CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

SUPERIOR COURT
(Commercial Division)

NO : 500-11-048114-157

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

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

Petitioners / Respondents

-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, THE ATTORNEY GENERAL OF CANADA, UNITED STEELWORKERS LOCAL SECTIONS 6254 & 6285, MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON

Objecting Parties

MONITOR'S ARGUMENTATION OUTLINE :
PROPOSED SUSPENSION OF AMORTIZATION AND OPEB PAYMENTS,
PRIORITY OF INTERIM LENDER CHARGE AND REPRESENTATION ORDERS

A. BACKGROUND

1. On May 20, 2015, Wabush Iron Co. Limited and Wabush Resources Inc., as Petitioners, together with Wabush Mines, Arnaud Railway Company and Wabush Lake Railway Company, Limited, as Mises-en-cause (collectively, the "**Wabush CCAA Parties**"), filed a Motion for the issuance of an Initial Order (No. 123 on the Court record printout, the "**Wabush Initial Motion**"), which was granted on that date by the Court by way of the issuance of an Initial Order as requested by the Wabush CCAA Parties (the "**Wabush Initial Order**").

2. Capitalized terms not otherwise defined shall have the meaning ascribed thereto in the Wabush Initial Order.

3. The Wabush Initial Order provided for a comeback hearing which was set to take place on June 9, 2015 (the "**Comeback Hearing**").

4. The Wabush CCAA Parties subsequently sought, by way of their "Motion for the issuance of an order in respect of the Wabush CCAA Parties (1) granting priority to certain CCAA charges, (2) approving a Sale and Investor Solicitation Process *nunc pro tunc*, (3) authorizing the engagement of a Sale Advisor *nunc pro tunc*,

(4) granting a Sale Advisor Charge, (5) amending the Sale and Investor Solicitation Process, (6) suspending the payment of certain pension amortization payments and post-retirement employee benefits, (7) extending the stay of proceedings, (8) amending the Wabush Initial Order accordingly" (dated May 29, 2015 and filed under Court docket entry number 130, the "**Wabush Comeback Motion**"), various conclusions including an order seeking priority with respect to the CCAA Charges and an order suspending the payment of the Monthly Amortization Payments and Yearly Catch-Up Amortization Payment (collectively, the "**Amortization Payments**") and other post-retirement employee benefits ("**OPEBs**").

5. Prior to the Comeback Hearing, the Wabush CCAA Parties and the Monitor received various Notices of Objection, which can be classified into two categories as follows:

   (a) the first category of Notices of Objection were filed on behalf of the Administration Portuaire de Sept-Îles/Sept-Iles Port Authority ("**SIPA**"), the Iron Ore Company of Canada ("**IOC**") and MFC Industrial Ltd., pertained to the reservation of certain contractual rights;

   (b) the second category of Notices of Objection filed on behalf of Her Majesty in right of Newfoundland and Labrador, as represented by the Superintendent of Pensions (the "**N&L Superintendent**"), the Attorney General of Canada, acting on behalf of the Office of the Superintendent of Financial Institutions ("**OSFI**"), United Steelworkers Local Sections 6254 & 6285 (the "**Union**"), Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson in their personal capacity and as the proposed representatives of all non-union employees and retirees of the Wabush CCAA Parties (collectively, the "**Proposed Representatives**", and together with the N&L Superintendent, OSFI and the Union, the "**Objecting Parties**"). These Notices of Objection will be described more fully below.

6. On June 9, 2015, the Court granted the Wabush Comeback Motion and issued an Order (the "**June 9 Order**"), which reserved the rights of SIPA, IOC and MFC as follows:

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

[11] **DECLARES** that this Order approving the SISP as it relates to the Wabush CCAA Parties *nunc pro tunc* is without prejudice to the rights, if any, of the Iron Ore Company of Canada or its related companies (hereinafter the "**IOC**"), vis-à-vis the Wabush CCAA Parties, including, but not limited to, the rights pursuant to the Subscription Agreement dated August 3, 1959 referred to in IOC' s Notice of objection already filed in the Court record and dated April 13, 2015;

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

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

7. The Court scheduled a hearing on June 22, 2015 to deal with the remaining requests of the Wabush CCAA Parties in relation to the suspension of Amortization Payments and payment of OPEBs, priority of the Interim Lender Charge and Notices of Objection filed by the Objecting Parties, the whole as provided by the June 9 Order:

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

[...]

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

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

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

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

8. On June 15, 2015, the Monitor received the Argumentation Outlines submitted on behalf of the Objecting Parties, together with the "Motion for an order appointing the Petitioners-Mises-en-cause as representative of salaried/non-union and retired employees of the Wabush CCAA Parties" (the "**Representation Motion**") filed by the Proposed Representatives.

B. THE OBJECTIONS AND REPRESENTATION MOTION

9. All Objecting Parties oppose the suspension of the Amortization Payments.

10. As for the DIP Charge, all Objecting Parties but for the Proposed Representatives object to its ranking ahead of statutory deemed trusts arising under pension plans legislation.

Objections Raised / Objecting Parties	N&L S.	OSFI	Union	Proposed Reps.
Suspension of Amortization Payments	Objects	Objects*	Objects	Objects
Suspension of OPEBs	--	--	Objects	Objects
Superpriority of DIP Charge	Objects*	Objects	Objects	--
Superpriority of other CCAA Charges	--	--	--	--

*Not in the Notice of Objection, but in their respective Argument Outline

11. In their Notice of Objection dated June 5, 2015, and Argumentation Outline dated June 15, 2015, the United Steel Workers of America, Locals 6254 and 6285 (the "**USW**" or the "**Union**"), requests that representatives of the Union be appointed as representatives of the unionized employees and unionized retirees of the Wabush CCAA Parties, and that those representatives be funded by the Wabush CCAA Parties to provide information and advice to unionized employees and unionized retirees (the "**USW Representation Motion**").

12. In addition to the Notice of Objection further detailed herein below, the Proposed Representatives filed the Salaried Representation Motion seeking to be appointed as representatives of salaried/non-union and retired employees of the Wabush CCAA Parties and to seek funding for their representative counsels (the "**Salaried Representation Motion**").

13. The Salaried Representation Motion and the USW Representation Motion are herein collectively referred to as the "**Representation Motions**".

N&L Superintendent

14. In its Notice of Objection, the N&L Superintendent objects to the Wabush CCAA Parties' request for a suspension of the Amortization Payments (para. 5b), but does not raise any objection inasmuch as the OPEBs are concerned.

15. The N&L Superintendent further claims that additional information with regards to paragraphs 83 to 91 of the Wabush Comeback Motion needs to be divulged in order for it to be able to properly carry out its statutory duties under the *Pension Benefits Act, 1997* of Newfoundland and Labrador, SNL 1996, c. P-4.01 (the "**N&L Act**"), including to assess the financial status of the plans (paras. 4, 5(a) of the Notice; paras. 22-26 of the Argument Outline).

16. The N&L Superintendent argues that the suspension of the Amortization Payments sought by the Wabush CCAA Parties unduly circumvent the provisions of the N&L Act (para. 21 of the Argument Outline).

17. To do so, the N&L Superintendent relies on the combined effect of Sections 32 and 61(2) of the N&L Act (paras. 9-11, 15-21 of the Argument Outline).

18. In addition to the foregoing, the N&L Superintendent also claims in its Argument Outline that the Wabush CCAA Parties are in a conflict of interest when it comes to the administration of the pension plans (paras. 28-29), and insinuates that other, less stringent financing alternatives would have been available (paras. 22, 32).

