CANADA

PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

C.A.M 500-09-
(S.C.M. 500-11-048114-157)

COURT OF APPEAL

IN THE MATTER OF THE PLAN OF ARRANGEMENT OF BLOOM LAKE GENERAL PARTNER LTD. *et al.*:

0778539 B.C. LTD.

APPLICANT
(Respondent)

v.

BLOOM LAKE GENERAL PARTNER LIMITED, legal person having a place of business at 1155, René-Lévesque Blvd. W., Suite 508, Montreal (Quebec) H3B 3A7

QUINTO MINING CORPORATION, legal person having a place of business at 1155, René-Lévesque Blvd. W., Suite 508, Montreal (Quebec) H3B 3A7

8568391 CANADA LIMITED, legal person having a place of business at 1155, René-Lévesque Blvd. W., Suite 508, Montreal (Quebec) H3B 3A7

CLIFFS QUEBEC IRON MINING ULC, legal person having a place of business at 1155, René-Lévesque Blvd. W., Suite 508, Montreal (Quebec) H3B 3A7

WABUSH IRON CO. LIMITED, legal person domiciled at 200, Public Square, Suite 3300, in the City of Cleveland, State of Ohio, United States of America, 44114

WABUSH RESOURCES INC., legal person domiciled at 199, Bay Street, Suite 4000, City of Toronto, Ontario, M5L 1A9

RESPONDENTS
(Petitioners)

MOTION FOR LEAVE TO APPEAL OF THE JUDGMENT ON WABUSH IRON CO. LTD.'S AND WABUSH RESOURCES INC.'s AMENDED MOTION FOR DIRECTIONS AND THE ISSUANCE OF A SAFEGUARD ORDER (#607)

Applicant
April 4, 2018

- and -

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, legal person having a place of business at 1155, René-Lévesque Blvd. West, Suite 508, in the City and District of Montreal, Quebec, H3B 3A7

BLOOM LAKE RAILWAY COMPANY LIMITED, legal person having a place of business at 1155, René-Lévesque Blvd. West, Suite 508, in the City and District of Montreal, Quebec, H3B 3A7

WABUSH MINES, co-enterprise having a place of business at P.O. Box 878, in the City of Sept-Îles, District of Mingan, Quebec, G4R 4L4

ARNAUD RAILWAY COMPANY, legal person having a place of business at 1, Place-Ville-Marie, Suite 3000, in the City and District of Montreal, Quebec, H3B 4N8

WABUSH LAKE RAILWAY COMPANY, LIMITED, legal person having a place of business at 1155, René-Lévesque Blvd. West, suite 508, in the City and District of Montreal, Quebec, H3B 3A7

MISES-EN-CAUSE
(Mises en cause)

- and -

FTI CONSULTING CANADA INC., in its capacity as Monitor, domiciled at 79, Wellington West, Suite 2100, Toronto (Ontario) M5K 1G8

MONITOR

MOTION FOR LEAVE TO APPEAL OF THE JUDGMENT ON WABUSH IRON CO. LTD.'S AND WABUSH RESOURCES INC.'S AMENDED MOTION FOR DIRECTIONS AND THE ISSUANCE OF A SAFEGUARD ORDER (#607)

(Section 13 and 14 *CCAA* and Articles 31, 352 *et seq.* and 357 *et seq.* CCP)

Applicant
April 4, 2018

TO ONE OF THE HONOURABLE JUSTICES OF THE COURT OF APPEAL, APPLICANT RESPECTFULLY STATES AS FOLLOWS:

A. INTRODUCTION

1. Applicant 0778539 B.C. Ltd. (called "**MFC**" in the judgment of the Superior Court and hereafter) was at the relevant times the lessor of the "Wabush Deposit", which was being mined by Wabush Mines (the partners of which are Respondents Wabush Iron Co. Ltd. and Wabush Resources Inc.) pursuant to an amendment and consolidation of mining leases dated September 2, 1959 **(Annex 4)**, as amended in 1961 **(Annex 5)**, 1987 **(Annex 6)** and 1989 **(Annex 7)** (the "**1959 Lease**").

2. Pursuant to the 1959 Lease, MFC was to receive certain payments for each calendar quarter calculated on Iron Ore Products shipped, but not less than certain minimum amounts (the "Minimum Royalty Payments"), regardless of whether any mining operations were conducted.

