CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

Nº 500-11-048114-157

SUPERIOR COURT
Commercial Division
(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.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 QUEBEC 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-

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

MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON

UNITED STEEL WORKERS, LOCALS 6254 AND 6285

RETRAITE QUÉBEC

MORNEAU SHEPELL LTD., IN ITS CAPACITY AS REPLACEMENT PENSION PLAN ADMINISTRATOR

VILLE DE SEPT-ÎLES

Mis en cause

-and-

FTI CONSULTING CANADA INC.

Monitor

REPLY OF THE MIS EN CAUSE
THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS

INTRODUCTION

I. SOURCE AND SCOPE OF THE FEDERAL *PENSION BENEFITS STANDARDS ACT*

1. The Monitor's response addresses the issue, raised by the Representatives of the Salaried/Non-unionized employees/retirees in its written submissions and in a notice of constitutional question dated May 29, 2017, of the source and scope of the jurisdiction of the federal government to legislate in relation to private pension plans. Section I replies to this issue.

   The federal government has jurisdiction over conditions of employment in relation to federal works and undertakings

2. The federal government has jurisdiction over federal works and undertakings pursuant to s 91(29) and 92(10) of the *Constitution Act, 1867*.

3. The authority to regulate federal works and undertakings includes the power to regulate the wages and other conditions of employment of those employed by the federal works and undertakings. Furthermore, federal jurisdiction over conditions of employment of employees of federal works and undertakings has consistently been held to be exclusive.[1]

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[1] See for example *Ontario Hydro v Ontario (LRB)* [1993] 3 SCR 327; *Bell Canada c Québec (CSST)* [1988] 1 SCR 749; *In Re Validity of the Industrial Relations and Disputes Investigation Act* RSC 1952 c 152 (Stevedores Reference) [1955] SCR 529; *McLeod* v. *Canada (Attorney General),* 1993 CarswellAlta 242; *Leblanc* c. *Dufour*, 1998 CarswellQue 389

4. Private pension benefits form part of the wages and other essential conditions of employment. As the Supreme Court of Canada has recognized, "employees rightly see their pension benefits as part of their overall compensation".[2]

The PBSA falls under 91(29)

5. The *Pension Benefits Standards Act (PBSA)* is valid federal law enacted pursuant to section 91(29) of the *Constitution Act, 1867.*

6. The full title of the PBSA is An Act respecting pension plans organized and administered for the benefit of persons employed in connection with certain federal works, undertakings and businesses. It is clear from this title that Parliament intended to enact a law limited to its power over federal works, undertakings, and businesses.[3]

7. Pursuant to section 4 of the *PBSA*, it applies to plans that provide pension benefits to "employees employed in included employment….". Section 4(4) defines the scope of "included employment":

(4) In this Act, ***included employment*** means employment, other than excepted employment, on or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada, including, without restricting the generality of the foregoing,	**(4)** Pour l'application de la présente loi, ***emploi inclus*** s'entend de tout emploi, autre qu'un emploi exclu, lié ou rattaché à la mise en service d'un ouvrage, d'une entreprise ou d'une activité de compétence fédérale et lié notamment à :
(a) any work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of a ship and transportation by ship anywhere in Canada;	**a)** un ouvrage, une entreprise ou une activité exploitée relativement à la navigation et les expéditions par eau, intérieures ou maritimes, y compris la mise en service d'un navire et le transport par navire au Canada;
(b) any railway, canal, telegraph or other work or undertaking connecting a province with another province or extending beyond the limits of a province;	**b)** un chemin de fer, canal, télégraphe ou autre ouvrage ou entreprise reliant une ou plusieurs provinces ou s'étendant à l'extérieur d'une province;
(c) any line of steam or other ships connecting a province with another province or extending beyond the limits of a province;	**c)** une ligne de navires à vapeur ou autres reliant une ou plusieurs provinces ou s'étendant au-delà des limites d'une province;
	d) un traversier exploité entre une ou plusieurs provinces ou une province et un pays étranger;

[2] *Buschau v Rogers Communications Inc 2006 SCC 28 para 12; Association provinciale des retraités d'Hydro-Québec c Hydro-Québec,* 2005 QCCA 304 paras 39-41.
[3] RSC 1985 c. 32 (2nd sup), see also 14-15-16 Eliz II c.92

