million per month and substantial environmental liabilities of more than $41.7 million.[62] Based, *inter alia*, on the aforementioned reasons, the assessment role is currently being contested.

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58 *Royal Bank of Canada v. Atlas Block Co. Limited*, 2014 ONSC 1531 at para. 37, **F.T.I.R., pp. 72 and 73.**

59 **D.A., pp. 45-51** at paras. 72-97.

60 Testimony of Richard Chabot, **E.A., vol. 2, p. 540**/70-73.

61 Testimony of Richard Chabot, **E.A., vol. 2, p. 541**/74-77.

62 Allocation Judgment, *supra* note 5 at para. 50; Monitor's 15th Report, *supra* note 9 at paras. 51, 66, 67.

55. Unlike the T.A.Q., the CCAA Supervising Judge was not tasked with reviewing the value of the assessment role as of a predetermined reference date, and had complete discretion in using the aforementioned factors in his evaluation of the reasonableness of the price allocation.

56. Consequently, and without deciding on what the values of the assessment role should be, the CCAA Supervising Judge rightfully concluded that "the municipal evaluation of the mine is not a reliable indication of its value."[63]

57. The Court of Appeal therefore justly noted "that the presumption of accuracy of an assessment role is not absolute, especially given that the judge was not called upon to review the municipal evaluation. Rather, he was asked to determine whether the contractual allocation was reasonable. FTI and the respondents properly submit that the reasonableness of an arms-length contractual allocation was a fact he was entitled to presume in the absence of any evidence to the contrary."[64]

58. In both its Notice of Leave to Appeal and Brief, the City of Fermont fails to identify any error committed by the Court of Appeal or the CCAA Court. Indeed, the CCAA Supervising Judge correctly stated the applicable principles, and the reasons to favour a contractual purchase price allocation determined by a purchaser acting at arm's length, as recommended by the Monitor.[65] It follows from the above analysis that the Court of Appeal properly concluded that the CCAA Supervising Judge did not commit a palpable and overriding error when he deduced from the facts, based in part on the uncontested testimony of the Monitor and its reasoned recommendation, and in light of the lacunar testimony of Mr. Chabot, that the City of Fermont has failed to meet its burden of proof.

59. In applying the standard of palpable and overriding error, which standard the City of Fermont does not contest, the Québec Court of Appeal is in lockstep with appellate courts throughout Canada. There is nothing novel in the Appeal Judgment and nothing that justifies the intervention of the Supreme Court of Canada.

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63 *Ibid*. at paras. 51-52.
64 Appeal Judgment, *supra* note 28 at para. 18.
65 Allocation Judgment, *supra* note 5 at paras. 18-24.

PART IV – COST

60. The Monitor requests costs on this Application for Leave to Appeal.

PART V – ORDERS SOUGHT

61. The Monitor seeks an order dismissing the Application for Leave to Appeal, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Montréal, August 13, 2018

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PART VI –TABLE OF AUTHORITIES

Jurisprudence **Paragraph(s)**

Doctrine
