

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

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 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-

FTI CONSULTING CANADA INC.

Monitor

-and-

MICHAEL KEEPER, TERENCE WATT,
DAMIEN LEBEL AND NEIL JOHNSON

Objecting Parties-Mises-en-cause

**Factum of the Representatives of the Salaried Employees and Retirees in response to the Motion
by the Monitor for Directions with respect to Pension Claims and the transfer of certain questions
to the Newfoundland Court**

(Sections 11, 17, and 23(k) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36)

TO THE HONOURABLE MR. JUSTICE STEPHEN W. HAMILTON, J.S.C., OR TO ONE OF THE HONOURABLE JUDGES SITTING IN THE COMMERCIAL DIVISION IN AND FOR THE JUDICIAL DISTRICT OF MONTRÉAL, THE OBJECTING PARTIES-MISES-EN-CAUSE RESPECTFULLY SUBMIT THE FOLLOWING:

PART I - OVERVIEW

1. This is the Factum by Representative Counsel of the Non-Union Employees and Retirees (the "**Salaried Members**") of the Wabush CCAA Parties (Wabush Iron Co. Limited, Wabush Resources Inc., Wabush Mines, Arnaud Railway company, and Wabush Lake Railway Company Limited) in response to the directions by this Honourable Court on October 28, 2016.
2. The directions relate to the determination of two issues: a) the identification of the appropriate questions in respect of the Newfoundland *Pension Benefits Act*, S.N.L. 1996 c. P-4.01 (the "**NPBA**") deemed trusts; and, b) which jurisdiction – the Québec Court or the Newfoundland Court – should decide those questions.
3. With respect to a) above, attached is a Schedule A setting out the questions that had been proposed by the Monitor, which are disputed, and the appropriate alternate questions as submitted by Representative Counsel.
4. With respect to b) above, this factum sets out the law and argument that the Newfoundland Court is the appropriate jurisdiction to determine the NPBA deemed trust questions.

PART II – THE FACTS

Background

5. On May 20, 2015, Wabush Iron Co. Limited, Wabush Resources Inc., Wabush Mines, Arnaud Railway Company, and Wabush Lake Railway Company Limited (collectively, the “**Wabush CCAA Parties**”) obtained protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C 1985, c. C-36 (“**CCAA**”) (the “**Wabush CCAA Proceedings**”).¹

6. Since the head office of Wabush Mines is located in Montreal, pursuant to section 9 of the CCAA, it filed for CCAA protection in the Québec Superior Court.

7. The Wabush CCAA Parties are not restructuring. They have shut down operations, terminated the vast majority of the employees, are liquidating all of their assets in a sales process in the CCAA proceedings, and have requested that the Newfoundland Superintendent of Pensions appoint a replacement administrator over the Wabush pension plans.

8. The shutdown of Wabush Mines is part of the corporate decision by the parent company, Cliffs Natural Resources (“**CNR**”), based in Cleveland, Ohio, to disengage from and shut down CNR's mining operations in Eastern Canada.²

The Wabush Pension Plans

9. The Wabush CCAA Parties provided two pension plans to salaried and unionized employees, respectively, which contained defined benefit schemes:

¹ Affidavit of Terence Watt, sworn December 14, 2016, at para 3 [“**Watt Affidavit**”].

² *Ibid.* at para 4, Exhibit REPS-1.

- (a) the Contributory Pension Plan for Salaried Employees of Wabush Mines, Cliffs Mining Company, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company (the "**Salaried Plan**"); and
- (b) the Pension Plan for Bargaining Unit Employees of Wabush Mines, Cliffs Mining Company, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company (the "**Union Plan**"; together with the Salaried Plan, the "**Wabush Plans**").³

The Wabush Plans are registered under the NPBA and regulated by the Newfoundland Superintendent of Pensions

10. The Wabush Plans are registered in Newfoundland and regulated under the Newfoundland *Pension Benefits Act*, 1997, SNL 1996, c P-4.01 (the "**NPBA**") by the Newfoundland Superintendent of Pensions (the "**Superintendent**"). All regulatory filings are made with the Superintendent.⁴

11. The Wabush Plans are significantly underfunded.⁵ On December 16, 2015, the Superintendent declared that the Salaried Plan be terminated effective on that date.⁶ The Plans are in the process of being wound up by Morneau Shepell, the actuarial consulting firm who was appointed by the Newfoundland Superintendent of Pensions on March 30, 2016 as the replacement pension plan administrator.

³ Monitor's Notice of Motion dated September 20, 2016 at para. 21.

⁴ Watt Affidavit, *supra* note 1 at para 13, Exhibit REPS-3.

⁵ *Ibid.* at para 17.

⁶ *Ibid.* at para 18, Exhibit REPS-6.

12. On January 26, 2016, the Salaried retirees received a letter from Wabush Mines notifying them that the Superintendent has directed Wabush Mines to reduce the amount of monthly pension benefits of the Salaried Members by 25%.⁷ In the course of the CCAA proceedings, the Salaried Members also lost their vested health and life insurance benefits in June, 2015. The Salaried Members are suffering significant financial losses and hardship.⁸ The Salaried Members are a very significant creditor group.