19. It bears noting that, in its Notice of Objection, the N&L Superintendent also reserved its rights to raise additional objections in order to ensure that "any and all deficiencies with respect of the Wabush CCAA Parties' pension plans are funded" (para. 5c) and that "all conclusions sought in the [Wabush Comeback] Motion are compliant with the [N&L] Act and other applicable law" (para. 5d).

20. While the N&L Superintendent's Notice of Objection is silent on the issue of the super-priority of the CCAA Charges, the Argument Outline filed later in support of its position appears to be challenging the priority of the DIP Charge, as it claims granting the relief sought in this regard would constitute a violation of the N&L Act (para. 3).

OSFI

21. In its Notice of Objection, OSFI objects solely to the granting of the priority of the DIP Charge, and only inasmuch as this would result of a priming rank over the normal cost payments owing to the pension plans (*"cotisations normales des régimes de retraite"* – para. 2).

22. To do so, OSFI relies on Sections 8 and 36(2) of the *Pension Benefits Standards Act, 1985*, RCS 1985, c. 32 (2nd Supp.) ("**PBSA**") (paras. 15-18 of the Notice).

23. In its Argument Outline, OSFI instead invokes the statutory deemed trust in connection with outstanding special and amortization payments ("*paiements spéciaux et rattrapage*").

24. OSFI now also challenges the suspension of the Amortization Payments (paras. 12-14 of the Argument Outline) on the basis that the Wabush CCAA Proceedings would not constitute a restructuring, but rather a liquidation (paras. 12-13).

25. In fact, it appears that it is only in the event that such suspension would be authorized despite its objection that OSFI relies on the deemed trust (Argument Outline, *Remarques liminaires*: *"[…] dans l'éventualité où ceux-ci seraient suspendus de déclarer que les paiements qui ne seraient pas versés par les débiteurs […] soient assujettis à la fiducie présumée […]*), thus making this argument a subsidiary one.

26. According to OSFI, the impact of the deemed trust is to render any and all amount owing to the pension plans inalienable and exempt from seizure, such that, as a result, the DIP Charge could not obtain a priming rank thereto (Argument Outline, paras. 20-21, 28-30, 35).

The Union

27. In its Notice of Objection, the Union opposes the suspension of both the Amortization Payments and the OPEBs, and in fact seek an order that the Wabush CCAA Parties be forced to make such payments notwithstanding the terms of the Interim Financing Term Sheet (paras. 4-5, 8-20).

28. In doing so, the Union insists on the hardship such a suspension would cause for the retirees (paras. 9-10, 12-14, 17-18), whose rights are more akin to alimony than unsecured claims (para. 19).

29. The Union also asks the Court to preserve the rank of the deemed trust for amounts owing to the pension plans, and seek to have this deemed trust rank ahead of or equal with the DIP Charge (paras. 6, 29-30 of the Notice; paras. 40-46 of the Argument Outline).

30. The Notice of Objection and Argument Outline also argue for the appointment of a representative to handle the numerous queries of union members (paras. 7, 31-33 of the Notice; paras. 52-66 of the Argument Outline).

Proposed Representatives

31. In their Notice of Ojbection, the Proposed Representatives object to the suspension of the OPEBs and Amortization Payments sought by the Wabush CCAA Parties on the basis of the significant prejudice such a relief would cause to the retirees (para. 5).

32. In their Argument Outline, they argue that such a suspension would in fact amount to a disclaimer or resiliation of agreements, subject to the provisions of Section 32 CCAA (para. 7), which it is argued were not respected in the case at hand (paras. 8, 10, 16, 18).

33. They add that the conditions of the DIP Term Sheet should not allow the Wabush CCAA Parties to circumvent the requirements of said Section 32 CCAA (para. 12).

C. ISSUES IN DISPUTE

34. The Monitor notes that none of Objecting Parties have objected to the issuance of the Wabush Initial Order, the renewal of the Wabush Stay of Proceedings up until July 31, 2015 or to the Court's jurisdiction and decision to create and grant superpriority ranking in favour of, the Directors' Charge and Administration Charge.

35. The Monitor further notes that the Wabush Initial and Comeback Motions do not affect the validity or the ranking of the applicable statutory pension deemed trusts in relation with existing hypothecs, mortgages, liens or security interest, and only purport to affect the ranking of said statutory pension deemed trusts with respect to the Wabush CCAA charges, including the Wabush Interim Lender's Charge. As previously stated, the Objecting Creditors did not object to the Initial and Comeback Motions in relation to the creation and ranking of the Directors' Charge and Administration Charge.

36. At this stage, this Court is not called upon to adjudicate a conflict between the rights of secured creditors holding conventional security and the rights created and protected by way of statutory pension deemed trusts: the rights and remedies of all interested parties with respect to these issues are unaffected by the Wabush Initial and Comeback Motions.

37. The Wabush May 18 Forecast (filed as Appendix A in support of the Monitor's Sixth Report), specifically provides for the continued payment of all monthly normal costs contribution, the payment of which is specifically permitted by Section 12(a) of the Wabush Initial Order.

38. Based on the foregoing, the Monitor submits that the issues in dispute can be outlined as follows:

    (a) Can/Should the Court relieve the Wabush CCAA Parties from the obligation to pay the OPEBs?

    (b) Can/Should the Court relieve the Wabush CCAA Parties from the obligation to pay the Amortization Payments?

    (c) Can/Should the Court order that the DIP Charge rank ahead of all encumbrances, including statutory deemed trusts?

D. ARGUMENTATION

Suspension of OPEBs

39. Contrary to what the Proposed Representatives argue, the suspension of the OPEBs do not constitute a disclaimer.

40. Section 32 CCAA, as an exception to otherwise applicable contract law principles, must receive a strict interpretation:

- *Hart Stores Inc. (Arrangement relatif à)*, 2012 QCCS 1094, Mongeon J., para. 17.

41. Nor does Section 33 CCAA prevent the suspension of employment benefits owing to retirees and former employees, even if provided for in collective agreements:

- *White Birch Paper Holding Company (Re)* (***White Birch***), 2010 QCCS 2590, Mongeon J., para. 30 and following:

> [40] Il n'y a rien dans ce qui précède qui permet au Tribunal de protéger les créances d'anciens employés maintenant retraités qui peuvent se voir privés d'avantages sociaux de la nature de ceux qui sont discutés en l'instance. Les commentaires qui précèdent doivent se lire dans le contexte où Stadacona continue d'employer des travailleurs syndiqués. Alors, leur salaire et avantages sociaux (y compris les assurances-groupe) que l'employeur doit leur verser sont ceux qui prévalent dans les conventions collectives en vigueur. C'est là la véritable portée intentionnelle de l'article 33 LACC et cette interprétation n'entre nullement en conflit avec l'énoncé du ministre Fontana, précité.
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> [...]
>
> [50] Pour conclure, le Tribunal est d'avis que l'entrée en vigueur de l'article 33 LACC lors des amendements du 18 décembre 2009 n'a rien changé aux raisonnements des arrêts *Mine Jeffrey Ltd* et *Nortel*.

