

KOSKIE MINSKY

JUSTICE MATTERS

June 15, 2016

Via Email

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Attention: Remy Boudreau, Chris Keirstead

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Attention: Randy Benson, Anamika Gadia

Attention: Carl Adjami

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**Attention: Pamela Huff, Bernard Boucher,
Chris Burr**

Dear Counsel:

**Re: Co-op Atlantic, Co-op Energy Ltd., C.A. Realty Ltd. (CCAA)
Co-op Atlantic Employees' Pension Plan
Court File No. SJM-98-15**

We have been retained by Murielle DiDomenicantonio, a retired salaried employee of Co-Op Atlantic. Ms. DiDomenicantonio recently received a letter (copy enclosed) advising that her monthly pension benefits would be reduced by 32% as a result of the wind-up of the Plan. We understand that a similar letter was sent to all members of the Co-Op Atlantic Pension Plan.

A 32% reduction is a very significant loss to each retirees' monthly pension benefits and has caused financial hardship to the retirees.

Ms. DiDomenicantonio has organized a group of approximately 90 salaried retirees. We have recently received written requests for legal assistance from a large number of Co-Op Salaried retirees.

As we expect you are aware, the pension plan *beneficiaries* have a first priority claim for amounts owing to the pension plan by the employer under section 51(4) of the New Brunswick *Pension Benefits Act*, S.N.B. 1987, c. P-5.1. As a statutory trust, those amounts are to be paid ahead of the claims of other creditors (after the CCAA-ordered charges), including secured creditors:

Contributions

...

51(3) An employer who is required by a pension plan to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions due and not paid into the pension fund.

51(4) *If a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan* an amount equal to employer contributions accrued to the date of the wind-up but not yet due under the plan or regulations.

51(5) the administrator of the pension plan has a lien and charge upon the assets of the employer in an amount equal to the amount that is deemed to be held in trust under subsections (1), (3) and (4).

51(6) Subsections (1), (3) and (4) apply whether or not the money mentioned in those subsections is kept separate and apart from other money or property of the employer. [emphasis added]

As we expect you are also aware, the Supreme Court of Canada in the *Indalex* case confirmed that the provincial statutory deemed trust for amounts owing to a pension plan by an employer continues to apply in CCAA proceedings (subject only to the doctrine of paramountcy). In the current CCAA proceedings of *Essar Algoma*, Mr. Justice Newbould, in the context of a motion to suspend special payment contributions to the pension plan during the CCAA proceedings, repeated the applicability of the provincial statutory deemed trust in CCAA proceedings:

...Under the *Pension Benefits Act*, there is a deemed statutory trust for the unpaid special payments. ***That trust has not gone away because of the CCAA proceedings. It still exists.*** [emphasis added]¹

Ms. DiDomenicantonio has advised us that the salaried retirees as a stakeholder group are not represented in the CCAA proceedings, and in particular that they were not represented at the motion on April 28, 2016 before the court where a settlement was approved between certain

¹ *Re: Essar Steel Algoma Inc. et al.*, Endorsement of Newbould J. dated January 13, 2016

parties involved in the CCAA proceedings: Co-op Atlantic, its secured creditors, and the firm of Eckler Ltd, who was appointed to wind up the plan.

We also understand that under the terms of the settlement among these stakeholders, National Bank is to be paid \$13,507,817 on its claim of \$14,138,012 (a 95% recovery), FCC is to be paid \$7,027,551 on its claim of \$7,425,021 (a 94% recovery), and Concentra is to be paid \$2,500,000 on its claim of \$3,070,986 (an 81% recovery). Eckler, the pension plan administrator filed claims based on the underfunding of the Co-op Atlantic Pension Plan of approximately \$74,650,000, including a claim for \$19 million for a pre-CCAA filing wind up deficiency and is to be paid only \$5,500,000 (a 7.37% recovery).

We also understand that the salaried retirees received notice of the settlement approval two weeks *after* the court hearing in a notice sent by Eckler dated May 17, 2016.

We have reviewed the Service List as well as the court order of April 28, 2016. We note that there is no mention of the salaried employees and retirees being represented in the CCAA proceedings under a court representation order or otherwise, and no mention that they were represented at the April 28, 2016 motion hearing.

It appears to us that a key stakeholder group with first statutory priority claims were not consulted nor meaningfully involved prior to the purported compromise of their priority claims by other parties in the CCAA proceeding and the distribution of all the assets in the estate. That is not acceptable.

Accordingly, our clients take the position that they are not bound by the Settlement Agreement entered into among the parties referred to above, and they reserve all rights to challenge the distributions made to those parties under the above-noted settlement.

We have been instructed to seek a representation order from the court for all of the salaried employees and retirees and funding for their legal costs from the estate. We note that as of May 13, 2016 there is approximately \$3.4 million remaining in the estate of the company. Please do not distribute any of those funds without reasonable prior notice to us.

Please add us to the Service List as proposed Representative Counsel to the non-union employees and retirees. We will be in touch with you further with respect to setting a date for the representation order motion and next steps.

Yours truly,

KOSKIE MINSKY LLP



Andrew J. Hatnay
AJH:vdl/encl

- c. Service List
- Client
- Ari Kaplan, James Harnum, *Koskie Minsky LLP*

Murielle M.P. DiDomenicantonio
865 Coverdale Avenue
Riverview, NB E1B 5E4

Statement of Interim Pension Reduction

As reported in the enclosed Pension Notice, the New Brunswick Superintendent of Pensions has instructed Eckler to apply a 32% reduction to pensions-in-pay. The reduction will begin with your May 1, 2016 pension payment.

This is an *interim* reduction that reflects the *estimated* funding level of the Plan on its wind-up date, December 31, 2015. The final funding level can only be determined once the Court approves distribution of the assets of Co-op Atlantic, the Superintendent of Pensions determines the status of Plan amendments that were made at the time of the proposed conversion to shared risk, and the wind-up report is approved.

The interim reduction is being applied to reduce over-payments while the final funding level is being determined. After the wind-up report is approved, a final adjustment will be made to your pension. This adjustment will take into account any overpayments made between the Plan wind-up on December 31, 2015 and the interim reduction on May 1, 2016.

Action required! Please review the information below and contact Eckler Ltd. at 1-888-544-5514 or coopension@eckler.ca if you find any errors. We also ask that you return the attached *Confirmation of Personal Information* form by June 1, 2016. It is vital for us to have complete and accurate data in order to complete the wind-up report and process final pension adjustments.

Name of pensioner:	Murielle M.P. DiDomenicantonio	Name of spouse:	Bernardino DiDomenicantonio
SIN:	██████████	Spouse's SIN:	██████████
Date of birth:	November 13, 1949	Spouse's date of birth:	February 24, 1948
Date of retirement:	December 1, 2014	Beneficiary:	Bernardino DiDomenicantonio
Province:	NB		

See reverse for details of pension amounts.

Your current form of pension is a pension paid for your life with 60% continuing to your spouse for his/her life after your death.

Starting on May 1, 2016, your monthly pension will be adjusted as follows. Your revised pension amount will remain in effect until you are notified otherwise.

	Pension Prior to Reduction	32% Interim Reduction	Revised Monthly Pension May 1, 2016
Monthly Lifetime Pension	\$893.94	\$286.06	\$607.88