(d) any ferry between a province and another province or between a province and a country other than Canada; **(e)** any aerodrome, aircraft or line of air transportation; **(f)** any radio broadcasting station; **(g)** any bank or authorized foreign bank within the meaning of section 2 of the *Bank Act*; **(h)** any work, undertaking or business that, although wholly situated within a province, is before or after its execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more provinces; and **(i)** any work, undertaking or business outside the exclusive legislative authority of provincial legislatures, and any work, undertaking or business of a local or private nature in Yukon, the Northwest Territories or Nunavut.	**e)** un aérodrome, un aéronef ou une ligne aérienne; **f)** une station de radiodiffusion; **g)** une banque ou une banque étrangère autorisée, au sens de l'article 2 de la *Loi sur les banques*; **h)** un ouvrage, une entreprise ou une activité que le Parlement déclare être à l'avantage général du Canada ou de plusieurs provinces même si l'ouvrage ou l'entreprise sont situés, ou l'activité est exercée, entièrement à l'intérieur d'une province; **i)** un ouvrage, une entreprise ou autre activité qui ne relèvent pas de la compétence législative exclusive des provinces ou qui sont de nature locale ou privée au Yukon, dans les Territoires du Nord-Ouest ou au Nunavut.

Again, Parliament undertook considerable effort in this provision to limit the application of this law only to those employed with federal works, undertakings or businesses.

8. That the *PBSA* provides for the possibility of agreements between jurisdictions in no way alters the scope or source of the law. Delegation between levels of government has long been recognized as an essential part of a federal system. The possibility of delegation in no way alters the division of powers.

9. In summary, it is clear from the drafting of the PBSA that it is intentionally restricted to the federal jurisdiction over federal works and undertakings. The PBSA does not purport to apply at-large to pension plans other than private pension plans of employees of included employment.

10. Given the obvious basis for federal jurisdiction for the PBSA pursuant to section 91(29) of the *Constitution Act, 1867,* there is no live factual basis on which the court could engage in an analysis of the scope or application of section 94A.

11. To be very clear, no constitutional doctrine allows the provincial legislation to apply or to take precedence over the *PBSA* in respect of employees of the Arnaud and Wabush railways. Contrary to the arguments put forward by other parties, there is no concurrent jurisdiction or

reverse paramountcy with respect to the pension plans of former employees of federal works. Nor does cooperative federalism permit the altering of the division of powers.[4]

Application in the case at bar: the PBSA applies to the federal works employees, the provincial laws apply to the other employees

12. The Arnaud and Wabush railways are federal works declared to be in the general interest of Canada. As such, employment on these railways constitutes "included employment" under the *PBSA*.[5]

13. These employees are identifiable: while the numbers are subject to confirmation, it appears that approximately 14 salaried (non-unionized) and 66 non-salaried (unionized) former employees worked for the Arnaud and Wabush railways (collectively, the "Federal Works employees").[6]

14. There are no relevant agreements relating to pension plans between the federal government and either Quebec or Newfoundland and Labrador.

15. It has been suggested by the Representatives of the Salaried Members at para 80(a) of their contestation that the wording of an OSFI policy statement renders the Newfoundland and Labrador *PSA* applicable to these employees of the federal Works. Their suggestion is incorrect. The relevant paragraph of the statement reads as follows:

> At times, further explanation may be necessary to clarify why a plan is federally registered. Some pension plans cover employees in "included employment" and employees who are subject to provincial pension legislation. These plans are known as multi-jurisdictional pension plans. OSFI is the lead regulator when the plurality of members of the plan is in included employment. To eliminate the need to register a pension plan with each designated province under whose jurisdiction the employees fall, the federal Minister of Finance has entered into bilateral reciprocal agreements with all provincial pension authorities except for Newfoundland (Note: OSFI has a reciprocal agreement with Quebec only for plans established in the Northwest Territories and the Yukon). These agreements authorize OSFI to administer the province's pension legislation on their behalf for those members subject to that province's jurisdiction. An RM must be aware if OSFI is monitoring the plan on behalf of any provincial jurisdiction.

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[4] *Reference re: Securities Act* 2011 SCC 66 paras 61-62.

[5] *An Act respecting Wabush Lake Railway Company Limited and Arnaud Railway Company* SC 1960 c 63.

[6] See for example para 46.11 of the *Amended motion by the Monitor for Directions with respect to pension claims*.

Contrary to the submission of the Representatives of the Salaried Members, nothing in that statement suggests that the Newfoundland and Labrador legislation is the "governing statute" in respect of the Federal Works Employees.