- *Syndicat national de l'amiante d'Asbestos Inc. c. Mine Jeffrey Inc.*, 2003 CanLII 47918, Québec Court of Appeal (***Mine Jeffrey***), Dalphond J., paras. 57-59:

> [57] En l'instance, la Cour supérieure en autorisant le contrôleur à suspendre le versement de cotisation au régime de retraite, «sauf, ..., pour les employés dont les services sont retenus par le contrôleur» ne modifie pas les conventions collectives. En effet, les obligations de Mine Jeffrey inc. à l'égard des sommes payables à la caisse de retraite en vertu des conventions collectives continuent d'exister, mais ne sont pas honorées en raison de l'insuffisance de fonds. Dans le cadre du plan de réorganisation, des arrangements pourront être convenus quant au paiement des sommes alors dues.
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> [58] Il en va de même à l'égard de la perte de certains bénéfices sociaux pour les personnes qui n'ont pas rendu de services à la débitrice depuis l'ordonnance initiale. Ces personnes deviennent des créanciers de la débitrice à hauteur de la

valeur monétaire des avantages perdus en raison de l'arrêt du versement des primes par Mine Jeffrey inc.; le fait que ces avantages soient prévus dans les conventions collectives n'y change rien.

[59] Finalement, quant aux jours de congé accumulés au moment de l'ordonnance initiale et toute rémunération non alors acquittée par Mine Jeffrey inc., ils demeurent des créances de la débitrice que le contrôleur n'est pas tenu d'acquitter (art. 11.8 LACC) et qui peuvent constituer des créances admissibles dans le cadre du plan de réorganisation.

42. Section 11.3 CCAA only requires employers to meet their ongoing obligations owing to employees who remain at their service following the initial order in relation to services rendered post-filing. See:

- *Nortel Networks Corporation (Re)*, 2009 CanLII 31600, Ontario Superior Court of Justice (***Nortel***), Morawetz J., at para. 67:

> [67] The flaw in the argument of the Union is that it equates the crystallization of a payment obligation under the Collective Agreement to a provision of a service within the meaning of s. 11.3. The triggering of the payment obligation may have arisen after the Initial Order but it does not follow that a service has been provided after the Initial Order. Section 11.3 contemplates, in my view, some current activity by a service provider post-filing that gives rise to a payment obligation post-filing. The distinction being that the claims of the Union for termination and severance pay are based, for the most part, on services that were provided pre-filing. Likewise, obligations for benefits arising from RAP and VRO are again based, for the most part, on services provided pre-filing. The exact time of when the payment obligation crystallized is not, in my view, the determining factor under section 11.3. Rather, the key factor is whether the employee performed services after the date of the Initial Order. If so, he or she is entitled to compensation benefits for such current service.
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> [Our underlining.]

Appeal dismissed in *Sproule v. Nortel Networks Corporation*, 2009 ONCA 833, Goudge, Feldman, and Blair JJ.A. See paras. 20-21:

> [20] Can it be said that the payment required for the services provided by the continuing employees of Nortel also extends to encompass the periodic payments to the former employees in question in this case? In our opinion, for the following reasons the answer is clearly no.
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> [21] The periodic payments to former employees are payments under various retirement programs, and termination and severance payments. All are products of the ongoing collective bargaining process and the collective agreements it has produced over time. [...] it can be assumed that the cost of these benefits was considered in the overall compensation package negotiated when they were created by predecessor collective agreements. These benefits may therefore reasonably be thought of as deferred compensation under those predecessor agreements. In other words, they are compensation deferred from past agreements but provided currently as periodic payments owing to former employees for prior services. The services for which these payments constitute "payment" under the *CCAA* were those provided under predecessor agreements, not the services currently being performed for Nortel.
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> [References omitted.]

- See also *Mine Jeffrey*, paras. 47 and following.

43. As such, the Court clearly has the power to suspend the Wabush CCAA Parties' obligations with regards to OPEBs and, for the reasons laid out in its Sixth Report, the Monitor is of the view that the Court should exercise its jurisdiction to indeed order such a suspension.

Suspension of Amortization Payments

44. The Monitor supports the suspension of Amortization and OPEB Payments, for the reasons set out in its Sixth Report, which reads in part as follows (at paras 69 to 74):

> 69. As discussed in the May 29 Motion, the Wabush CCAA Parties are required to pay the following amounts in respect of their defined benefit pension plans:
>
> (a) Monthly amortization payments of $666,555.58, comprising $393,337.00 in respect of the Hourly DB Plan and $273,218.58 in respect of the Salaried DB Plan (the "**Monthly Amortization Payments**"); and
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> (b) A lump sum amortization payment in July 2015 (the "**Yearly Catch Up Amortization Payment**") estimated to be approximately $5.5 million.
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> 70. In addition, and also as discussed in the May 29 Motion, the Wabush CCAA Parties currently provide other post-retirement benefits to former hourly and salaried employees and a supplemental retirement arrangement plan to certain current and former employees (payments in respect of the foregoing being collectively the "**OPEB Payments**").
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> 71. The Wabush CCAA Parties seek the suspension of Amortization Payments and OPEB Payments.
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> 72. Based on the Wabush May 18 Forecast, it is clear that the Wabush CCAA Parties have insufficient liquidity to make the Amortization Payments and the OPEB Payments at this time. Furthermore, paragraph 25(h) of the Interim Financing Term Sheet prohibits the payment of the Amortization Payments and the OPEB Payments.
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> 73. The Monitor is of the view that the continuation of activities to safeguard the assets of the Wabush CCAA Parties while continuing to seek buyers for the assets will maximize of recoveries for stakeholders. Continuation of such activities would not be possible without the Interim Financing, which would not be available in the event that the Wabush CCAA Parties are required to make the Amortization Payments and the OPEB Payments.
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> 74. Accordingly, the Monitor supports the Wabush CCAA Parties' request for suspension of the Amortization Payments and the OPEB Payments.

45. Abundant precedents support the notion that corporations undergoing a restructuring under the CCAA may be relieved from having to make the special payments otherwise owing to pension plans. See:

- *Fraser Papers Inc. (Re)* (***Fraser Papers***), 2009 CanLII 39776, Ontario Superior Court of Justice, Pepall J., at para. 20:

> [20] Applying these cases, I conclude that I do have jurisdiction to make an order staying the requirement to make special payments. The evidence indicates that these payments relate to services provided in the period prior to the Initial Order and the collective agreements do not change this fact. In essence, the special payments are unsecured debts that relate to employment services provided prior to filing. Furthermore, I am not being asked to modify the terms of the pension plans or the collective agreements. The operative word is suspension, not extinction. In addition, the actuarial filings are current and the relief requested is not premature.

- See also *White Birch*, 2010 QCCS 764, at paras. 96-100, and 2012 QCCS 1679, paras. 88-92.

- *Aveos Fleet Performance Inc. (Re)*, 2013 QCCS 5762, reasons by Justice Schrager, as he then was (***Aveos***), at para. 88-89:

> [88] The interruption of payments to the pension plan has been allowed by CCAA courts when necessary to enhance liquidity to promote the survival of a company in financial distress [...]
>
> [References omitted.]

46. In this context, courts have been inclined to characterized amortization payments as pre-filing obligations. See:

- *White Birch*, 2010 QCCS 764, Mongeon J., para. 89-97:

> [97] The mere fact that those past service contributions are considered to be pre-filing obligations is, however, not the only issue to consider. I must also analyse if, in the absence of a consent of all affected stakeholders, I should authorize the suspension of past service contributions. In AbitibiBowater, the situation was relatively simple and clear: the past service contributions due, as at the date of the Initial Order, was close to $1.4 billion and monthly contributions to correct the situation were estimated at approximately $13 million per month. The Monitor was therefore able to convince the Court that it would be illusory to expect that AbitibiBowater would be able to complete a successful restructuring if it would remain obligated to continue to fund past service contributions during the period of restructuration. Accordingly, Madam Justice Mayrand exercised her discretion in favor of the suspension.

- *AbitibiBowater Inc. (Re)*, 2009 QCCS 2028, Mayrand J. (***AbitibiBowater***), at paras. 37-44.