The Monitor's Motion for Directions

13. On August 14, 2015, Representative Counsel wrote to the company and other parties asserting that the deemed trust priority provisions in the NPBA (the "**NPBA Deemed Trust**") apply as a priority claim in favour of the beneficiaries of the Wabush Salaried Plan.⁹

14. On November 16, 2015, at the hearing of the motion by the Monitor for approval of the Claims Procedure Order, Representative Counsel advised the Monitor and this Honourable Court that it is the Representatives' position that any issue(s) regarding the interpretation of the NPBA Deemed Trust should be referred to the Supreme Court of Newfoundland and Labrador for adjudication.

15. Despite the previously communicated position of Representative Counsel, on September 20, 2016, the Monitor filed a motion seeking:

...directions with respect to the priority of Pension claims filed by the Plan Administrator...and the applicability and scope of deemed trusts under the Pension Benefits Standards Act, R.S.C. 1985, c. 32 (2nd Supp.)

⁷ *Ibid.* at para 19, Exhibit REPS-7.

⁸ *Ibid.* at para 27.

⁹ *Ibid.* at para 24, Exhibit REPS-8.

(PBSA) and the Newfoundland & Labrador Pension Benefits Act, S.N.L. 1996, c. P-401 (PBA)...¹⁰

(emphasis added) (the "**Monitor's Motion for Directions**").

16. On October 7, 2016, Representative Counsel filed a Notice of Objection to the Monitor's Motion for Directions. The Notice of Objection repeats that it is the Representatives' position that any issue(s) regarding the interpretation of the NPBA Deemed Trust should be referred to the Supreme Court of Newfoundland and Labrador for adjudication.

PART II – THE ISSUES

A) What are the appropriate questions for the resolution of the NPBA statutory deemed trusts? **Answer: See Schedule A attached.**

B) Should the issues concerning the NPBA statutory deemed trusts be determined by the Supreme Court of Newfoundland and Labrador? **Answer: Yes.**

PART III – THE LAW

17. The Supreme Court of Canada has confirmed that pension benefits are the deferred wages of employees that they earned during their employment service for an employer.¹¹

18. A registered pension plan is the primary means by which an employer delivers those deferred wages on the retirement of their employees. Employees "almost invariably agree to

¹⁰ Monitor's Notice of Motion dated September 20, 2016 at para. 9.

¹¹ *IBM Canada Limited v. Waterman*, 2013 SCC 70, [2013] 3 S.C.R. 985 at para 4 (Book of Authorities of Representative Counsel, Tab 1).

accept lower wages and fewer employment benefits in exchange for the employer's agreeing to set up the pension trust in their favour."¹²

19. One of the purposes of pension legislation is to protect employees who have earned pension benefits to ensure they receive all of the pension benefits to which they are entitled.¹³

The NPBA deemed trust priority for pension plan beneficiaries

20. The NPBA contains deemed trusts in favour of the pension plan beneficiaries for amounts owing to a pension plan by an employer in respect of the following different categories of outstanding contributions: a) normal costs (i.e., going concern) costs; b) special payments; and, c) wind-up payments. Section 32 of the NPBA states:

Amounts to be held in trust

32. (1) An employer or a participating employer in a multi-employer plan shall ensure, with respect to a pension plan, that

- (a) the money in the pension fund;
- (b) an amount equal to the aggregate of
 - (i) *the normal actuarial cost*, and
 - (ii) *any special payments* prescribed by the regulations, that have accrued to date; **and**
- (c) **all**
 - (i) amounts deducted by the employer from the member's remuneration, and
 - (ii) *other amounts due under the plan from the employer that have not been remitted to the pension fund*

are kept separate and apart from the employer's own money, **and shall be considered to hold the amounts referred to in**

¹² *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611 at para. 66 (Book of Authorities of Representative Counsel, Tab 2).

¹³ *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54 at paras 14, 50 (Book of Authorities of Representative Counsel, Tab 3).

paragraphs (a) to (c) in trust for members, former members, and other persons with an entitlement under the plan.

(2) In the event of a liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that under subsection (1) is considered to be held in trust shall be considered to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own money or from the assets of the estate.

(3) Where a pension plan is terminated in whole or in part, an employer who is required to pay contributions to the pension fund shall hold in trust for the member or former member or other person with an entitlement under the plan an amount of money equal to employer contributions due under the plan to the date of termination.

(4) An administrator of a pension plan has a lien and charge on the assets of the employer in an amount equal to the amount required to be held in trust under subsections (1) and (3).
[emphasis added]

The Newfoundland & Labrador Legislature made clear that the purpose of section 32 is to protect members of Newfoundland pension plans

21. Section 32 of the NPBA has not been judicially considered in any reported case. The Wabush CCAA proceedings are the first time that this section will be before a court for interpretation.

