

C A N A D A

PROVINCE OF QUÉBEC  
DISTRICT OF MONTRÉAL

**SUPERIOR COURT**

Commercial Division

(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended)

N°: 500-11-048114-157

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**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-

**BMO TRUST COMPANY  
BEUMER KANSAS CITY, LLC  
BEUMER CORPORATION**

Respondents

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**PETITIONERS' FACTUM IN SUPPORT OF THE RE-AMENDED MOTION TO OBTAIN THE RELEASE OF ESCROWED FUNDS (#307)**

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1. **RESTATEMENT OF THE FACTS**

1. The Bloom Lake CCAA Parties<sup>1</sup> hereby reiterate all allegations of the Re-Amended Motion to Obtain the Release of Escrowed Funds (#307) (the “**Motion**”) and of the Answer to the Written Contestation of the Respondent, Beumer Corporation, to the Bloom Lake CCAA Parties’ Re-Amended Motion to Obtain the Release of Escrowed Funds (#303) (the “**Answer**”) filed in the Court record as if expressly restated herein.

2. **THE ESCROW AGREEMENT IS AN AGREEMENT FOR DEPOSIT OF SEQUESTRATION**

2. The Escrow Agreement provides that Bloom Lake LP and Beumer desire to engage the services of BMO to hold the Escrowed Funds pending the resolution of a contractual dispute between them:

A. BLLP and Beumer desire to engage the services of the Escrow Agent to hold certain funds in escrow until the resolution of a certain contractual dispute between the Parties in the context of the sale of certain equipments to BLLP by Beumer pursuant to two Purchase Agreements dated as of October 1, 2011, and one Purchase Order, dated as of October 4, 2011, by and between the Parties (collectively, the “**Purchase Agreements**”), and for the Parties are currently in dispute.<sup>2</sup>

[Emphasis added]

3. The Escrow Agreement also provides that BMO is acting “solely as a depository”, that the Escrow Agreement does not create any “principal, agency, trust, joint venture or partnership relationship” between BMO and either Bloom Lake LP or Beumer, and that BMO is acting “as an independent contractor and shall be considered an independent contractor” by both Bloom Lake LP and Beumer with respect to the other party.<sup>3</sup>

4. The Escrow Agreement clearly provides that Escrowed Funds were to be “deposited by wire transfer by [Bloom Lake LP] with [BMO].”<sup>4</sup> [Emphasis added]

5. Furthermore, Bloom Lake LP and Beumer reserved the right to deal with the Escrowed Funds, requiring BMO to make investments and reinvestment and to otherwise deal with the Escrowed Funds only as directed and instructed jointly by Bloom Lake LP and Beumer.<sup>5</sup>

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<sup>1</sup> Unless otherwise defined herein, all initially capitalized terms used in this Factum shall have the meanings ascribed to them in the Motion and/or in the Answer.

<sup>2</sup> Escrow Agreement, Exhibit R-6 in support of the Motion at recital A.

<sup>3</sup> *Ibid.* at s. 4.2.

<sup>4</sup> *Ibid.* at s. 2.2.

<sup>5</sup> *Ibid.*, see e.g. ss. 3.1, 3.2 and 6.1.

6. In light of the foregoing, and of a reading of the Escrow Agreement as a whole, it is clear that the Escrow Agreement is a contract of deposit, which is defined at the first paragraph of art. 2280 C.C.Q. as follows:

**Art. 2280.** Deposit is a contract by which a person, the depositor, hands over movable property to another person, the depositary, who undertakes to keep it for a certain time and to restore it to him.

[...]

7. More specifically, the Escrow Agreement sets up a sequestration, which is a particular type of deposit defined at art. 2305 C.C.Q., which reads follows:

**Art. 2305.** Sequestration is the deposit by which persons place property over which they are in dispute in the hands of another person chosen by them, who binds himself to restore it, once the issue is decided, to the person who will then be entitled to it.

8. Having established that the Escrowed Funds are held on deposit with BMO, we must now determine how funds held on deposit are treated in the context of CCAA proceedings.

**3. THE TREATMENT OF FUNDS HELD ON DEPOSIT BY A THIRD PARTY IN CCAA PROCEEDINGS**

9. While no case law exists regarding the treatment of funds held on deposit pending the outcome of litigation in CCAA proceedings, there are several analogous cases in bankruptcy matters under the *Bankruptcy and Insolvency Act* (the “BIA”).

