**SUPERIOR COURT**

**(Commercial Division)**

**CANADA**
**PROVINCE OF QUEBEC**
**DISTRICT OF MONTREAL**

**No: 500-11-048114-157**

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

**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-

**MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON**

REPRESENTATIVES-Mis-en-cause

**UNITED STEELWORKERS, LOCAL 6254, UNITED STEELWORKERS, LOCAL 6285**

**MORNEAU SHEPELL**

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

**THE ATTORNEY GENERAL OF CANADA, ACTING ON BEHALF OF THE OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS**

**RÉGIE DES RENTES DU QUÉBEC**

Mis-en-cause

**REPLY OF THE REPRESENTATIVES OF THE SALARIED/NON-UNION EMPLOYEES AND RETIREES (Sections 11 and 23(k) of the Companies' Creditors Arrangement Act)**

## INTRODUCTION

1. This is the Reply of the Representatives of the Salaried/Non-Union Employees and Retirees in response to the Outline of Arguments of the Monitor with respect to Pension Claims dated June 14, 2017. All abbreviations from the Representatives' Argumentation Outline are continued herein;

2. The Representatives make the following three arguments in response to the Monitor's most recent submissions:

   (a) The Court should apply the Newfoundland *Pension Benefits Act* S.N.L.1996 c. P-4.01 (the "**NLPBA**") deemed trust provisions in favour of the Wabush Salaried Plan beneficiaries. Contrary to the Monitor's argument, this Court ought not to create an inconsistent priority recovery scenario dependent on what type of work was done by employees and/or the location of the work. Such an approach is not supported at law or by the terms of the Wabush Salaried Plan. Notably, and in contrast to the Monitor's arguments:

      i) The *Leco* decision serves as an effective framework for comparing and contrasting why the NLPBA ought to apply to all the members of the Salaried Plan. In *Leco*, there were exceptional circumstances and good and compelling reasons to allow the Court to apply different provisions of different pension statutes. No such exceptional circumstances and no such good and compelling reasons exist in this case. Regardless, *Leco* was a pension surplus withdrawal case. There was no underfunded pension and no deemed trust issue; and

      ii) The Monitor misstates the decisions in *Stelco* and *Stelco Ontario*. Regardless, the decisions in *Stelco Ontario* have no application to the within matter. If anything, the decisions in *Stelco* support the position of the Representatives. These cases involved whether an enhanced pension benefit ("grow-in") that is expressly applicable to members in Ontario should also be extended to enhance the pension benefits of Québec plan members;

   (b) In addition to the NLPBA deemed trust, the plan administrator's lien and charge under the NLPBA is a secured claim that is effective and applicable in the CCAA; and,

(c) There was no insolvency in these cases, nor an underfunded pension plan, nor a deemed trust issue. The NLPBA deemed trust for amounts owing to the Salaried Plan under pension legislation are valid post-CCAA filing and are unaffected by the stay of proceedings. Contrary to the Monitor's arguments, the Supreme Court of Canada in *Indalex* left open the possibility that priorities can be revisited "at the end of the CCAA liquidation period." Moreover, since that time, at least one Court has raised the possibility that priorities can be revisited following a sale, vesting order and distribution. Notably:

   i) A pension plan does not have to be wound up as of the CCAA filing date for the deemed trust to be effective;
   ii) Priority contests involving deemed trusts are determined when there is a conflict with another creditor with respect to a distribution; and,
   iii) An initial CCAA order does not have the effect of invalidating the PBA deemed trust priority regime;

***A patchwork application of pension statutes is not appropriate***

3. At paragraphs 24 to 42, the Monitor argues that the pension legislation applicable to the Wabush Pension Plans, including the Wabush Salaried Plan, ought to be determined on what type of work is being done and the location of the work. This approach is not supported at law. The Representatives reply as follows;

***a) Leco – No exceptional circumstances and no good and compelling reasons***

4. At paragraph 38, the Monitor relies on *Regie des rentes du Québec v. Commission des regimes de retraite de l'Ontario*[1] (the "***Leco***" decision). ***Leco*** **was a pension surplus withdrawal case.**[2] The facts in that case are readily distinguishable from the deemed trust motion in Wabush Mines;

5. In *Dinney* v. *Great-West Life Assurance Co.* ("***Dinney***"), Jewers J. of the Manitoba Superior Court summarized *Leco,* and the law with respect to the exceptional circumstances and good and compelling reasons that must exist, at a minimum, before a Court might consider whether to apply laws of another jurisdiction to certain members of a pension plan who are otherwise subject to another jurisdiction's PBA.

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[1] *Regie des rentes du Quebec* v. *Commission des regimes de retraite de l'Ontario*, (2000), 189 DLR (4th) 304 (Ont. Div. Ct.), Book of Authorities of Monitor ("**BOA of Monitor**"), Tab 6.

[2] In *Leco,*the Pension Commission of Ontario (the "**Commission**") approved the withdrawal and payment of the surplus remaining in the Leco Plan (the "**Commission's Decision**") in accordance with the procedural framework of the Ontario PBA and purportedly pursuant to its powers under the terms of a reciprocal agreement entered into by the Commission and the *Regie des rentes du Quebec* (the "**Regie**") and other provincial pension authorities. In turn, the Regie brought an application for judicial review of the Commission's Decision, resulting in the *Leco* decision. The Regie argued that the Commission ought to have applied Quebec pension legislation to Quebec members of the Plans and that the Commission's Decision should be quashed and the matter remitted to the Commission for reconsideration. The Ontario Divisional Court granted the Regie's application. Namely, the Court quashed the Commission's Decision insofar as it affected Quebec members of the Plan and remitted the matter to the Commission for reconsideration.