22. Section 32 was debated by the Newfoundland Legislature when the NPBA was introduced. The purpose of section 32 is clearly to protect the security of pensions:

Mr. Speaker, I am pleased to be able to introduce to second reading this legislation, ***which will provide increased pension benefits for workers in the Province. ... Mr. Speaker, this act certainly secures the future for people in the Province who are looking to obtain funds from a pension.*** This act provides enhanced pension benefit coverage for the people of the Province through the increased payments, procedures and conditions, as well as improved investment regulations and

monitoring requirements, and *the act promotes increased security of pension benefits promised*.¹⁴ [Emphasis added]

23. The Supreme Court of Canada in *Re Indalex* confirmed that the provincially-created deemed trust (in that case the Ontario PBA) are valid in CCAA proceedings subject only to paramouncy and in particular, applies to the entire amount of wind-up deficit:

[52] The provincial deemed trust under the PBA continues to apply in CCAA proceedings, subject to the doctrine of federal paramouncy (*Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3 (CanLII), [2004] 1 S.C.R. 60, at para. 43).¹⁵

24. On August 14, 2015, Representative Counsel wrote to the company and other parties asserting that the deemed trust provisions in the NPBA apply in favour of the beneficiaries of the Wabush Salaried Plan and as such that the amounts subject to the trust are not available for distribution to other creditors, including the secured creditor, Cliffs Mining Company.¹⁶

25. On November 16, 2015, at the hearing of the motion by the Monitor for approval of the Claims Procedure Order, Representative Counsel advised this Honourable Court and the counsel to the Monitor, company, and other parties who were present that it is the Representatives' position that any issue(s) regarding the interpretation of the NPBA Deemed Trust should be referred to the Supreme Court of Newfoundland and Labrador for adjudication.

26. Despite the previously communicated position of Representative Counsel, the Monitor without prior consultation with Representative Counsel, filed its Motion for Directions with pre-

¹⁴ Newfoundland and Labrador, Legislative Assembly, Hansard, 43rd General Assembly, 1st Sess, No 55 (17 December 1996) (Ernie McLean) (Book of Authorities of Representative Counsel, Tab 4).

¹⁵ *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 SCR 271, 2013 SCC 6 at para. 52 (Book of Authorities of Representative Counsel, Tab 5).

¹⁶ Watt Affidavit, *supra*, note 1 at para 24, Exhibit REPS-8.

formulated questions relating to the NPBA and seeking to have this court answer all the questions.

27. On review of the motion record, Representative Counsel notified the Monitor that did not agree with the Monitor's proposed questions and reinstated its previous positions.

The NPBA deemed trust issues should be transferred to the Newfoundland Court for determination

28. The issue on this motion involves the intersection of three statutes: the CCAA, the NPBA, and the Québec *Civil Code*.

a) The CCAA

29. The CCAA does not provide an express answer to the transfer issue that is before this Court. Section 9 of the CCAA provides direction to insolvent companies as to the jurisdiction in which to file for CCAA protection. Section 9 states that a company may bring the application in the province where the head office or chief place of business is situated or in any province in which assets of the company are situated. Section 9 only specifies the jurisdiction for the filing of a CCAA application and nothing more:

Jurisdiction of court to receive applications

9 (1) Any application under this Act may be made to the court that has jurisdiction in the province ***within which the head office or chief place of business of the company in Canada is situated***, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

30. Section 9 does not state that the CCAA filing court is the court to decide all issues and disputes arising in the CCAA proceeding, Section 17 of the CCAA, however, expressly

contemplates that the CCAA filing court can request the aid of *another court* in dealing with an issue before the filing court:

Courts shall aid each other on request

17 All courts that have jurisdiction under this Act and the officers of those courts *shall act in aid of and be auxiliary to each other in all matters provided for in this Act*, and an order of a court seeking aid with a request to another court shall be deemed sufficient to enable the latter court to exercise in regard to the matters directed by the order such jurisdiction as either the court that made the request or the court to which the request is made could exercise in regard to similar matters within their respective jurisdictions. [emphasis added]

CCAA courts have transferred issues for administration to other courts

i) Timminco

31. *Timminco*¹⁷ is precedent authority directly on point supporting the transfer of a pension issue to the jurisdiction where the pension plan is registered and has been administered, where that jurisdiction differs from the jurisdiction of the CCAA court filing. In *Timminco*, the company obtained CCAA protection in Toronto before the Ontario Superior Court of Justice (Commercial List). An issue arose in the course of that proceeding on the interpretation of the deemed trust priority provisions in the Québec *Supplemental Pension Plan Act*, chapter R-15.1 ("SPPA") which applied to and regulated one of the Timminco pension plans. The CCAA judge supervising the Timminco proceeding ordered adjudication of those issues to be transferred to the Québec Superior Court. A decision was ultimately released by Mr. Justice Mongeon of the Quebec court interpreting the provisions of the deemed trust provisions of the Quebec SPPA to the Québec Timminco Plan.¹⁸

¹⁷ *Timminco Limited and Becancour Silicon Inc.*, Court File No. CV-12-9539-00CL, Order of Morawetz J. (18 October 2012) at para 2 (Ont SCJ [Commercial List]), (Book of Authorities of Representative Counsel, Tab 6).

¹⁸ *Ibid.*

ii) *Curragh*

32. In *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.*, Curragh Inc. was subject to bankruptcy proceedings in Ontario but its main asset was a Yukon mine against which various persons had filed liens. While retaining "overall jurisdiction" under the bankruptcy legislation, Farley J. of the Ontario Superior Court (Commercial List) referred certain issues to be determined to the Yukon Supreme Court in respect of the miner's lien claims pursuant to a Yukon statute, the *Miners Lien Act*, R.S.Y.T. 1968 [MLA]:

This legislation [the MLA] and its concept of the lien affecting the output of the mine or mining claim is apparently unique to the Yukon Territory. It was felt appropriate to have the courts of the Territory deal with the interpretation and entitlement of those provisions. Certainly their approach is the preferable one when looked at from the aspect of one court accordingly due deference to another with a "closer" connection to the situation and this course alleviates the necessity of having to deal with the MLA through opinions on foreign law.