10. In general, the cases in which money held on deposit by a third party (or deposited into court as security) was found to be the property of the bankruptcy estate rest on the finding by the Court that **no payment had been made** by the debtor, such that the funds did not fall into the exception to s. 70(1) of the BIA, which reads as follows:

**70 (1)** Every bankruptcy order and every assignment made under this Act takes precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, legal hypothecs of judgment creditors, executions or other process against the property of a bankrupt, except those that have been completely executed by payment to the creditor or the creditor’s representative, and except the rights of a secured creditor.

[Emphasis added]

11. The case most applicable to the facts herein is the *D.I.M.S.* bankruptcy matter,<sup>6</sup> the relevant facts of which can be summarized as follows:

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<sup>6</sup> *D.I.M.S. Construction Inc. (Re)* (2000), SOQUIJ AZ-00021898 (Que. S.C.) (“*D.I.M.S.*”).

- a) Before its bankruptcy, the debtor had provided \$100,000 as a guarantee deposit to Jevco, who had provided a surety to all amounts owed by the debtor for wages, materials and services to a contractor;<sup>7</sup>
  - b) Also before the bankruptcy, the debtor was sued in relation to the obligations subject to the surety provided by Jevco;<sup>8</sup>
  - c) The bankruptcy trustee sought to have the \$100,000 deposit returned by Jevco;<sup>9</sup>
  - d) Jevco argued that this amount was a payment to which it was entitled, as a guarantee for the claim brought by the contractor against the debtor.<sup>10</sup>
12. The Court in *D.I.M.S.* held that, despite the fact that Jevco has a claim against the debtor, this claim was not liquid.<sup>11</sup> In fact, because Jevco had agreed to hold the deposit until the litigation between the debtor and the contractor was settled or decided by final judgment,<sup>12</sup> the deposit did not constitute a payment by the debtor to Jevco,<sup>13</sup> thereby remaining in the debtor's patrimony and not becoming part of Jevco's patrimony. Therefore, the deposit held by Jevco formed part of the debtor's estate, for the benefit of the creditors thereof.
13. Similarly, there are several cases in which the courts have ruled that funds paid by a defendant into court before bankruptcy as security for a plaintiff's claim remain the property of the defendant's bankruptcy estate, unless the funds were paid pursuant to a court order.<sup>14</sup>
14. For example, the following comments of the Supreme Court of British Columbia in *Bremner v. Larabie* is directly applicable herein:<sup>15</sup>

[14] In the case at bar, the court ordered a specific fund held pending further order or agreement. The fund represented the bankrupt's share of the proceeds of sale. There were claimants to the bankrupt's share including the Plaintiff and the judgment creditors. The Plaintiff claims he would have been entitled to a priority over the other creditors

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<sup>7</sup> *Ibid.* at pp. 2-3.

<sup>8</sup> *Ibid.* at p. 3.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.* at p. 4.

<sup>11</sup> *Ibid.* at p. 6.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> See e.g. *Re Careen*, 2004 NLSCTD 132; *Bremner v Larabie*, 2003 BCSC 67; *Ont. Dev. Corp. v. I.C. Suatac Const. Ltd.* (1976), 12 O.R. (2d) 465 (C.A.); *Amanda Designs Boutique Ltd. v. Charisma Fashions Ltd.*, [1972] 3 O.R. 68 (C.A.); *Re Power Tek Developments Inc.*, 2002 BCSC 1735; *Laker (Trustee of) v. Colby* (1987), 66 C.B.R. (N.S.) 71 (Que. S.C.).

<sup>15</sup> *Bremner v Larabie*, 2003 BCSC 67 at para. 14.

because he would have been able to establish that the Defendant was holding his interest in the property on a constructive trust for the Plaintiff. The Plaintiff says he would have been able to establish that the Defendant was unjustly enriched and the Plaintiff correspondingly deprived. He seeks his alternative relief of lifting the stay to allow him to prove that claim. At this stage, the Plaintiff is a contingent creditor of the Defendant given that he has not proceeded to judgment and has no priority over the judgment creditors.

15. The foregoing jurisprudence is applicable herein. Beumer's claim against Bloom Lake LP before the U.S. Courts is an unliquidated claim and the deposit of the Escrowed Funds with BMO certainly did not constitute a payment of this claim by Bloom Lake LP, who contests Beumer's claim, denies that any amount whatsoever is owed to Beumer and claims the right to Escrowed Funds irrespective of the existence of these CCAA proceedings.