9 In that case [*Leco*], McColl-Frontenac Petroleum Inc. made an application to the Pension Commission of Ontario under the Ontario *Pension Benefits Act* to obtain the Commission's consent to the withdrawal of the surplus remaining in the pension plan of Leco Inc., a predecessor corporation to McColl-Frontenac. The Commission approved the payment of the surplus to McColl-Frontenac and the applicant Régie des rentes du Québec representing Québec employees involved in the plan moved to quash the decision by way of judicial review on the ground that it was not reasonable. The Ontario Superior Court of Justice Divisional Court quashed the decision on the ground that the Commission should have followed Québec law.

10 The plan specifically provided as follows:

> 13.6 The Plan shall be construed and administered in accordance with the laws of the Province of Québec, the Province of Ontario and the rules of the Department of National Revenue.
>
> 14.2 ..., in the event of the termination of the Plan, the Employer shall not be obligated to make any further contributions to the Plan and, if there be any excess to the Plan after the benefits accrued under the Plan have been purchased from an Insurance Company, such excess amount shall be paid to the Employer. It is provided, however, that the provisions of any Pension Benefits Act to which the Plan is subject will be applied on termination of the Plan.

11 The plan included members in Ontario and Québec but the majority of members reported to work in Ontario and for these reasons, under the terms of a reciprocal agreement between Ontario and Québec, the plan was registered solely with the Commission in Ontario and the Commission acted as the "major authority" in relation to the plan.

12 It will be seen that the plan provided that upon termination, any excess [i.e., surplus] shall be paid to the employer and presumably, it was for this reason that the Ontario Commission decided to order the excess [surplus] amount payable to McColl-Frontenac. However, in so doing the Commission ignored and did not give effect to the provisions of the Québec Supplemental Pension Plans Act which specifically provides that ***a member may request arbitration if no agreement is reached on surplus distribution when such arbitration had been requested.***

13 The court held that in the absence of specific provisions stating otherwise either in the reciprocal agreement or in the Québec Act, the Commission knew or ought to have known as a matter of constitutional law that the law of Québec applied to McColl-Frontenac's surplus application insofar as it affected the Québec members.

14 However, in my opinion that case [*Leco*], is distinguished from the case at bar. ***In the Ontario case [Leco], the plan specifically stated that it was to be construed and administered in accordance with the laws of the Province of Québec as well of the Province of Ontario*** and the rules of the Department of National Revenue. Not only that, but the plan provided that the provisions of any

> Pension Benefits Act to which the plan is subject will be applied on termination of the plan. There are ***no such provisions in the plan in question. I can see no reason in principle why, where the proper law of the plan is Manitoba, the entitlement of the pensioners should be governed by the laws of another province.*** There is nothing in the plan indicating an intention that more than one law should govern. I agree with the statement in the case of *Gerling Global General Insurance Co. v. Canadian Occidental Petroleum Ltd.,* [1998] A.J. No. 918 (Alta. Q.B.) (page 12):
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> > ... Although there may be exceptional circumstances where it may be inferred that a contract is to be governed by the law of more than one jurisdiction, ***the courts in Canada are reluctant to split the proper law of a contract without good and compelling reason. Even in situations where the contract may be performed in more than one place, the more usual determination is that the substance of the contract is to be determined by one law only, although the method and manner of performance may be regulated by the law of the place of performance*** (*Montreal Trust Co*., [1966] 1 O.R. 258, *Kenton Natural Resources Co. v. Burkinshaw* (1983), 47 A.R. 321, Q.B.). It is also clear that the proper law of a contract does not shift from time to time, but is to be determined as of the date the contract was made (Colmenares, [1967] S.C.R. 443 at 449-450).
>
> 15 There may very well be instances where Manitoba law would have to give way to the laws of another province; for example, one can conceive of a situation where one province would lay down regulatory standards ***for the protection of persons employed in that province*** and such like but in my view this is not one of those cases. This case is essentially one of the interpretation of the plan and the court can certainly infer - as I do here - ***that the parties intended the plan and specifically the vesting provisions to be interpreted in accordance with Manitoba law.***
>
> 16 In the result, I would hold and direct that the extra-provincial employees should be included in the class.[3] [emphasis added]

6. In *Leco,* the plan expressly stated that it was to be construed and administered in accordance with the laws of <u>two provinces</u>: the Province of Québec, as well as the Province of Ontario;

7. Secondly, the Wabush Salaried Plan makes no specific reference of the federal pension statute. Also, the Wabush Salaried Plan specifically and carefully limits the application of the Québec SPPA to only specific areas, which does not include the deemed trust. In all other respects, the applicable law, including for the deemed trust, is pursuant to the *NLPBA*; [4]

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[3] *Dinney* v. *Great-West Life Assurance Co.* [2002] M.J. No. 466 (Man. Q.B.), Book of Authorities of Representative Counsel ("**BOA of Rep Counsel**"), Tab 14, at para. 133 paras. 9 to 16.

[4] Wabush Salaried Plan, Monitor's Amended Motion Record, Exhibit R-24, sections 12.06 and 14.