3. Mining operations were idled by Wabush Mines in November 2014 and on May 20, 2015, Wabush Iron and Wabush Resources applied for and were granted Court protection under the *Companies' Creditors Arrangement Act* (R.S.C. 1985, c. C-36 as amended).

4. Wabush Mines continued to pay the Minimum Royalty Payments after the idling of the Wabush mine and until July 2015, when it ceased to make such payments. This gave rise to a dispute as to whether Minimum Royalty Payments were still payable to MFC.

5. As a result, the Minimum Royalty Payments were paid in trust to the Monitor for the period from July 1, 2015 to June 30, 2017, in the amount of $6,543,349.42 including interest, and Wabush Mines moved for directions on November 23, 2015 (#247). MFC filed a Contestation on April 5, 2017 **(Annex 3)** and Wabush Mines filed an Amended Motion on December 4, 2017 **(Annex 2)**.

6. By judgment rendered on March 14, 2018 **(Annex 1)**, the Motion Judge decided that Wabush Mines was entitled not to pay the Minimum Royalty Payments set forth in the 1959 Lease for the period from July 1, 2015 to June 30, 2017 and he ordered the Monitor to transfer the funds to the general trust account opened in connection with the restructuring of the Wabush *CCAA* Parties.

7. MFC hereby seeks leave to appeal the Motion Judge's decision.

B. CONTEXT

8. Since March 11, 1954, MFC has had exploration rights and the right to obtain mineral leases in land in Labrador, including the area known as the Wabush Deposit, an area rich in iron ore. These rights were granted to it for 99 years by a Crown corporation called the Newfoundland and Labrador Corporation Limited.

9. Mining leases were entered into in 1957 by MFC with various parties for the easterly and westerly portions of the Wabush Deposit and an Amendment and Consolidation of Mining Leases was entered into in 1959 by MFC and Wabush Iron to cover all of the Wabush Deposit"".

10. As amended, the relevant provisions of the 1959 Lease provide that Wabush Mines is required to pay the following amounts to MFC:

    (a) An annual rent of $360;

    (b) Earned Royalties payable on a quarterly basis for each Gross Ton of Iron Ore Products shipped from the Mine; and

    (c) If Earned Royalties are less than the Minimum, then a quarterly Minimum Royalty calculated as follows:[1]

    "For each calendar quarter during which this Indenture remains in effect, and regardless of whether the Lessee shall conduct

[1] This provision of the 1959 Lease was amended in 1961 to modify the tonnage specified, and again in 1987 to renumber it as Section A.3 and modify the introductory paragraph (see par. 5 of the Judgment). The text presented here is the result of these amendments.

> *on the Demised Premises any mining or other operations, the Lessee shall, on the Quarterly Payment Dates, pay the Lessor a quarterly minimum royalty (hereinafter called 'Minimum') equal to one-quarter of an amount calculated at the rate of thirty cents ($.30), Canadian Funds, per Gross Ton on the following tonnages.*
>
> | | |
> |---|---|
> | *During 1960-1964, inclusive* | *1,500,000 Gross Tons per year* |
> | *During 1965-1966, inclusive* | *6,000,000 Gross Tons per year* |
> | *During 1967* | *8,000,000 Gross Tons per year* |
> | *During 1968* | *8,333,000 Gross Tons per year* |
> | *During 1969 -1972 inclusive* | *10,333,000 Gross Tons per year* |
> | *During 1973 and each year thereafter* | *10,833,000 Gross Tons per year"* |

11. The Lease provides that any amount paid by way of royalty otherwise than in payment of Earned Royalties shall constitute a credit against future Earned Royalties.

12. The payment of the Minimum Royalty is subject to a number of conditions. The condition which is relevant to the present dispute (Section A.1(f)), which the Motion Judge calls the "cap", provides a one-time maximum amount of Minimum Royalty payable over the duration of the Lease:

> *"(f) When the Lessee shall have paid to the Lessor Minimum for which it has not taken credit, and such payments equal or exceed that figure determined by multiplying the tonnage of Iron Ore Products which can be produced from the remaining proven ore in the Demised Premises by the rate of thirty cents (30¢) per Gross Ton thereof, then, and in that event, the Lessee shall be under no further obligation to pay Minimum to the Lessor. The quantity of the remaining proven ore will be established in accordance with operating estimates customary in the iron ore industry. Any dispute which may arise hereunder with respect to the rights and limitations herein set forth, shall be submitted to arbitration as hereinafter provided."*
>
> [Emphasis added]

13. The 1959 Lease states at its Section 11, that "*[t]his indenture is to be construed and interpreted in accordance with the laws of the Province of Newfoundland, Canada*", and the Motion Judge admitted and relied on an

expert opinion of a Newfoundland lawyer for the purpose of interpreting the Lease.

