

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
No: 500-11-048114-157

SUPERIOR COURT

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

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
WABUSH MINES
ARNAUD RAILWAY COMPANY
WABUSH LAKE RAILWAY COMPANY LIMITED

Mises en cause

and

FTI CONSULTING CANADA INC.

Monitor

and

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

Objecting Party

THE SUPERINTENDENT OF PENSIONS' PLAN OF ARGUMENT IN SUPPORT OF ITS OBJECTION
TO THE MOTION FOR THE ISSUANCE OF AN ORDER IN RESPECT OF THE WABUSH CCAA
PARTIES, DATED MAY 29, 2015

INTRODUCTION

1. Pursuant to the *Pension Benefits Act, 1997* ("Act"), control and supervision of the administration of the Act - which applies to all pension plans for persons employed in

the province of Newfoundland and Labrador¹ - has been vested in the Superintendent of Pensions (“Superintendent”) (section 6(2) of the Act).

➤ *Pension Benefits Act, 1997*, SNL 1996 Chapter P-4-4.01 (TAB 1)

2. The Superintendent thus has a public interest role to play in ensuring that the Act’s provisions are correctly applied.
3. In the context of the Wabush CCAA Parties’ May 29, 2015 Motion (“Motion”), the Superintendent is of the view that the suspensions of the Defined Benefit Plans, as well as the priority to the Interim Lender Charge, all sought at paragraphs 80-91 of the Motion (“Suspensions”), would, if granted, violate the Act and frustrate its underlying objectives.

PROVISIONS OF NEWFOUNDLAND AND LABRADOR’S PENSION BENEFITS ACT, 1997 OF PARTICULAR RELEVANCE TO THIS ISSUE

Powers and duties of superintendent

6.

- (1) The Lieutenant-Governor in Council shall appoint a Superintendent of Pensions.
 - (1.1) The Lieutenant-Governor in Council may appoint a Deputy Superintendent of Pensions
 - (a) to act in place of the superintendent in his or her absence or incapacity; and
 - (b) to exercise the powers and perform the duties of the superintendent under an Act or regulations that may be assigned by the superintendent.
- (2) The superintendent, subject to the approval of the minister, has the control and supervision of the administration of this Act, and has the following powers and duties:
 - (a) to examine all pension plans and all amendments to those plans that are filed for registration under this Act;
 - (b) to register and issue certificates of registration in respect of all pension plans that are filed for registration under this Act and comply with the standards for registration;

¹ Except those pension plans to which an Act of the Parliament of Canada applies. See Section 5 of the Act.

- (c) to refuse to register a pension plan that does not comply with this Act;
 - (d) to carry out periodic or other inspections and audits of registered pension plans;
 - (e) to revoke the registration and cancel the certificate of registration for a pension plan that ceases to comply with the requirements of this Act;
 - (f) to direct the administrator of a pension plan to provide information to plan members at a time and in a manner specified by the superintendent;
 - (g) to assess and collect fees for the registration and annual supervision of pension plans; and
 - (h) to perform other functions and duties that the Lieutenant-Governor in Council may assign.
- (3) On receipt of a written request and if satisfied reasonable grounds exist for the extension, the superintendent may extend a time limit imposed under this Act to a maximum of 6 months.
- (4) The superintendent may place a pension plan under trusteeship and appoint one or more persons to act as trustee of the plan where, in the opinion of the superintendent, it is necessary to do so.
- (5) The cost of administering a pension plan by a trustee under subsection (4) is to be paid
- (a) by the employer; or
 - (b) by the plan fund where, in the opinion of the superintendent, special circumstances exist.

1996 cP-4.01 s6; 2004 c40 s1

Duties of administrator

14.

- (1) An administrator shall administer a pension plan and pension fund as a trustee for the employer, the members and former members of the plan, and other persons with an entitlement under the plan.

Amounts to be held in trust

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;
 - (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).

1996 cP-4.01 s32

Money not assignable

33.

Money payable under a pension plan shall not be assigned, charged, attached, anticipated or given as security and is exempt from execution, seizure or attachment, and a transaction purporting to assign, charge, attach, anticipate or give as security such money is void, except where this section is overridden by another Act, or in circumstances prescribed by the regulations.

1996 cP-4.01 s33

Funding

35.

- (1) A pension plan shall provide for funding, in accordance with the requirements for solvency as prescribed by the regulations, which is adequate to provide for payment of all pension benefits required to be paid under the plan.
- (2) In the case of an actuarial report required under section 16, where the superintendent is of the opinion that the report has not been prepared
 - a) on the basis of actuarial assumptions or methods that are adequate and appropriate; and

- b) in accordance with accepted actuarial practice, the superintendent shall notify the administrator of the plan in writing of this opinion and shall direct the administrator to have the appropriate changes made to the report, and the administrator shall immediately comply with that direction.
- (3) A pension plan shall be funded in accordance with the report referred to in subsection (2) as amended in accordance with the direction of the superintendent.

1996 cP-4.01 s35

Plan termination

59.

