

CANADA

**PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL**

No.: 500-09-029797-214
(500-11-048114-157)

C O U R T O F A P P E A L

AGENCE DU REVENU DU QUÉBEC

and

CANADA REVENUE AGENCY

Appellants

v.

FTI CONSULTING CANADA INC.

Respondent – Applicant

and

**BLOOM LAKE GENERAL PARTNER
LIMITED ET ALS.**

Mises en cause

and

**QUÉBEC NORTH SHORE & LABRADOR
RAILWAY COMPANY AND IRON
COMPANY OF CANADA**

Mise en cause

and

EMPLOYÉS SALARIÉS NON-SYNDIQUÉS

Mise en cause

APPLICATION TO BE HEARD BY PREFERENCE
Rule 73 of the Civil Practice Regulation (Court of Appeal)

TO THE HONOURABLE CHIEF JUSTICE OF THE COURT OF APPEAL, THE APPLICANT FTI CONSULTING CANADA INC. RESPECTFULLY SUBMITS THE FOLLOWING:

I. OVERVIEW

1. By way of this Application, FTI Consulting Canada Inc. (the “**Monitor**”), acting in its capacity as court-appointed monitor overseeing the CCAA Parties’¹ proceedings under the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36 (“**CCAA**”), hereby seeks an order to set an expedited hearing date in respect of this appeal.
2. The Monitor submits that it is in the best interest of justice that this appeal be heard on an expedited basis so that the Monitor may proceed with the (third and) final distribution and seek its discharge and termination of the CCAA proceedings commenced in 2015. Indeed, the Monitor has already reported to the CCAA Court (as defined below) that it only intends to proceed with the next and final distribution once this appeal is finally resolved. As such, the timing of this appeal has an impact on more than 1700 creditors, including approximately 1040 former unionized employees and retirees with claims against the CCAA Parties, and approximately 250 former non-unionized employees and retirees with claims against the CCAA Parties, the whole as more fully described below.

II. RELEVANT FACTS

3. The CCAA Parties owned or operated different aspects of open-pit iron ore mines in Fermont and northern Labrador (Wabush) and a processing and shipping facility in Sept-Îles, Québec. The iron ore would be mined in Fermont and Wabush, and then shipped by rail to Sept-Îles, where it would be further processed and shipped via large lake ships to steelmakers.
4. In 2015, the CCAA Parties obtained protection from their creditors under the CCAA by way of two Initial Orders issued successively on January 27, 2015 (in relation to Bloom

¹ “**CCAA Parties**” means the mis en cause Bloom Lake General Partner Limited, Quinto Mining Corporation, Cliffs Québec Iron Mining ULC, Wabush Iron Co. Limited, Wabush Resources Inc., The Bloom Lake Iron Ore Mine Limited Partnership, Bloom Lake Railway Company Limited, Wabush Mines, Arnaud Railway Company and Wabush Lake Railway Company Limited.

Lake General Partner Limited, Quinto Mining Corporation, Cliffs Québec Iron Mining ULC, The Bloom Lake Iron Ore Mine Limited Partnership and Bloom Lake Railway Company Limited), and May 20, 2015 (in relation to Wabush Iron Co., Limited, Wabush Resources Inc., Wabush Mines, Arnaud Railway Company and Wabush Lake Railway Company Limited) by the Quebec Superior Court, for the judicial district of Montreal sitting in Commercial Division (the “**CCAA Court**”), as part of joint proceedings in court file 500-11-048114-157 (the “**CCAA Proceedings**”).

5. As part of the CCAA Proceedings, notices of rescission or disclaimer were sent by Cliffs Québec Iron Mining ULC (“**CQIM**”) to disclaim contracts (the “**Disclaimed Contracts**”) to four of its creditors (the “**CQIM Creditors**”) pursuant to subsection 32(1) CCAA.
6. Pursuant to subsection 32(7) CCAA, and in accordance with the court-sanctioned Claims Procedure Order², the CQIM Creditors filed claims for the losses they incurred in relation to the Disclaimed Contracts (“**Restructuring Claims**”).
7. Revenu Québec (“**RQ**”), also acting on behalf of the Canada Revenue Agency, filed claims for unpaid GST and QST in the aggregate of approximately \$13M (“**RQ \$13M Claims**”) which was owed by CQIM at the time of commencement of the CCAA Proceedings against it.
8. In June 2018, the proposed plan of compromise and arrangement³ (the “**Plan**”) presented by certain of the CCAA Parties, including CQIM, received court approval. The Monitor commenced the first interim distribution to creditors (“**First Interim Distribution**”) in August 2018, which included partial payment of the CQIM Creditors’ Restructuring Claims (the “**Damage Payments**”). Approximately \$132.4 million was distributed to the CCAA Parties’ creditors as part of the First Interim Distribution.
9. Accordingly, in its sales tax returns for the corresponding reporting period (which ended on November 30, 2018), CQIM claimed input tax credits (“ITCs”) and input tax refunds (“ITRs”) (collectively, the “**Damage Payment ITCs**”), in the aggregate amount of