14. The Wabush mine began its operations in 1965. Mining operations were suspended in March 2014 and permanently idled in November 2014.

15. Since operations were suspended in March 2014, Wabush Mines paid Minimum Royalty and not Earned Royalty Payments due quarterly pursuant to the 1959 Lease. Said payments were made until July 2015.

16. Pursuant to an agreement signed on June 2, 2017, the mine was sold through the *CCAA* proceedings to Tacora Resources Inc. in July 2017 for a total consideration of approximately $70 million.

C. ISSUES IN DISPUTE

17. The issues in the Superior Court which remain relevant were identified as follows:

    (a) What is the proper interpretation of the cap on Minimum Royalties under Article A.1(f) of the 1959 Lease?

    (b) What was the amount of the cap in the period between July 1, 2015 and June 30, 2017?

18. In order to decide these issues, the Motion Judge stated that it was necessary to determine the meaning of the expression "*Iron Ore Products which can be produced from the remaining proven ore*", found at Article A.1(f) of the 1959 Lease.

19. There was no debate as to the quantities of proven or probable reserves of ore remaining as of December 31, 2014, which totaled 199.5 million metric tonnes.

20. The position of Wabush Mines was that (a) the expression "remaining proven ore" in the 1959 Lease means "iron ore that could be extracted in an economically viable or profitable manner" and that (b) in light of the then

current market conditions, it was not profitable for Wabush Mines to exploit the nearly 200 million metric tonnes of reserves of ore, such that (c) there was no "remaining proven iron ore" and Wabush Mines is not required to pay any Minimum Royalty.

21. The position of MFC was that the payment of the Minimum Royalty did not depend on the profitability of the mine as operated by Wabush Mines at a given time.

D. THE DECISION OF THE COURT

22. The Motion Judge decided that there was no "remaining proven ore" if it cannot be mined profitably under then current economic conditions (Annex 1, par. 82 to 84).

23. He further decided that it was not economically viable to extract the ore in the period between July 1, 2015 and June 30, 2017 (par. 101), but that the sale to Tacora demonstrates that it had become viable again at the time of that sale (par. 105).

24. Accordingly, he concluded that no Minimum Royalties were payable between July 1, 2015 and June 30, 2017 (par. 106).

E. GROUNDS FOR APPEAL

25. It is respectfully submitted that the judgment is wrong in law and rests on a manifest misunderstanding of the commercial transaction between the parties and a misinterpretation of the lease. The judge also erred in law in admitting evidence of the law of Newfoundland and Labrador.

26. The decision of the Motion Judge is entirely based on what he believed to have been the majority view at the time of the 1959 Lease, of the meaning in the mining industry of the one word "***ore***", as used in the relevant phrase of the lease, namely: "*Iron Ore Products which can be produced from the remaining proven ore*".

27. The lease does not contain a definition of the phrase "*remaining proven* ore" nor of any of the words or combinations of words in it. The lease does contain a definition of the words "*Iron Ore Products*", as follows:

> *"Iron Ore Products" shall mean and include iron ore, crude iron-bearing material and any metal, material or composition produced from iron ore or crude iron bearing material."*

28. There were contradictory expert opinions on the meaning of the phrase "*Iron Ore Products which can be produced from the remaining proven ore*". The Motion Judge rejected the opinion of MFC's expert on the basis of his own definition of the words "*can be produced*", as used in that phrase, to mean "*can be produced at a profit*" (at par. 46, emphasis added). In so doing, he distorts and adds to the plain meaning of the words used, which are not at all ambiguous.

29. The Motion Judge was in error in accepting as evidence and relying on the opinion of a Newfoundland lawyer on the proper interpretation under Newfoundland law of the phrase "*remaining proven ore*" in the contract. Sitting as a court pursuant to the *CCAA*, the Motion Judge had to take judicial notice of and apply the law of Newfoundland, and no expert evidence as to Newfoundland law was admissible.

30. The Motion Judge also committed palpable and overriding errors in ignoring the context in which these provisions are used in the 1959 Lease, that is that they apply only when actual production falls below minimum quantities and even when the mine is not in operation:

> *"...regardless of whether the Lessee shall conduct on the Demised Premises any mining or other operations...".*

31. It should therefore have been concluded, on a proper interpretation of the lease as a whole, that these provisions were intended to apply even when it was not profitable, at a specific time, for the mine to operate.