- (1) The superintendent may declare the whole or part of a pension plan terminated where
- (a) there is a suspension or cessation of employer contributions in respect of all or part of the plan membership, except where surplus is used to meet funding requirements;
 - (b) the employer has discontinued or is in the process of discontinuing all of its business operation or a part in which a substantial portion of its employees who are members of the plan are employed;
 - (c) the employer is bankrupt within the meaning of the Bankruptcy Act (Canada);
 - (d) the superintendent is of the opinion that the plan has failed to meet the requirements prescribed by the regulations for solvency in respect of funding; or
 - (e) all or part of the business or assets of a predecessor employer's business are sold, assigned or otherwise disposed of and the successor employer who acquired the business or assets does not provide a pension plan for the members of the predecessor employer's plan who become employees of the successor employer.
- (2) A declaration made under subsection (1) shall declare the whole or part of a pension plan to be terminated as of a date determined by the superintendent.

1996 cP-4.01 s59

Plan termination requirements

60.

- (1) An employer, or, in the case of a multi-employer pension plan, the administrator, who intends to terminate the whole or part of a pension plan shall notify in writing the superintendent and any other person or body who is affected of that intention at least 60 days before the date of the intended termination.

- (2) On the termination of the whole or part of a pension plan, the administrator of the plan shall file with the superintendent
 - (a) a report required by the superintendent, within 6 months after the effective date of termination; and
 - (b) all outstanding annual information returns up to the effective date of the termination, within 3 months after that date.
- (3) The wind-up of a pension plan shall commence immediately after the termination of the plan unless the superintendent gives written approval to postpone the wind-up.

1996 cP-4.01 s60

Termination payments

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.

1996 cP-4.01 s61; 2008 c16 s1

Distribution of plan assets

62.

- (1) On termination or wind-up of a pension plan, no part of the assets of the plan shall revert to the benefit of the employer until the superintendent's consent has been obtained and provision has been made for the payment to members or former members, the principal beneficiary, beneficiary or estate of a member or former member of a pension benefit, accrued or payable, in respect of membership to the date of termination or wind-up and, for that purpose, those pension

benefits shall be treated as if the members or former members were entitled to a deferred pension benefit.

- (2) Where a notice of intention to terminate a pension plan has been given, the assets of the plan may not be applied toward the provision of a pension benefit until the superintendent has approved the report required by subsection 60(2), but the administrator of the plan may continue to pay a pension benefit which began before the notice of intention to terminate and any other payment approved by the superintendent.
- (3) On termination of a pension plan all assets of the plan that are to be used for the purpose of providing a pension benefit or another benefit continue to be subject to this Act.
- (4) Where a pension plan is terminated in part, the rights of members affected shall not be less than what they would have been if the whole of the plan had been terminated on the same date as the partial termination.

1996 cP-4.01 s62; 2001 c22 s29

ACTUARIAL VALUATIONS AS AT JANUARY 1, 2014

4. The latest Contributory Pension Plan for Salaried Employees' fund's ("Salaried Employees' Fund") actuarial valuation communicated to the Superintendent is as at January 1, 2014.
 - *Cliffs Natural Resources Inc. Contributory Pension Plan for Salaried Employees of Wabush Mines, Cliffs Mining Company, Managing Agent Actuarial Valuation as at January 1, 2014 ("Salaried Employees' Fund Valuation") (TAB 2)*
5. Pursuant to this valuation, the hypothetical windup financial position of the Salaried Employees' Fund places it at a \$10,471,332 deficit, although because of particularities of this plan, the actual liability could be \$10,718,471.
 - Pages 6 and 7 of the Salaried Employees' Fund Valuation
6. The latest Pension Plan for Bargaining Unit Employees' fund's ("Bargaining Unit Employees' Fund") actuarial valuation communicated to the Superintendent is as at January 1, 2014.

- *Cliffs Natural Resources Inc. Pension Plan for Bargaining Unit Employees of Wabush Mines, Cliffs Mining Company, Managing Agent Actuarial Valuation as at January 1, 2014* (“Bargaining Unit Employees’ Fund Valuation”) (TAB 3)

7. Pursuant to this valuation, the hypothetical windup financial position of the Bargaining Unit Employees’ Fund places it at a \$11,806,522 deficit, although because of particularities of this plan, the actual liability could be \$15,804,111.

- Pages 6 and 7 of the Bargaining Unit Employees’ Fund Valuation

8. The preceding means that as at January 1, 2014, the funds in the Salaried Employees’ Fund and in the Bargaining Unit Employees’ Fund were respectively at least \$10,471,332 and \$11,806,522 below what would be required to honour obligations towards members if the plans were to wind up on that date.

THE SUSPENSIONS CONCERN PAYMENTS WHICH ARE HELD BY THE EMPLOYER IN TRUST

9. Pursuant to Section 32 of the Act, all amounts owed by an employer to a pension plan fund are deemed to be held in trust.

10. Furthermore, since April 1, 2008, Section 61(2) of the Act requires that the employer must make *all* payments required which have accrued to the date of termination into the pension fund.

11. As such, the Monthly Amortization Payments and the Yearly Catch Up Amortization Payment at issue in the Motion will be owed in full in the event of a termination and are currently deemed to be held in trust by the employer for the benefit of the funds’ members.