...

*I am of the view that the mixed or compromise approach is the reasonable one to adopt in these circumstances. It seems to me that this can be achieved by having the Yukon court adjudicate the MLA claims but providing that this Court as the one involved in the insolvency proceedings grant an order that any MLA claims for which proofs of claim not filed with the IR for adjudication in the Yukon Court (assuming no excess problem) by a specific date will be barred. In this regard, I would request the aid of the Yukon Court in its bankruptcy capacity (see s. 188 BIA) to assist in the implementation of this to the extent necessary.*¹⁹ [emphasis added]

iii) *Yukon Zinc*

33. Similarly, in *Yukon Zinc Corp. (Re)*, the British Columbia Superior Court adapted the approach from in *Curragh Inc.* to a request for a transfer of certain issues relating to the application of the *MLA* to the Yukon Supreme Court. In doing so, the British Columbia Superior

¹⁹ *Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc.*, [1994] O.J. No. 953 at paras. 11, 18 (Book of Authorities of Representative Counsel, Tab 7).

Court acknowledged that the Yukon court is likely the more appropriate forum for the purpose of adjudicating the validity of the liens under the *MLA*, particularly in light of the substantial issues raised in that respect:

In my view, the above factor supports that the Yukon court is the more appropriate forum to adjudicate the very specific issues raised by Hy's and Sidhu on this application. **These issues are confined to the interpretation and application of the MLA, a unique piece of legislation that the Yukon courts have familiarity and expertise with.** Assessing the validity of the miners liens should not require an application of British Columbia law or involve any CCAA considerations.²⁰ [Emphasis added]

34. The "mixed or compromise" approach adopted by the insolvency courts in *Curragh* and *Yukon Zinc* should also be applied in this case. This Court would retain overall jurisdiction in the insolvency proceedings but request the assistance of the Newfoundland Court to determine the NPBA deemed trust issues.

Section 11 of the CCAA

35. Further, a CCAA court has broad jurisdiction under section 11(1) of the CCAA to make any order it considers appropriate, and is therefore authority to order such transfer of the NPBA deemed trusts issues to the Newfoundland Supreme Court.²¹ In *Century Services Inc. v. Canada (Attorney General)*, the Supreme Court of Canada stated:

[67] The initial grant of authority under the CCAA empowered a court "where an application is made under this Act in respect of a company . . . on the application of any person interested in the matter, . . . subject to this Act, [to] make an order under this section" (CCAA, s. 11(1)). The plain language of the statute was very broad.

²⁰ *Yukon Zinc Corp. (Re)*, [2015] B.C.J. No. 2342 at para 57 (Book of Authorities of Representative Counsel, Tab 8).

²¹ *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 section 11(1).

[68] In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the CCAA. Thus, in s. 11 of the CCAA as currently enacted, a court may, “subject to the restrictions set out in this Act, . . . make any order that it considers appropriate in the circumstances” (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of CCAA authority developed by the jurisprudence.²²

b) *The Québec Civil Code*

The doctrine of forum non conveniens can apply to determine the appropriate forum

36. Where two or more courts have jurisdiction to hear a dispute and there is a dispute about which court is the more appropriate forum, the doctrine of *forum non conveniens* "confers on the court a supplementary power to decline to exercise a jurisdiction that is otherwise granted to it".²³ Quebec courts have recognized the applicability of this doctrine in its jurisprudence on interprovincial jurisdictional disputes.²⁴ Further, article 3135 of the *Civil Code of Quebec* (CCQ) codifies the doctrine of *forum non conveniens* and applies to the case at bar:

Even though a Québec authority has jurisdiction to hear a dispute, it may, exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another State are in a better position to decide the dispute.

37. Under article 3135 of the CCQ, a Quebec court may decline to hear a case over which it has jurisdiction if it considers that the authorities of another jurisdiction are in a better position to decide. Article 3135 has been applied in cases of interprovincial jurisdictional disputes.²⁵

²² *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 SCR 379, 2010 SCC 60 (CanLII) at paras 67- 68, (Book of Authorities of Representative Counsel, Tab 9).

²³ *Boucher c. Stelco Inc.*, 2005 SCC 64 at para 37 (Book of Authorities of Representative Counsel, Tab 10).

²⁴ See, for e.g., *Boucher c. Stelco Inc.*, 2005 SCC 64 (Book of Authorities of Representative Counsel, Tab 10).

²⁵ *Ibid.*

38. The application of the doctrine of *foreign non conveniens* involves a review of various criteria. While this Court has overall jurisdiction of the insolvency proceeding, the analysis under *forum non conveniens* can assist this Court to determine the issue of referring the NPBA Deemed Trust issues to a more appropriate forum, namely, the Newfoundland Court.