32. Most importantly, it is a fundamental error to fail to consider the functioning of the different payment terms of the lease as a commercial whole.

Considering those terms as a commercial whole, it becomes clear that it is impossible for there to be times when the lessee is or is not obliged to pay a quarterly minimum depending on whether it can produce at a profit. Rather, clause A.1(d) of the 1959 amendment and consolidation of mining leases (Annex 4) included a mitigating factor specifically applicable to annual payments of the Minimum, based on total steel production in the United States being reduced because of "*adverse business conditions*".

33. The interpretation favoured by the Motion Judge makes it as though there are a notional zero tonnes of ore in the ground at a given time when it is not profitable for the lessee to mine it, so the lessee does not have to pay anything to the lessor. But at a previous or subsequent time when it is profitable to mine it, there are then quantities of tonnes of ore in the ground from which Iron Ore Products can be produced, and the lessee has to make minimum payments. That cannot be what was intended.

34. And yet that is precisely what the Motion Judge decides and expresses at par. 105, thereby completely changing the unambiguous commercial terms of the original transaction between the parties to the lease.

35. Properly viewed as a whole, the payment terms of the lease provide for a single cap which will be reached once only during the term of the lease, when the total amount of Minimum Royalty paid under the Lease (and for which no credit has been taken) exceeds the value calculated on the basis of the tonnage of Iron Ore Products which can be produced from the remaining proven ore remaining in the ground. That minimum quantity cannot have been attained one day because prices of iron or other economic conditions result in its being unprofitable to extract it, and then no longer have been attained the next day because prices or other economic conditions change. Nothing in the 1959 Lease provides for a resumption of Minimum Royalty Payments if the mining operations become profitable after the "cap" has been reached.

36. The Motion Judge also considered extrinsic evidence which was not proven to be scientifically reliable and was neither contemporaneous with the 1959 Lease nor relevant to the intentions of the parties at the time, such as three of four definitions of "*ore*" in 1909 and 1918 (he discounted the fourth contrary definition), and responses to a questionnaire sent to a group of Canadian mining companies in 1968 (at par. 80).

37. Acting inconsistently, however, the Motion Judge also considered but rejected a definition of "*ore*" published in 1984 in National Policy Statement No. 2-A, entitled "*Guide for Engineers, Geologists and Prospectors Submitting Reports on Mining Properties to Canadian Provincial Securities Administrators*" (Exhibit D-4, **Annex 8**). The definition reads as follows:

> *"Ore" means a natural aggregate of one or more minerals which, at a specified time and place, may be mined and sold at a profit, or from which some part may be profitably separated.*

38. While the concept of profitability is included in that definition, it is clear that profitability need not exist at the time at which the report of the geologist or prospector is made. It need only be expected to exist at some future time, for example, such as when the costs of operation of the mine change or when the price of the mineral rises. Indeed, it is unreasonable to believe that decisions in the mining industry are taken only on the basis of the current price of minerals, instead of also taking into account longer-term factors including expectations as to future price trends.

39. That this is the correct interpretation of the notion of "*ore*" is clear from the general comments of the National Policy Statement, which provide:

> *"The author must state that, in his judgment, the venture is of sufficient merit to make the work recommended a worthwhile undertaking."* (Annex 8, p. 1)

40. Indeed, that is precisely what happened in the present case, since the Motion Judge concludes that what was not economically viable between July 2015 and June 2017 was so thereafter (par. 105). After all, there remained almost 200 million metric tonnes of proven and probable mineral

reserves in the ground at the mine (par. 87). And the fact that Wabush did not operate the mine at a profit does not mean that it was not possible to do so, as appears from Tacora's interest in doing so.

F. THESE ISSUES MERIT LEAVE TO APPEAL

41. Leave is to be granted by this Honourable Court if the following four criteria are satisfied:[2]

(a) Whether the point on appeal is of significance to the practice;

(b) Whether the point is of significance to the action or proceedings;

(c) Whether the appeal is *prima facie* meritorious or frivolous;

(d) Whether the appeal will unduly hinder the progress of the action or proceedings.

42. The importance of the mining industry to the Canadian economy is indisputable. As is the importance of accurate and consistent reporting of ore quantities and mineral reserves and the consistent interpretation and application by the courts of the terms of the commercial arrangements between parties, particularly as they relate to payments under mining leases.

