CANADA

PROVINCE OF QUÉBEC DISTRICT OF **MONTREAL**	**SUPERIOR COURT** Commercial Division (Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. 36, as amended)
N°: **500-11-048114-157**	**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- **MOELIS & COMPANY LLC** Mise-en-cause

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WABUSH CCAA PARTIES' OUTLINE OF ARGUMENTS

(In support 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, and (8) Amending the Wabush Initial Order* (the "**Motion**"))

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1. INTRODUCTION[1]

1. Following the issuance by the Honorable Stephen W. Hamilton, J.S.C., of the Wabush Initial Order on May 20, 2015, the Wabush CCAA Parties brought the above-captioned Motion for an order amending the Wabush Initial Order.

2. By way of their Motion, the Wabush CCAA Parties sought to:
   a) Grant priority to certain CCAA Charges;
   b) Approve a sale and investor solicitation procedure *nunc pro tunc*;
   c) Authorize the engagement of a Sale Advisor *nunc pro tunc*;
   d) Grant a Sale Advisor Charge;
   e) Amend the sale and investor solicitation procedure;
   f) Extend the Stay of Proceedings; and
   g) Suspend the payment of certain pension amortization payments and post-retirement employee benefits.

3. In an Order rendered on June 9, 2015 (the "**Comeback Order**"), the Honourable Justice Hamilton granted all of the relief sought in the aforementioned Motion, including the granting of priority to CCAA Charges ahead of all Encumbrances, including, *inter alia*, trusts and deemed trusts, as appears from paragraph 5 of said Comeback Order:

> [5] **ORDERS** that paragraph 47 of the Wabush Initial Order shall be amended as follows:
>
> 47. **DECLARES** that each of the CCAA Charges shall rank ahead of all hypothecs, mortgages, liens, security interests, priorities, trusts, deemed trusts (statutory or otherwise), charges, encumbrances or security of whatever nature or kind (collectively, the "**Encumbrances**") [...] affecting the Property of the Wabush CCAA Parties whether or not charged by such Encumbrances [...], with the exception of the Crown deemed trusts for sources deductions described in Section 37(2) CCAA and the sums that could be subject to a claim under Section 38(3) CCAA. For greater certainty, the CCAA Charges only extend to assets or rights against assets over which the Wabush CCAA Parties hold or acquire title, and the Interim Lender's Charge is subject to the Permitted Priority Liens (as defined in the Interim Financing Term Sheet).

4. In so doing, Justice Hamilton reserved the rights of the Government of Newfoundland and Labrador and the Government of Canada to contest the priority of the Interim

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[1] All capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Motion.

Lender Charge over statutory deemed trusts, if any, as described at paragraph 6 of the Comeback Order:

> [6] **RESERVES** the rights of Her Majesty in right of Newfoundland and Labrador, as represented by the Superintendant 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.

5. This Motion was therefore adjourned on this issue only, which is therefore the only issue currently before the Court.

2. GRANTING PRIORITY TO CERTAIN CCAA CHARGES

2.1 General principles

6. In the Wabush Initial Order, the following charges, each as defined in the Wabush Order, were created (the "**CCAA Charges**"):

Charge	Amount	Paragraph of the Order
Interim Lender Charge	$15M	25
Directors Charge	$2M	31
Administration Charge	$1.75M	45

7. The CCAA Charges initially ranked behind the existing Encumbrances, but the Wabush CCAA Parties and the beneficiaries of the CCAA Charges, reserved their rights to seek priority of the CCAA Charges over the Encumbrances (para. 47 of the Wabush Initial Order). Since the issuance of the Comeback Order, the CCAA Charges rank ahead of the Encumbrances, with the Governments of Newfoundland and Labrador and of Canada having reserved their right to contest the priority of the Interim Lender Charge over statutory deemed trusts, if any, as mentioned above.

8. The applicable provisions of the CCAA are the following:

a) Interim Lender Charge (Section 11.2 CCAA):

> "**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."

b) Directors Charge (Section 11.51 CCAA)

"**11.51** (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, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

(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 not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault."

c) Administration Charge (section 11.52 CCAA)

"11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to

a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of:

(*a*) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(*b*) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(*c*) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

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

2.2 Can the Interim Lender Charge rank above rights flowing from a deemed trust?

9. The Salaried DB Plan is governed by the laws of Newfoundland and Labrador pursuant to the 1968 Memorandum of Reciprocal Agreement between Pension Regulators while the Hourly DB Plan is governed by Federal laws.[2]

10. Section 32 of the *Pension Benefits Act* (the "**PBA**")[3] creates a deemed trust to secure the payment of any amount which may become payable to the Salaried DB Plan while section 8 of the *Pension Benefit Standards Act* ("**PBSA**")[4] does the same for the Hourly DB Plan.

11. In the Comeback Order, the definition of the term "Encumbrances" includes amounts payable pursuant to a deemed trust.

2.2.1 The deemed trusts created to protect amounts owed to a pension plan are ineffective in a proceeding under the CCAA

2.2.1.1 The evolution of the legislation and of case law since *Sparrow Electric*

2.2.1.1.1 *Sparrow Electric*: the language of the deemed trust

12. OSFI relies on section 8(2) of the PBSA as its grounds for asserting that the amount of the special payments due is protected by a deemed trust.

13. The Supreme Court has considered the identical argument in respect of the substantially similar provision in the *Income Tax Act* (the "**ITA**") in the *Sparrow Electric* decision, and rejected it.

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2 Memorandum of Reciprocal Agreement **(Tab 9)**.

3 *Pension Benefits Act, 1997*, SNL 1996, c. P-4.01 **(Tab 7)**.

4 *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32 (2nd Supp.) **(Tab 6)**.

14. In *Sparrow Electric*, the Supreme Court was asked to determine a priority dispute between the federal Crown and a secured lender in respect of unpaid source deductions that had not been remitted by the debtor to the federal government. The Crown asserted and relied on the deemed trust provisions then found in subsections 227(4)[5] and 227(5) of the ITA in arguing that it had priority over the proceeds of assets of the debtor that had been liquidated in a receivership.

15. The secured lender in that case, Royal Bank of Canada ("**Royal Bank**"), had been granted security by the debtor pursuant to a general security agreement governed by and perfected pursuant to the *Personal Property Security Act* (the "**PPSA**") for Alberta, and had also been granted *Bank Act* security.

16. The provisions of sections 227(4) and (5) of the ITA in effect in 1997 were substantially similar to the current deemed trust provisions of the PBSA. Sections 227(4) and (5) of the ITA then at issue read as follows:

> "(4) Every person who deducts or withholds any amount under this Act shall be deemed to hold the amount so deducted or withheld in trust for Her Majesty.
>
> (5) Notwithstanding any provision of the Bankruptcy Act, in the event of any liquidation, assignment, receivership or bankruptcy of or by a person, an amount equal to any amount
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> (a) deemed by subsection 9(4) to be held in trust for Her Majesty, ...
>
> Shall be deemed to be separate from and form no part of the estate in liquidation, assignment, receivership or bankruptcy, whether or not that amount has in fact been kept separate and apart from the person's own moneys or from the assets of the estate."

17. Section 8 of the PBSA came into force in 1986. Since that time, the language of section 8(1) has not been substantively changed, and section 8(2) has remained unchanged[6]. The following is a side by side comparison of the 1997 ITA provisions considered in *Sparrow Electric* and the current PBSA provisions:

PBSA: **8**(1) An employer shall ensure, with respect to its pension plan, that the following amounts are kept separate and apart from the employer's own	***ITA:*** **227**(4) Every person who deducts or withholds any amount under this Act shall be deemed to hold the amount so

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5 *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp) **(Tab 3)**.