12. It should be noted that Section 61(2) was added in an April 1, 2008 amendment to specifically ensure that in the event of a plan termination, plan members be protected.

13. Prior to April 1, 2008, employers did not have an obligation to make payments necessary to fund the benefits provided under a plan in the event of its termination.

14. This addition points to the clear intent of the Newfoundland and Labrador legislator that all benefits provided under a plan be prioritized - as trusts - in favour of plan members.

THE SUSPENSIONS SOUGHT CIRCUMVENT PROVISIONS OF THE ACT PUT IN PLACE TO PROTECT MEMBERS

15. A pension plan under the Act is always required to make provisions for full funding and to make all required payments to ensure such funding.

➤ Section 35 of the Act

16. In the event of the termination of a pension plan, Section 61(2) of the Act requires full funding of the plan.

17. Wabush Mines JV has *not* notified the Superintendent of its intention to terminate the pension plans at issue.

18. Sections 59 to 62 of the Act show that the termination of payments was meant to be preceded by plan termination and Superintendent oversight.

19. In the context of a plan termination, information regarding the plan must be filed with the Superintendent (Section 60(2)), which includes any information required by the Superintendent.

➤ *Directive No. 9* issued under the Act (TAB 4)

20. In turn, Section 62(1) of the Act requires that the Superintendent's consent be obtained before any assets of a plan can revert to the benefit of the employer.

21. The Suspensions sought circumvent this process set forth under the Act - a process which was put in place to protect pension plan members' interests.

22. Plan members should be offered the same protection in a context such as this one: amounts owed by the employer should not be undone by lending terms, particularly in a situation where recent actuarial valuations and information pertaining to whether

alternative financing options may be available have not been made available to the Court.

UP-TO-DATE FINANCIAL INFORMATION AND ALTERNATIVE FINANCING OPTIONS HAVE NOT BEEN MADE AVAILABLE

23. The latest actuarial valuations communicated to the parties are more than eighteen months old.

24. It is thus impossible to assess the current financial status of the plans or the consequences of the orders sought.

25. It should be noted that the Superintendent submitted a request for additional information to the Monitor - FTI Consulting Canada Inc. - on June 10, 2015 and has made other such requests in the past, without having received a full response.

- Email from Michael P. Delaney to the “Wabush Hotline”, June 10, 2015 at 1:29 PM (TAB 5)

26. At the time of filing of this Plan of Argument, a response has yet to be received.

WABUSH CCAA PARTIES' CONFLICT OF INTEREST AND FEDERAL PARAMOUNTCY

27. A majority of Supreme Court justices in *Indalex* recognized that the employer, as pension plan administrator was in a conflict of interest when it sought a CCAA order to override the plan members' priority.

- *Sun Indalex Finance v. United Steelworkers*, [2013] 1 S.C.R. 271 (TAB 6)

28. The Superintendent is of the view that the same holds true with regards to the Wabush CCAA Parties.

29. The lack of information described above is of particular concern given the conflicting interests of the Wabush CCAA Parties in this case.

30. Finally, though *Indalex* recognizes that the federal paramountcy doctrine *can* warrant a judge granting a lender priority over all other security holders, it *does not* stand for the proposition that the paramountcy doctrine commands, in all cases, that such a priority be granted.

31. To the contrary, this determination is highly fact-specific.

➤ See *Sun Indalex Finance v. United Steelworkers* paras 58-60; 242; 265

32. The lack of information on both the current financial status of the pension funds and on alternative financing options which may be available (including any possible negotiations with the proposed Interim Lender), coupled with the conflicting interests of the Wabush CCAA Parties, all militate against granting the Interim Lender priority.

CONCLUSION

33. For the above reasons, the Superintendent's position is that the suspension of the Monthly Amortization Payments and the Yearly Catch Up Amortization Payment *nunc pro tunc* should not be authorized, and that a priority should not be granted to the Interim Lender Charge.

MONTREAL, this 15th day of June, 2015


IRVING MITCHELL KALICHMAN LLP
Attorneys for the Superintendent of Pensions

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THE SUPERINTENDENT OF PENSIONS' BOOK OF AUTHORITIES

1. *Pension Benefits Act, 1997, SNL 1996 Chapter P-4-4.01;*
2. *Cliffs Natural Resources Inc. Contributory Pension Plan for Salaried Employees of Wabush Mines, Cliffs Mining Company, Managing Agent Actuarial Valuation as at January 1, 2014;*
3. *Cliffs Natural Resources Inc. Pension Plan for Bargaining Unit Employees of Wabush Mines, Cliffs Mining Company, Managing Agent Actuarial Valuation as at January 1, 2014;*

4. *Directive No. 9* issued under the *Pension Benefits Act, 1997*;
5. Email from Michael P. Delaney to the "Wabush Hotline", June 10, 2015 at 1:29 PM;
6. *Sun Indalex Finance v. United Steelworkers*, [2013] 1 S.C.R. 271.

MONTREAL, this 15th day of June, 2015


IRVING MITCHELL KALICHMAN LLP
Attorneys for the Superintendent of Pensions

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