#### **4. ANSWER TO THE SPECIFIC GROUNDS RAISED IN BEUMER'S CONTESTATION**

##### **4.1 The Escrowed Funds do not Represent a Payment to Beumer**

16. Beumer's reliance on the Court of Appeal's decision in *Bigknowledge*, is simply not applicable herein:<sup>16</sup>
- a) In *Bigknowledge*, the amounts held in escrow represented rents that were acknowledged to be due but that were withheld by the debtor as compensation for a separate claim by the debtor for reduction of purchase price in the context of an asset purchase agreement;
  - b) The debtor had no choice but to pay the rents in order to avoid being evicted, and the payment thereof, albeit in escrow, constituted performance of this obligation – i.e. it was a payment;
  - c) Furthermore, the debtor in *Bigknowledge* relinquished all control over the funds in escrow.
17. In light of the foregoing, given that the rents were acknowledged to be due by the debtor, the amounts held in escrow were more akin to a security deposit by the creditor to secure any amount that the debtor may have had a right to pursuant to its claim for reduction of purchase price.
18. Similarly, in all of the relevant jurisprudence in which the Court has found that deposits by a debtor constituted a payment: (i) the debtor had relinquished all control and right to

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<sup>16</sup> *Entreprises Bigknowledge inc. (Syndic de)*, 2008 QCCA 1613 at paras. 26-32 and 35-38.

deal with the funds in question, and (ii) the payment of such funds by the debtor constituted a true payment of a liquidated and exigible amount due.<sup>17</sup>

19. In our case, on the other hand, there is no amount acknowledged as due to Beumer. In fact, notwithstanding Beumer's allegations that the Escrowed Funds have been "earned", Beumer's claim is a contingent, unliquidated, unsecured, pre-filing claim by Beumer against Bloom Lake LP, which is the subject of contested litigation before the U.S. Federal Court.
20. Furthermore, in our case, Bloom Lake LP has not completely relinquished control over the Escrowed Funds, as mentioned above.
21. Therefore, any amounts deposited into sequestration by Bloom Lake LP in relation to Beumer's claim have certainly **not** been paid to Beumer. In fact, even in the absence of the Motion and the CCAA proceedings herein, it is fully possible that Bloom Lake LP would have the right to the entirety of the Escrowed Funds, depending on the outcome of the U.S. litigation.

#### **4.2 Bloom Lake LP and Beumer are not Co-Owners of the Escrowed Funds**

22. In its Contestation, Beumer, in direct contradiction of its principal argument that the Escrowed Funds would have left Bloom Lake LP's patrimony, makes the alternative argument that that Bloom Lake LP and Beumer are co-owners of the Escrowed Funds.
23. There are no legal grounds for finding that the funds are held in co-ownership, and the Escrow Agreement makes clear that the Escrowed Funds have been deposited by Bloom Lake LP with BMO and are held by BMO in such capacity.
24. In the present case, the Escrow Agreement certainly does not provide for undivided ownership of the Escrowed Funds, notwithstanding the cherry-picked extracts of the Escrow Agreement cited out of context by Beumer in its Contestation, as more fully discussed in the Answer.<sup>18</sup>
25. Pursuant to art. 1011 C.C.Q., indivision of ownership must arise from a contract, a succession, a judgment or by operation of law.
26. The Escrow Agreement is clearly not a contract establishing undivided co-ownership of the Escrowed Funds, as it does not create any of the legal characteristics of undivided co-ownership in respect of the Escrowed Funds. For example:
  - a) Beumer has none of the rights and obligations of an exclusive owner in respect of any portion of the Escrowed Funds, as Beumer may not alienate or

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<sup>17</sup> *Ressources Meston inc. (Syndic de)*, 2010 QCCS 428, para. 50-51, 74-76 and 82; *Restaurant chinois de Thetford Mines inc. v. Paradis & Dionne, avocats*, 2010 QCCS 2430, para. 9; *McGilton (Syndic de)*, 2006 QCCA 1561, para. 2.

<sup>18</sup> Answer, paras. 24-32.

hypothecate any portion of the Escrowed Funds, nor may any portion of the Escrowed Funds be seized by Beumer's creditors,<sup>19</sup> and

b) Beumer has no right to make use of any portion of the Escrowed Funds.<sup>20</sup>

27. Furthermore, the C.C.Q. clearly sets out a regime for the Escrow Agreement, which creates a "deposit by which persons place property over which they are in dispute in the hands of another person chosen by them, who binds himself to restore it, once the issue is decided, to the person who will then be entitled to it," as described by art. 2305 C.C.Q.