39. *Van Breda v. Village Resorts* is the leading case on the application of this doctrine. The Supreme Court identified a list of non-exhaustive factors to determine whether the *forum non conveniens* should be applied:

- (a) the location of the parties and the witnesses;
- (b) the cost of transferring the case to another jurisdiction;
- (c) the cost of declining to stay the action;
- (d) the possibility of conflicting judgments;
- (e) the impact of declining jurisdiction on the conduct of litigation or on related parallel proceedings.²⁶

40. The factors most commonly considered by Quebec courts were reviewed by the Quebec Court of Appeal in *Lexus Maritime inc. c. Oppenheim Forfait GmbH*²⁷ where the Court established that the relevant considerations include, among others, the following factors which are not individually determinative, but must be considered globally:

- (a) the place of residence of the parties and witnesses;

²⁶ *Van Breda v. Village Resorts Ltd*, 2012 SCC 17 at para 110 (Book of Authorities of Representative Counsel, Tab 11); see also *Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP*, 2016 SCC 30 (Book of Authorities of Representative Counsel, Tab 12). The *Van Breda* factors have also been cited by Quebec courts: for e.g., see *Stanford International Bank Ltd., Re*, 2014 QCCS 204 (Book of Authorities of Representative Counsel, Tab 13).

²⁷ *Lexus Maritime inc. c. Oppenheim Forfait GmbH*, 1998 CarswellQue 638 (Que. C.A.) at para 22 (Book of Authorities of Representative Counsel, Tab 14); see also *Black v. Breeden*, 2012 SCC 19 at para 25 (Book of Authorities of Representative Counsel, Tab 15).

- (b) the location of the evidence;
- (c) the place of formation and execution of the contract;
- (d) the existence of proceedings pending between parties in another jurisdiction and the stage of any such proceeding;
- (e) the location of the defendant's assets;
- (f) the applicable law;
- (g) the advantage conferred on the plaintiff by its choice of forum;
- (h) the interests of justice;
- (i) the interests of the two parties;
- (j) the need to have the judgment recognized in another jurisdiction.

Newfoundland is the more appropriate forum for the NPBA deemed trust questions

41. To determine whether it is appropriate to decline jurisdiction under the doctrine of *foreing non conveniens*, the Court must perform an overall analysis of the case in relation to the specific facts of that case.²⁸ In the case at bar, the application of the most relevant factors readily leads to the conclusion that the Newfoundland Court is the most appropriate jurisdiction to hear the NPBA Deemed Trust issues.

a) The applicable law on the NPBA deemed trust issues is the NPBA

42. Pursuant to section 12.06 of the Salaried Plan text, the Plan must be interpreted pursuant to the laws applicable in the Province of Newfoundland.²⁹ This factor has been considered in

²⁸ *Van Breda v. Village Resorts Ltd.*, 2012 SCC 17 at paras 107, 110 (Book of Authorities of Representative Counsel, Tab 11).

²⁹ Watt Affidavit, *supra* note 1 at para 13, Exhibit REPS-2.

many Quebec cases as well as in the Minister's Commentaries on article 3135 of the CCQ.³⁰ The principal idea underlying this criterion is that the lack of familiarity with foreign law is a problem for a Québec court for the administration of justice.

43. The Québec Superior Court is a court of civil jurisdiction. The Newfoundland court is a court of common law jurisdiction. The NPBA is a statute of a common law jurisdiction. With respect, it is more appropriate for common law court to interpret an uninterpreted common law statute than a civil court.

b) The Wabush Plans are registered in Newfoundland and Labrador

44. The Wabush Plans are registered in the Province of Newfoundland and Labrador and have been funded and administered in accordance with the NPBA since their inception. The actuarial reports have been and continue to be prepared in accordance with the NPBA.

45. The Wabush Plans have also been, and continue to be, regulated by the Newfoundland Superintendent of Pensions pursuant to the provisions of NPBA. It was the Newfoundland Superintendent who directed Wabush Mines to reduce the amount of monthly benefits being paid due to the underfunding of the pension plans. Further, it was the Superintendent who appointed the actuarial firm of Morneau Shepell as the replacement plan administrator.

³⁰ CCQ article 3135 states that a Quebec authority "may exceptionally" decline jurisdiction. See Jeffrey Talpis and Shelley L. Kath, "The Exceptional as Commonplace in Quebec Forum Non Conveniens Law: Cambior, a Case in Point", (2000) 34R.J.T. 761 at p. 837 (Book of Authorities of Representative Counsel, Tab 16).

c) *The majority of the Wabush Plan Members reside in Newfoundland and Labrador*

46. The majority of retirees whose lives will be most impacted by this decision are resident in the Province of Newfoundland and Labrador and should be entitled to have this vital issue decided in the Province in which they have spent their working lives.

47. There are currently 656 plan members in the Salaried Plan. 313 of these Salaried Members reside in Newfoundland and Labrador. For the Union Plan, these numbers are even greater. Of the 1,732 members in the Union Plan, 1,005 Union Plan members reside in the province of Newfoundland and Labrador.

d) *There will be increased costs if the Québec court interprets the NPBA*

48. It is also more efficient and cost-effective for the Newfoundland Supreme Court to interpret the NPBA Deemed Trust rather than the Québec Superior Court. Respectfully, this Court does not have expertise in interpreting the NPBA Deemed Trust.