8. Further, in *Leco,* applying the Quebec law was more advantageous to the affected members; whereas, in this case, applying the approach argued by the Monitor would lead to disadvantage to the Québec members;

9. Finally, the Wabush Salaried Plan does not provide that different rules should apply for deemed trust priority recovery depending on the type of work done;

10. ***Conclusion:*** As set out above, the *Leco* decision serves as an effective framework for comparing and contrasting why the Newfoundland PBA should apply to all the members of the Wabush CCAA Parties. In *Leco*, there were exceptional circumstances and good and compelling reasons to allow the Court to split the proper law of the contract. No such exceptional circumstances and no such good and compelling reasons exist in this case;

***b) The Monitor misstates Stelco***

11. At paragraph 38, the Monitor relies on *Stelco Inc.* v. *Ontario (Superintendent of Pensions)*[5] ("***Stelco Ontario***") and the related case *Boucher* v. *Stelco Inc.*[6] ("***Stelco***");

12. The Monitor misstates the rulings in the *Stelco* and *Stelco Ontario* cases. *Stelco Ontario* has no application to Wabush Mines. If anything, the decision in *Stelco* supports the position of the Salaried Representatives;

13. Firstly, *Stelco Ontario* and *Stelco* have nothing to do with the deemed trust or funding.

    (a) *Stelco Ontario* dealt primarily with whether there was a reorganization of Stelco pursuant to the Ontario *Pension Benefits Act* and whether the Superintendent in Ontario could make an order or adopt a plan that affected the rights of the employer outside Ontario; and,

    (b) *Stelco* dealt with whether the Québec courts have jurisdiction to rule on that matter, and, whether Québec residents are entitled to enhanced "grow-in" benefits on the partial wind-up of the plan pursuant to *Ontario law.*

14. Secondly, *Stelco* and *Stelco Ontario* confirm the Representatives' position that the laws of Newfoundland ought to apply to the interpretation and application of the Wabush Salaried Plan because the plan expressly says so – even for those members that work in another province;

15. Thirdly, in the *Stelco* matter, the only Courts to rule on the merits as to whether the Québec residents are entitled to grow-in benefits pursuant to Ontario law were the Québec Court of Appeal and the Québec Superior Court. While divided on other issues, **the unanimous Québec Court of Appeal, as well as the Québec Superior Court judge all applied Ontario law to the Québec employees of Stelco regarding grow-in**

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[5] *Stelco Inc.* v. *Ontario (Superintendent of Pensions)*, 126 DLR (44th) 767 (Ont. C.A.), BOA of Monitor, Tab 5.
[6] *Boucher v. Stelco Inc.*, [2005] S.C.R. 279 (S.C.C.), BOA of Monitor, Tab 7.

**benefits.** Some of the judges believed that Ontario law grants Québec residents grow-in rights under the Ontario PBA, whereas other judges (still applying the Ontario PBA to the Québec workers) believed that the Ontario PBA only grants grow-in benefits to "a member in Ontario", mainly due to the unique wording of the grow-in benefit section;

16. Notably, the Ontario *PBA* has unique provisions that create enhanced grow-in pension benefits and expressly limits this section to apply only to members **in Ontario**. At that time, the grow-in provision under the Ontario *PBA* provided:

> Combination of age and years of employment
>
> 74.--(1) **A member in Ontario** of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least fifty-five, at the effective date of the wind up of the pension plan in whole or in part, has the right to receive,
>
> > (a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;
> >
> > (b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,
> >
> > > (i) the normal retirement date under the pension plan, or
> > >
> > > (ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date; or
> > >
> > > (c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date.[7] [emphasis added]

17. In *Stelco*, a pension plan registered in Ontario included some members employed in Québec. In 1990, Stelco closed a number of its facilities, including three facilities in Québec. The Ontario Superintendent of Financial Services (then the Superintendent of Pensions) (the "**Superintendent**") ordered a partial wind-up of the plan. In determining the entitlements of the affected members employed in Québec, Stelco did not provide "grow-in" benefits under the Ontario *PBA* because they were employed in Québec;

18. Based on the language of the Ontario *PBA*, Stelco took the position that grow-in benefits under the Ontario *PBA* apply only to members employed in Ontario. The Superintendent approved Stelco's partial wind-up report. That approval was at the heart of the *Boucher* case;

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[7] *Pension Benefits Act*, RSO 1990, c. P. 8 (effective December 31, 1991 to December 15, 2004).

19. The *Stelco Ontario* decisions dealt with other matters. *Stelco Ontario* concerned the authority of the Superintendent to consider the termination of employees outside of Ontario in deciding whether to order a pension plan partially wound up. Following the decision in *Stelco Ontario*, the plan was ordered partially wound up and a partial wind-up report was filed with the Superintendent. The Superintendent approved the partial wind-up report that provided grow-in benefits only to the affected members in Ontario. The affected Québec members **did not appeal the decision that grow-in benefits only apply to members in Ontario.** As noted by the Supreme Court of Canada in *Stelco*:

> 18. ...The [Québec] appellants are challenging final decisions regarding the administration and wind up of the pension plan that were made by the competent administrative authorities **even though they have not availed themselves of the administrative appeals or legal proceedings that are available in such cases**.
>
> 19. Despite all the attempts to sidestep it, the question of the nature and effect of the Superintendent's decision remains the central issue in this appeal...
>
> ...
>
> 31. ...**I repeat that no appeal or judicial review proceedings have been instituted in Ontario**. ...[8]