43. The specific matter at issue in this case turns on the question of how to properly interpret clauses in the lease of a mining property, which while it finds its source in general contract and commercial law, is of obvious importance to the specific practice of insolvency and to the debtors and creditors who rely on it.

44. The issue of whether courts acting pursuant to the *CCAA* must take judicial notice of the law of all Canadian provinces and territories or should rather require expert evidence of the law of a place other than where they are

[2] *Aviva cie d'assurances du Canada v. Béton Brunet 2001*, 2016 QCCA 1837.

sitting, is also a matter of obvious significance to the practice of insolvency law in Canada.[3]

45. Regarding the second branch of the test, the points raised are of definite significance to the action. Whether Wabush Mines owes the amount claimed by MFC in excess of $6 million will clearly impact not only MFC but also the other creditors in the *CCAA*.

46. Thirdly, it is respectfully submitted that on a *prima facie* basis the appeal is meritorious, in that it is not frivolous. The arguments presented to convince this Honourable Court to conclude that the Motion Judge erred, are, at the very least, arguable.[4]

47. Concerning the fourth criterion, it is respectfully submitted that the appeal will not hinder the progress of the *CCAA* file. The Monitor is in possession of the disputed funds in trust. The mine was sold and nothing related to this matter impedes the progress of the *CCAA* file in all other respects.

48. Proceedings are ongoing with respect to the plan of arrangement, but according to the latest report of the Monitor, there remains uncertainty as to the amounts available for payment to creditors because of a variety of unresolved matters in the *CCAA* Proceedings.[5]

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[3] *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, [2001] 3 SCR 978, 2001 SCC 92, at par. 61; *Lawrence Home Fashions Inc./Linge de maison Lawrence inc. (Syndic de)*, 2013 QCCS 3015, at par. 18. The issue is also mentioned in another decision of Justice Hamilton in this same record, at 2017 QCCS 284.

[4] See "*Appealing!?!: Recent trends in Motions and Application for Leave to Appeal under the Companies' Creditors Arrangement Act*", D. Milivojevic and N. MacParland, Journal of the Insolvency Institute of Canada, 2016, Vol. 5, Thomson Reuters, Toronto, 2016, p. 135 at 163.

[5] *Forty-Fourth Report to the Court Submitted by FTI Consulting Canada Inc., in its Capacity as Monitor*, dated March 22, 2018 (including only the Report, the Plan and its Schedule "A" Definitions) **(Annex 9),** at page 25 (par. 83).

FOR THESE REASONS, MAY IT PLEASE THIS HONOURABLE COURT TO:

I. **GRANT** leave to 0778539 B.C. LTD. to appeal the Judgment of the Honourable Stephen W. Hamilton of the Superior Court rendered on March 14, 2018;

II. **ORDER** that the "Deposit Amounts" (as defined in the Judgment) held in trust by the Monitor remain in trust until a final decision on the appeal;

III. **ORDER** that the proceedings in first instance other than those between the instant parties and directly related to the present appeal are not suspended;

IV. **FIX** a date, place, time and duration for the hearing of the appeal.

V. **MAKE** such other orders and directions as this Honourable Court sees fit.

THE WHOLE with legal costs to follow.

MONTREAL, this April 4, 2018

LCM Attorneys Inc.

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NOTICE OF PRESENTATION

TO:

The Participating CCAA Parties
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Counsel for the Monitor

NOTICE IS HEREBY GIVEN that the Applicant's *Motion for Leave to Appeal* will be presented before a judge of the Court of Appeal sitting at Édifice Ernest-Cormier, located at 100 Notre-Dame Street East, in Montréal, at 9:30 AM on April 24, 2018, in Courtroom RC-18.

PLEASE ACT ACCORDINGLY.

MONTREAL, this April 4, 2018

LCM Attorneys Inc.

LCM ATTORNEYS INC.
Attorneys for the Applicant
0778539 B.C.LTD.

CANADA

PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

C.A.M 500-09-
(S.C.M. 500-11-048114-157)

COURT OF APPEAL

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0778539 B.C. LTD.

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RESPONDENTS (Petitioners)

- and -

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP *et al.*

MISES-EN-CAUSE (Mises en cause)

- and -

FTI CONSULTING CANADA INC., in its capacity as Monitor

MONITOR

LIST OF APPLICANT'S ANNEXES

Motion for Leave to Appeal of the Judgment on Wabush Iron Co. Ltd.'s and Wabush Resources Inc.'s Amended Motion for Directions and the Issuance of a Safeguard Order (#607)

Annex 1 Judgment of the Superior Court rendered on March 14, 2018.