49. Under article 3077 of the CCQ, the law of another province is treated as foreign law.³¹ If a Quebec court is to take judicial notice of foreign law, it must be pleaded.³² In order for the NPBA to be properly pleaded, the adjudication of the NPBA Deemed Trust will therefore require expert evidence to be adduced before the Québec court. Section 2809 of the CCQ is also applicable in these circumstances:

³¹ art 3077 CCQ.

³² See, e.g., *Bombardier Produits récréatifs inc (BRP) c Christian Moto Sport inc*, 2012 QCCA 1670 at para 70 (Book of Authorities of Representative Counsel, Tab 17); *Cloutier c. Société Canada Trust*, 2008 QCCA 544 at para 18 (Book of Authorities of Representative Counsel, Tab 18).

Judicial notice may be taken of the law of other provinces or territories of Canada and of that of a foreign state, provided it has been pleaded. The court may also require that proof be made of such law; this may be done, among other means, by expert testimony or by the production of a certificate drawn up by a juriconsult.

Where such law has not been pleaded or its content has not been established, the court applies the law in force in Québec.

50. The process of pleading foreign law, in this case, the NPBA, involves the identification, retainer, and payment of suitable expert(s) by the adversarial parties who will be required to prepare expert affidavits on the interpretation of the NPBA. The process to retain such expert(s) is costly and time consuming will contribute to delay and costs to the estate. This costs can be avoided by referring the NPBA Deemed Trust issues to the Newfoundland Court which, as a court of competent jurisdiction to interpret Newfoundland statute law, does not require expert evidence.

51. The importance of avoiding such additional costs is a factor in the *forum non conveniens* analysis, and also weighs in favour of referring the NPBA Deemed Trust issues to the Newfoundland Court.³³

e) The Representatives of the Salaried Employees and Retirees want the Newfoundland Court to interpret the NPBA

52. The NPBA Deemed Trust is a critical remedy for members of the Wabush Plans to help relieve them from financial hardship caused by the underfunding of the Plans by Wabush Mines. The interpretation of the deemed trust provisions in the NPBA is *an issue of first instance* in Newfoundland courts. The natural forum for reviewing legislation from the Province of

³³ *Swimwear Etc. v. Raymark Xpert Business Systems Inc.*, 2006 ABQB 82 at paras. 34-35 (Book of Authorities of Representative Counsel, Tab 19).

Newfoundland and Labrador would be a Newfoundland court, if only to reduce the risk of conflicting decisions.

f) The location of assets of Wabush Mines is not a relevant factor in determining the transfer of the NPBA Deemed Trust Issues

53. The Monitor states in its Motion for Directions that it believes another issue on which it needs direction is whether the proceeds derived from the sale of assets located in Quebec could be used toward the payment of a valid NPBA Deemed Trust claim, should the court hold that the NPBA Deemed Trust priority is valid. As a Québec *property* issue, that is not a factor to consider in transferring the NPBA Deemed Trust *priority* issue to the Newfoundland court. The issue of whether Quebec property laws apply in the manner suggested by the Monitor may only arise, if at all, if the NPBA Deemed Trust priority applies in favour of the pension plan beneficiaries. The Québec property issue may not arise at all.

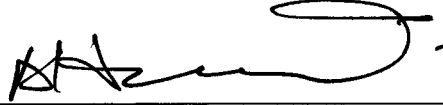
FOR THESE REASONS THE OBJECTING PARTIES-MISES-EN-CAUSE ASKS THAT THIS HONOURABLE COURT:

[A] DISMISS the Motion for Directions in respect of the Pension Claims;

[B] DECLARE the Newfoundland PBA Deemed Trust issues as set out in Schedule A be referred to the Newfoundland and Labrador Supreme Court for adjudication.

THE WHOLE without costs, unless contested.

Montreal and Toronto, this 15th day of December, 2016
(Signed) Koskie Minsky LLP & Nicholas Scheib



KOSKIE MINSKY LLP & NICHOLAS SCHEIB
Attorneys for the Objecting Parties-Mises-en-cause
Michael Keeper, Terence Watt, Damien Lebel and Neil
Johnson

Schedule "A"

Wabush – Monitor's Motion for Directions with respect to Pension Claims
Preliminary Motion re: proposed questions and court to answer
To be heard: December 20, 2016 at 9:30 A.M.