- *Papiers Gaspésia Inc. (Faillite de)*, 2004 CanLII 40296, Superior Court of Québec, Chaput J. (***Papiers Gaspésia***).

47. The characterization of special cost payments such as the Amortization Payments at hand as pre-filing obligation does not automatically entail their suspension, but rather affords the Court a discretion to do so where appropriate:

- *Aveos*, Schrager J., at para. 86-87:

> [86] In this regard, an issue arises as to whether the special payments constitute pre or post-filing obligations. Of course, if the obligation is a pre-filing obligation (albeit payable in instalments after filing) then it is arguable such amounts be the subject of a proof of claim in an arrangement and not be paid after the C.C.A.A. filing.
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> [87] The reason advanced that the obligation is pre-filing is that pension entitlement is part of the consideration or remuneration for labour services rendered by employees which in this case were all rendered pre-filing. The undersigned does not think it is necessary to characterize the special payments as pre or post-filing to decide this point in the circumstances of this case.
>
> [88] The interruption of payments to the pension plan has been allowed by C.C.A.A. courts when necessary to enhance liquidity to promote the survival of a company in financial distress. In Nortel, the company was being put through a sales process and did not appear to be able to continue its normal business operations.
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> [References omitted. Our underlining.]

48. In the exercise of their discretion to suspend amortization payments, courts have considered conditions of the interim credit facility prohibiting that the proceeds of the loan be used for special cost payments owing to pension funds. See for example:

- *AbitibiBowater*, Mayrand J., at paras. 11, 34, and 55 and following:

> [11] Abitibi ne demande pas de modifier les termes des régimes ou des conventions collectives, mais plutôt de suspendre l'exécution d'une partie de ses obligations de financement, soit le versement des cotisations d'équilibre. Il n'est pas question de suspendre les cotisations d'exercice, c.-à-d. pour le service courant, qu'Abitibi continuera de verser pendant la restructuration.
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> [...]
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> [34] Avec égards, que ce soit en vertu de la LACC ou de l'article 49 de la Loi sur les régimes complémentaires de retraite (LRCR), les créances en cause sont des créances ordinaires, que le législateur n'a pas choisi de protéger dans le contexte de la présente restructuration. [...]
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> [...]
>
> [55] Fairfax a indiqué au Tribunal que ce financement avait été octroyé pour financer les activités courantes de Bowater et ne pouvait ainsi être utilisé pour payer les cotisations d'équilibre aux régimes de retraite. Le financement est aussi sujet au respect de différents ratios de solvabilité.

[58] [...] Le prêteur exige que les sommes prêtées ne soient utilisées que pour le maintien de l'exploitation et des activités courantes, et impose le respect de ratios de solvabilité qui ne seront pas satisfaits si Abitibi doit verser les cotisations disponibles.

[61] Comme l'a clairement expliqué le contrôleur dans son rapport et lors de son témoignage, la marge de manœuvre d'Abitibi est trop mince. L'entreprise a besoin d'oxygène pour faire face aux prochains mois cruciaux de sa restructuration. Le Tribunal réfère notamment aux paragraphes 42 à 51 et 57 à 60 et 63 du troisième rapport du contrôleur.

[62] Il y a donc lieu d'ordonner la suspension des cotisations d'équilibre.

[Our underlining.]

- *Ivaco Inc. (Re)*, 2006 CanLII 34551, Ontario Court of Appeal, Laskin, Rosenberg, and Simmons, JJ.A., at paras. 17-18:

[17] [...] Because of the magnitude of these payments, the creditors would not agree to permit the DIP (debtor in possession) loan to be used for funding the pension plans. In their view, and in the view of the Monitor, doing so would imperil the possibility of restructuring. Relying on the Monitor's opinion, the Companies sought, and on November 28, 2003, were granted a pension stay order.

[18] The motions judge relieved the Companies from making past service contributions or special payments to the underfunded non-union pension plans during the CCAA stay. No interested party, including both the Superintendent and the QPC, opposed the order. All parties thought that relieving the Companies from making these payments would assist their restructuring efforts. The Companies still remained obligated to make current contributions to the non-union plans.

- *Collins & Aikman*, 2007 CanLII 45908, Ontario Superior Court of Justice, Spence J., at paras. 51-57, 66, 99-100.

- *Fraser Papers*, 2009 CanLII 39776, Ontario Superior Court of Justice, Pepall J., at paras. 2-8, and 20-23.

[21] [...] On the other hand, the Applicants have no ability to pay the special payments at this time. Their ability to operate is wholly dependent on the provision of DIP financing. Furthermore, payment of the special payments constitutes a DIP loan event of default. A bankruptcy would not produce a better result for the employees with respect to the special payments in that they do not receive priority in bankruptcy. Claims in this regard are unsecured. 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.

[...]

> [23] The other argument raised by CEP is that the terms of the DIP financing are unreasonable. Morawetz J. did expressly approve the DIP financing and the term sheets. No motion was brought to amend his order in that regard. Even if one disregards this procedural problem, the Monitor reported to the Court that, based on a comparison of the principal financial terms of the two DIP financing arrangements with a number of other DIP packages in the forestry, pulp and paper sector with respect to pricing, loan availability and certain security considerations, the financial terms of the DIP term sheets appeared to be both commercially reasonable and consistent with current market transactions. The Monitor specifically referred to the treatment accorded to the special payment obligations. I also observe that no evidence of any alternative DIP financing was advanced or even suggested.
>
> [Our underlining.]

49. For the reasons laid out in its Sixth Report, the Monitor is of the view that the Court should grant the relief sought by the Wabush CCAA Parties in connection with the Amortization Payments.

50. Where the Parliament intended to afford certain outstanding claims pertaining to pension plans protection under the umbrella of a CCAA arrangement, it expressly did so.

- *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36;
- Sections 6(6) and 37(2) CCAA.

51. In doing so, Parliament made a clear policy decision to only afford protection to unpaid normal cost contributions, at the exclusion of unpaid special cost payments in relation to defined benefits pension plans.

- *Sun Indalex Finance LLC v. United Steelworkers*, 2013 SCC 6 (***Indalex***), Deschamps J., at para. 81-82

> [81] There are good reasons for giving special protection to members of pension plans in insolvency proceedings. Parliament considered doing so before enacting the most recent amendments to the CCAA, but chose not to [...]. A report of the Standing Senate Committee on Banking, Trade and Commerce gave the following reasons for this choice:
>
> > Although the Committee recognizes the vulnerability of current pensioners, we do not believe that changes to the BIA regarding pension claims should be made at this time. Current pensioners can also access retirement benefits from the Canada/Quebec Pension Plan, and the Old Age Security and Guaranteed Income Supplement programs, and may have private savings and Registered Retirement Savings Plans that can provide income for them in retirement. The desire expressed by some of our witnesses for greater protection for pensioners and for employees

> currently participating in an occupational pension plan must be balanced against the interests of others. As we noted earlier, insolvency – at its essence – is characterized by insufficient assets to satisfy everyone, and choices must be made.
>
> The Committee believes that granting the pension protection sought by some of the witnesses would be sufficiently unfair to other stakeholders that we cannot recommend the changes requested. For example, we feel that super priority status could unnecessarily reduce the moneys available for distribution to creditors. In turn, credit availability and the cost of credit could be negatively affected, and all those seeking credit in Canada would be disadvantaged.
>
> (Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act (2003), at p. 98; see also p. 88.)
>
> [82] In an insolvency process, a CCAA court must consider the employer's fiduciary obligations to plan members as their plan administrator. It must grant a remedy where appropriate. However, courts should not use equity to do what they wish Parliament had done through legislation.
>
> [References omitted. Our underlining.]