² Exhibit R-2, Appellants’ Memorandum (“**A.M.**”), vol. 2 at p. 828.

³ Exhibits R-3 and R-4, **A.M.**, vol. 2 at p. 851 and 912.

approximately \$7.5M (“**CQIM \$7.5M Claim**”) for the GST and QST it was deemed to have paid when the Damage Payments were made in August 2018, pursuant to section 182 of the *Excise Tax Act*, RSC 1985, c E-15 (“**ETA**”) and section 318 of the *Act respecting the Québec sales tax*, CQLR c T-0.1 (“**QSTA**”).

10. RQ takes the position that it can operate compensation between the CQIM \$7.5M Claim and the RQ \$13M Claims, as compensation between two debts that arise before an initial order under the CCAA is made (“pre-pre compensation”) is permitted by section 21 CCAA. Subsidiarily, RQ argues that should the CQIM \$7.5 Claim be deemed to be a post-filing claim owing to CQIM, the CCAA Court should have allowed RQ to operate pre-post compensation.
11. On May 17, 2021, the Monitor proceeded with a second interim distribution to the CCAA Parties’ creditors (“**Second Interim Distribution**”). Approximately \$30 million was distributed to the CCAA Parties’ creditors in the Second Interim Distribution. ITCs in the aggregate amount of approximately \$2.7 million have been claimed by the CCAA Parties in respect of distributions on account of Damage Payments in the Second Interim Distribution. These ITCs are also currently being audited and withheld, pending the resolution of this appeal.
12. As of March 31, 2022, the Monitor held roughly \$18 million in cash on behalf of the CCAA Parties, net of unrepresented cheques and uncashed distributions made in the First and Second Interim Distributions. Other than contested tax refunds such as the one central to this appeal, there are no other material receivables or pending disbursements which would significantly increase or decrease the sums available for the third and final distribution to the CCAA Parties’ creditors.

III. PROCEDURAL HISTORY

13. On January 18, 2021, the Monitor filed a motion for directions from the Court (the “**Motion**”) with respect to RQ’s right to operate compensation.
14. On May 14, 2021, RQ filed a contestation to the Monitor’s motion for directions. RQ submitted that the Damage Payment ITCs were pre-filing amounts, and subsidiarily, should

the CQIM \$7.5 Claim be deemed to be a post-filing claim owing to CQIM, that it should be allowed to operate pre-post compensation.

15. On June 18, 2021, the Monitor amended the Motion, as directions were also required from the Court with respect to compensation that RQ purported to effect between \$234,755.16 in other ITCs claimed by CQIM for post-filing supplier invoices (the “**Other Post-Filing ITCs**”).
16. The Motion was heard on August 19 and 20, 2021. The judgment *a quo* was rendered on November 8, 2021 and essentially declared that the CQIM \$7.5M Claim was a post-filing debt which could not be compensated against the pre-filing RQ \$13M Claims. Accordingly, RQ was ordered to pay CQIM roughly \$7.5M in Damage Payment ITCs and \$234,755.16 in Other Post-Filing ITCs.
17. On November 29, 2021, RQ sought leave to appeal the judgment *a quo*. Leave to appeal was not contested by the Monitor, which specifically stated that should leave be granted that it was critical that the appeal be heard on an expedited basis so as not to delay the timing of the third and final distribution to the creditors.
18. Leave to appeal was granted on December 17, 2021, by this Court. In addition, an expedited and simplified time-schedule for the filing of memoranda was set as follows:
 - a. The Appellants (RQ, also acting on behalf of the Canada Revenue Agency) were ordered to file a single memorandum, not to exceed 30 pages, no later than February 18, 2022;
 - b. The Respondent (Monitor) and mises en cause CCAA Parties were ordered to file their respective memoranda, not to exceed 30 pages, no later than April 1, 2022;
 - c. The mises en cause Quebec North Shore & Labrador Railway Company and Iron Company of Canada (“**QNS&L**”) and Employés Salariés Non-Syndiqués were each allowed to file memoranda, not to exceed 10 and 5 pages respectively, no later than April 1, 2022.