| Questions proposed by the monitor in the motion for directions | Submissions re: appropriateness of question | Which court should answer? |
|--|---|---|
| 1. What is the proper meaning of "liquidation" pursuant to subsections 8(2) PBSA and 32(2) PBA? | This question derives from the opening words of section 32(2) of the PBA. This question is too narrow. Section 32 of the NPBA and the deemed trust provisions of the PBSA should be interpreted as a whole and not in a piecemeal manner. | Newfoundland Court, but as part of the broader questions posed below. |
| 2. Did a "liquidation" within the meaning of subsections 8(2) PBSA and 32(2) PBA occur prior or since the Wabush Initial Order? | This question is too narrow. As above, section 32 of the NPBA and the deemed trust provisions of the PBSA should be interpreted as a whole and not in a piecemeal manner as this question suggests. | Newfoundland Court, but as part of the broader questions posed below. |
| 3. Would such a liquidation deemed trust with respect to outstanding special payments be effective if triggered by a "liquidation" occurring after the Wabush Initial Order? | The special payment deemed trust is in section 32(1)(ii) of the NPBA. There is no mention of "liquidation" in section 32(1)(ii) of the NPBA. This question seems to suggest that the court should read "liquidation" into section 32(1)(ii) where there is no such word in the section. There is also no timing factor in section 32(1)(ii). | Section 32(1)(ii) should be interpreted by Newfoundland Court but as part of the broader questions posed below. |
| 4. Absent CCAA or BIA proceedings with respect to an employer, could the full amount of the deficit upon termination of a defined benefit pension plan be subject to a deemed trust pursuant to either of the PBSA or the PBA? | This question derives from section 32(3) of the NPBA which states: (3) Where a pension plan <i>is terminated in whole or in part</i> , an employer who is required to pay contributions to the pension fund shall hold in trust for the member or former member or other person with an entitlement under the plan an amount of money equal to <i>employer contributions due under the plan to the date of termination</i> . [emphasis added] | Newfoundland Court, as part of the questions posed below. |

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| <p>5. Would such a wind-up deficit deemed trust be effective if triggered by a termination occurring after the Wabush Initial Order?</p> | <p>There is no timing factor (i.e. if the wind up occurred before the CCAA filing or after the CCAA filing) in section 32 of the NPBA. This question also seems to suggest the court should read in a timing factor where there are no such words in section 32.</p> | <p>None.</p> |
| <p>6. Is the deemed trust arising under the PBA specifically or implicitly limited to assets of the employer located in Newfoundland & Labrador?</p> | <p>This question is premature as the issue of the location of assets to pay a distribution should be dealt with after resolution of the deemed trusts' applicability and scope.</p> | <p>Not necessary to decide at this time.</p> |
| <p>7. Could this Court nonetheless recognize and enforce a PBA deemed trust against assets located in this Province (or the sale proceeds standing in their stead)?</p> | <p>This question is premature as the issue of the location of assets to pay a distribution should be dealt with after resolution of the deemed trusts' applicability and scope.</p> | <p>Not necessary to decide at this time.</p> |

| <p>Questions proposed by Pension Interests</p> | <p>Which court should answer?</p> |
|---|--|
| <p>1. The Supreme Court of Canada has confirmed in <i>Indalex</i> that provincial laws apply in CCAA proceedings, subject only to the doctrine of paramountcy. Assuming there is no issue of paramountcy, what is the scope of section 32 in the NPBA deemed trusts in respect of:</p> <ul style="list-style-type: none"> a) unpaid current service costs; b) unpaid special payments; and, c) unpaid wind-up liability. | <p>Newfoundland Court</p> |
| <p>2. The Salaried Plan is registered in Newfoundland and regulated by the NPBA.</p> <ul style="list-style-type: none"> a) (i) Does the PBA deemed trust also apply to those members of the Salaried Plan who worked on the railway (i.e., a federal undertaking)? (ii) If yes, is there a conflict with the NPBA and PBA if so, how is the conflict resolved? b) (i) Does the SPPA also apply to those members of the Salaried Plan who reported for work in Québec? (ii) If yes, is there a conflict with the NPBA and SPPA and if so, how is the conflict resolved? (iii) Do the Quebec SPPA deemed trusts also apply to Québec Salaried Plan members? | <p>Newfoundland Court</p> |

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|---|-------------------------------|
| <p>3. Is the NPBA lien and charge in favour of the pension plan administrator in section 32(4) of the NPBA a valid secured claim in favour of the plan administrator? If yes, what amounts does this secured claim encompass?</p> | <p>Newfoundland Court</p> |
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Schedule "B"

LIST OF AUTHORITIES

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| 1. | <i>IBM Canada Limited v. Waterman</i> , 2013 SCC 70, [2013] 3 S.C.R. 985 |
| 2. | <i>Schmidt v. Air Products Canada Ltd.</i> , [1994] 2 S.C.R. 611 |
| 3. | <i>Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)</i> , 2004 SCC 54 |
| 4. | Newfoundland and Labrador, Legislative Assembly, Hansard, 43rd General Assembly, 1st Sess, No 55 (17 December 1996) (Ernie McLean) |
| 5. | <i>Sun Indalex Finance, LLC v. United Steelworkers</i> , [2013] 1 SCR 271, 2013 SCC 6 |
| 6. | <i>Timminco Limited and Becancour Silicon Inc.</i> , Court File No. CV-12-9539-00CL, Order of Morawetz J. (18 October 2012) |
| 7. | <i>Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc.</i> , [1994] O.J. No. 953. |
| 8. | <i>Yukon Zinc Corp. (Re)</i> , [2015] B.C.J. No. 2342 at para 57. |
| 9. | <i>Century Services Inc. v. Canada (Attorney General)</i> , [2010] 3 SCR 379, 2010 SCC 60 (CanLII) |
| 10. | <i>Boucher c. Stelco Inc.</i> , 2005 SCC 64 |
| 11. | <i>Van Breda v. Village Resorts Ltd</i> , 2012 SCC 17 |
| 12. | <i>Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP</i> , 2016 SCC 30 |
| 13. | <i>Stanford International Bank Ltd., Re</i> , 2014 QCCS 204 |
| 14. | <i>Lexus Maritime inc. c. Oppenheim Forfait GmbH</i> , 1998 CarswellQue 638 (Que. C.A.), 1998 CanLII 13001 |
| 15. | <i>Black v. Breeden</i> , 2012 SCC 19 |
| 16. | Jeffrey Talpis and Shelley L. Kath, "The Exceptional as Commonplace in Quebec <i>Forum Non Conveniens</i> Law" |
| 17. | <i>Bombardier Produits récréatifs inc (BRP) c Christian Moto Sport inc</i> , 2012 QCCA 1670 |
| 18. | <i>Cloutier c. Société Canada Trust</i> , 2008 QCCA 544 |
| 19. | <i>Swimwear Etc. v. Raymark Xpert Business Systems Inc.</i> , 2006 ABQB 82 |