Annex 2 Amended Motion for Directions and for the Issuance of a Safeguard Order, dated December 4, 2017.

Annex 3 Contestation dated April 5, 2017.

Annex 4 Amendment and Consolidation of Mining Leases, entered into as of September 2, 1959 (Exhibit R-5).

Annex 5 Amendment of Amendment and Consolidation of Mining Leases, entered into as of August 8, 1961 (Exhibit R-11).

Annex 6 Memorandum of Agreement entered into in 1987 (Exhibit R-13).

Annex 7 First Amendment to Memorandum of Agreement entered into in 1989 (Exhibit R-14).

Annex 8 National Policy Statement No. 2-A, entitled "Guide for Engineers, Geologists and Prospectors Submitting Reports on Mining Properties to Canadian Provincial Securities Administrators" (Exhibit D-4).

Annex 9 Forty-Fourth Report to the Court Submitted by FTI Consulting Canada Inc., in its Capacity as Monitor, dated March 22, 2018 (including only the Report, the Plan and its Schedule "A" Definitions).

MONTREAL, this April 4, 2018

LCM Attorneys Inc.

LCM ATTORNEYS INC.
Attorneys for the Applicant
0778539 B.C.LTD.

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PROVINCE OF QUEBEC
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APPELLANT (Respondent)

v.

BLOOM LAKE GENERAL PARTNER LIMITED,

QUINTO MINING CORPORATION,

8568391 CANADA LIMITED,

CLIFFS QUEBEC IRON MINING ULC,

WABUSH IRON CO. LIMITED, and

WABUSH RESOURCES INC.

RESPONDENTS (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 (Mises en cause)

- and -

FTI CONSULTING CANADA INC., in its capacity as Monitor

MONITOR

NOTICE OF APPEAL

(Art. 352 CCP)

Appellant (April 4, 2018)

A. THE JUDGMENT UNDER APPEAL

1. Appellant 0778539 B.C. Ltd. (hereinafter "**MFC**") appeals from a judgment of the Superior Court (District of Montreal) rendered on March 14, 2018[1] by the Honourable Stephen W. Hamilton J.S.C., which granted Respondents Wabush Iron Co. Ltd.'s and Wabush Resources Inc.'s *Amended Motion for Directions and the Issuance of a Safeguard Order (#607)* and concluded that Wabush Mines was entitled not to make certain payments set forth in a mining lease relating to the lands underlying the Wabush Mine and the "Wabush Deposit", located in Newfoundland and Labrador. Copy of the judgment *a quo* is attached as **Annex 1**.

2. The hearing in first instance lasted two days.

3. This file is not confidential.

B. THE ERRORS COMMITTED BY THE MOTION JUDGE

4. The Motion Judge erred in law in accepting expert evidence as to the content of the law of the Province of Newfoundland and Labrador. When a Court sits as a *CCAA* court, its jurisdiction extends to the whole of Canada (as opposed to only the province or territory where it is sitting), and it must accordingly take judicial notice of the laws of all provinces and territories of Canada. No expert evidence as to the law of Newfoundland was therefore admissible.

5. The Motion Judge also erred in law and committed palpable and overriding errors of fact in resorting to extrinsic evidence to interpret the unambiguous terms of the 1959 Lease[2] and reject their clear meaning, as well as in

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[1] The Notice of Judgment is dated March 15, 2018.

[2] See Amendment and consolidation of mining leases dated September 2, 1959 **(Annex 4)**, Amendment of Amendment and Consolidation of Mining Leases, entered into as of August 8, 1961 **(Annex 5)**, Memorandum of Agreement entered into in 1987 **(Annex 6)** and First Amendment to Memorandum of Agreement entered into in 1989 **(Annex 7)**.

considering for this purpose extrinsic evidence which was neither relevant nor reliable.

6. The Motion Judge committed palpable and overriding errors in his interpretation of the 1959 Lease, and particularly clause A.1(f) thereof, in that, *inter alia*, he failed to interpret the 1959 Lease as a whole, ignored the overall context of the parties' transaction and the long-term nature of their agreement, disregarded the commercial bargain struck by the parties and ignored the economic realities of the mining industry.