16. Moreover, as previously indicated, the *PBSA* falls under s 91(29) of the *Constitution Act, 1867*, in respect of which no doctrine of provincial paramountcy exists.

17. The *PBSA* therefore applies in respect of the pension plans of these employees.

18. During the administration of the two pension plans, no distinction was made in relation to the jurisdictions involved or the existence (or not) of agreements between the jurisdictions.

19. However, considering that the debtor companies have liquidated their assets and that the pension plans have been terminated by the regulators, the allocation of assets must be made to the deemed trusts of the different jurisdictions involved.

20. On the wording of section 8 of the *PBSA,* this provision appears to create a deemed trust in respect of moneys for all beneficiaries of the plan. Likewise, on the wording of section 32 of the *PBA,* a deemed trust appears to be created by that law in respect of moneys for all beneficiaries of the plan.

21. However, statutory interpretation is not founded on the wording of a single provision alone. The words must be read in their "entire context ... harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament". Moreover, one assumes that a legislator's intent is to respect the division of powers. When legislation can be read so as to fit within the proper jurisdiction of the legislator, this reading is preferred.[7]

22. This is particularly the case when the matter of federal jurisdiction is recognized to be part of the vital core of that jurisdiction.

23. To the extent possible, the three acts should be read (in absence of any agreement modifying the application of the acts) as applying in respect only of the beneficiaries within their legislative jurisdiction. We do not exclude the possibility that there may be areas in which this reading down of the three laws is impossible. However, there is no indication that this possibility arises in the present case.

24. Section 8 of the *PBSA* should be read to apply only to the amounts to be held in trust for members of the plan included in included employment.

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[7] Ruth Sullivan, *Construction of Statutes* (LexisNexis, Canada, 2014) pp 332-333, see also 531-533; See for example *Stevedores Reference*; *CBC v Cordeau* [1979] 2 SCR 618 at 641-642.

25. Similarly, section 32 of the *PBA* and section 49 of the *SPPA* should be read to apply only to the amounts to be held in trust for members of the plan who did not carry out included employment and to whom the *PBA* or *SPPA* apply respectively.

26. With such a reading, there is no conflict or overlap between the federal and provincial laws.

27. In light of the forgoing, and considering that the conclusions sought in the Contestation of OSFI were indicated as "subject to change", OSFI amends the second conclusion of its Contestation to read:

> "**DECLARES** that the normal payments and the special payments, including the catchup payments, as made in respect of the plan participants determined to be former employees of the Arnaud and Wabush railways, are subject to the deemed trust created by section 8 of the Pensions Benefits Standards Act, 1985 RCS 1985 c 32 (2nd suppl)";

II. THE PBSA TRUST

The wording of section 8 of the PBSA

28. The Sparrow decision cannot be applied in this case as the pension plan itself is a trust according to section 8(1) of the PBSA.

29. The sums of money paid into the pension plan as well as those to be paid are not assets of the employer, unlike a merchant who collects taxes. The sums entering into the patrimony of a merchant through the course of carrying on his business are not contributions entering into a pension fund which is exempt from seizure. The fund itself is a separate asset.

30. This is the reasoning followed by Justice Mongeon in Timminco, who concluded that the Trust under the Supplemental Pension Plans Act of Quebec was applicable to the CCAA on the basis that the Trust was a real trust and that the assets therein were exempt from seizure, they were themselves excluded from the assets of the debtor under section 67(1)b).

Justice Mongeon wrote :

> « [103] Rappelant par la suite les affaires Re: *Deslauriers Construction Productions Ltd* (1970)3 O.R. 599 (C.A.), *Dauphin Plains Credit Union Ltd c. Xyloid Industries Ltd* [980] 1 S.C.R. 1182, *British Columbia c. Henfrey Samson Bélair Ltd* [1989] 2 SCR 24 et *Royal Bank of Canada c. Sparrow Electric Corp.* [1997] 1 S.C.R. 411, le juge Fish conclut que le texte de l'article 20 LMRQ, tel qu'il existait antérieurement à l'amendement de 1993, ne rencontrait pas les exigences des articles 67 LFI et 227(5) de la *Loi fédérale sur les impôts*. Le texte de l'amendement de 1993 a eu pour effet de régler le problème de la fiducie présumée de l'article 20 LMRQ mais force est de constater que le texte de l'article 49 LRCR contient les mots « sacramentels » confirmant l'existence d'une fiducie réputée, même si l'employeur n'a pas gardé les cotisations qu'il doit verser aux Comités de retraite requérants séparées ou non de ses autres biens. »