52. As such, the Objecting Parties cannot maintain as they do that the suspension of the Amortization Payments would amount to an end-run on the very purpose of the deemed trusts provided for in the N&L Act and PBSA.

Statutory Deemed Trusts

53. The Wabush Comeback Motion does not aim at having the deemed trust statutory provisions that may or may not apply as a result of the suspension of the Amortization Payments declared inoperative, but merely seeks a clear indication that any such deemed trust shall rank after the CCAA Charges, including the DIP Charge.

54. Statutory deemed trusts only come into existence once the debtor's liability for unpaid amounts arises. See:

- *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 SCR 411 (***Sparrow***), Iacobucci J., at paras. 98-99:

> [98] It is open to my colleague [Gonthier J., dissenting] to distinguish the fact situation in this appeal from the hypothetical priority contests I have mentioned on the ground that the Crown's interest in the inventory is unlike other charges against inventory in that it depends on the fictional device of deeming. What makes this case different, it might be said, is that the ITA deems to have been done what could have been done. On this understanding, it does not matter that the inventory was not actually sold and the proceeds were not actually remitted to the Receiver General, because s. 227(4) and (5) ITA deem these things to have been done. But in my view, this answer cannot succeed because the inventory was not an unencumbered asset at the moment the taxes came due. It was subject to the respondent's security interest and therefore was legally the

respondent's and not attachable by the deemed trust. As Gonthier J. himself says (at para. 39):

> [...] [s. 227(4)] does not permit Her Majesty to attach Her beneficial interest to property which, at the time of liquidation, assignment, receivership or bankruptcy, in law belongs to a party other than the tax debtor.
>
> [99] The deeming is thus not a mechanism for undoing an existing security interest, but rather a device for going back in time and seeking out an asset that was not, at the moment the income taxes came due, subject to any competing security interest. In short, the deemed trust provision cannot be effective unless it is first determined that there is some unencumbered asset out of which the trust may be deemed. The deeming follows the answering of the chattel security question; it does not determine the answer.

- *First Vancouver Finance v. M.N.R.*, 2002 SCC 49 (***First Vancouver***), Iacobucci J., at paras. 3, 32-33.

55. Statutory deemed trusts do not constitute true trusts. See:

- *Sparrow*, Gonthier J. (dissenting on other points) at para. 31:

> [31] In the present case, I find the language in s. 227(5) to be clear and unambiguous, especially when viewed as a provision directly following s. 227(4), which renders amounts unremitted as held in trust for Her Majesty. In my view, this section is designed to, upon liquidation, assignment, receivership or bankruptcy, seek out and attach Her Majesty's beneficial interest to property of the debtor which at that time is in existence. The trust is not in truth a real one, as the subject matter of the trust cannot be identified from the date of creation of the trust: D.W.M. Waters, Law of Trusts in Canada (2nd ed. 1984), at p. 117. However, s. 227(5) has the effect of revitalizing the trust whose subject matter has lost all identity. This identification of the subject matter of the trust therefore occurs ex post facto. In this respect, I agree with the conclusion of Twaddle J.A. in Roynat, supra, where he states the effect of s. 227(5) as follows, at p. 647: "Her Majesty has a statutory right of access to whatever assets the employer then has, out of which to realize the original trust debt due to Her".

- *First Vancouver*, Iacobucci J., at para. 34.

- *White Birch*, 2012 QCCS 1679, Mongeon J., at para. 145:

> [145] *Les fiducies présumées contenues dans plusieurs lois fédérales ou provinciales ne font que présumer l'existence d'une fiducie. Pour qu'une telle fiducie puisse réellement exister, il faut que selon le droit civil applicable, les éléments constitutifs d'une vraie fiducie doivent y avoir, en règle générale, une identification du bien.* [...]

- *Aveos*, Schrager J., at paras. 57-58:

> [57] The Superintendent did not urge that Section 8(2) P.B.S.A. creates a true trust. In similar circumstances, analyzing similar statutory language, the Supreme Court of Canada in *Sparrow* stated that the deemed trust is not a real one as the subject matter cannot be identified from the date of the creation of the trust.

[58] Clearly, then, either at common law or in virtue of Article 1260 of the Civil Code of Québec ("C.C.Q."), no real trust exists in the present case since the property subject to the trust is not readily identifiable as funds were not segregated as required by Article 8(1) P.B.S.A., but rather, commingled. This situation is common; thus, the need for the legislator to create the deemed trust in Section 8(2) P.B.S.A. to protect sums due to pension plans.

[References omitted.]

56. Rather, statutory deemed trusts are akin to a floating charge, in that they do not attach to specific assets of the employer's estate.

➢ *First Vancouver*, Iacobucci J., at paras. 4-5 and 40 and following:

[4] For the reasons set forth below, I find that the s. 227(4.1) deemed trust is similar in principle to a floating charge over all the tax debtor's assets in favour of Her Majesty. The trust arises the moment the tax debtor fails to remit source deductions by the specified due date, but is deemed to have been in existence from the moment the deductions were made. As long as the tax debtor continues to be in default, the trust continues to float over the tax debtor's property. Thus, at any given point in time, whatever property then belonging to the tax debtor is subject to the deemed trust.

[5] Viewed in this way, it is clear that, as property comes into possession of the tax debtor, it is caught by the trust and becomes subject to Her Majesty's interest. Similarly, property which the tax debtor disposes of is thereby released from the deemed trust. This mutuality of treatment between incoming and outgoing property relating to the deemed trust is supported by both the plain language of the provisions as well as their purpose and intent. Most importantly, Her Majesty's interest in the tax debtor's property is protected because, while property which is sold to third party purchasers is released from the trust, at the same time, the proceeds of disposition of the alienated property are captured by the trust. Moreover, commercial certainty is promoted owing to the fact that third party purchasers are free to transact with tax debtors or suspected tax debtors without fearing that Her Majesty may subsequently assert an interest in the property so acquired.

[...]

[40] In my view, the scheme envisioned by Parliament in enacting ss. 227(4) and 227(4.1) is that the deemed trust is in principle similar to a floating charge over all the assets of the tax debtor in the amount of the default. As noted above, the trust has priority from the time the source deductions are made, and remains in existence as long as the default continues. However, the trust does not attach specifically to any particular assets of the tax debtor so as to prevent their sale. As such, the debtor is free to alienate its property in the ordinary course, in which case the trust property is replaced by the proceeds of sale of such property.

[41] This interpretation finds support in both the words used in ss. 227(4) and 227(4.1) and the purpose of the deemed trust. In my opinion, s. 227(4.1) explicitly restricts the trust to property owned by the tax debtor by stating that the property of the tax debtor held in trust for Her Majesty "is property beneficially owned by Her Majesty ... and the proceeds of such property shall be paid to the Receiver General" (emphasis added). This reference to the proceeds of trust property is an acknowledgment in the very words of the ITA that Parliament

contemplated that a tax debtor is free to alienate its property and that, when it does so, the trust releases the disposed-of property and attaches to the proceeds of sale. In addition, as discussed above, the trust does not attach to any specific property. Instead, by s. 227(4.1), the trust attaches to "property of the [tax debtor] ... equal in value to the amount [of the tax debt]". This language indicates, first, that the subject matter of the trust is focussed solely on the tax debtor's property, and, second, that it is anticipated that the character of the tax debtor's property will change over time.