Schedule "C"

Newfoundland *Pension Benefits Act*, S.N.L. 1996 c. P-4.01

Part V : Standards for Registration

Amounts to be held in trust

32. (1) An employer or a participating employer in a multi-employer plan shall ensure, with respect to a pension plan, that

- (a) the money in the pension fund;
- (b) an amount equal to the aggregate of
 - (i) the normal actuarial cost, and
 - (ii) any special payments prescribed by the regulations, that have accrued to date; and
- (c) all
 - (i) amounts deducted by the employer from the member's remuneration, and
 - (ii) other amounts due under the plan from the employer that have not been remitted to the pension fund

are kept separate and apart from the employer's own money, and shall be considered to hold the amounts referred to in paragraphs (a) to (c) in trust for members, former members, and other persons with an entitlement under the plan.

(2) In the event of a liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that under subsection (1) is considered to be held in trust shall be considered to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own money or from the assets of the estate.

(3) Where a pension plan is terminated in whole or in part, an employer who is required to pay contributions to the pension fund shall hold in trust for the member or former member or other person with an entitlement under the plan an amount of money equal to employer contributions due under the plan to the date of termination.

(4) An administrator of a pension plan has a lien and charge on the assets of the employer in an amount equal to the amount required to be held in trust under subsections (1) and (3). [emphasis added]

Part IX: Reconsideration and Appeals

Application to court

69. Where a provision of this Act is contravened, the superintendent may apply to the Trial Division for an order prohibiting the continuation or repetition of the contravention or the carrying on of any activity specified.

Companies' Creditors Arrangement Act, R.S.C 1985, c. C-36

Part II: Jurisdiction of Courts

Jurisdiction of court to receive applications

9 (1) Any application under this Act may be made to the court that has jurisdiction in the province *within which the head office or chief place of business of the company in Canada is situated*, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Courts shall aid each other on request

17 All courts that have jurisdiction under this Act and the officers of those courts *shall act in aid of and be auxiliary to each other in all matters provided for in this Act*, and an order of a court seeking aid with a request to another court shall be deemed sufficient to enable the latter court to exercise in regard to the matters directed by the order such jurisdiction as

either the court that made the request or the court to which the request is made could exercise in regard to similar matters within their respective jurisdictions. [emphasis added]

Civil Code of Québec, CQLR c CCQ-1991

2809. Judicial notice may be taken of the law of other provinces or territories of Canada and of that of a foreign state, provided it has been pleaded. The court may also require that proof be made of such law; this may be done, among other means, by expert testimony or by the production of a certificate drawn up by a jurisconsult.

Where such law has not been pleaded or its content has not been established, the court applies the law in force in Québec.

3077. Where a State comprises several territorial units having different legislative jurisdictions, each territorial unit is regarded as a State.

Where a State comprises several legal systems applicable to different categories of persons, any reference to the law of that State is a reference to the legal system prescribed by the rules in force in that State; in the absence of such rules, any such reference is a reference to the legal system most closely connected with the situation.

3135. Even though a Québec authority has jurisdiction to hear a dispute, it may, exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another State are in a better position to decide the dispute.

N° / 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.,

- and - Petitioners

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, BLOOM LAKE RAILWAY COMPANY LIMITED, WABUSH MINES, ARNAUD RAILWAY COMPANY, WABUSH LAKE RAILWAY COMPANY LIMITED

- and - Mises-en-cause

FTI CONSULTING CANADA INC.

Monitor

- and -

MICHAEL KEEPER, TERENCE WATT, DAMIEN LABEL & NEIL JOHNSON

OBJECTING PARTIES-Mises-en-cause

- and -

UNITED STEELWORKERS, LOCAL 6254, UNITED STEELWORKERS, LOCAL 6285

Mises-en-cause

- and -

MORNEAU SHEPELL

Mise-en-cause

FACTUM OF THE REPRESENTATIVES

of the Salaried Employees and Retirees in response to the Motion by the Monitor for Directions with respect to Pension Claims and the transfer of certain questions to the Newfoundland Court

M^{es} NICHOLAS SCHEIB, ANDREW HATNAY, BARBARA WALANCIK AND AMY TANG

Co-Attorneys for the Objecting Parties-Mises-en-cause Michael Keeper, Terence Watt, Damien Label and Neil Johnson

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