7. The Motion Judge's conclusion that the phrase "*Iron Ore Products which can be produced from the remaining proven ore*", and the included terms "*remaining proven ore*", must be interpreted as referring only to remaining proven ore which can be profitably extracted by Wabush Mines under then current market conditions, is entirely at odds with the agreement reached by the parties. Indeed, the terms of the 1959 Lease clearly show that the parties had anticipated that market conditions may become less favourable over the course of the lease and had adopted specific provisions to deal with this possibility. Thus:

   (a) Minimum Royalties are only payable when production falls below a certain threshold, that is when Earned Royalties payable on the gross tons of Iron Ore Products shipped from the mine fall below a stated minimum;

   (b) The 1959 Lease expressly provides that Minimum Royalties are payable "*regardless of whether the Lessee shall conduct* [...] *any mining or other operations*" (Article A.1);

   (c) The 1959 Lease provides that Minimum Royalties would be reduced in case of "*adverse business conditions*". Indeed, section A.1(d) provided that if during a given year the total steel production in the United States fell below 85% of the rated capacity of the US steel

industry for that year, then the Minimum Royalties payable by Wabush Mines would be reduced proportionately;[3]

(d) If current market conditions are such that the operation of the mine becomes unprofitable for Wabush Mines, or if for any other reason it wants to cease exploiting the mine, then Wabush Mines is entitled to terminate the 1959 Lease by giving MFC 60 days' notice and paying a determined amount (section C.1).[4] MFC has no corresponding right to unilaterally terminate the Lease unless mining operations have been suspended for ten *consecutive* years (article C.9)[5].

8. By contrast, the definition of the cap as "*that figure determined by multiplying the tonnage of Iron Ore Product which can be produced from the remaining proven ore in the Demised Premises by the rate of thirty cents (30¢) per Gross Ton thereof*" is remarkably devoid of reference to current market conditions or to the profitability of the Lessee's operations at the mine.

9. That the parties did not intend the cap to depend on Wabush Mines' profitability or on market prices for product is also reflected by the fact that Article A.1(f) specifically provides a method for determining the quantity of remaining proven ore in the ground "*in accordance with operating estimates customary in the iron ore industry*", but contains no provision whatsoever relating to how market prices or Wabush Mines' operating costs should be estimated or taken into consideration in determining if the cap has been reached.

10. The Motion Judge's interpretation results in making Minimum Royalty Payments dependent on Wabush Mines' own cost structure and

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[3] This provision was deleted in 1961 (Exhibit R-11).

[4] Starting in 1964, the amount payable upon termination is $1,600,000 less all sums expended in respect to of exploration, laboratory, development and improvement work, and all amounts paid under the 1959 Lease as royalties or otherwise.

[5] MFC may also terminate the Lease *for cause* upon 60 days' notice if Wabush Mines fails to pay rent or royalty (Article C.4).

investments in its mining and processing operations. Indeed, it is apparent from the Motion Judge's analysis that he interprets what can be "economically extracted" from the mine as being what can be economically extracted *by Wabush Mines itself* (see *inter alia* Annex 1, paragraphs 88-91 and 101).

11. The conclusion reached by the Motion Judge also fundamentally alters the economic bargain struck by the parties. Whereas the parties had agreed that Wabush Mines could only be relieved of the obligation of paying Minimum Royalty by terminating the Lease, which it could do at any time upon a 60-day notice, the judge's interpretation gives Wabush Mines the right to cease payment of the Minimum Royalty while retaining the benefits of the Lease.

12. MFC could thus find itself without any revenue[6] for ten years (and potentially substantially more, if the Lessee temporarily resumes operations before the end of the ten-year period and then suspends them again) and be prevented from terminating the Lease and finding a lessee willing to make the capital investment required or to rationalize costs in order to increase profitability.

13. The facts in evidence before the judge demonstrated just that. Whereas Wabush Mines claimed that extraction of the remaining proven ore was not profitable, the sale to Tacora demonstrated that it would be profitable for another operator. Tacora thus agreed to pay $70 million to purchase the Wabush mine in July 2017 and announced that it would resume production and that it anticipated making a $250 million capital investment (paragraphs 102-104).

14. This sale to Tacora demonstrates the absurdity of the result reached by the first judge. Indeed, Respondents supported the sale to Tacora and argued in favour of its approval by the Superior Court, insisting that Tacora intended

[6] With the exception of the nominal yearly rent of $360 less any amount expended on exploration, etc. (page 3 of the 1959 Lease).

to recommence mining operations. However, Respondents argued before the Superior Court that there is no remaining proven ore. How is it possible for a mine with no "remaining proven ore" or, even by modern terms, no "reserves", to be sold for over $70 million, and how is it possible for Respondents to argue, on the one hand, that there is no remaining proven ore, but then argue that a key consideration in approving the sale to Tacora was the latter's intention to restart mining operations?