[42] Indeed, it is the logical corollary to my conclusion on the first issue, namely that the deemed trust attaches to after-acquired property of the tax debtor, that the trust also releases property alienated by the tax debtor. In this way, when an asset is sold by the tax debtor, the deemed trust ceases to operate over that asset; however, the property received by the tax debtor in exchange becomes subject to the deemed trust. As such, the trust is neither depleted nor enhanced; it simply floats over the property belonging to the tax debtor at any given time, for as long as the default in remittances continues.

[Emphasis in the original.]

57. Case-law clearly establishes that deemed trusts are to be considered as a security interest that do not afford pensioners a property interest or title to the employer's assets.

Ambit of the Deemed Trust

58. Unless the legislator expressly provides to the contrary, the ambit of a statutory deemed trust will be limited to assets unencumbered at that point.

- *Sparrow*, Iacobucci J., paras. 98-99:

> [98] [...] But in my view, this answer cannot succeed because the inventory was not an unencumbered asset at the moment the taxes came due. It was subject to the respondent's security interest and therefore was legally the respondent's and not attachable by the deemed trust. [...]
>
> [99] The deeming is thus not a mechanism for undoing an existing security interest, but rather a device for going back in time and seeking out an asset that was not, at the moment the income taxes came due, subject to any competing security interest. In short, the deemed trust provision cannot be effective unless it is first determined that there is some unencumbered asset out of which the trust may be deemed. [...]
>
> [Emphasis in the original.]

- See also *Sparrow*, Gonthier J. (dissenting on other points), at para. 39, and the cases cited therein:

> [39] I would hasten to add to this, however, that this provision does not permit Her Majesty to attach Her beneficial interest to property which, at the time of liquidation, assignment, receivership or bankruptcy, in law belongs to a party other than the tax debtor. [...]

- See *First Vancouver*, at paras. 26-29, in which Iacobucci J. summarizes the modifications to the *Income Tax Act* (**ITA**) dubbed the "*Sparrow Electric* amendments".

- *Aveos*, Schrager J., at para. 62-65:

  > [65] What is noteworthy in this legislative evolution is that no similar amendments to overcome *Sparrow* were ever brought to Section 8(2) [of the PBSA]

- See also *Century Services Inc. v. Canada*, 2010 SCC 60 (***Century Services***), Deschamps J., at para. 33.

- See Sections 227(4) and 227(4.1) ITA.

59. If no unencumbered assets are available when the deemed trust provisions are triggered, such deemed trust will be <u>at best</u> subordinate to pre-existing security interests.

- *Aveos*, Schrager J., para. 67

  > [67] Consequently, this Court agrees with the Secured Lenders first position that their security was created before any deemed trust for the $2.8 million could have existed. Since the assets were already charged, any deemed trust under Section (8)(2) P.B.S.A. is at best subordinate to the security of the Secured Lenders.

60. Absent language specifically providing that the deemed trusts arising pursuant to the N&L Act and the PBSA are to apply notwithstanding other encumbrances (or "*Sparrow Electric* amendments"), it will be necessary for the Objecting Parties to establish the existence of a real trust in order to trump such pre-existing encumbrances.

- *White Birch*, 2012 QCCS 1679, para. 137

  > [137] De plus, il est utile de mentionner que le législateur, en y insérant l'expression « malgré toute autre garantie » dans la LIR (art. 227(4), (4.1)), le Régime des pensions du Canada (art. 23(3), (4)) et dans d'autres lois telles que la Loi sur l'assurance-emploi (art. 86(2), (2.1)), voulait assurer une priorité de premier rang à ces fiducies présumées[38]. La fiducie présumée visée par ces trois lois s'applique donc de manière continue et vise tous les biens qui se retrouvent en la possession du débiteur de manière rétroactive à la retenue initiale, et ce, jusqu'à ce que le débiteur ait remédié à son défaut. Ce type de fiducie élimine donc la nécessité de retracer l'origine du bien, ce qui constitue une caractéristique importante de la fiducie réelle.
  >
  > [References omitted.]

Deemed Trusts and Insolvency

61. Except where legislation expressly provides otherwise, deemed trusts are not enforceable in insolvency scenarios. See:

- *Century Services*, Deschamps J., at para. 45, and Fish J. (dissenting on other points), at para. 96:

> [45] I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the CCAA (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the CCAA. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the CCAA and s. 67(3) of the BIA expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The CCAA and BIA are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the CCAA or the BIA. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists in those Acts carving out an exception for GST claims.
>
> [...]
>
> [96] In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision creating the trust; and second, a CCAA or Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA") provision confirming — or explicitly preserving — its effective operation.

- *Aveos*, Schrager J., at paras. 71-73.

- See Section 37 (formerly 18.3) CCAA and Sections 67(3) and 86(2) BIA.

62. Contrary to what OSFI argues, this is true whether the statutory deemed trust exists in favour of the Crown or other beneficiaries. See:

- *Aveos*, Schrager J., at paras. 74-75:

> [74] The Superintendent seeks to distinguish Century because there, the confirming provisions recognizing the deemed trust were necessary given that Parliament made the Crown an ordinary creditor in insolvencies in 2005. This is now reflected in Section 37(1) C.C.A.A. Thus, it was necessary for Parliament to specifically recognize the Crown deemed trusts for source deductions in Section 37(2) C.C.A.A. lest they be subsumed by Section 37(1) C.C.A.A. and treated as ordinary claims. Since the Section 8(2) P.B.S.A. deemed trust was never rendered ineffective by insolvency legislation (such as Section 37(1) C.C.A.A.) than there is no need for specific confirmation in the C.C.A.A., argues the Superintendent.

> [75] Whatever allure this logic may contain, the reasoning of Deschamps, J. and Fish, J. in Century does not appear restricted to considerations of Crown deemed trust though that is the factual background of the case. Deschamps, J. is explicit in referring to the "general rule that deemed trusts are ineffective in insolvency".
>
> [References omitted.]

63. The CCAA does not specifically provide for the survival of pension-related deemed trusts.

64. Rather, the 2009 reform established different mechanisms to afford protection to certain specific pension obligations incumbent upon the debtor, which do not include amortization payments, whether pursuant to provincial or federal legislation. See:

- Sections 6(6) and 36(7) CCAA.
- *Aveos*, Schrager J., at paras. 76-77:

> [76] More significantly, however, to indicate the intention of the legislator not to preserve the Section 8(2) P.B.S.A. deemed trust, are the 2009 amendments to the C.C.A.A. (and the B.I.A.). Sections 6(6) and 36(7) C.C.A.A. provide that an arrangement may only be sanctioned or an asset sale approved by the court, if provision is made for the payment of certain enumerated pension obligations including obligations under the P.B.S.A. These obligations do not however include special payments but rather are limited to deductions from employee salaries and normal cost contributions of the employer (neither of which is in issue in the present case). Similar protection was given in the B.I.A. for bankruptcy liquidations and receivership sales (see Sections 81.5 and 81.6 B.I.A.).
>
> [77] The protection of Section 6(6) C.C.A.A. is not extended specifically to Section 8(2) P.B.S.A. or generally to special payments for actuarial deficits. Moreover, in the next seminal case of the Supreme Court of Canada dealing with deemed trusts in insolvency, Deschamps, J., in the matter of Indalex, quotes from the report of Parliament's Standing Committee on Banking, Trading and Commerce to conclude that Parliament considered giving special protection to pension plan members in matters of insolvency but chose not to.
>
> [references omitted]

- See *Indalex*, Deschamps J., at paras. 81-82:

> [...] courts should not use equity to do what they wish Parliament had done through legislation.

- See also Sections 60(1.5), 65.13(8), 81.5 and 81.6 BIA.