20. The Québec members who also sought the enhanced grow-in benefits began an action before the Québec Superior Court claiming entitlement to grow-in benefits based on a provision in the plan stating it "shall be construed and interpreted in accordance with the laws of the Province of Ontario." The Québec Superior Court found it had jurisdiction to hear the case but concluded the members employed in Québec were not entitled to grow-in benefits based on the language in section 74(1) of the PBA that says "A member in Ontario". The Judge applied Ontario law to the Québec residents and, to his mind, Ontario's PBA itself limited this benefit to employees who had been employed in Ontario; [9]

21. The Québec employees appealed. The Québec Court of Appeal dismissed the appeal:[10]

    (a) According to Robert C.J.Q., the Superior Court had jurisdiction, and the Ontario law was applicable. The Chief Justice concluded that a proper interpretation of the Ontario legislation did not permit the advantage of the grow-in benefits to be limited to plan members employed in Ontario.

    (b) Morin J.A. concluded that the Québec Superior Court lacked jurisdiction. The action, as brought, could not be allowed without first reversing the Superintendent's decision. In the alternative, he recognized, as Durocher J. had, that the Ontario legislation limited early retirement benefits to plan members employed in Ontario.

    (c) Although Nuss J.A. concurred with Robert C.J.Q. regarding the jurisdiction of the Superior Court, he nevertheless concluded that the appeal should be dismissed

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[8] *Boucher*, *supra* note 8, BOA of Monitor, Tab 7, at para. 18-19 and 31.
[9] *Ibid*, at para. 12.
[10] *Ibid*, at para. 13.

because he agreed with Morin J.A, that the Ontario *PBA* limited grow-in benefits to plan members employed in Ontario:

B. Judicial History

1. Québec Superior Court (2000), 26 C.C.P.B. 20

12 The appellants first lost in the Superior Court. Durocher J. began by recognizing that the Québec Superior Court had jurisdiction over the appellants' action. He then decided that he had to rule on the merits, and dismissed their claims. In his view, even though ***the plan was subject to Ontario law***, the appellants were not entitled to receive early retirement benefits. Only plan members employed in Ontario were so entitled. ***To his mind, Ontario's Pension Benefits Act itself limited this benefit to pensioners who had been employed in Ontario***. The appellants then appealed to the Québec Court of Appeal.

2. Québec Court of Appeal (2004), 241 D.L.R. (4th) 266

13 The Québec Court of Appeal was divided on the outcome of the appeal. Robert C.J.Q. would have allowed the appeal and the action. Morin and Nuss JJ.A. agreed, but for different reasons, that the appeal should be dismissed.

14 According to Robert C.J.Q., the Superior Court had jurisdiction to hear the appellants' action. Although it was in fact an action based on contracts of employment, those contracts had, as is permitted under Québec private international law, been made subject to Ontario law. Disagreeing with the Superior Court, ***the Chief Justice concluded that a proper interpretation of the Ontario legislation did not permit the advantage of early retirement benefits to be limited to plan members employed in Ontario***. It was also his view that such a conclusion was not an impermissible collateral attack on the decision of Ontario's Superintendent of Pensions. The Superintendent had granted the appellants the minimum benefits provided for under Québec law; he had not decided that they could not receive fuller benefits under Ontario law. Moreover, Robert C.J.Q. was of the view that the Québec Court of Appeal had held in a previous decision, J.J. Newberry Canadian Ltd. v. Régie des rentes du Québec, [1986] R.J.Q. 1884, that courts of original general jurisdiction have jurisdiction to interpret the provisions of a pension plan and a statute relating to the eligibility of pension plan members for benefits. ***He would therefore have found in favour of the appellants in their action***.

15 Morin J.A. took a completely different approach to the legal issues in the appeal and to the consequences of resolving them. He concluded that the Québec Superior Court lacked jurisdiction. In his view, the proceedings amounted to an application for judicial review of, or a disguised appeal from, the decision of Ontario's Superintendent of Pensions on the payments owed following the partial wind up of Stelco's pension plan. The action, as brought, could not be allowed without first

> reversing the Superintendent's decision. The issues raised by the appellants should have been raised by way of administrative appeals to the Pension Commission and actions in the Divisional Court of Ontario. The applicability of Ontario law to the plan barred the Québec courts from exercising jurisdiction. ***In the alternative, he recognized, as Durocher J. had, that the Ontario legislation limited early retirement benefits to plan members employed in Ontario.*** For these reasons, he concluded that the appeal should be dismissed. Although Nuss J.A. concurred with Robert C.J.Q. regarding the jurisdiction of the Superior Court, he nevertheless concluded that the appeal should be dismissed because ***he agreed with Morin J.A. that early retirement benefits were limited to plan members employed in Ontario***. The case was then brought before this Court.[11] [emphasis added]

22. The Québec employees appealed to the Supreme Court. In November 2005, the Supreme Court of Canada dismissed the appeal holding that the Superintendent had the authority to approve the partial wind-up report pursuant to the Ontario *PBA* and the memorandum of reciprocal agreement between the various pension regulators in Canada. Interestingly, the Supreme Court also held that the Québec courts did *not* have jurisdiction to hear this case, based on the principle of *res judicata* (that is, the Superintendent's decision was not contested by the Québec employees in an Ontario court and is therefore final). The Supreme Court did not decide the issue as to whether the Québec or Ontario pension benefits acts applied to the Québec members:

> 39. Since the action as brought is inadmissible, there is no need to consider the other issues raised by the parties. Consequently, for the reasons set out above, I concurred with my colleagues that the appeal should be dismissed with costs.[12]

23. ***Conclusion:*** The decisions in *Stelco* and *Stelco Ontario* do not support the Monitor's position. The decisions in *Stelco Ontario* have no application to the within matter. Further, if anything, the decisions in *Stelco* support the position of the Representatives;

### *Plan Administrator's Lien and Charge*

24. At paragraphs 66 to 70, the Monitor relies on the decision of the Ontario Court of Appeal in *Harbert Distressed Investment, L.P.* v. *General Chemical Canada Ltd.*[13] ("***General Chemical***") for the proposition that the PBA lien and charge do not create secured creditor status in these CCAA proceedings, and that it only extends to the same amounts secured by the deemed trust;

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[11] *Ibid*, at paras. 12 to 15.

[12] *Ibid*, paras 39.

[13] *Harbert Distressed Investment, L.P.* v. *General Chemical Canada Ltd.*, 2007 ONCA 600 (CanLII); leave to appeal to the SCC denied: 2008 CanLII 6391 (S.C.C.), BOA of Monitor, Tab 10.

25. *General Chemical* is of no assistance. That case only considered the effect of the pension lien and charge **in a bankruptcy,** not a CCAA and turned on the definition of secured creditor in the BIA, which is different from the definition in the CCAA;

26. The BIA requires that a secured creditor be "a person holding a...charge or lien..." for "a debt due or accruing **due to the person** from a debtor...".

> 2 In this Act, ...
>
> **secured creditor** means **a person holding a** mortgage, hypothec, pledge, **charge or lien** on or against the property of the debtor or any part of that property as security for a **debt due or accruing due to the person from the debtor**, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable, and includes
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> > (a) a person who has a right of retention or a prior claim constituting a real right, within the meaning of the Civil Code of Québec or any other statute of the Province of Quebec, on or against the property of the debtor or any part of that property, or
> > (b) any of
> > > (i) the vendor of any property sold to the debtor under a conditional or instalment sale,
> > > (ii) the purchaser of any property from the debtor subject to a right of redemption, or
> > > (iii) the trustee of a trust constituted by the debtor to secure the performance of an obligation,
>
> if the exercise of the person's rights is subject to the provisions of Book Six of the Civil Code of Québec entitled Prior Claims and Hypothecs that deal with the exercise of hypothecary rights; (créancier garanti)[14] [emphasis added]

27. In contrast, the CCAA is broader. It is not restricted to a person to whom a debt is owed directly. Under the CCAA, a secured creditor includes "a **holder** of a... charge, lien...**for indebtedness of the debtor** company... in respect of, all or any property of the debtor company, whether the **holder or beneficiary** is resident or domiciled within or outside Canada...". Therefore, a secured creditor under the CCAA readily includes the plan administrator's lien and charge.

> 2 (1) In this Act, ...
>
> **secured creditor** means **a holder of a** mortgage, hypothec, pledge, **charge, lien** or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security **for indebtedness of the debtor company,** or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, **whether the holder or beneficiary** is resident or domiciled within or

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[14] *BIA,* section 2.

> outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds; (créancier garanti)[15] [emphasis added]

28. Regardless, the PBA lien and charge do not need to meet the definition of secured creditor under the CCAA (or the BIA) to succeed. Subject only to paramountcy, provincial legislation (including the PBA lien and charge) continues to operate in a CCAA;

29. The BIA sets out a comprehensive code with respect to the scheme of priorities and distribution amongst various creditors. Creditors must fit within those various definitions of the BIA to establish their order of priority. In contrast, the CCAA has no such comprehensive code of priorities and distribution. Under the CCAA, there is no need for the lien and charge to fall within any such definitions found in the CCAA in order for that lien and charge to have effect in a CCAA;

30. ***Conclusion:*** Accordingly, the plan administrator's lien and charge under the PBA is a secured claim in the CCAA;

***A Deemed Trust can be valid post-CCAA filing***

31. At paragraphs 206 to 218, the Monitor relies on the lower court decision in *Grant Forest,* which incorrectly references *Indalex* for the proposition that once a CCAA Initial Order has been issued, a PBA deemed trust cannot arise or operate. Those findings were not upheld by the appellate Courts in those cases, and are not supported at law;

32. In *Indalex,* the Supreme Court of Canada did not support such a proposition;

33. Moreover, in *Grant Forest,* the Ontario Court of Appeal did not expressly affirm Justice Campbell's conclusion on that point;

***a) A pension plan does not have to be wound up as of the CCAA filing date for the wind-up deemed trust to be effective***

34. In *Grant Forest*, the motion judge erred by introducing a different timing concept. The motion judge states that "The deemed trust that arises upon wind up prevails when the wind up occurs before insolvency as opposed to the position that arises when wind up arises after the granting of the Initial Order."[16] There is no support in the CCAA, the PPSA, or the Supreme Court's decision in *Indalex* for such a statement. On the contrary, the Supreme Court decision holds that the validity of the PBA wind up deemed trust is to be determined *as of the date of the sale/distribution motion*. The date of the Initial CCAA Order is irrelevant:

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[15] *CCAA,* section 2

[16] *Grant Forest Products Inc. (Re)*, 2013 ONSC 5933, BOA of Monitor, Tab 24, at para. 7.1.