19. As of April 1, 2022, all parties had filed their respective memoranda, save for the mise en cause Employés Salariés Non-Syndiqués who ultimately elected not to make any written submissions. As such, this appeal is now ready to be heard and a hearing date can now be fixed.
20. The total time requested for oral arguments by the parties is 200 minutes and is broken down as follows:
 - a. Appellants (RQ, also acting on behalf of the Canada Revenue Agency): 90 minutes;
 - b. Respondent (Monitor): 45 minutes;
 - c. Mises en cause (CCAA Parties): 45 minutes;
 - d. Mise en cause (QNS&L): 15 minutes;
 - e. Mise en cause (Employés Salariés Non-Syndiqués): 5 minutes.

IV. **GROUNDS FOR ORDER SOUGHT**

21. The third and final distribution to the CCAA Parties' creditors is dependent on the resolution of this appeal, as the Monitor has already reported to the CCAA Court that it will not proceed with a further interim distribution.
22. The CCAA Parties' creditors include approximately 1040 former unionized employees and retirees and 250 former non-unionized employees and retirees with claims against the CCAA Parties.
23. The vast majority of the former employee and retirees are elderly individuals. They have suffered reductions in their monthly pension benefits because of their pension plans' underfunding at the time of commencement of CCAA Proceedings and subsequent termination, as well as the termination of their supplemental post-employment benefits and payments ("OPEBs"). The CCAA Court has appointed representative counsel to represent the former salaried employee and retirees which were considered as vulnerable creditors.
24. While it is undisputed that "jumping the queue" may cause some prejudice to other

litigants, here, the Monitor is acting in the interest of more than 1700 creditors, including an important group of vulnerable individuals.

25. Finally, this Application is uncontested and will not prejudice any of the parties to this appeal.
26. Given the above, the Monitor respectfully submits that is the best interest of justice that this Honourable Court exercise its discretion and allow this appeal to be heard by preference.

FOR THESE REASONS, MAY IT PLEASE THE COURT TO:

GRANT the *Application to be heard by preference*;

FIX a hearing to be heard by preference for a total duration of 200 minutes (90 minutes for the Appellants, 45 minutes for the Respondent, 45 minutes for the mises en cause CCAA Parties, 15 minutes for the mise en cause Quebec North Shore & Labrador Railway Company and Iron Company of Canada, and 5 minutes for the mises en cause Employés Salariés Non Syndiqués), or, alternately, **DEFER** the file to the Master of the Rolls to schedule such a hearing by preference;

THE WHOLE without costs.

MONTREAL, April 8, 2022

Woods s.e.n.c.r.l./LLP

Woods LLP

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AFFIDAVIT

I, the undersigned, Nigel Meakin, Senior Managing Director of FTI Consulting Canada Inc., acting in its capacity as Monitor to the CCAA Parties in these proceedings, having a place of business at 79 Wellington Street West, Suite 2010 in Toronto, Ontario, M5J 2N7 solemnly affirm:

1. I am a representative of FTI Consulting Canada Inc.;
2. All the facts alleged in this Application are true.

AND I HAVE SIGNED:



NIGEL MEAKIN

Solemnly affirmed before me in Montreal by
videoconference this 8th day of April 2022



Commissioner for Oaths

NOTICE OF PRESENTATION

To: Mtres. Daniel Cantin, Jean-Claude Gaudette and Henrick Lavoie

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TAKE NOTICE that the present *Application to be heard by preference* will be presented for adjudication before the Chief Justice or one of the Honourable Judges of the Court of Appeal designated by the Chief Justice sitting in the Ernest-Cormier Building, located at 100, Notre-Dame Street East, in Montreal, on a date to be determined by them, in room **RC-18**, at **9:30** or so soon thereafter as counsel may be heard.

MONTREAL, April 8, 2022

Woods s.e.n.c.r.l./LLP

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ORIGINAL

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Mtre. Joshua -Bouzaglou

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