65. Once the employer becomes insolvent, Parliament, as part of the latest insolvency legislation reform in 2007, opted to limit the protection of amounts owing to a pension fund vis-à-vis ordinary creditors. See:

- *Indalex*, Deschamps J., at paras. 81-82.

- *Aveos*, Schrager J., at paras. 81-83:

> [81] [...] The special payments are not protected and would not have priority over the rights of a secured lender in any scenario: bankruptcy, receivership or CCAA regime.
>
> [82] The Superintendent also submits that Parliament's intent should also be gleaned from the amendments to the P.B.S.A. in 2009 limiting the deemed trust to the actual payment deficit and not to the whole actuarial deficiency (see Sections 29(6.2) and 29(6.5) P.B.S.A.) The actuarial deficit of the Aveos non-unionized pension plan is approximately $29,748,200.00. This argument is not however logically helpful to extend the protection of Section 8(2) P.B.S.A. to special payments due by a company under C.C.A.A protection. It is plausible that such an amendment was motivated by Parliament's desire not to subordinate or dilute ordinary creditors by a multi-million dollar pension claim. In any event, the argument does not bolster the position vis-à-vis secured claims.
>
> [83] The Superintendent legitimately poses the rhetorical question of what use is the deemed trust? Certainly it is useful for the protection of special payments but only vis-à-vis creditors who do not hold security over the assets of the debtor company which was perfected prior to the deemed trust attaching to the assets.

66. The foregoing suffices to defeat the Objecting Parties' assertion that the deemed trusts arising pursuant to the N&L Act and Federal Act cannot be subordinated to CCAA charges without frustrating the legislator's intent.

67. It is not necessary for the Court to find that the deemed trusts provided for in the N&L Act and the PBSA are wholly inoperative in CCAA proceedings to grant the relief sought by the Wabush CCAA Parties with regards to the DIP Charge ranking.

Superpriority of CCAA Charges

68. Pursuant to section 11.2 CCAA, courts can order that CCAA charges rank ahead of all other existing encumbrances.

> **11.2** (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

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

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

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

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

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

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

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

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

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

69. Again, where Parliament intended to have deemed trusts treated as actual trusts under a CCAA restructuring, it expressly did so.

- *White Birch*, 2012 QCCS 1679, para. 136:

> [136] De nos jours, la situation a encore évolué et la LFI ne reconnaît que les fiducies réelles et non les fiducies présumées, à l'exception des fiducies présumées prévues à l'article 67(3) LFI. Il en est de même en ce qui a trait à la LACC. Outre ces exceptions, en matière de faillite ou de restructuration, pour que les tribunaux puissent considérer une fiducie présumée comme étant une fiducie réelle au sens de la LFI ou de la LACC, elle doit satisfaire les critères du trust de la common law. [...]
>
> [Emphasis in the original. References omitted.]

- See Section 37(2) CCAA.

- See also Section 67(3) BIA.

70. That CCAA charges can trump statutory deemed trusts makes no doubt. See:

- *White Birch*, 2012 QCCS 1679, Mongeon J., at para. 126:

> [126] Comme nous avons pu le constater plus haut dans ces motifs, la situation factuelle des Requérants est à l'opposé de celle des requérants dans Indalex. Les Requérants savent depuis le début des procédures que la super-priorité accordée aux prêteurs DIP passe devant les cotisations d'équilibre.

- *Timminco Limited (Re)* (***Timminco***), 2012 ONSC 948, Morawetz J., at para. 29:

[29] In respect of this issue, counsel to the Timminco Entities submits that to the extent that the request for the DIP Lenders' Charge is a request for the court to override the provisions of the QSPPA or the OPBA, the court has the jurisdiction to do so. I agree with this submission. This issue was analyzed in Timminco Limited (Re), 2012 ONSC 506, which considered the court's jurisdiction to grant super priority to the Administration Charge and D&O Charge, and is incorporated by reference to this decision and attached as Appendix A. The analysis of the court's jurisdiction in that case is also applicable here.

[Our underlining.]

- *Timminco*, 2012 ONSC 506, Morawetz J., at paras. 6-8, 14:

[6] The Timminco Entities requested that the Administration Charge rank ahead of the existing security interest of Investissement Quebec ("IQ") but behind all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise, including any deemed trust created under the Ontario Pension Benefit Act (the "PBA") or the Quebec Supplemental Pensions Plans Act (the "QSPPA") (collectively, the "Encumbrances") in favour of any persons that have not been served with this application.

[...]

[8] At [35] of my endorsement, I noted that the Timminco Entities had indicated their intention to return to court to seek an order granting super priority ranking for both the Administration Charge and the D&O Charge ahead of the Encumbrances.

[...]

[14] It was not disputed that the court has the jurisdiction and discretion to order a super priority charge in the context of a CCAA proceeding. However, counsel to CEP submits that this is an extraordinary measure, and that the onus is on the party seeking such an order to satisfy the court that such an order ought to be awarded in the circumstances.

- *Timminco*, 2014 QCCS 174, Mongeon J., at paras. 83-85:

[83] La présente instance porte sur la priorité des créances de deux créanciers qui ne bénéficient pas de super-priorités alors que la débitrice SBI est au stade de rembourser ses créanciers selon leur priorités respectives établies par le droit québécois. Il s'agit donc de décider si, aux termes du droit québécois, l'ordre de priorité attaché à chacune de ces créances fait en sorte que les Comités de retraite peuvent se réclamer d'un rang prioritaire à celui de IQ.

[84] Ainsi, même si l'on doit conclure à l'existence d'une fiducie créée par la loi en vertu de l'article 49 LRCR, une telle conclusion, si elle avait été retenue dans White Birch n'aurait pas eu d'impact sur la finalité de ce débat car la question était toute autre.

[85] En effet, la conclusion finale retenue dans White Birch demeure la même car la doctrine de la préséance du droit fédéral fait en sorte que la fiducie de l'article 49 LRCR, si elle avait été retenue, ne lui aurait pas donné priorité de rang sur la créance super-prioritaire du prêteur DIP.

[References omitted. Our underlining.]

- See also by analogy *Aveos*, in which it was determined that conventional pre-existing security interests trumped statutory deemed trusts, which, *a fortiori*, supports the notion that court-ordered CCAA charges can too.

71. For the reasons outlined in its Sixth Report, the Monitor is of the view that the Court should exercise its discretion under Section 11.2 CCAA to order that the DIP Charge rank in priority to any and all encumbrances, including statutory deemed trusts that may arise in connection with amounts owing to pension funds.

Representation Motions

72. The Monitor will file its Seventh Report with respect to the Representation Motions. The Monitor's position and recommendations are informed by the following precedents:

- *Nortel Networks Corp. (Re)*, 2009 CanLII 26603, Ontario Superior Court of Justice, Morawetz, at paras. 3, 13-15 and 61:

> [3] The proposed representative counsel are:
>
> (i) Koskie Minsky LLP ("KM") who is seeking to represent all former employees, including pensioners, of the Applicants or any person claiming an interest under or on behalf of such former employees or pensioners and surviving spouses in respect of a pension from the Applicants. Approximately 2,000 people have retained KM.
>
> [...]
>
> (iv) Mr. Lewis Gottheil, in-house legal counsel for the National Automobile, Aerospace, Transportation and General Workers Union of Canada ("CAW") who is seeking to represent all retirees of the Applicants who were formerly members of one of the CAW locals when they were employees. Approximately 600 people have retained Mr. Gottheil or the CAW.
>
> [...]
>
> [13] In the KM factum, it is submitted that employees and retirees are a vulnerable group of creditors in an insolvency because they have little means to pursue a claim in complex CCAA proceedings or other related insolvency proceedings. It was further submitted that the former employees of Nortel have little means to pursue their claims in respect of pension, termination, severance, retirement payments and other benefit claims and that the former employees would benefit from an order appointing representative counsel. In addition, the granting of a representation order would provide a social benefit by assisting former employees and that representative counsel would provide a reliable resource for former employees for information about the process. The appointment of representative counsel would also have the benefit of streamlining and introducing efficiency to the process for all parties involved in Nortel's insolvency.
>
> [14] I am in agreement with these general submissions.

[15] The benefits of representative counsel have also been recognized by both Nortel and by the Monitor. Nortel consents to the appointment of KM as the single representative counsel for all former employees. Nortel opposes the appointment of any additional representatives. The Monitor supports the Applicants' recommendation that KM be appointed as representative counsel. No party is opposed to the appointment of representative counsel.

[...]

[61] In view of this acknowledgement, it seems to me that there is no advantage to be gained by granting the CAW representative status. There will be no increased efficiencies, no simplification of the process, nor any real practical benefit to be gained by such an order.

[Our underlining.]

- *Fraser Papers*, 2009 CanLII 55115, Ontario Superior Court of Justice, Pepall J., at paras. 13, 17-18:

[13] Davies is proposing to represent all unrepresented employees, former employees and their successors. In my view, there is a commonality of interest amongst the members of this group. In essence, they engage unsecured obligations. Arguably those proposed to be represented by the unions could also be included, and indeed absent a change of position by the CMAW, former members of the CMAW will be. That said, for the reasons outlined above, I am satisfied in this case that it is desirable to have the unions act for their members and former members if so willing. Indeed, no one took an opposing position.

[...]

[17] In the event that a real as opposed to a hypothetical or speculative conflict arises at some point in the future, parties may seek directions from the Court. As with the unions, the order appointing Davies will allow anyone to opt out of the representation.

[18] Unlike the unions, absent funding, Davies would not be expected to serve as representative counsel. Accordingly, funding is ordered to be provided by Fraser Papers. Again, the funding re- quest is supported by the Monitor, the Applicants and the DIP lenders.

[Our underlining.]

- *TBS Acquireco Inc. (Re),* 2013 ONSC 4663, Brown J., at paras. 36-37:

[36] I accept the principles set out in the Nortel and Canwest cases, but their application to the specific facts of this case leads to a different result. The present CCAA proceeding does not bear the degree of complexity as did those in Nortel and Canwest. A SISP process was approved by this Court back on April 25, 2013, a fair sales and marketing process was run, and it resulted in only one going-concern offer to purchase. Under that Transaction, no sales proceeds will be available for unsecured creditors. From the evidence filed in this Court, that was the best result achievable under the particular circumstances of these applicant companies. This representation motion has been brought only at the end of that process.

[37] While the loss of a job by any person is devastating to that person, the remedies available to a terminated employee are defined in the law. In the present case no money will be available for pre-filing unsecured claims. The Monitor submitted that a bankruptcy will follow upon the completion of the transition of business operations to the purchaser, and WEPPA claims can be advanced at that time. Given that WEPPA imposes duties on a trustee in respect of such claims, I have difficulty understanding what significant extra "value-added" representative counsel could bring to the employment-related claims process at this very late stage of this proceeding. In addition, counsel for the Monitor indicated that the Monitor had committed to completing the bankruptcy proceeding for about $50,000, a much lower amount than that sought for representative counsel. Finally, the applicant companies have no money to fund representative counsel. To fund representative counsel out of the contractual CCAA Completion Costs portion of the purchase price would result in the purchaser underwriting the legal fees of one class of unsecured creditors. In light of the duties imposed on a trustee to deal with WEPPA claims, I do not regard as fair the proposal of the moving party that the Court, in effect, amend the proposed agreement of purchase and sale – following its submission in a court-approved SISP and following its conditional acceptance by the applicants – to use part of the purchase price for such a purpose. Consequently, I dismissed the motion brought by the Terminated Employees.

[Our underlining.]

➢ *U.S. Steel Canada Inc. (Re)*, 2014 ONSC 6145, Wilton-Siegel J., at paras. 34-37:

Appointment of Representative Counsel for the Non-USW Active and Retiree Beneficiaries

[34] The beneficiaries entitled to benefits under the Hamilton Salaried Pension Plan, the LEW Salaried Pension Plan, the LEW Pickling Facility Plan who are not represented by the USW, the Legacy Pension Plan, the Steinman Plan, the Opportunity GRRSP, RBC's and RA's who are not represented by the USW and beneficiaries entitled to OEPB's who are not represented by the USW (collectively, the "non-USW Active and Retiree Beneficiaries") do not currently have representation in these proceedings. The defined terms in this section have the meanings ascribed thereto in the affidavit of Michael A. McQuade referred to in the Initial Order.

[35] The Applicant proposes the appointment of six representatives and representative counsel to represent the interests of the Non-USW Active and Retiree Beneficiaries. The Court has authority to make such an order under the general authority in section 11 of the CCAA and pursuant to Rules 10.01 and 12.07 of the Rules of Civil Procedure. I am satisfied that such an order should be granted in the circumstances.

[36] In reaching this conclusion, I have considered the factors addressed in Canwest Publishing (Re), 2010 ONSC 1328, [2010] O.J. No. 943. In this regard, the following considerations are relevant.

[37] The Non-USW Active and Retiree Beneficiaries are an important stakeholder group in these proceedings under the CCAA and deserve meaningful representation relating to matters of recovery, compromise of rights and entitlement to benefits under the plans of which they are beneficiaries or changes to other compensation. Current and former employees of a company in

proceedings under the CCAA are vulnerable generally on their own. In the present case, there is added concern due to the existence of a solvency deficiency in the Applicant's pension plans and the unfunded nature of the OPEB's.

[Our underlining.]

- *Target Canada Co. (Re)*, 2015 ONSC 303, Morawetz J., at paras. 60-61:

> [60] The Applicants also request the Court to appoint Koskie Minsky LLP as employee representative counsel (the "Employee Representative Counsel") with Ms. Susan Philpott acting as senior counsel. The Applicants contend that the Employee Representative Counsel will ensure that employee interests are adequately protected throughout the proceeding, including by assisting with the Employee Trust. The Applicants contend that at this stage of the proceeding, the employees have a common interest in the CCAA proceedings and there appears to be no material conflict existing between individual or groups of employees. Moreover, employees will be entitled to opt out, if desired.
>
> [61] I am satisfied that section 11 of the CCAA and the Rules of Civil Procedure confer broad jurisdiction on the court to appoint Representative Counsel for vulnerable stakeholder groups such as employee or investors (see Re Nortel Networks Corp., 2009 CarswellOnt 3028 (S.C.J.) (Nortel Networks Representative Counsel)). In my view, it is appropriate to approve the appointment of Employee Representative Counsel and to provide for the payment of fees for such counsel by the Applicants. In arriving at this conclusion, I have taken into account:
>
> (i) the vulnerability and resources of the groups sought to be represented;
>
> (ii) the social benefit to be derived from the representation of the groups;
>
> (iii) the avoidance of multiplicity of legal retainers; and
>
> (iv) the balance of convenience and whether it is fair and just to creditors of the estate. [...]
>
> [Our underlining.]

See also:

- Reyes, Tony and Stam, Jennifer, "*Employee-Related Issues in the Nortel CCAA Proceedings*", 26 B.F.L.R. 85.

THE WHOLE, RESPECTFULLY SUBMITTED.

Montreal, June 19, 2015

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