> [46] Unlike s. 57(3), which provides that the deemed trust protecting employer contributions exists while a plan is ongoing, ***s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up. This is a choice made by the Ontario legislature. I would not interfere with it. Thus, the deemed trust entitlement arises only once the condition precedent of the plan being wound up has been fulfilled. This is true even if it is certain that the plan will be wound up in the future.*** ***At the time of the sale,*** the Executive Plan was in the process of being, but had not yet been, wound up. Consequently, the deemed trust provision does not apply to the employer's wind-up deficiency payments in respect of that plan. [emphasis added]

35. In fact, the Supreme Court of Canada in *Sun Indalex Finance, LLC v. United Steel Workers* ("***Indalex***") left open the possibility that priorities can be revisited "at the end of the CCAA liquidation period."

> 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, [2004] 1 S.C.R. 60 (S.C.C.), 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*.[17] [emphasis added]

36. The motion judge in *Grant Forest* further errs where he broadly states: "The Supreme Court of Canada's decision in *Indalex* stands for the proposition that provincial provisions in pension areas prevail prior to insolvency but once the federal statute is involved the insolvency provision regime apples."[18] This statement is incorrect. The Supreme Court in *Indalex* did not make such a statement;

37. On the contrary, the Supreme Court made clear that provincial laws, including the PBA, continue to apply in CCAA, subject only to paramountcy;[19]

38. ***Conclusion:*** The Monitor's argument that the Wabush Salaried Plan has to be wound up prior to the CCAA filing date for the deemed trust to be effective must fail and is wrong at law. In this case, the Wabush Salaried Plan was terminated effective as of December 15, 2015. A summary of the 18 sale transactions is set out in Representatives Argument, dated May 12, 2017. Fifteen (15) of the eighteen (18) reported sales occurred post termination of the Wabush Salaried Plan. More importantly, no distributions have occurred;

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[17] *Sun Indalex Finance, LLC v. United Steel Workers*, 2013 SCC 6, BOA of Rep Counsel, Tab 8.
[18] *Grant Forest, supra* note 22, BOA of Monitor, Tab 24, at para. 80.
[19] *Indalex, supra* note 23, BOA of Rep Counsel, Tab 8, at para. 52.

***b) Priority contests involving the PBA deemed trust are determined at the time there is a conflict with another creditor with respect to a distribution***

39. Creditor priorities continue to evolve during CCAA proceedings, as they would under normal company operations. In relation to priority contests between the beneficiaries of the PBA deemed trust and another creditor, the relevant time for deciding that contest will be at the time of the distribution of assets, either during the CCAA proceeding or when the CCAA is effectively concluded, and a dispute arises among creditors as to whom the assets should be paid. Prior to those points in time, the CCAA contemplates that creditors' priority rights continue to evolve during the course of the CCAA proceeding. Notably:

    (a) In *Indalex*, the majority of the Supreme Court analyzed the rights of the competing creditors as of the company's date of its sale approval and distribution motion, i.e., not as of the date of the CCAA filing; and,

    (b) The Ontario Court of Appeal has held that priority contests between competing secured creditors "must be resolved as of the time when their respective security interests came into conflict", i.e., not as of the date of the filing of an insolvency proceeding;[20]

40. Therefore, based on *Indalex* and caselaw, and recognizing the practical process of how a pension plan wind up occurs in a CCAA proceeding where the company has abandoned the pension plan, the PBA deemed trust can readily become applicable if a pension plan is wound up *after* the CCAA filing date;

41. ***Conclusion:*** There is no legal support whatsoever for the motion judge's statement in *Grant Forest* that a pension plan must be wound up as of the CCAA filing date in order for the deemed trust to be effective. Priority contests involving the PBA deemed trust are determined at the time there is a conflict with another creditor with respect to a distribution. In this case, distribution has not yet occurred. Accordingly, the wind-up deemed trust relating to the Wabush Salaried Plan is effective;

***c) An initial CCAA order does not operate to invalidate the PBA deemed trust priority regime***

42. In *Grant Forest,* the motion judge erred in his application of the doctrine of paramountcy and in particular, in concluding that the issuance of the *Grant Forest* Initial CCAA Order (which is similar to most other initial CCAA orders) had the wholesale effect of rendering the PBA priority regime of no effect in a CCAA proceeding. Paramountcy is not engaged by the mere issuance of an initial CCAA order;

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[20] *Ontario Dairy Cow Leasing Ltd. v. Ontario Milk Marketing Board*, [1993] O.J. No. 4634 (Ont. C.A.), Reply Book of Authorities of Representative Counsel ("**Reply BOA of Rep Counsel**"), Tab 1, at para. 4; *Loeb Canada Inc. v. Caisse Populaire Alexandria Ltée* 2004 CarswellOnt 4973, 7 P.P.S.A.C. (3d) 19 (Ont. S.C.J.), Reply BOA of Rep Counsel, Tab 2, at paras. 70-76.