> [173] Avec égards pour l'opinion contraire, le soussigné est d'avis que les questions en litige ne se résolvent ni par une référence à l'affaire *Sparrow Electric* ni par une référence à l'article 37 LACC. Dans *Sparrow,* il n'était pas question d'insaisissabilité ou d'incessibilité des sommes devant revenir à la Couronne fédérale mais uniquement de la non-application prioritaire des sommes visées par la fiducie réputée contenue à la LIR, problème qui a été corrigé par un amendement subséquent à la *Loi de l'impôt*. Ici, les biens constituant l'assiette de la fiducie réputée sont littéralement exclus de l'application de la garantie dont bénéficie IQ. Pour IQ, ces biens sont inaccessibles car ils ne peuvent faire partie d'une quelconque cession ou transfert par SBI.

31. The intention of the legislator in creating the Deemed Trust is clear, it is to protect the amounts owed to the pension plan.

32. As mentioned by the author Pierre André Côté (Interprétation des Lois, page 395)

> « 1269. On suppose qu'il règne, entre les divers textes législatifs adoptés par une même autorité, la même harmonie que celle que l'on trouve entre les divers éléments d'une loi : l'ensemble des lois est censé former un tout cohérent [190]. L'interprète doit donc favoriser l'harmonisation des lois entre elles plutôt que leur contradiction, car le sens de la loi qui produit l'harmonie avec les autres lois est réputé représenter plus fidèlement la pensée de son auteur que celui qui produit des antinomies [191].
>
> 1270. Plus concrètement, la présomption de cohérence des lois entre elles se manifeste avec d'autant plus d'intensité que les lois en question portent sur la même matière, sont « in pari materia », comme on a l'habitude de dire. D'autre part, il peut apparaître certains conflits entre différentes lois, conflits que l'interprète devra résoudre de manière à rétablir l'harmonie.
>
> [190] Voir l'opinion du juge Bastarache dans 65302 *British Comumbia Ltd.* c. *Canada*, [1999] 3 R.C.S. 804, par 7.
>
> [191] Voir : *Canada 3000 Inc., Re; Inter-Canadien (1991) Inc. (Syndic de),* [2006] 1 R.C.S. 865, par 54; *Bell ExpressVu Limited Partnership* c. *Rex*, [2002] 2 R.C.S. 559, par. 27; *Pointe-Claire (Ville)* c. *Québec (Tribunal du travail),* [1997] 1 R.C.S. 1015, par. 61.»

33. The same legislator cannot, as claimed by the debtors, the Monitor and the city of Sept-Iles, on one hand create a Deemed Trust in the event of bankruptcy or liquidation in order to substract assets, an amount equal to the payments due to the pension plans and on the other hand limit such protection only to cases of bankruptcy and liquidation under specific statutes other than the CCAA, which can only apply to solvent corporations. This approach is contrary to the intended purpose.

34. It is true that the judgement rendered on June 26, 2015 concluded that the Deemed Trust does not apply in the matter of the CCAA on the basis that the legislator deliberately made the choice to protect only the normal payments. This intention is reflected in Section 6(6)

and 36(7) of the CCAA and the inherent difficulty to reconcile these with Section 8(2) of the PBSA.

35. Alternatively, the judgment concluded that none of the elements that trigger the Deemed Trust under Section 8(2) are found in this case, the liquidation to which this section refers is not a liquidation under the CCAA.

36. This alternative conclusion goes hand in hand with the main conclusion, in the context where a plan is filed. This is the logic behind Sections 36(7) and 6(6) of the CCAA and their equivalents, Sections 60(1.5) and 65.13(8) of the BIA.

III. WHAT IF THERE IS NO PLAN?

37. As Justice Deschamps mentioned in *Century Services,*

> [14]...Unlike the BIA, the CCAA contains no provisions for liquidation of a debtor assets if reorganization fails.

38. The *CCAA* applies to cases of successful reorganization, but is mute as to cases that end in bankruptcy or receivership.

39. However, the debtor companies and the Monitor ask the Court to grant them the benefit of all the advantages of the *CCAA* though they circumvent the principal objective of this law, that is, to restructure an insolvent company by proposing a plan of arrangement to its creditors.

40. No evidence was submitted to suggest that a plan would be filed. On the contrary, it appears that the exit from the *CCAA* in this case will be of a different nature.