6 Section 8(1) was amended in 1998 and 2010. Section 8(1) originally appeared as "An employer shall ensure, with respect to its pension plan, that (a) the moneys in the pension fund, (b) an amount equal to the aggregate of (i) the normal actuarial cost, and (ii) any prescribed special payments, that have accrued to date; and (c) 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 are kept separate and apart from the employer's own moneys, and shall be deemed to hold the amounts referred to in paragraphs (a) to (c) in trust for members of the pension plan, former members, and any other persons entitled to pension benefits or refunds under the plan."

moneys, and the employer is deemed to hold the amounts referred to in paragraphs (*a*) to (*c*) in trust for members of the pension plan, former members, and any other persons entitled to pension benefits under the plan: (*a*) the moneys in the pension fund, (*b*) an amount equal to the aggregate of the following payments that have accrued to date: i) the prescribed payments, and (ii) the payments that are required to be made under a workout agreement; and (*c*) all of the following amounts that have not been remitted to the pension fund: i) amounts deducted by the employer from members' remuneration, and (ii) other amounts due to the pension fund from the employer, including any amounts that are required to be paid under subsection 9.14(2) or 29(6). (2) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (1) is deemed to be held in trust shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate." [Emphasis added]	deducted or withheld in trust for Her Majesty. (5) Notwithstanding any provision of the *Bankruptcy Act*, in the event of any liquidation, assignment, receivership or bankruptcy of or by a person, an amount equal to any amount (a) deemed by subsection (4) to be held in trust for Her Majesty, ... Shall be deemed to be separate from and form no part of the estate in liquidation, assignment, receivership or bankruptcy, whether or not that amount has in fact been kept separate and apart from the person's own moneys or from the assets of the estate."

18. In *Sparrow Electric*, the Supreme Court held that the deemed trust provisions at section 227(5) of the ITA were an attempt to overcome the loss of a true trust. In the event of a liquidation, assignment, or bankruptcy, these provisions purported to grant a deemed trust over amounts equivalent to the amounts that were not set aside in trust by the debtor:

> " ...s. 227(5) is a provision designed to minimize the adverse effect upon Her Majesty from the misappropriation of trust funds held by tax debtors on account of their employees' tax payable. The provision contemplates an intermingling of Her Majesty's property with that of a tax debtor's, such that the subject matter of the trust cannot be (or indeed never was) identifiable. To address this conceptual problem, s. 227(5) allows Her Majesty to attach its interest to any property which lawfully belongs to the debtor at the time of liquidation, assignment, receivership or bankruptcy; this property is then deemed to exist "separate" and apart from the tax debtor's estate." [para. 38]

2.2.1.1.2 Response to *Sparrow Electric*

19. In 1998, as a legislative response to the *Sparrow Electric* decision, the Federal Government replaced sections 227(4) and (5) of the ITA with new sections 227(4) and (4.1). The history of the amendment was summarized by Justice Deschamps in *Century Services*[7], at para. 33:

> "In Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411, this Court addressed a priority dispute between a deemed trust for sources deductions under the ITA and security interests taken under both the Bank Act, S.C. 1991 c. 46, and the Alberta Personal Property Security Act, S.A. 1988, c. P-4005 ("PPSA"). As then worded, an ITA deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. Sparrow Electric held that the ITA deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the ITA deemed trust had no property on which to attach when it subsequently arose. Later, in First Vancouver Finance v. M.N.R., 2002 SCC 49, [2002] 2 S.C.R. 720, this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the ITA by deeming it to operate from the moment the deductions were not paid to the Crown as required by the ITA, and by granting the Crown priority over all security interests (para. 27-29) (the "Sparrow Electric amendment")"

20. The new sections 227(4) and 227(4.1) of the ITA provide as follows:

> 227...
>
> (4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided for under this Act.
>
> (4.1) Notwithstanding any other provision of this Act, the Bankruptcy and Insolvency Act (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed

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[7] Century Services Inc. v. Canada (Attorney General), [2010] 3 S.C.R. 379, 2010 SCC 60 **(Tab 10)**.

> (a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
>
> (b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest
>
> and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests. [Emphasis added]

21. The amendments to the ITA deemed trust provisions made it clear that the Crown intended to take priority over security interests in respect of source deductions, no matter when such security interests arise. As noted in *Century Services*, this was confirmed by the Supreme Court in *First Vancouver Finance* v. *M.N.R.*, 2002 SCC 49 ("***First Vancouver***")[8]:

> "It is apparent from these changes that the intent of Parliament when drafting s. 227(4) and 227(4.1) was to grant priority to the deemed trust in respect of property that is also subject to a security interest regardless of when the security interest arose in relation to the time the source deductions were made or when the deemed trust takes effect." [para. 28]

22. While steps were taken by Parliament to amend the ITA in 1998, as well as similar changes at the same time to section 23 of the Canada Pension Plan (the "***CPP***") and s. 86 of the Employment Insurance Act (the "***EIA***"), and subsequently in 2000 to the Excise Tax Act (the "***ETA***")[9] , Parliament did not take similar steps to amend the language of the PBSA to provide for priority over pre-existing security interests, notwithstanding that Parliament chose to make numerous other amendments to other provisions of the PBSA, including to section 8 in 1998, 2010, and 2012[10]. However, the provisions of section 8(2) are unaltered since 1986. It is submitted that Parliament had numerous occasions to make amendments similar to those made to the ITA, the CPP, the EIA, and the ETA, but chose not to. As a result, the reasoning of the Supreme Court in Sparrow Electric applies to this case.

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8 *First Vancouver Finance* v. *M.N.R.*, 2002 SCC 49 **(Tab 11)**.

9 *Income Tax Amendments Act, 1997, Statutes of Canada*, 1998 c. 19; *Sales Tax and Excise Tax Amendment Act, 1999, Statutes of Canada*, 2000, c. 30 **(Tab 4)**.

10 *Statutes of Canada*, 1998, c. 12, s. 6; 2010, c. 12, s. 1791; c. 25, s. 183; 2012, c. 16, s. 86 **(Tab 5)**.

2.2.1.2 Is the deemed created by the PBSA effective in a proceeding under the CCAA?

23. The general rule with respect to the treatment of creditors is that they shall be paid on a pari passu basis except under specific exceptions set out in law. The following statements are found in *Re White Birch*:

> *[141] En droit québécois comme en droit canadien, les biens d'une société sont le gage commun de ses créanciers. Ils doivent donc être utilisés à l'avantage commun à moins que, par exception, ces biens ne soient dévolus à des créanciers spécifiques.*
>
> *[142] Les créanciers de ces créances spécifiques seront toujours traités dans un contexte d'exception.*[11]

24. The Supreme Court, in dealing with a deemed trust created in order to facilitate the collection of goods and services tax, made the following statements in *Century Services*, statements which were cited with approval in *Re White Birch*:

> *[155] Arborant la question de la fiducie réputée touchant la TPS, par rapport à la LACC, la juge Deschamps écrira:*
>
> > *[44] En examinant la question dans tout son contexte, je suis amenée à conclure, pour plusieurs raisons, que ni le raisonnement ni le résultat de l'arrêt Ottawa Senators ne peuvent être adoptés. Bien qu'il puisse exister un conflit entre le libellé des textes de loi, une analyse téléologique et contextuelle visant à déterminer la véritable intention du législateur conduit à la conclusion que ce dernier ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a apporté à la LTA, en 2000, la modification découlant de l'arrêt Sparrow Electric.*
> >
> > *[45] Je rappelle d'abord que le législateur a manifesté sa volonté de mettre un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité. Selon le par. 18.3(1) de la LACC (sous réserve des exceptions prévues au par. 18.3(2)), les fiducies réputées de la Couronne n'ont aucun effet sous le régime de cette loi. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. Par exemple, le par. 18.3(2) de la LACC et le par. 67(3) de la LFI énoncent expressément que les fiducies réputées visant les retenues à la source continuent de produire leurs effets en cas d'insolvabilité. Le législateur a donc clairement établi des exceptions à la règle générale selon laquelle les fiducies réputées n'ont plus d'effet dans un contexte*

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[11] *White Birch Paper Holding Company (Arrangement relatif à)*, 2012 QCCS 1679, [2012] R.J.Q. 1063, para. 158 **(Tab 12)**.

> *d'insolvabilité. La LACC et la LFI sont en harmonie : elles préservent les fiducies réputées et établissent la priorité de la Couronne seulement à l'égard des retenues à la source. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la TPS bénéficient d'un traitement préférentiel sous le régime de la LACC ou de la LFI. Alors que les retenues à la source font l'objet de dispositions explicites dans ces deux lois concernant l'insolvabilité, celles-ci ne comportent pas de dispositions claires et expresses analogues établissant une exception pour les créances relatives à la TPS.*
>
> *[46] La logique interne de la LACC va également à l'encontre du maintien de la fiducie réputée établie dans la LTA à l'égard de la TPS. En effet, la LACC impose certaines limites à la suspension par les tribunaux des droits de la Couronne à l'égard des retenues à la source, mais elle ne fait pas mention de la LTA (art. 11.4). Comme les fiducies réputées visant les retenues à la source sont explicitement protégées par la LACC, il serait incohérent d'accorder une meilleure protection à la fiducie réputée établie par la LTA en l'absence de dispositions explicites en ce sens dans la LACC. Par conséquent, il semble découler de la logique de la LACC que la fiducie réputée établie par la LTA est visée par la renonciation du législateur à sa priorité (art. 18.4).*

[156] De son côté, le juge Fish sera encore plus clair sur la survie des fiducies présumées par rapport à la LACC. Il écrit:

> *[95] Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité. Il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il ne nous appartient pas de nous interroger sur les raisons de ce choix. Nous devons plutôt considérer la décision du législateur de maintenir en vigueur les dispositions en question comme un exercice délibéré du pouvoir discrétionnaire de légiférer, pouvoir qui est exclusivement le sien. Avec égards, je rejette le point de vue suivant lequel nous devrions plutôt qualifier l'apparente contradiction entre le par. 18.3(1) (maintenant le par. 37(1)) de la LACC et l'art. 222 de la LTA d'anomalie rédactionnelle ou de lacune législative susceptible d'être corrigée par un tribunal.*
>
> *[96] Dans le contexte du régime canadien d'insolvabilité, on conclut à l'existence d'une fiducie réputée uniquement lorsque deux éléments complémentaires sont réunis : en premier lieu, une disposition législative qui crée la fiducie et, en second lieu, une disposition de la LACC ou de la Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3 (« LFI ») qui confirme l'existence de la fiducie ou la maintient explicitement en vigueur.*

(Emphasis added)

25. It is clear that the CCAA does not contain any provision that would confirm the validity of a deemed trust created by the PBSA or a provincial law to the same effect.

26. As was the case in *Century Services*, when seeking to determine what could be the priority between a Court-created interim lender charge and the deemed trust created by the PBSA, the Court is faced with two federal statutes. The goal is to seek out the overall intent of Parliament. Century Services reiterates the principal of statutory interpretation that a contextual and purposive analysis ought to be applied in order to determine Parliament's true intent[12].

27. As noted in *Century Services*, "where Parliament has sought to protect certain Crown claims through statutory deemed trust and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. [13]" However, in respect of PBSA deemed trust, no such protection has been enacted in the CCAA. A contextual analysis leads to the conclusion that Parliament did not intend for the PBSA deemed trust to have any effect in a CCAA proceeding.

28. It is submitted that the recent amendments to the *Companies' Creditors Arrangement Act* in 2009 confirm this position. Those amendments provide for specific protection to pension obligations at sections 6(6) and 36(7)[14]. These provisions provide, respectively, that a compromise or arrangement may only be sanctioned by a Court, and a sale of assets out of the ordinary course of business may only be approved by the Court, if provision is made to ensure payment of certain enumerated pension obligations. The obligations enumerated for such protection consist only of employee deductions, and normal cost contributions. They do <u>not</u> include special payments.

29. It is submitted that it is clear from these specific additions to (and corresponding omissions from) the amendments to the *CCAA* in 2009, that Parliament did not intend for the deemed trust for special payments under the PBSA or any provincial legislation to the same effect to have any priority in a CCAA proceeding[15].

30. In discussing the pension related amendments to the CCAA and *Bankruptcy and Insolvency Act* (the "**BIA**") in reference to the circumstances of pension plan deficiencies, Justice Deschamps noted the deliberate choices made by Parliament in *Sun Indalex Finance*[16] :

> "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, <u>but chose not to</u> (An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection

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12 *Century Services*, *supra*, at para. 44.

13 *Century Services*, *supra*, at para. 45.

14 *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 **(Tab 1)**.

15 See also recent article in the National Creditor Debtor Review: "*What about Federal Pension Claims? The Status of Pension Benefits Standards Act, 1985 and Pooled Registered Pension Plans Act Deemed Trust Claims in Insolvency*", 28 National Creditor Debtor Review, p. 25 **(Tab 13)**.

16 *Sun Indalex Finance, LLC* v. *United Steelworkers*, [2013] 1 S.C.R. 271, 2013 SCC 6 **(Tab 14)**.

> Program Act and chapter 47 47 of the Statutes of Canada, 2005, S.C. 2007, c. 36, in force September 18, 2009, SI/2009-68; see also Bill C-501, An Act to amend the Bankruptcy and Insolvency Act and other Acts (pension protection), 3rd Sess., 40th Parl., March 24, 2010 (subsequently amended by the Standing Committee on Industry, Science and Technology, March 1, 2011)). 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.)
>
> 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." [paras. 81-82] [emphasis added]

31. It is submitted that the conclusions made in a recent article, *What about Federal Pension Claims? The Status of Pension Benefits Standards Act, 1985 and Pooled Registered Pension Plans Act Deemed Trust Claims in Insolvency*, that the only proper interpretation of the CCAA and the PBSA is that the deemed trust is not intended to have any priority in a CCAA proceeding, are correct:

> "The above application of the Sparrow Electric reasoning to the PBSA deemed trust yields the same results as application of common rules of statutory interpretation. Given that the pension provisions of the BIA and CCAA came into force much later than s. 8 of the PBSA, normal interpretation would require that the later legislation to be deemed remedial in nature. Likewise, since these provisions of the BIA and

> CCAA are the more specific provisions, normal interpretation would take them to have precedence over the general. Finally, the limited scope of the protection given to pension claims in the BIA and CCAA would, by application of the doctrine of implied exclusion, suggest that Parliament did not intend there to be any additional protection. In enacting BIA subs. 60(1.5) and 65.13(8) and ss. 81.5 and 81.6 and CCAA subs. 6(6) and 36(7), while not amending subs. 8(2) of the PBSA by adding explicit priority language or by removing the insolvency trigger), Parliament demonstrated the intent that pension claims would have protection in insolvencies and restructurings only to the extent set out in the BIA and CCAA". [17]

32. If Parliament had intended to give the PBSA deemed trust, or to a deemed trust created by a provincial law to that effect, priority, it has had numerous opportunities since 1997 to do so, through amendments to the CCAA and/or the PBSA. It has made a deliberate decision not to do so.

33. The parallel evolution of the relevant legislation and case law can be summarized as follows:

> 1986: Adoption of Section 8(2) of the PBSA;
>
> 1997: *Sparrow Electric*: The Supreme Court holds that the ITA deemed trust cannot prevail over security interests because no express priority is provided for over pre-existing security interests;
>
> Amendment to CCAA: section 18.3 of the CCAA (now section 37) is added – Deemed trusts in favour of the Crown are nullified subject to certain exemptions for source deductions claims;
>
> 1998: The "Sparrow Electric Amendment": Parliament enacts section 227(4.1) of the ITA which expressly provides for priority over security interests, retroactive to 1994. As well, similar amendments made to EIA and CPP at same time (and similar amendments to the ETA in 2000);
>
> 2002: *First Vancouver*: The Supreme Court holds based on the Sparrow Electric Amendment that a deemed trust is similar to a floating charge. The Supreme Court concludes that by the Sparrow Electric Amendment, Parliament has granted priority to the deemed trust for source deductions over security interests.
>
> 2010: *Century Services*: The GST deemed trust has no effect in a CCAA context due to the wording of section 18.3 of the CCAA, which does not expressly recognize the GST deemed trust. This is so notwithstanding that s. 222(3) of the ETA states that the deemed trust created by 222(1) of the ETA applies despite any other federal act (other than the BIA).

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[17] *Supra,* at p. 30.

34. This issue was discussed at length in the matter of *Aveos*[18] and the Court adopted the argument to the effect that the PBSA deemed trust is not effective in a CCAA proceeding.

2.2.2 The Salaried DP Plan: paramountcy of Federal legislation over Provincial legislation

35. In the matter of *Sun Indalex Finance*,[19] the Supreme Court of Canada unanimously held (in three concurrent judgements on this point) that an interim lender charge created by the Court pursuant to the CCAA may even rank ahead of a deemed trust for pension priorities created by provincial statute by operation of the constitutional doctrine of federal paramountcy, as the Court's ability to create super-priority for interim lender charges is crucial to achieving the purposes of the CCAA, even in the context of a liquidating CCAA.

36. The decision of Justice Deschamps is most explicit on this point:

> B. *Does the Deemed Trust Supersede the DIP Charge?*
>
> [48] The finding that the interests of the Salaried Plan's members in all the employer's wind-up contributions to the Salaried Plan are protected by a deemed trust does not mean that part of the money reserved by the Monitor from the sale proceeds must be remitted to the Salaried Plan's fund. This will be the case only if the provincial priorities provided for in s. 30(7) of the PPSA ensure that the claim of the Salaried Plan's members has priority over the DIP charge. [...]
>
> [...]
>
> [51] In order to avoid a race to liquidation under the BIA, courts will favour an interpretation of the CCAA that affords creditors analogous entitlements. Yet this does not mean that courts may read bankruptcy priorities into the CCAA at will. **Provincial legislation defines the priorities to which creditors are entitled until that legislation is ousted by Parliament.** Parliament did not expressly apply all bankruptcy priorities either to CCAA proceedings or to proposals under the BIA. Although the creditors of a corporation that is attempting to reorganize may bargain in the shadow of their bankruptcy entitlements, those entitlements remain only shadows until bankruptcy occurs. At the outset of the insolvency proceedings, Indalex opted for a process governed by the CCAA, leaving no doubt that although it wanted to protect its employees' jobs, it would not survive as their employer. This was not a case in which a failed arrangement forced a company into liquidation under the BIA. Indalex achieved the goal it was pursuing. It chose to sell its assets under the CCAA, not the BIA.

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18 *Aveos Fleet Performance Inc./Aveos Performance aéronautique inc. (Arrangement relatif à)*, 2013 QCCS 5762 **(Tab 15)**.

19 *Supra* note 16.

[52] **The provincial deemed trust under the PBA continues to apply in CCAA proceedings, subject to the doctrine of federal paramountcy** (*Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3 (CanLII), [2004] 1 S.C.R. 60, at para. 43). The Court of Appeal therefore did not err in finding that at the end of a CCAA liquidation proceeding, priorities may be determined by the PPSA's scheme rather than the federal scheme set out in the BIA.

[...]

[56] A party relying on paramountcy must "demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law" (*Canadian Western Bank*, at para. 75). **This Court has in fact applied the doctrine of paramountcy in the area of bankruptcy and insolvency to come to the conclusion that a provincial legislature cannot, through measures such as a deemed trust, affect priorities granted under federal legislation** (*Husky Oil*).

[...]

[58] In the instant case, the CCAA judge, in authorizing the DIP charge, did not consider the fact that the Salaried Plan's members had a claim that was protected by a deemed trust, nor did he explicitly note that ordinary creditors, such as the Executive Plan's members, had not received notice of the DIP loan motion. However, he did consider factors that were relevant to the remedial objective of the CCAA and found that Indalex had in fact demonstrated that the CCAA's purpose would be frustrated without the DIP charge. It will be helpful to quote the reasons he gave on April 17, 2009 in authorizing the DIP charge ((2009), 52 C.B.R. (5th) 61):

(a) **the Applicants are in need of the additional financing in order to support operations during the period of a going concern restructuring**;

(b) **there is a benefit to the breathing space that would be afforded by the DIP Financing that will permit the Applicants to identify a going concern solution**;

(c) **there is no other alternative available to the Applicants for a going concern solution**;

(d) a stand-alone solution is impractical given the integrated nature of the business of Indalex Canada and Indalex U.S.;

(e) given the collateral base of Indalex U.S., the Monitor is satisfied that it is unlikely that the Post-Filing Guarantee with respect to the U.S. Additional Advances will ever be called and the Monitor is also satisfied that the benefits to stakeholders far outweighs the risk associated with this aspect of the Post-Filing Guarantee;

(f) **the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing against the assets of the Applicants**;

(g) the Pre-Filing Security has been reviewed by counsel to the Monitor and it appears that the unsecured creditors of the Canadian debtors will be in no worse position as a result of the Post-Filing Guarantee than they were otherwise, prior to the CCAA filing, as a result of the limitation of the Canadian guarantee set forth in the draft Amended and Restated Initial Order . . . ; and

(h) **the balancing of the prejudice weighs in favour of the approval of the DIP Financing**. [para. 9]

[59] Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the ~~CCAA judge's findings of fact, but~~ **~~case after case has shown that "the~~ priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout"** (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve their rights on June 12, 2009 are instructive. He indicated that any **uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate"** (2009 CanLII 37906 (ON SC), 2009 CanLII 37906, at paras. 7-8).

[60] **In this case, compliance with the provincial law necessarily entails defiance of the order made under federal law.** On the one hand, s. 30(7) of the PPSA required a part of the proceeds from the sale related to assets described in the provincial statute to be paid to the plan's administrator before other secured creditors were paid. On the other hand, **the Amended Initial Order provided that the DIP charge ranked in priority to "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise" (para. 45). Granting priority to the DIP lenders subordinates the claims of other stakeholders, including the Plan Members. This court-ordered priority based on the CCAA has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result**

> **of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.**[20]
>
> [Emphasis added]

37. The decisions rendered by Justices Cromwell and LeBel, respectively, concur with Justice Deschamps on this issue.[21]

38. While the case law in Quebec is contradictory regarding whether Quebec's pension legislation creates a deemed trust at all, there appears to be unanimity that, in the event that such a statutory deemed trust exists, a CCAA interim lender charge may be given super-priority ahead of the deemed trust pursuant to the doctrine of paramountcy.

39. In *White Birch Paper Holding Company (Arrangement relatif à)*, Justice Mongeon held that the *Supplemental Pension Plans Act* (the "**SPPA**"),[22] did not create a deemed trust under Quebec that could survive in the context of a CCAA.[23]

40. Justice Mongeon went to on state, in *obiter*, that even if the provincial legislation created a deemed trust that could survive the CCAA, such a deemed trust could not rank ahead of the super-priority accorded to an interim lender charge pursuant to the CCAA:

> *[215] Dans un second volet du dossier Timminco, le* ***juge Morawetz rendra une seconde série de motifs portant cette fois sur l'opportunité d'accorder une super-priorité à un financement DIP*** *(décision du 9 février 2012). Il commentera la démarche et les arguments du prêteur DIP en ces termes:*
>
> > [46] It is unrealistic to expect that any commercially motivated DIP Lender will advance funds without receiving the priority that is being requested on this motion. It is also unrealistic to expect that any commercially motivated party would make advances to the Timminco Entities for the purpose of making special payments or other payments under the pension plans.
> >
> > [47] The alternative proposed by CEP – of a DIP Charge without super priority – is not, in my view, realistic, nor is directing the Monitor to investigate alternative financing without providing super priority. **If there is going to be any opportunity for the Timminco Entities to put forth a restructuring plan, it seems to me that it is essential and necessary for the DIP Financing to be approved and the DIP Charge granted. The alternative is a failed CCAA process.**
> >
> > [48] This underscores the lack of other viable options that was fully considered in the first Timminco endorsement (*Timminco Limited (Re)*, 2012 ONSC 506). The situation has not changed. The

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20 *Ibid.*, paras. 48, 51-52, 56 and 58-60.

21 *Ibid.*, paras. 242 and 265.

22 *Supplemental Pension Plans Act*, CQLR c R-15.1, section 49 **(Tab 8)**.

23 *Supra* note 11.

> reality, in my view, is that there is no real alternative. The position being put forth by CEP does not, in my view, satisfactorily present any viable alternative. In this respect, it seems to me that the challenge of the unions to the position being taken by the Timminco Entities is suspect, as the only alternative is a shutdown. It is impossible for me to reach any conclusion other than the fact that there simply is no other viable alternative.
>
> [49] **In the absence of the court granting the requested super priority, the objectives of the CCAA would be frustrated. It is neither reasonable nor realistic to expect a commercially motivated DIP lender to advance funds in a DIP facility without super priority.** The outcome of a failure to grant super priority would, in all likelihood, result in the Timminco Entities having to cease operations, which would likely result in the CCAA proceedings coming to an abrupt halt, followed by bankruptcy proceedings. Such an outcome would be prejudicial to all stakeholders, including CEP and USW.

> [216] Ces deux opinions démontrent jusqu'à quel point la LACC et les super-priorités qu'elle permet de mettre en place, sont cruciales au processus de restructuration. Il serait impensable, sur le plan pratique de fonctionner sans elles.
>
> [217] Ainsi, **même si le Tribunal avait conclu à l'existence d'une fiducie en faveur des divers régimes de retraite et créée par l'article 49 LRCR, faisant en sorte que les cotisations d'équilibre suspendues depuis l'ordonnance initiale soient soustraites de l'actif de la Débitrice (ce qui n'est pas le cas), le Tribunal aurait alors invoqué les mêmes motifs que le juge Morawetz dans Timminco pour rejeter les arguments des Requérants.**[24]
>
> [Emphasis added]

41. In the later decision of *Timminco ltée (Arrangement relatif à)*,[25] Justice Mongeon reversed his holding in *White Birch* and held that the SPPA does, in fact, create a deemed trust for the benefit of pension beneficiaries.

42. However, Justice Mongeon went on to state, *in obiter*, that this deemed trust, created by provincial statue, could only have priority over secured creditors whose security was also pursuant to provincial statue; a deemed trust for the benefit of pension beneficiaries created by provincial statute would still rank behind a super-priority interim lender charge ordered by the CCAA Court, pursuant to the doctrine of federal paramountcy:

> *[82] Pour les motifs qui suivent et malgré l'analyse du soussigné dans l'affaire White Birch, force est de conclure que l'article 49 LRCR crée une fiducie réputée opposable à la créance de IQ. Toutefois, le présent dossier touche une question différente des affaires White Birch et Indalex. Dans ces deux dossiers, il s'agissait de décider si les*

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24 *Ibid.*, paras. 215-217.

25 *Timminco ltée (Arrangement relatif à)*, 2014 QCCS 174 **(Tab 16)**.

contributions d'équilibre ou les soldes des déficits actuariels des régimes de retraite avaient préséance sur la créance du prêteur « DIP », elle-même protégée par une super-priorité en vertu de la LACC, et ce, alors que la loi provinciale entrevoyait l'existence d'une fiducie réputée applicable aux cotisations ou soldes actuariels en question, selon le cas.

[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 leurs 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.

[...]

*[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.**[26]*

[Emphasis added]

3. SUSPENSION OF CERTAIN PENSION AMORTIZATION PAYMENTS AND POST-RETIREMENT EMPLOYEE BENEFITS

3.1 The DB Plans, the Amortization Payments and the OPEBs

43. Salaried employees and unionized hourly employees at the Wabush Mine and the Pointe-Noire Port hired before January 1, 2013 are respectively covered by the Salaried DB Plan and the Hourly DB Plan, both of which are administered by Wabush Mines JV.[27]

44. As mentioned above, the Salaried DB Plan is governed by the laws of Newfoundland and Labrador pursuant to the 1968 Memorandum of Reciprocal Agreement[28] between Pension Regulators while the Hourly DB Plan is governed by Federal laws.

45. The estimated wind-up deficiency of the DB Plans as at January 1, 2015 was approximately $41.5 million,[29] requiring the Wabush CCAA Parties to make Monthly Amortization Payments of $666,555.58[30] and a Yearly Catch Up Amortization Payment of approximately $5.5 million in July 2015[31] (collectively, the "**Amortization Payments**"),

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26 *Ibid.*, paras. 82-83 and 85.

27 The Motion, paras. 80-82.

28 *Supra* note 2.

29 The Motion, para. 83.

30 The Motion, para. 86.

31 The Motion, para. 87.

pursuant notably to section 35 of the PBA and section 12(3)(d) of the *Pension Benefits Act Regulations* (the "**PBAR**").[32]

a) Section 35(1) of the PBA:

> **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.

b) Section 12 of the PBAR:

> **12.** (1) This section applies only to a pension plan that contains one or more defined benefit provisions.
>
> (2) For the purpose of section 30 and 35 of the Act, every pension plan to which this section applies shall be funded in accordance with the funding requirements of this section.
>
> (3) ~~Subject to subsections (5) and (6) and section 13,~~ **every employer shall pay to a pension fund**
>
> [...]
>
> (d) **the amount required to liquidate any solvency deficiency by equal payments made at least quarterly, with interest at the solvency valuation interest rate, within 5 years of the review date of the solvency valuation in which solvency deficiency is identified.**
>
> [...]
>
> [Emphasis added]

46. Additionally, the Wabush CCAA Parties' accumulated benefits obligations in relation to OPEBs totaled approximately $52.1 million as of December 31, 2014,[33] and would require funding of $182,000 per month.[34]

47. The Wabush CCAA Parties do not have any cash available to pay the Amortization Payments or the OPEBs, as the Interim Financing Facility is the only source of financing available to the Wabush CCAA Parties[35] and the Interim Financing Term Sheet prohibits the payment of the Amortization Payments[36] and the OPEBs.[37]

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32 *Pension Benefits Act Regulations*, N.L.R. 114/96 **(Tab 7)**.

33 The Motion, para. 94.

34 The Motion, para. 95.

35 The Motion, para. 26.

36 The Motion, para. 89.

37 The Motion, para. 97.

48. The DB Plans would be liquidated, and the members would bear the estimated $41.5 million wind-up deficiency.

49. This is precisely the situation in which the jurisprudence has recognized that payment of pension special payments and other post-retirement benefits, such as the Amortization Payments and OBEPs at issue herein, should be suspended, as discussed below.

3.2 The Court's Jurisdiction to Order the Suspension of the Amortization Payments and the OPEBs

50. The Courts have applied the case law that confirms that the constitutional paramountcy of the CCAA allows a CCAA court to grant priority to various CCAA charges ahead of provincial construction liens and hypothecs[38] and to suspend the payment of pension special payments due pursuant to provincial law:

> [42] In view of the reasoning and the decisions in the above cases considered, **the Court has a jurisdiction under the** CCAA which, in the words of the decision in *Re Sulphur Corp. of Canada Ltd.*, *supra*, at paragraph 37, **"can be used to override an express provincial statutory provision" where that would contribute to carrying out the protective function of the CCAA as reflected particularly in the provisions of s. 11 of the CCAA.**[39]
>
> [Emphasis added]

51. This flows from the characterization of pension special payments as unsecured claims related to pre-filing employment, which happen to become payable by the employer post-filing:

> [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.** [...][40]
>
> [Emphasis added]

See also:

> *[27] **La Cour supérieure a juridiction pour décider s'il y a lieu d'ordonner la suspension des cotisations d'équilibre à la caisse d'un régime complémentaire de retraite.** La question n'est pas nouvelle et a d'ailleurs fait l'objet de décisions par les tribunaux québécois et canadiens.*

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38 See e.g. *Sun Indalex Finance, LLC v. United Steelworkers*, *supra* note 16.

39 *Collins & Aikman Automotive Canada Inc. (Re)*, 2007 CanLII 45908, 37 C.B.R. (5th) 282, [2007] O.J. No. 4186 (Ont. S.C.J.), para. 42 **(Tab 17)**.

40 *Fraser Papers Inc. (Re)*, 2009 CanLII 39776, 55 C.B.R. (5th) 217 (Ont. S.C.J.), para. 20 **(Tab 18)**.