43. As the Supreme Court has repeatedly held, provincial law continues to apply in CCAA proceedings, subject only to paramountcy.[21] In determining whether to issue a specific order under the CCAA which overrides a valid provincial law, the motion judge must be satisfied that the CCAA's purpose would be frustrated by the provincial law. There is no evidence to support that the PBA deemed trust regime that determines priority among creditors frustrates the issuance of a CCAA initial order;

44. ***Conclusion:*** In this case, there is no evidence justifying overriding the provincial priority law in the PBA, which requires a high burden in any event;[22]

***d) Ivaco is of no assistance***

45. At paragraphs 216 and 218, the Monitor also relies on *Ivaco* to support the view that during a stay of proceedings, a deemed trust cannot operate. However, *Ivaco* is no longer good law;

46. Again, *Ivaco* does not stand for such a proposition. Regardless, in light of the Supreme Court's decision in *Indalex,* any reliance on *Ivaco* on this issue is misplaced;

47. In *Indalex,* the Supreme Court of Canada did not refer to *Ivaco*. Before the Ontario Court of Appeal, in *Indalex,* the Ontario Court of Appeal expressly stated that *Ivaco* was "of little assistance" and is "not determinative of the scope of the deemed trust…".

> [105] ***Much reference has been made to the two cases in which s. 57(4) has been discussed: Ivaco Inc.*** (Re), 2005 CanLII 27605 (ON SC), [2005] O.J. No. 3337, 12 C.B.R. (5th) 213 (S.C.J.), affd (2006), 2006 CanLII 34551 (ON CA), 83 O.R. (3d) 108, [2006] O.J. No. 4152 (C.A.) and *Toronto-Dominion Bank v. Usarco*, [1991] O.J. No. 1314, 42 E.T.R. 235 (Gen. Div.). ***In my view, these decisions are of little assistance in deciding this issue.***
>
> [106] ***Factually, Ivaco and Usarco differ from the present case. In Ivaco and Usarco, the prospect of bankruptcy was firmly before the court,*** whereas in this case, at its highest, there is a motion to lift the stay and file for bankruptcy.
>
> [107] ***Moreover, there are conflicting statements in Ivaco and Usarco regarding the applicability of the deemed trust to wind up deficiencies.*** In *Usarco*, a bankruptcy petition had been filed but no steps had been taken to proceed with the petition. The company was not under CCAA protection. ***In that context, Farley J., the motion judge, held that the deemed trust provision referred only to the regular contributions together with special contributions that were to have been made but had not been.*** [See Note 8 below] In *Ivaco*, the major financers and creditors wished to have the CCAA proceeding, which was functioning as a liquidation, transformed into a bankruptcy proceeding. ***The case was focused primarily on whether there was a reason to defeat the bankruptcy petition. In Ivaco, Farley J. took a different view of the scope of the s. 57(4)***

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[21] *Indalex supra* note 23, BOA of Rep Counsel, Tab 8, at para. 52.
[22] *Quebec (Attorney General) v. Canadian Owners and Pilots Association,* [2010] 2 S.C.R. 536, BOA of N&L Superintendent, Tab 30, at paras. 66-68.

> ***deemed trust, stating that in a non-bankruptcy situation, the company's assets were subject to a deemed trust on account of unpaid contributions and wind up liabilities.*** [See Note 9 below] ***On appeal, although this court indicated that it thought that Farley J.'s*** [page661] ***statement in Usarco was correct, it found it unnecessary to decide the matter. Accordingly, these decisions are not determinative of the scope of the deemed trust created by s. 57(4) of the PBA.***[23] [emphasis added]

48. *Ivaco* was released at a time when the concept of a "liquidating CCAA" and distributions to pension creditors from a CCAA proceeding were unclear at law,[24] which is no longer the case.[25] Once all the assets have been sold in a liquidating CCAA, such as the Wabush Mines CCAA proceeding, the only major remaining step is to distribute the assets to creditors and such distributions are commonly made in CCAA proceedings without resorting to a bankruptcy;

49. The law and common practice of distributions in CCAA proceedings was recently summarized in *Nortel,* where Newbould, J. distinguished *Ivaco*:

> [53] I first note that the CCAA makes no provision as to how money is to be distributed to creditors. This is not surprising taken that plans of reorganization do not necessarily provide for payments to creditors and taken that the CCAA does not expressly provide for a liquidating CCAA process.
>
> ...
>
> [55] I note also that payments to creditors without plans of arrangement or compromises are often ordered. In *Timminco Limited (Re)*, 2014 ONSC 3393 (CanLII), Morawetz J. noted at para. 38 that the assets of Timminco had been sold and distributions made to secured creditors without any plan and with no intention to advance a plan.
>
> ...
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> [57] Justice Gascon did not accept this argument [that a distribution under CCAA can only occur with a Plan of Compromise]. He stated:
>
>> 71 Despite what the Bondholders argue, it is neither unusual nor unheard of to proceed with an interim distribution of net

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[23] *Indalex Ltd., Re,* 2011 ONCA 265,Reply BOA of Rep Counsel, Tab 3, at paras. 105 to 107.

[24] Indeed, in *Re Nortel Networks Corporation et al.*, 2014 ONSC 5274, BOA of Rep Counsel, Tab 22, at paras. 49 and 60, Newbould J. dismisses the *obiter* statement in *Ivaco* that a CCAA proceeding is "spent" where only distribution remains to be effected.