41. In this respect, and in the absence of a plan, section 6(6) cannot be used to conclude that under the *CCAA,* only the normal payments are protected.

42. Also, as it appears from the decision Cliffs Over Maple Bay Investment Ltd v. Fisgard Capital Corp 2008 BCCA 327, the filing of a plan is an essential element in order to maintain the stay of proceedings in a CCAA. It is even more accurate when one wants to benefit from the protection offered by the Act.

> [31] « The filing of a draft plan of arrangement or compromise is not a prerequisite to the granting of a stay under s. 11: see **Re Fairview Industries Ltd** (1991), Can LII 4287 (NSSC), 109 N.S.R. (2d) 12, 11 C.B.R. (3d) 43 (S.C.). In my view, however, a stay should not be granted or continued if the debtor company does not intend to propose a compromise or arrangement to its creditors. If it not clear at the hearing of the initial application whether the debtor company is intending to propose a true arrangement or compromise, a stay might be granted on an interim basis, and the intention of the debtor

company can be scrutinized at the comeback hearing. The case of **Re Ursel Investment Ltd** (1990), 2 C.B.R. (3d) 260 (Sask. Q.B.), rev'd on a different point (1991), 1992 Can LII 8251 (SK CA), 89 D.L.R. (4th) 246 (Sask. C.A.) is an example of where the court refused to direct a vote on a reorganization plan under de **CCAA** because it did not involve an element of mutual accommodation or concession between the insolvent company and its creditors"

43. The amendments to the *CCAA* in 2009 and incorporating section 6(6) presuppose a context in which an arrangement is proposed. The *CCAA* itself is drafted in this sense. The opposite would render the two laws irreconcilable.

44. If Parliament had truly wanted to exclude the deemed trust created by the *PBSA,* it would have expressly mentioned it, as Parliament did in section 37(1) for the deemed trusts in favour of the Crown. In consequence, the analysis and the conclusion drawn from these amendments by the Monitor and the debtor companies must be nuanced depending upon whether a plan of arrangement has been filed or not.

45. In addition, it is erroneous to suggest, like the debtor companies do, that only the deemed trusts mentioned in section 37(2) of the *CCAA* are recognized by this law. That section deals exclusively with trusts in favour of the crown. Other deemed trusts are not excluded.

«71. It must be emphasized at the outset that the deemed trust under Section 8(2) PBSA is not a deemed trust in favour of the Crown. This is a fundamental distinction. Section 37(1) CCAA, which renders all deemed trusts in favour of the Crown ineffective in the CCAA context, subject to certain exceptions, has no application to the deemed trust under Section 8(2) PBSA. As a result, many of the cases cited to the Court, which deal with the effectiveness of deemed trusts in favour of the Crown, must be applied with caution in the present circumstances.

72. In particular, the Wabush CCAA Parties rely on language in the Supreme Court's judgment in *Century Services*[11] that must be read carefully. Justice Deschamps refers in paragraph 45 toe "the general rule that deemed trusts are ineffective in insolvency", There is no such general rule, other than Section 37(1) CCAA (and Section 67(2) of the Bankruptcy and Insolvency Act [12]) which applies only to deemed trusts in favour of the Crown. She begins the paragraph with a reference to the predecessor of Section 37(1) CCAA and she refers throughout the paragraph to Crown claims and Crown priorities. She must be referring to Crown deemed trusts in that sentence as well. Justice Fish's comments in paragraph 95 must be similarly limited. The Court respectfully disagrees with Justice Schrager in *Aveos* [13] on this issue and concludes that there is no general rule that deemed trusts in favour of anyone other than the Crown are ineffective in insolvency. Deemed trusts will be interpreted restrictively as exceptions to the general principle that the assets on the debtor are available for all of the creditors, [14] but there is no general rule that they are ineffective.»

Justice Hamilton, June 26, 2015

46. It must also be clarified that paragraph 96 of the decision *Century Services,* cited by the debtor companies to the effect that in order to survive, a deemed trust needs to be explicitly referred to in the text of the CCAA is contradicted by paragraph 40 of that same decision, where the court denies that such a requirement exists.