28. Pursuant to this regime, the Escrowed Funds are held in sequestration.

#### **4.3 The Escrowed Funds have not been Pledged in Favour of Beumer.**

29. As elaborated more fully in the Answer,<sup>21</sup> the Escrowed Funds have not met either of the following fundamental criteria to be considered subject to a moveable hypothec with delivery (also known as a "pledge") in favour of Beumer:

a) The Escrowed Funds are not in the possession of Beumer,<sup>22</sup>

b) Bloom Lake LP never consented to pledge the Escrowed Funds held by BMO in favour of Beumer, and BMO never consented to hold the Escrowed Funds as a pledge on behalf of Beumer.<sup>23</sup>

30. Finally, even in the event that the Escrowed Funds were deemed to be secured in favour of Beumer by a movable hypothec with delivery, which is expressly denied, the Escrowed Funds should still be returned to Bloom Lake LP, with Beumer making a secured claim in these CCAA Proceedings pursuant to the terms of the Claims Procedure Order rendered herein.

### **5. THE IMPROPER CONCLUSIONS SOUGHT BY BEUMER**

31. In its Contestation, Beumer seeks not only the dismissal of the Motion but also an order for BMO to release the Escrowed Funds to Beumer.

32. This conclusion goes well beyond the issues in dispute, and is in effect a request by Beumer to render a judgment in its favour on the merits of the litigation before the U.S. Court and on the merits of the proof of claim filed by Beumer herein in these CCAA Proceedings on December 18, 2015.

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<sup>19</sup> Art. 1015 C.C.Q., para. 2; Denys-Claude Lamontagne, *Biens et propriété*, 7th ed. (Cowansville, Qc.:Yvon Blais, 2013) at p. 248 ("**Lamontagne**").

<sup>20</sup> Art. 1016 C.C.Q., para. 1; Lamontagne, *ibid.* at p. 246.

<sup>21</sup> Answer at paras. 33-38.

<sup>22</sup> Art. 2702 C.C.Q.; Jacques Deslauriers, *Les sûretés réelles au Québec* (Montreal: Wilson & Lafleur, 2008) at para. 962 ("**Deslauriers**"); Aurore Benadiba, "Dispositions spécifiques à l'hypothèque mobilière avec ou sans dépossession" in Pierre-Claude Lafond & Yaëll Emerich, eds., *Sûretés*, looseleaf (Montreal: LexisNexis, 2011) 9/1 at para. 24 ("**Benadiba**").

<sup>23</sup> Art. 2705 C.C.Q.; Deslauriers, *ibid.*; Benadiba, *ibid.* at para. 26.

**6. CONCLUSION**

33. Beumer's claim against Bloom Lake LP in the US litigation is nothing more than an unliquidated, contingent, pre-filing, unsecured, contractual claim.
34. This claim is contested by Bloom Lake LP, and the deposit of the Escrowed Funds with BMO certainly did not constitute the payment by Bloom Lake LP of any amount to Beumer.
35. Even if successful in its claim, whether before the U.S. Court or by way of the claims procedure herein, Beumer's claim must be treated like all other unsecured, pre-filing claims.
36. In light of the foregoing, the Escrowed Funds form part of the patrimony of Bloom Lake LP and should be returned to Bloom Lake for the benefit of Bloom Lake LP's creditors.
37. Therefore, the Bloom Lake CCAA Parties respectfully seek the dismissal of Beumer's Contestation and the granting of the Motion on its conclusions.

**THE WHOLE, RESPECTFULLY SUBMITTED.**

Montréal, March 21, 2016

  
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**BLAKE, CASSELS & GRAYDON LLP**  
Attorneys for the Bloom Lake CCAA Parties



N°: 500-11-048114-157

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**SUPERIOR COURT  
DISTRICT OF MONTREAL  
(Commercial Division)**

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**IN THE MATTER OF THE PLAN OF COMPROMISE OR  
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-and-

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**PETITIONERS' FACTUM IN SUPPORT OF THE  
RE-AMENDED MOTION TO OBTAIN THE  
RELEASE OF ESCROWED FUNDS (#307)**

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**ORIGINAL**

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