15. The judge's interpretation also results in considerable uncertainty and unpredictability in the parties' bargain. Whereas the parties' clear intent in drafting the 1959 Lease was to provide for a one-time cap above which no Minimum Royalty would be payable, the result of the judge's interpretation is that whether there is "remaining proven ore" (and thus an obligation to pay Minimum Royalty) will depend on the short-term variations in the price of iron ore products and on the lessee's own operating cost structure rather than on industry standards and practices regarding what constitutes "proven ore".

16. Under the judge's interpretation, when iron ore prices drop or operating costs rise, there is no "remaining proven ore" from which Iron Ore Products can be produced under the Lease, but when prices rise or costs drop, there suddenly is "remaining proven ore" again. This is particularly problematic given that there are no express terms in the 1959 Lease providing for resumption of Minimum Royalty payments once the "cap" has been found to have been reached because there was at some point no "remaining proven ore".

C. CONCLUSIONS

17. The Appellant will ask this Honourable Court to:

I. ALLOW the appeal;

II. **SET ASIDE** the judgment rendered by the Superior Court on March 14, 2018;

III. **DECLARE** that an amount of $6,543,349.42 is payable to the Appellant as Minimum Royalty and interest under the terms of the 1959 Lease for the period between July 1, 2015 and June 30, 2017;

IV. **ORDER** the Monitor to pay to the Appellant the sum of $6,543,349.42 plus interest from December 1, 2017 to date;

THE WHOLE with legal costs in both Courts.

MONTREAL, this April 4, 2018

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CANADA

PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

C.A.M 500-09-
(S.C.M. 500-11-048114-157)

COURT OF APPEAL

IN THE MATTER OF THE PLAN OF ARRANGEMENT OF BLOOM LAKE GENERAL PARTNER LTD. *et al.*:

0778539 B.C. LTD.

APPELLANT (Respondent)

v.

BLOOM LAKE GENERAL PARTNER LIMITED *et al.*

RESPONDENTS (Petitioners)

- and -

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP *et al.*

MISES-EN-CAUSE (Mises en cause)

- and -

FTI CONSULTING CANADA INC., in its capacity as Monitor

MONITOR

LIST OF ANNEXES IN SUPPORT OF APPELLANT'S NOTICE OF APPEAL

Annex 1 Judgment of the Superior Court of Québec (the Honourable Stephen W. Hamilton J.S.C.), rendered on March 14, 2018.

Annex 2 Amended Motion for Directions and for the Issuance of a Safeguard Order, dated December 4, 2017.

Annex 3 Contestation dated April 5, 2017.

Annex 4 Amendment and Consolidation of Mining Leases, entered into as of September 2, 1959 (Exhibit R-5).

Annex 5 Amendment of Amendment and Consolidation of Mining Leases, entered into as of August 8, 1961 (Exhibit R-11).

Annex 6 Memorandum of Agreement entered into in 1987 (Exhibit R-13).

Annex 7 First Amendment to Memorandum of Agreement entered into in 1989 (Exhibit R-14).

Annex 8 National Policy Statement No. 2-A, entitled "Guide for Engineers, Geologists and Prospectors Submitting Reports on Mining Properties to Canadian Provincial Securities Administrators" (Exhibit D-4).

Annex 9 Forty-Fourth Report to the Court Submitted by FTI Consulting Canada Inc., in its Capacity as Monitor, dated March 22, 2018 (including only the Report, the Plan and its Schedule "A" Definitions).

MONTREAL, this April 4, 2018

LCM Attorneys Inc.

LCM ATTORNEYS INC.
Attorneys for Appellant
0778539 B.C.LTD.

N°: 500-09-
(C.S.M 500-11-048114-157)

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FTI CONSULTING CANADA INC., in its capacity as Monitor

MONITOR

Motion for Leave to Appeal of the Judgment on Wabush Iron Co. Ltd.'s and Wabush Resources Inc.'s Amended Motion for Directions and the Issuance of a Safeguard Order (#607)

Notice of Presentation

List of Applicant's Annexes

Notice of Appeal and List of Appellant's Annexes

Applicant (April 4, 2018)

ORIGINAL FOR THE COURT OF APPEAL

Code: BL5788 Our ref.: 70517.1

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