> «40. The apparent conflict in this case is whether the rule in the CCAA first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the CCAA, is overridden by the one in the ETA enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the BIA. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize conflicts, apparent or real, and resolve them when possible.»
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> *Century Services inc.* v. *Canada (AG),* [2010] 3 SCR 379

47. Based on section 6(6) of the *CCAA,* which stipulates that the court cannot ratify a plan that does not provide minimally for the payment of normal payments to the pension plan, the Monitor asks the court to determine that in the absence of a plan, and thus in the absence of the approval of the main interested parties (that is, the beneficiaries of the plans) we should nonetheless apply the same reasoning and make these parties lose that which the law itself protects.

48. At the time that the decision of June 26, 2015 was rendered, the court had been given the impression that a plan of arrangement would eventually be filed, and when the pension plans were still in effect. Given the evolution of the file, and its current status, can it still be said that it is difficult to reconcile section 6(6) of the *CCAA* and section 8(2) of the *PBSA*?

49. In the logic of restructuring, saving businesses and jobs, it is entirely possible to reconcile these two sections. In such a context, the beneficiaries of the plan can in effect decide to make concessions in exchange for safeguarding their jobs and continuing the funding of the pension plans. In such circumstances, and even if the sale of some assets is necessary to "survive", that sale would not be a liquidation in the sense of section 8(2) since the beneficiaries of the trust would have themselves renounced the protection accorded by the PBSA.

50. In a context like the case at bar, in which the mines were closed and the majority of employees laid off even before the initial order, in which the assets have been liquidated and no plan has been produced, and even more, in which the pension plans were terminated given the absence of contributors, section 8(2) of the *PBSA* continues to apply and it is difficult to suggest that the liquidation undertaken would not be a liquidation pursuant to a section that is intended to protection pension plans in such circumstances.

51. To restrict, as the Monitor and the debtor companies do, « any liquidation » mentioned in section 8(2) to only liquidation undertaken pursuant to a specific law, and in the context in which no plan has been submitted to the beneficiaries of the pension plans, is to render inoperative, for all intents and purposes, the deemed trust.

IV. TERMINATION OF THE PENSION PLANS

52. OSFI does not share the position of the Monitor, debtor companies, or the town of Sept-Iles concerning the consequences that they attribute to the fact that the pension plans were terminated after the initial order.

53. In the context of a business liquidation in which the business does not continue its operations, the fact that the termination of the pension plans occurs after the initial order does not have for effect the loss of the benefit of the deemed trust. That the plans were terminated prior to or after the initial order, the consequence is the same, and it is expressly set out at section 29(6) of the *PBSA*. Thus, by virtue of this section, the following sums are due:

The normal costs due until December 31, 2015;
The special costs due until December 31, 2015; and
The catch-up payments due until December 31, 2015.

Distinguishing *Grant Forest*

- The Ontario law created a special trust for the deficit in case of termination of the pension plan (section 57(4) OPBA) ;
- This deemed trust arises at the date of termination of the plan and covers the total deficit of the plan ;
- The tribunal raised the suspension of procedures in order to provoke the bankruptcy of the debtor, to then apply the Scheme of Distribution of the *Bankruptcy and Insolvency Act* Paragraph 121 of *Grant Forest*)

V. FAIR BALANCE BETWEEN THE DIFFERENT STAKEHOLDERS

54. Parliament chose not to protect the total deficit of plans in the event of termination of plans. However, one cannot conclude from this that Parliament intended to annul the effect of its own law (the *PBSA)* in the context of the *CCAA.*

55. The amounts that fall under the federal deemed trust are sufficiently modest that they would not disrupt the equilibrium sought between the different creditors and stakeholders in the context of the *CCAA.*

56. In the case at bar, it seems clear that there will be nothing for the ordinary creditors, and that no plan will be proposed.

57. The federal deemed trust only covers the assets of the debtor companies subject to federal jurisdiction. The amount subject thereto is therefore modest compared to the prejudice felt by the federal plan beneficiaries from both the loss of their jobs and the loss of continuation of their pension plans.

58. There is no indication that Parliament intended to render inapplicable the deemed trust under section 8(2) of the *PBSA* in the context of the *CCAA.* We cannot simply by interpretation render inapplicable a deemed trust, even more so a deemed trust that protects a pension plan.

59. Contrary to the decisions in *Sun Indalex* and *Grant Forest,* the protection accorded by the *PBSA* does not provide for the total deficit and federal paramountcy has no application.

MONTRÉAL, June 21, 2017

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N° 500-11-048114-157

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District of MONTREAL
Commercial Division
(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. 36, as amended)

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REPLY OF THE MIS EN CAUSE THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS

ORIGINAL

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