

August 28, 2015

Via E-Mail

Andrew J. Hatnay
Direct Dial: 416-595-2083
Direct Fax: 416-204-2872
ahatnay@kmlaw.ca

Steven Weisz
Blake, Cassels & Graydon LLP
199 Bay Street, Suite 4000
Commerce Court West
Toronto ON M5L 1A9

Dear Mr. Weisz:

**Re: Wabush Mines (CCAA), Québec Court File No. 500-11-048114-157
Contributory Pension Plan for Salaried Employees of Wabush Mines, Cliffs Mining
Company, Managing Agent Arnaud Railway Company and Wabush Lake Railway
Company, Limited Newfoundland Registration Number 021314-000 (the “Salaried
Plan”)
Our File No. 15/1359**

We acknowledge receipt of your letter dated August 25, 2015.

We do not agree with your analysis of the decisions of Mr. Justice Hamilton dated June 26, 2015, nor of the Québec Court of Appeal dated August 18, 2015.

Mr. Justice Hamilton did not make any finding that the Newfoundland PBA deemed trust is not effective in the CCAA proceeding. That motion, as you are aware, was in the context of whether a specific priority should be granted to the DIP lender over the statutory deemed trust priorities. Mr. Justice Hamilton granted the specific priority to the DIP lender but made no determination of the applicability or validity of the Newfoundland PBA deemed trust with respect to amounts owing by the company *other than* DIP advances. The Court acknowledged the law from the Supreme Court of Canada in *Indalex* which states that a provincial deemed trust continues to apply in CCAA proceedings, subject only to the doctrine of paramountcy. Thus, the Newfoundland PBA deemed trust continues to apply to give first priority recovery to the pension plan beneficiaries of the Salaried Plan for all amounts owing to the Salaried Plan by Wabush (immediately after the court-ordered CCAA charges).

As for the federal PBSA, again, the motion before Mr. Justice Hamilton was in the context of a motion for a specific priority to the DIP lender, not the applicability of the PBSA deemed trust priority over other assets of Wabush. As the Québec Court of Appeal pointed out in its decision (para. 36) “the matter of the effectiveness of the federal [PBSA] deemed trust in CCAA

proceedings is not settled law". The Québec Court of Appeal also noted a number of arguments in favour of the effectiveness of the PBSA in the CCAA proceeding:

[43] ...There are, in my view, grounds for framing a statutory interpretation argument for the petitioners' position that have *prima facie* merit when one considers, for example, that the CCAA amendments are the product of a complicated evolution; that the CCAA and the PBSA amendments have different policy objectives which may shape interpretation; that the relevance of principles developed by the Supreme Court in other settings to the deemed trusts problem faced in this case is the matter of fair debate; that comparisons might be made with deemed trust regimes from the provinces or other statutes, and more. *All of these factors suggest to me that, notwithstanding the strength of the judgment a quo, there are prima facie meritorious lines of argument that might be pressed on appeal.*" [emphasis added]

Accordingly, we continue to assert the Newfoundland PBA deemed trust priority for the beneficiaries of the Salaried Plan, as well as the PBSA deemed trust priority for those beneficiaries of the Salaried Plan who are subject to the PBSA.

Yours truly,

KOSKIE MINSKY LLP



Andrew J. Hatnay

AJH:vdl

- cc. Bernard Boucher, Milly Chow, *Blake, Cassels & Graydon LLP*
Nigel Meakin, Steven Bissell, *FTI Consulting* (Monitor)
Sylvain Rigaud, Chrystal Ashby, *Norton Rose Fulbright LLP* (Counsel for the Monitor)
Matthew Gottlieb, *Lax O'Sullivan LLP* (Independent Counsel for the Board of Directors of the Petitioners)
Louis Dumont, *Dentons LLP* (Counsel to Cliffs Mining Company (the DIP Lenders))
Grant Moffat, *Thornton Grout Finnigan LLP* (Counsel for Cliffs Mining Company (the DIP Lenders))
Pierre Lecavalier, *Department of Justice, Attorney General of Canada* (Counsel to OSFI)
Doug Mitchell, Leslie-Anne Wood, *Irving Mitchell Kalichman* (Counsel to Superintendent of Pensions, Newfoundland and Labrador)
Jean-Francois Beaudry, *Philon Leblanc Beaudry*, (Counsel to Syndicat des Metallos, Section Locale 6285)
Clients
Gerry Apostolos, *Langlois Kronston Desjardins* (Creditors Quebec North Shore and Labrador Railway Company Inc., Air Inuit Ltd., Metso Shared Services Ltd., Iron Ore Company of Canada, and WSP Canada Inc.)
Nicholas Scheib, *Scheib Legal*
Ari Kaplan, *Koskie Minsky LLP*
Service List