> *[31] Le juge Spence soulève la distinction importante entre les droits qui découlent d'une convention collective, notamment ceux prévus dans le régime de retraite, et l'exécution des obligations pour y donner effet.* ***Du point de vue juridictionnel, il ajoute que, malgré le cadre statutaire provincial qui oblige l'employeur à verser des cotisations d'équilibre ponctuellement, il n'en demeure pas moins qu'il s'agit de créances qui peuvent être suspendues et qui seront traitées lorsqu'il sera mis fin à la protection offerte en vertu de la LACC.***
>
> *[32] Le Tribunal partage cet avis et considère dès lors avoir juridiction pour trancher la question qui lui est soumise.*[41]
>
> [Emphasis added]

52. Though the Court does not have jurisdiction to alter a collective bargaining agreement or to extinguish amounts coming due pursuant to provincial law, such as the Amortization Payments and the OPEBs, it does have the jurisdiction to suspend the payment of such amounts:

> [20] [...] 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.[42]
>
> [Emphasis added]

See also:

> *[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.*
>
> *[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.***[43]

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41 *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 2028, 57 C.B.R. (5th) 285, [2009] R.J.Q. 1415, paras. 27, 31-32 **(Tab 19)**.

42 *Fraser Papers Inc. (Re)*, *supra* note 40, para. 21.

43 *Syndicat national de l'amiante d'Asbestos Inc. v. Mine Jeffrey inc*, 2003 CanLII 47918, 40 C.B.R. (4th) 95, [2003] J.Q. no. 264, [2003] R.J.Q. 420 (Que. C.A.), paras. 57-58 **(Tab 20)**.

[Emphasis added]

3.3 The Court's Discretion to Suspend the Amortization Payments and the OPEBs

53. As discussed above, in rendering a discretionary order under the CCAA, the Court must exercise its discretion in furtherance of the purposes of the CCAA.[44] This applies equally when determining whether to suspend pension special payments and other post-retirement benefits.[45]

54. In determining whether to exercise this jurisdiction, without elaborating a formal test, the Courts have consistently given weight to the following factors:

a) whether the CCAA debtor company has the ability to pay the pension special payments;

b) if the CCAA debtor company's only source of financing is interim financing, whether the terms such financing prohibit the payment of pension special payments;

c) whether, in the absence of the interim financing the CCAA restructuring would be doomed to failure, and whether a bankruptcy would bear better results for all affected stakeholders, including the pension beneficiaries.

55. Applying these factors, the Court of Appeal ordered the suspension of the payment of special pension payments in the matter *Syndicat national de l'amiante d'Asbestos Inc. v. Mine Jeffrey inc*,[46] as did Madam Justice Mayrand in the matter of *AbitibiBowater inc. (Arrangement relatif à)*,[47] and Mr. Justice Chaput in the matter of *Papiers Gaspésia Inc., Re.*[48]

56. Madam Justice Pepall of the Ontario Superior Court of Justice elaborated her reasoning in the matter of *Fraser Papers Inc.*, based on the same considerations:

> [21] I must then consider whether having concluded that I have jurisdiction, I should exercise it as requested by the Applicants. Frankly, I do not consider either of the alternatives to be particularly appealing. On the one hand, one does not wish to in any way jeopardize pensions. 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**

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44 *Century Services Inc. v. Canada (Attorney General)*, *supra* note 7.

45 *AbitibiBowater inc. (Arrangement relatif à)*, *supra* note 41, paras. 45*ff.*; *Collins & Aikman Automotive Canada Inc. (Re)*, *supra* note 39, para. 90; *White Birch Paper Holding Company (Arrangement relative à)*, 2010 QCCS 764, paras 94-95 **(Tab 21)**.

46 *Syndicat national de l'amiante d'Asbestos Inc. v. Mine Jeffrey inc*, *supra* note 43, paras. 54-56.

47 *AbitibiBowater inc. (Arrangement relatif à)*, *supra* note 41, paras. 52*ff.*

48 *Papiers Gaspésia Inc. (Faillite), Re*, 2004 CanLII 40296 (Que. S.C.), paras. 87-91 **(Tab 22)**.

> **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.**[49]
>
> [Emphasis added]

See also the reasons of Mr. Justice Morawetz in *Timminco Limited (Re)*:

> [61] The evidence has established that **the Timminco Entities are in a severe liquidity crisis and, if required to make the pension contributions, will not have sufficient funds to continue operating.** The Timminco Entities would then be forced to cease operations to the detriment of their stakeholders, including their employees and pensioners.
>
> [62] On the facts before me, I am satisfied that the application of the QSPPA and the PBA would frustrate the Timminco Entities ability to restructure and avoid bankruptcy. Indeed, while the Timminco Entities continue to make Normal Cost Contributions to the pension plans, **requiring them to pay what they owe in respect of special and amortization payments for those plans would deprive them of sufficient funds to continue operating, forcing them to cease operations to the detriment of their stakeholders, including their employees and pensioners.**
>
> [63] In my view, **this is exactly the kind of result the CCAA is intended to avoid. Where the facts demonstrate that ordering a company to make special payments in accordance with provincial legislation would have the effect of forcing the company into bankruptcy, it seems to me that to make such an order would frustrate the rehabilitative purpose of the CCAA. In such circumstances, therefore, the doctrine of paramountcy is properly invoked, and an order suspending the requirement to make special payments is appropriate** (see *ATB Financial and Nortel Networks Corporation (Re)*).[50]
>
> [Emphasis added]

See also the reasons of Justice Spence in *Collins & Aikman Automotive Canada Inc. (Re)*:

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49 *Fraser Papers Inc. (Re)*, *supra* note 40, para. 21.

50 *Timminco Limited (Re)*, 2012 ONSC 506 **(Tab 23)**.

> [91] **The evidence before this Court is that Automotive is incapable of making the special payments. Automotive does not have the funds necessary to make the special payments. As at July 19, 2007, Automotive had no cash of its own.** In the five-week period from July 19, 2007 to August 25, 2007, Automotive had negative cash flow from operations of approximately $5 million. It is forecast that in the four-week period from August 26, 2007 until September 22, 2007 Automotive will have negative cash flow of approximately an additional $12 million. **Since filing, Automotive has been wholly dependent on the DIP Loan to fund all disbursements.**
>
> [92] Two other important considerations are evident in the present case. First, for the reasons given above, **the effective suspension of special payments is a feature of the integrated arrangement which was made available by Chrysler as the DIP Lender and which was the arrangement which enabled the company to continue in operation. So there was and is a very good reason for the Court to approve that arrangement.**[51]
>
> [Emphasis added]

57. Given that all of these factors are present herein (see paras. 46 to 49, above), the Wabush CCAA parties respectfully submit that the Court should confirm the priority of the Interim Lender Charge over deemed trusts, if any, under pension legislation, as provided for at paragraph 5 of the Comeback Order.

4. REPLY TO THE VARIOUS ARGUMENTS RAISED BY THE OBJECTING PARTIES

4.1 Michael Keeper and Terence Watt

58. The Objecting Parties, Michael Keeper and Terence Watt, state that the relief sought by the company to not pay the amount described in the Wabush CCAA Parties' Motion is at law either a disclaimer or a resiliation of those obligations, not a suspension.

59. According to the Wabush CCAA Parties, the suspension sought is neither a disclaimer nor a resiliation of an agreement. On that point, the Quebec Court of Appeal has already decided that seeking a suspension of payments to be made in connection with a pension plan does not entail that said pension plan will be modified or is terminated.

> *[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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51 *Collins & Aikman Automotive Canada Inc. (Re)*, *supra* note 39, paras. 91-92.

> *[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.***[52]
>
> [Emphasis added]

60. This reasoning has also been adopted in the matter of *AbitibiBowater*[53]:

> *27] La Cour supérieure a juridiction pour décider s'il y a lieu d'ordonner la suspension des cotisations d'équilibre à la caisse d'un régime complémentaire de retraite. La question n'est pas nouvelle et a d'ailleurs fait l'objet de décisions par les tribunaux québécois et canadiens.*
>
> *[28] Dans l'arrêt Mine Jeffrey, la débitrice avait obtenu la protection de la LACC pour se restructurer. La Cour d'appel du Québec a, d'une part, décidé que l'employeur ne pouvait modifier unilatéralement le contrat collectif de travail, mais a fait droit à la demande de suspension des cotisations d'équilibre, pendant la période de restructuration.*
>
> *[29] La suspension des cotisations d'équilibre a aussi été ordonnée dans l'affaire de Papiers Gaspésia par le juge Chaput de cette Cour.*
>
> *[30] Plus récemment, dans Collins c. Eickman Automotive Canada Inc., le juge Spence de la Cour supérieure de l'Ontario fait une revue exhaustive de la jurisprudence canadienne sur la question (dont l'arrêt de la Cour d'appel dans Mine Jeffrey).*
>
> *[31] Le juge Spence soulève la distinction importante entre les droits qui découlent d'une convention collective, notamment ceux prévus dans le régime de retraite, et l'exécution des obligations pour y donner effet. Du point de vue juridictionnel, il ajoute que, malgré le cadre statutaire provincial qui oblige l'employeur à verser des cotisations d'équilibre ponctuellement, il n'en demeure pas moins qu'il s'agit de créances qui peuvent être suspendues et qui seront traitées lorsqu'il sera mis fin à la protection offerte en vertu de la LACC.*
>
> *[32] Le Tribunal partage cet avis et considère dès lors avoir juridiction pour trancher la question qui lui est soumise.*

4.2 Attorney General of Canada

61. As a starting point, referring to the decision rendered by the Supreme Court of Canada in *Indalex*, the Attorney General of Canada (the "**AG**") states that since the federal

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52 *Mine Jeffrey, Supra* note 43, para 57-58.

53 *AbitibiBowater inc. (Arrangement relatif à), supra* note 41.

paramountcy doctrine cannot be applied in the present matter, the PBSA shall continue to be effective despite the Wabush CCAA Parties' CCAA filing.[54]

62. On that point, the Wabush CCAA Parties recognize that the federal paramountcy doctrine is not applicable in a case where the CCAA and the PBSA provisions are in conflict. However, the CCAA provisions shall prevail in an insolvency context for several other reasons.

63. On that issue, the following statements made by Marie Deschamps J. in *Indalex* are particularly telling:

> [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** (An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 47 of the Statutes of Canada, 2005, S.C. 2007, c. 36, in force September 18, 2009, SI/2009-68; see also Bill C-501, An Act to amend the Bankruptcy and Insolvency Act and other Acts (pension protection), 3rd Sess., 40th Parl., March 24, 2010 (subsequently amended by the Standing Committee on Industry, Science and Technology, March 1, 2011)). 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

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[54] Para. 26 of the AG's Outline of Arguments.

> Companies' Creditors Arrangement Act (2003), at p. 98; see also p. 88.)[55]
>
> [Emphasis added]

64. With respect to this statement of Deschamps J., it was referred to with approbation in the decision rendered by this Court in the matter of *Aveos*[56]. At paragraphs 68 and following of this decision, Schrager J. explained why a deemed trust created to protect or give preferential treatment to the pension amortization payments is not effective in CCAA proceedings.

65. It is to be noted that the effectiveness of the provisions that were debated in the matter of *Aveos* was the exact same as the one discussed in the present case, Section 8(2) PBSA.

66. On another issue, at paragraph 30 of its Outline of Arguments, the AG states that a debtor cannot grant to an interim lender a charge on assets that does not belong to it due to the effect of the PBSA deemed trust. On that point, the Court has already granted the Interim Lender Charge, and the only question that remains is whether the Interim Lender Charge can have priority over deemed trusts, if any, created pursuant to pension legislation. The AG's position that the Interim Lender Charge cannot be granted such priority is contrary to the case law, including *Timminco*, which dealt with the priority of security pursuant to the *Civil Code of Québec* versus a deemed trust created by Quebec pension legislation.

67. With respect to the reference made at paragraph 31 of the AG's Outline of Arguments to the judgment rendered in the matter of *Timminco*, it is the Wabush CCAA Parties' position that this decision has no application in the present matter. In *Timminco*, the Court had to settle a conflict of priority between a deemed trust created pursuant to provincial law and security also created pursuant to Quebec provincial law (i.e. the *Civil Code of Québec*, as mentioned in the foregoing paragraph). In fact, in this decision Justice Mongeon took great care to make the appropriate distinction with a situation like the one which is currently under review in this matter.

> *[82] Pour les motifs qui suivent et malgré l'analyse du soussigné dans l'affaire White Birch, force est de conclure que l'article 49 LRCR crée une fiducie réputée opposable à la créance de IQ. Toutefois, le présent dossier touche une question différente des affaires White Birch et Indalex. Dans ces deux dossiers, il s'agissait de décider si les contributions d'équilibre ou les soldes des déficits actuariels des régimes de retraite avaient préséance sur la créance du prêteur « DIP », elle-même protégée par une super-priorité en vertu de la LACC, et ce, alors que la loi provinciale entrevoyait l'existence d'une fiducie réputée applicable aux cotisations ou soldes actuariels en question, selon le cas.*
>
> *[83] La présente instance porte sur la priorité des créances de deux créanciers qui ne bénéficient pas de super-priorités alors que la débitrice*

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55 *Sun Indalex, Supra* note 16, para 81.

56 *Aveos Fleet Performance Inc, Supra* note 18.

> *SBI est au stade de rembourser ses créanciers selon leurs 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.*
>
> *[...]*
>
> *[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.*
>
> *[163] Nous sommes à la fin d'un processus de réorganisation sous l'empire de la LACC qui a pris la forme d'une vente des actifs de SBI à une nouvelle entité (qui continuera les activités de cette dernière). Il s'agit maintenant de distribuer le produit de cette vente d'actifs aux créanciers de SBI.* ***Ces créanciers ne détiennent aucune super-priorité qui aurait pu leur être accordée sous l'empire de la LACC.*** *La priorité accordée aux créances des Comités de retraire, d'une part, et de IQ, d'autre part, doit donc être analysée à la seule lumière du droit québécois.* ***Il n'est nullement question de l'application de la doctrine de la préséance du droit fédéral sur le droit provincial.***
>
> *[171] En l'absence de l'application de la doctrine de la prépondérance fédérale, force est de conclure que ces dispositions doivent recevoir leur plein effet.* [57]

[Emphasis added]

68. With regard to the decision rendered in the matter of *Aveos*, the AG attempts to distinguish it. It states at paragraph 33 of its Outline of Arguments that it is mainly based on the decision rendered by the Supreme Court of Canada in *Sparrow* and the fact that the hypothec held by the secured lenders was registered before the deemed trust took effect. However, this statement fails to take into account the fact that at paragraphs 68 and following of this decision, Schrager J. has also stated that in light of the legislative choices made by Parliament, a deemed trust created to protect a pension plan has no application at all in an insolvency context.

69. Furthermore, the AG argues that there is no conflict between section 11.2 CCAA that allows the creation of an interim lender charge that will affect all the assets of a debtor and section 8(2) PBSA which the AG argues has the effect of excluding from the debtor's assets to protect the payment of the amounts which are payable to a pension plan. Firstly, that characterization of section 8(2) PBSA is inaccurate, as assets are not excluded, but rather such provision purports by statute to deem a trust to exist over the debtor's assets. Therefore, we believe that the AG's interpretation of section 8(2) PBSA is incorrect, and, in any case, its reasoning is in clear contradiction with the statement made by the Supreme Court of Canada in the matter of *Indalex*.

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[57] *Timminco, supra* note 25, paras. 82, 83, 85, 163, 171.

> [60] In this case, compliance with the provincial law necessarily entails defiance of the order made under federal law. On the one hand, s. 30(7) of the *PPSA* required a part of the proceeds from the sale related to assets described in the provincial statute to be paid to the plan's administrator before other secured creditors were paid. On the other hand, the Amended Initial Order provided that the DIP charge ranked in priority to "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise" (para. 45). Granting priority to the DIP lenders subordinates the claims of other stakeholders, including the Plan Members. This court-ordered priority based on the *CCAA* has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.[58]

70. Finally, the AG mentions in its Outline of Arguments that there would be no rule that states that specific provisions are needed in the CCAA to confirm the application of a pension plan deemed trust in an insolvency context on the basis of the statement made by Deschamps J. in *Indalex*.[59] That statement was then applied by Justice Schrager in the matter of *Aveos*[60], on facts that are applicable in this case, and the latter decided to apply the statement to the contrary made by Fish J. in *Century Services*.

71. Even if this Court were to decide that the requirement stated by Fish J. in *Century Service* does not exist, the pension plan deemed trust should in any case not be recognized in an insolvency context on the basis of the statement made by Deschamps J. in *Indalex*, which statement was then applied by Justice Schrager in the matter of *Aveos*, as mentioned in the foregoing paragraph.

4.3 Superintendent of Pensions for Newfoundland and Labrador

72. In paragraph 27 of its Outline of Arguments, the Superintendent of Pensions for Newfoundland and Labrador states that a majority of the Supreme Court Justices in *Indalex* recognize that the pension plan administrator was in conflict of interest when it sought a CCAA order to override the plan members' priority. Despite the fact that this statement is accurate, it presents an overly simplistic view of the statements made by the Supreme Court of Canada in *Indalex* with respect to the conflict of interest which may exist for an employer which acts as administrator of a pension plan. The reasoning of the Supreme Court on this point can be more accurately summarized as follows:

    a) Section 8(1)a) PPSA allows an employer to act as administrator.[61] Thus, it is not all the decisions taken by an employer in this capacity which will result in a conflict of interest situation.

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58 *Sun Indalex, supra* note 16, para 60.

59 AG's Outline of Arguments, paras 39 to 43.

60 *Aveos Fleet Performance Inc., supra* note 18, para 71.

61 The same situation exists pursuant to the *Pension Benefits Act, 1997* of Newfoundland and Labrador (*supra* note 3) pursuant to Section 12(1)(a).

b) The decision to commence bankruptcy proceedings does not entail on its own a breach of a fiduciary obligation for the employer[62].

c) In seeking from the CCAA Court the authorization to grant an interim lender charge, Indalex was seeking to override the plan members' priority. In that case, the plan administrator's duty to the plan members was determined to be that it should at least have given the plan members' notice and the opportunity to present their arguments. More specifically, this duty meant that they were entitled to reasonable notice of the interim financing motion in order to allow the plan members to potentially be in a position to present their arguments.[63]

d) In *Indalex*, there was no justification for the Court of Appeal to have created for the benefit of the pensioners a constructive trust since, ultimately, it was difficult to see what gains the plan members would have secured had they received notice of the motion. In that case, the first instance judge made it clear that there was no alternative to the interim loan.[64]

73. In the present case, the Wabush CCAA Parties presented a motion for special mode of service in order to be authorized to send a notice to all known members and beneficiaries of the DB Plans. In fact, more than 2,000 notices were sent to all known members and beneficiaries of the DB Plans. Moreover, the Motion was served on the union and the Government of Newfoundland and Labrador. With respect to OSFI, it was not served initially since it was initially thought that the Hourly DB Pension Plan was governed by provincial law and not federal law; the OSFI was subsequently served after contacting the Monitor. In any case, it is clear that in this matter, all the parties have now received sufficient notice and that once the June 22, 2015 hearing is over, all the parties will have had the opportunity to be properly heard by this Court.

74. In its Outline of Arguments, the Superintendent of Pensions argues that although *Indalex* recognizes that the federal paramountcy doctrine can warrant a judge granting a lender priority over all security holders, it does not stand for the proposition that the paramountcy doctrine commands, in all cases, that such a priority be granted. The Superintendent then states that this determination is highly fact specific, while referring to paragraphs 58 to 60 of *Indalex*. These paragraphs read as follows:

> [58] In the instant case, the *CCAA* judge, in authorizing the DIP charge, did not consider the fact that the Salaried Plan's members had a claim that was protected by a deemed trust, nor did he explicitly note that ordinary creditors, such as the Executive Plan's members, had not received notice of the DIP loan motion. However, he did consider factors that were relevant to the remedial objective of the *CCAA* and found that Indalex had in fact demonstrated that the *CCAA*'s purpose would be frustrated without the DIP charge. It will be helpful to quote the reasons

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62 *Sun Indalex, supra* note 16, para. 70.

63 *Sun Indalex, supra* note 16, para. 73.

64 *Sun Indalex, supra* note 16, para. 80.

he gave on April 17, 2009 in authorizing the DIP charge ((2009), 52 C.B.R. (5th) 61):

> (a) the Applicants are in need of the additional financing in order to support operations during the period of a going concern restructuring;
>
> (b) there is a benefit to the breathing space that would be afforded by the DIP Financing that will permit the Applicants to identify a going concern solution;
>
> c) there is no other alternative available to the Applicants for a going concern solution;
>
> (d) a stand-alone solution is impractical given the integrated nature of the business of Indalex Canada and Indalex U.S.;
>
> (e) given the collateral base of Indalex U.S., the Monitor is satisfied that it is unlikely that the Post-Filing Guarantee with respect to the U.S. Additional Advances will ever be called and the Monitor is also satisfied that the benefits to stakeholders far outweighs the risk associated with this aspect of the Post-Filing Guarantee;
>
> (f) the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing against the assets of the Applicants;
>
> (g) the Pre-Filing Security has been reviewed by counsel to the Monitor and it appears that the unsecured creditors of the Canadian debtors will be in no worse position as a result of the Post-Filing Guarantee than they were otherwise, prior to the CCAA filing, as a result of the limitation of the Canadian guarantee set forth in the draft Amended and Restated Initial Order; and
>
> (h) the balancing of the prejudice weighs in favour of the approval of the DIP Financing. [para. 9];

[59] Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the *CCAA* judge's findings of fact, but case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve their rights on June 12, 2009 are instructive. He

> indicated that any uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate" (2009 CanLII 37906, at paras. 7-8).
>
> [60] In this case, compliance with the provincial law necessarily entails defiance of the order made under federal law. On the one hand, s. 30(7) of the *PPSA* required a part of the proceeds from the sale related to assets described in the provincial statute to be paid to the plan's administrator before other secured creditors were paid. On the other hand, the Amended Initial Order provided that the DIP charge ranked in priority to "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise" (para. 45). Granting priority to the DIP lenders subordinates the claims of other stakeholders, including the plan members. This court-ordered priority based on the *CCAA* has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.[65]

75. On that point, the Wabush CCAA Parties respectfully submit that the situation described by Mr. Justice Campbell, as first instance judge in *Indalex*, and quoted with approval by Deschamps J. at paragraph 58 of the Supreme Court's decision (see the preceding paragraph), is applicable to the present matter and should be followed herein.

4.4 United Steelworkers

76. At paragraph 34 of its Outline of Arguments, the United Steelworkers state that the condition set out in the Interim Financing Term Sheet prohibiting special and catch-up payments for is unreasonable. With respect to this statement, it should be analysed while taking into account the following statement made by the Supreme Court of Canada in *Indalex*:

> [59] Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the *CCAA* judge's findings of fact, but case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). **The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members** or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve their rights on June 12, 2009 are instructive. **He indicated that any uncertainty as to whether the lenders would withhold advances** or whether they would have priority

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65 *Sun Indalex, supra* note 16, paras 58-60.

> if advances were made **did "not represent a positive development"**. **He found that, in the absence of any alternative, the relief sought was "necessary and appropriate"** (2009 CanLII 37906, at paras. 7-8).[66]

[Emphasis added]

77. Similarly here, the relief sought to suspend payment of the amortization payments and OPEBs is necessary and appropriate.

78. Finally, with respect to the request of the unions to appoint an information officer at the cost of the Wabush CCAA Parties, this would result in a duplication of work already performed by the Monitor. Moreover, the tasks intended to be performed by such information officer are those that should be part of the unions' regular mandate to its members. The proposed information officer consists of two existing union officers whose salaries are currently paid by the union through union dues. Therefore, it is rather surprising now after having collected union dues for all those many years that the unions are now asking the Wabush CCAA Parties to remunerate the unions to perform a task that they have already been paid by its members to perform.

THE WHOLE RESPECTFULLY SUBMITTED.

Montréal, June 19, 2015

Blake, Cassels & Graydon

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66 *Sun Indalex, supra* note 16, para 59.