[25] In *Timminco* (See Order of the Honourable Mr. Regional Senior Justice Morawetz dated June 24, 2014 (Authorizing the Monitor to make Distributions *in Timminco Limited (Re)*), a priority distribution was made to the beneficiaries of Timminco's Ontario plan members (the Haley Plan) pursuant to the PBA deemed trust that continues to operate in CCAA proceedings. Distributions in *Timminco* were also made to beneficiaries of Timminco's Quebec pension plan who are accorded similar priority under the Quebec SPPA as Ontario pension plan members under the PBA (See *Timminco ltée (Arrangement relative à),* 2014 QCCS 174, BOA of Rep Counsel, Tab 11, at paras. 177-180. Further, in *Indalex,* distributions were made to the pension beneficiaries following a settlement achieved after the Supreme Court decision that a subsequent motion by retirees based on the PBA deemed trust: *Indalex Limited (Re),* 2013 ONSC 7932, BOA of Rep Counsel, Tab 9.

> proceeds in the context of a sale of assets in a CCAA reorganization. Nothing in the CCAA prevents similar interim distribution of monies. There are several examples of such distributions having been authorized by Courts in Canada. (underlining added by Justice Newbould).[26]

50. ***Conclusion:*** *Ivaco* is irrelevant and of no assistance. Further, subsequent to *Ivaco,* Courts have acknowledged that a distribution under the CCAA can occur without a Plan of Compromise. Regardless, in light of the Supreme Court's decision in *Indalex* (as set out above), any reliance on *Ivaco* on this issue is misplaced.

**THE WHOLE RESPECTFULLY SUBMITTED.**

Toronto, this 21st day of June, 2017

**KOSKIE MINSKY LLP**
**per: Andrew J. Hatnay and Demetrios Yiokaris**

*Court-appointed Representative Counsel to the Applicants/Objecting Parties, Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson as Court-appointed Representatives of all non-union employees and retirees of the Wabush CCAA Parties*

[26] *Re Nortel Networks Corporation et al*, *supra* note 31, BOA of Rep Counsel, Tab 22.

**Schedule A**


1. *Aveos Fleet Performance Inc.*, 2013 QCCS 5762
2. *Boucher* v. *Stelco Inc.*, [2005] SCJ No. 35 (S.C.C.)
3. *Dinney* v. *Great-West Life Assurance Co.*, 2002 MBQB 277
4. *Grant Forest Products Inc. (Re)*, 2013 ONSC 5933
5. *Harbert Distressed Investment, L.P.* v. *General Chemical Canada Ltd.*, 2007 ONCA 600
6. *Indalex Ltd., Re*, 2011 ONCA 265
7. *Indalex Limited (Re),* 2013 ONSC 7932
8. *Loeb Canada Inc. v. Caisse Populaire Alexandria Ltée* 2004 CarswellOnt 4973
9. *Re Nortel Networks Corporation et al.*, 2014 ONSC 5274
10. *Ontario Dairy Cow Leasing Ltd. v. Ontario Milk Marketing Board*, [1993] O.J. No. 4634 (Ont. C.A.)
11. *Quebec (Attorney General) v. Canadian Owners and Pilots Association,* [2010] 2 S.C.R. 536
12. *Regie des rentes du Quebec* v. *Commission des regimes de retraite de l'Ontario*, (2000), 189 DLR (4th) 304 (Ont. Div. Ct.)
13. *Stelco Inc.* v. *Ontario (Superintendent of Pensions)*, 126 DLR (44th) 767 (Ont. C.A.)
14. *Sun Indalex Finance, LLC v. United Steel Workers*, 2013 SCC 6
15. *Timminco ltée (Arrangement relative à),* 2014 QCCS 174

## Schedule B

## Relevant Statutes

***Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3**

**Definitions**

2 In this Act,

secured creditor means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable, and includes

(a) a person who has a right of retention or a prior claim constituting a real right, within the meaning of the Civil Code of Québec or any other statute of the Province of Quebec, on or against the property of the debtor or any part of that property, or

(b) any of

(i) the vendor of any property sold to the debtor under a conditional or instalment sale,

(ii) the purchaser of any property from the debtor subject to a right of redemption, or

(iii) the trustee of a trust constituted by the debtor to secure the performance of an obligation,

if the exercise of the person's rights is subject to the provisions of Book Six of the Civil Code of Québec entitled Prior Claims and Hypothecs that deal with the exercise of hypothecary rights; (créancier garanti)

***Companies' Creditors Arrangement Act, RSC 1985, c C-36***

**Definitions**

2 (1) In this Act,

secured creditor means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds; (créancier garanti)

***Pension Benefits Act*, R.S.O. 1990, c. P.8 (effective December 31, 1991 to December 15, 2004)**

**Grow-in benefits for members**

**Combination of age and years of employment**

74.--(1) A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least fifty-five, at the effective date of the wind up of the pension plan in whole or in part, has the right to receive,

(a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;

(b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,

(i) the normal retirement date under the pension plan, or

(ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date; or

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date.

**ORIGINAL**

Nº / No.: 500-11-048114-157

SUPERIOR COURT

(COMMERCIAL DIVISION)

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

**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 -**

**MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL & NEIL JOHNSON**

**REPRESENTATIVES-Mis-en-cause**

***REPLY OF THE REPRESENTATIVES OF THE SALARIED EMPLOYEES AND RETIREES***
***in response to the Monitor's Amended Motion for Directions with respect to Pension Claims***

**ANDREW HATNAY, DEMETRIOS YIOKARIS, AND AMY TANG**

Attorneys for the Representatives-Mis-en-cause Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson