AFFIDAVIT IN SUPPORT OF AN APPLICATION

I, Nigel Meakin, Senior Managing Director at FTI Consulting Canada Inc., of Toronto, Ontario, swear (affirm) that the following facts are true:

1. For ease of reference, the following capitalized terms used in this affidavit shall have the following meaning:

    a) **CCAA** means *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended;

    b) **CCAA Court** means Quebec Superior Court for the district of Montreal, sitting in commercial division;

    c) **Wabush CCAA Parties** means collectively Wabush Iron Co. Limited, Wabush Resources Inc., Wabush Mines, Arnaud Railway Company and Wabush Lake Railway Company Limited;

    d) **Wabush CCAA Proceedings** means the proceedings instituted before the CCAA Court pursuant to the CCAA in relation to the Wabush CCAA Parties in the court record bearing number 500-11-048114-157, which are presided and supervised by the Honourable Stephen W. Hamilton, J.C.S.;

    e) **Wabush Initial Order** means order issued on May 20, 2015 by the CCAA Court (as subsequently amended, rectified and/or restated) pursuant to the CCAA;

    f) **Claims Procedure Order** means order issued on November 5, 2015 CCAA Court (as amended on November 16, 2015) which approved and established a procedure for the filing of creditor's claims against, *inter alia*, the Wabush CCAA Parties and their directors and officers; and

    g) **Monitor** means FTI Consulting Canada Inc., acting as court-appointed monitor in the Wabush CCAA Procedings.

2. On September 20, 2016, the Monitor filed a *Motion for Directions with respect to pension claims*, as amended on April 13, 2017 (the "**Motion for Directions**") with respect to the priority of pensions claims filed by the plan administrator of certain pension plans pursuant to the Claims Procedure Order, and the applicability and scope of deemed trusts, if any, under the *Pensions Benefits Standards Act*, R.S.C. 1985, c. 32 (2nd Supp.) and the Newfoundland & Labrador *Pensions Benefits Act*, S.N.L. 1996, c. P-4.01 as well as the Québec *Supplemental Pension Plans Act*, R.L.R.Q., c. R-15.1.

3. On January 30, 2017, the CCAA Court issued its decision (the "**January 30th Order**") with respect to various jurisdictional issues and other preliminary objections raised with respect to the Motion for Directions by several parties, including Her Majesty in Right of Newfoundland, as represented by the Superintendent of Pensions. Copy of the January 30th Order is attached as **Exhibit NM-1** to this Affidavit and is described more fully herein below.

4. On May 9, 2017, counsel to the Monitor sent a letter to Rolf Pritchard, Director Civil Division for the Office of the Attorney General of Newfoundland and Labrador (the "**May 9 Letter**"), copy of which is attached as **Exhibit NM-2** to this Affidavit, including the Motion for Directions, a list of relevant orders with respect to the Wabush CCAA Parties and the January 30th Order (Schedules A, B, and C).

5. The May 9 Letter (Exhibit NM-2), which describes the January 30th Order (Exhibit NM-1), reads in part as follows:

> The May 5th Order and the three (3) questions to be submitted to the Newfoundland & Labrador Court of Appeal by way of the Reference (the **Reference Questions**), as currently drafted, appear to be inextricably related to the pending proceedings before the CCAA Court in the above-captioned matter, presided and supervised by the Honourable Justice Stephen W. Hamilton, J.S.C. more specifically as they concern the Wabush CCAA Parties (the **Wabush CCAA Proceedings**). As such, there exists in our view a significant risk that the Reference will be in part duplicative in light of the ongoing Wabush CCAA Proceedings, thereby potentially leading certain interested parties to mistakenly believe that issues relating to the Wabush CCAA Parties are open for adjudication before both the CCAA Court and the Newfoundland & Labrador Court of Appeal. We are concerned that the Reference could amount to a collateral attack of orders previously made by the CCAA Court.
>
> [...] We have reached out on numerous occasions to you and your colleagues (Philip Osborne and Raylene Stokes) to share our views as to the importance of limiting the scope of the proposed Reference Questions to matters of statutory interpretation *in abstracto* as they relate to Section 32 of the *Pension Benefits Act*, 1997, S.N.L. 1996, c. P-4.01 (**PBA**), without overreaching and veering into the adjudication of the rights of parties already engaged in the Wabush CCAA Proceedings. We have specifically asked to be consulted with respect to the wording of the notices to be sent in connection with the Reference so as to avoid confusion amongst stakeholders and ensure that the Reference process does not run afoul of the current stay of proceedings against the Wabush CCAA Parties or disrupt the conduct of the Wabush CCAA Proceedings.

[...] The CCAA Court issued on January 30th, 2017, its decision (the **January 30th Order**) with respect to various jurisdictional issues and other preliminary objections raised with respect to the Motion for Directions by several parties, including Her Majesty in Right of Newfoundland, as represented by the Superintendent of Pensions. We attach for your convenience copy of the January 30 Order as Schedule C. The position of the parties in relation to said jurisdictional issues is summarized at paragraphs 23 to 28 of the January 30th Order. In declining to refer any of the issues to the courts with jurisdiction in Newfoundland & Labrador, including specifically the questions as formulated by the representatives of the salaried employees and retirees (at paragraph 25) – which have since been adopted *verbatim* as the Reference Questions – the CCAA Court relied on well-established precedents that favour a single forum to hear all disputes relating to an insolvent debtor (at paragraphs 29 to 33) and properly exercised its discretion not to seek the assistance of another court on the basis of legal, factual and practical considerations (at paragraphs 39 to 89), including the position of the United Steel Workers representing the unionized pensioners of the Wabush CCAA Parties, which supported the jurisdiction of the CCAA Court and objected to the referral of certain issues before the courts with jurisdiction in Newfoundland & Labrador (at paragraph 80), as well as the fact that a plurality of non-unionized pensioners are residents in the Province of Quebec (at paragraph 77).

The January 30th Order was not appealed from, and all interested parties, including Her Majesty in Right of Newfoundland, as represented by the Superintendent of Pensions, have since agreed to debate the merits of the Motion for Directions before the CCAA Court on June 26th and 27th, 2017.

As for the Reference Questions, we have already expressed concerns about the formulation of questions 1 and 3 and the extent to which the Newfoundland & Labrador Court of Appeal will be asked to determine the scope and dollar value of the deemed trusts, liens and charges, that may arise pursuant to Section 32 PBA, as this provision applies to the Pension Plans at stake in the Wabush CCAA Proceedings and more specifically the Motion for Directions. Further, the preamble to question 1 appears unduly argumentative and, in our view, obfuscates the interplay between Section 32 PBA and the applicable provisions of the CCAA and the terms of the orders issued to date in the Wabush CCAA Proceedings.

The foregoing was noted by Mr. Justice Hamilton in the January 30th Order (at paragraph 66), wherein he also pointed out that such a

question, inasmuch as the Wabush CCAA Parties are concerned, may well be moot:

> Finally, as is typical in these cases, there is a close interplay between the NLPBA and the CCAA. The first question proposed by the representatives of the salaried employees and retirees is: "Assuming there is no issue of paramountcy, what is the scope of section 32 in the NLPBA deemed trusts". The scope of the NLPBA is not relevant if the NLPBA does not apply because of a conflict with the CCAA and federal paramountcy. In that sense, there may not even be a need to deal with the interpretation of the NLPBA.

As previously reported, we also seriously question the appropriateness of seeking the opinion of the courts of another forum than Québec with respect to question 2(b).

[...] We are of the view that the Reference Questions should be limited to the matters relating exclusively to the interpretation of Section 32 PBA and that all other matters relating to the Wabush CCAA Parties or the Wabush CCAA Proceedings should be dealt with exclusively by the CCAA Court.

6. Copy of the reply to the May 9 Letter, by way of email message dated May 11, 2017 and follow-up email from the Monitor's counsel dated May 12, 2017 is attached as **Exhibit NM-3** to this Affidavit.

I make this affidavit in support of the application of FTI Consulting Canada Inc.

Sworn before me in Toronto in the province

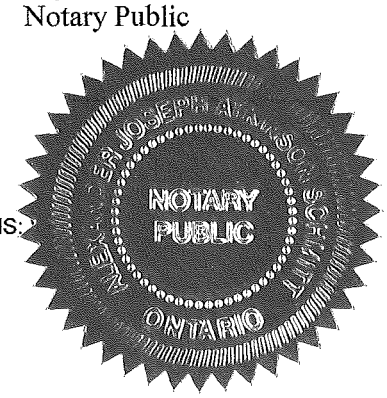
of Ontario

this 15th day of May, 2017

Nigel Meakin

ALEXANDER SCHMITT LSUC# 63860F

Notary Public



CAN_DMS:

This is **Exhibit "NM-1"** referred to in the

Affidavit of **Nigel Meakin**

sworn before me, this **15th day**

of **May, 2017**

A Commissioner for taking Affidavits

SUPERIOR COURT

(*Commercial Division*)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

No: 500-11-048114-157

DATE: January 30, 2017

PRESIDED BY THE HONOURABLE STEPHEN W. HAMILTON, J.S.C.

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.
Petitioners
And
THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP
BLOOM LAKE RAILWAY COMPANY LIMITED
WABUSH MINES
ARNAUD RAILWAY COMPANY LIMITED
WABUSH LAKE RAILWAY COMPANY LIMITED
Mises en cause
And
MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON
SYNDICAT DES MÉTALLOS, SECTIONS LOCALES 6254 ET 6285
MORNEAU SHEPELL LTD, IN ITS CAPACITY AS REPLACEMENT PENSION PLAN ADMINISTRATOR
HER MAJESTY IN RIGHT OF NEWFOUNLAND AND LABRADOR, AS REPRESENTED BY THE SUPERINTENDENT OF PENSIONS

JH5439

THE ATTORNEY GENERAL OF CANADA, ACTING ON BEHALF OF THE OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS
RÉGIE DES RENTES DU QUÉBEC
VILLE DE SEPT-ÎLES
Mises en cause
And
FTI CONSULTING CANADA INC.
Monitor

JUDGMENT

INTRODUCTION

[1] The debtors have filed proceedings under the *Companies' Creditors Arrangement Act* ("CCAA").[1] They owe substantial liabilities under two pension plans, including special payments, catch-up special payments and wind-up deficiencies. The Monitor has filed a motion for directions with respect to the priority of the various components of the pension claims.

[2] A preliminary issue has arisen as to whether the Court should request the aid of the Supreme Court of Newfoundland and Labrador (the "NL Court") with respect to the scope and priority of the deemed trust and other security created by the Newfoundland and Labrador *Pension Benefit Act* ("NLPBA"),[2] which regulates in part the pension plans.

CONTEXT

[3] On May 19, 2015, the Petitioners Wabush Iron Co. Limited and Wabush Resources Inc. and the Mises-en-cause Wabush Mines (a joint venture of Wabush Iron and Wabush Resources), Arnaud Railway Company and Wabush Lake Railway Company Limited (together the "Wabush CCAA Parties") filed a motion for the issuance of an initial order under the CCAA, which was granted the following day by the Court.

[4] Prior to the filing of the motion, Wabush Mines operated (1) the iron ore mine and processing facility located near the Town of Wabush and Labrador City, Newfoundland and Labrador, and (2) the port facilities and a pellet production facility at Pointe-Noire, Québec. Arnaud Railway and Wabush Lake Railway are both federally regulated

---

1 R.S.C. 1985, c. C-36.
2 S.N.L. 1996, c. P-40.1.

railways that transported iron ore concentrate from the Wabush mine to the Pointe-Noire port. The operations had been discontinued and the employees terminated or laid off prior to the filing of the CCAA motion.

[5] The Wabush CCAA Parties have two pension plans for their employees which include defined benefits:

- A hybrid pension plan for salaried employees at the Wabush mine and the Pointe-Noire port hired before January 1, 2013, known as 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

- A pension plan for unionized hourly employees at the Wabush mine and Pointe-Noire port, known as 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").

[6] Wabush Mines was the administrator of both plans.

[7] The majority of the employees covered by the plans reported for work in Newfoundland and Labrador while some reported for work in Québec. Moreover, some of the employees covered by the Union Plan worked for Arnaud Railway, which is a federally regulated railway. The result is that the Salaried Plan is governed by the NLPBA, while the Union Plan is governed by both the NLPBA and the federal *Pension Benefits Standards Act* ("PBSA").[3] Further, the Union suggests that the Québec *Supplemental Pension Plans Act* ("SPPA")[4] might be applicable to employees or retirees who reported for work in Québec. Both plans are subject to regulatory oversight by the provincial regulator in Newfoundland and Labrador, the Superintendent of Pensions (the "NL Superintendent"), while the Union Plan is also subject to regulatory oversight by the federal pension regulator, the Office of the Superintendent of Financial Institutions ("OSFI"). The Québec regulator, Retraite Québec, might also have a role to play.

[8] On June 26, 2015, in the context of approving the interim financing of the debtors, the Court ordered the suspension of payment by the Wabush CCAA Parties of the monthly amortization payments and the annual lump sum "catch-up" payments coming due under the plans, and confirmed the priority of the Interim Lender Charge over the deemed trusts with respect to the pension liabilities. The Court also ordered the

---

3 R.S.C. 1985 (2nd Supp.), c. 32.
4 CQLR, c R-15.1, s. 49.

suspension of payment of other post-retirement benefits, including life insurance, health care and a supplemental retirement arrangement plan.[5]

[9] On December 16, 2015, the NL Superintendent terminated both plans effective immediately on the basis that the plans failed to meet the solvency requirements under the regulations, the employer has discontinued all of its business operations and it was highly unlikely that any potential buyer of the assets would agree to assume the assets and liabilities of the plans.[6] On the same date, OSFI terminated the Union Plan effective immediately for the same reasons.[7]

[10] Both the NL Superintendent and OSFI reminded the Wabush CCAA Parties of the employer's obligation upon termination of the plan to pay into the pension fund all amounts that would be required to meet the solvency requirements and the amount necessary to fund the benefits under the plan. They also referred to the rules with respect to deemed trusts.[8]

[11] On January 26, 2016, the salaried retirees received a letter from Wabush Mines notifying them that the NL Superintendent had directed Wabush Mines to reduce the amount of monthly pension benefits of the members by 25%.[9] Retirees under the Union Plan had their benefits reduced by 21% on March 1, 2016.[10]

[12] On March 30, 2016, the NL Superintendent and OSFI appointed Morneau Shepell Ltd as administrator for the plans.[11]

[13] The Wabush CCAA Parties paid the monthly normal cost payments for both plans up to the termination of the plans on December 16, 2015. As a result, the monthly normal cost payments for the Union Plan were fully paid as of December 16, 2015.[12] The monthly normal cost payments for the Salaried Plan had been overpaid in the amount of $169,961 as of December 16, 2015.[13]

---

5 2015 QCCS 3064; motion for leave to appeal dismissed, 2015 QCCA 1351.
6 Exhibit R-13.
7 Exhibit R-14.
8 Exhibits R-13 and R-14.
9 Exhibit RESP-7.
10 Affidavit of Terence Watt, sworn December 14, 2016, par. 19.
11 Exhibit R-15.
12 There is a debate as to whether the Wabush CCAA Parties were required to pay the full monthly payment for December or only a pro-rated portion. The amount at issue for the period from December 17 to 31, 2015 is $21,462.
13 Exhibit R-16.

[14] However, the Wabush CCAA Parties ceased making the special payments in June 2015 pursuant to the order issued by the Court, with the result that unpaid special payments as of December 16, 2015 total $2,185,752 for the Salaried Plan[14] and $3,146,696 for the Union Plan.[15]

[15] Further, the Wabush CCAA Parties did not make the lump sum "catch-up" special payments that came due after June 2015. The amount payable is now calculated to be $3,525,125.[16] These amounts became known with certainty only when the actuarial report was completed and filed in July 2015, but some of these amounts may relate to the pre-filing period.

[16] Finally, the plans are underfunded. The Plan Administrator estimates the wind-up deficits as at December 16, 2015 to be approximately $26.7 million for the Salaried Plan and approximately $27.7 million for the Union Plan.

[17] As a result, according to the Monitor, the total amounts owing are approximately $28.7 million to the Salaried Plan and $34.4 million to the Union Plan.

[18] The Plan Administrator filed a proof of claim in respect of the Salaried Plan that includes a secured claim in the amount of $24 million and a restructuring claim in the amount of $1,932,940,[17] and a proof of claim with respect to the Union Plan that includes a secured claim in the amount of $29 million and a restructuring claim in the amount of $6,059,238.[18]

[19] The differences in the numbers are not important at this stage. It is sufficient to note that there are very large claims and that the Plan Administrator claims the status of a secured creditor with respect to a substantial part of its claims.

[20] It is also important to note that the Wabush CCAA Parties held assets both in Newfoundland and Labrador and in Québec. Many of the Québec assets have been sold and have generated substantial proceeds currently held by the Monitor.

[21] The Monitor is now working through the claims procedure. In that context, the Monitor applies to the Court for an order declaring that:

a) normal costs and special payments outstanding as at the date of the Wabush Initial Order are subject to a limited deemed trust;

---

14 Exhibit R-16.
15 Exhibit R-17.
16 Exhibit R-17.
17 Exhibit R-18.
18 Exhibit R-19.

b) normal costs and special payments payable after the date of the Wabush Initial Order, including additional special payments and catch up payments established on the basis of actuarial reports issued after the Wabush Initial Order, constitute unsecured claims;

c) the wind-up deficiencies constitute unsecured claims; and

d) any deemed trust created pursuant to the NLPBA may only charge property in Newfoundland and Labrador.

[22] Those issues are not yet before the Court. A preliminary issue has arisen as to whether the Court should request the aid of the NL Court with respect to the scope and priority of the deemed trust and the lien created by the NLPBA and whether the deemed trust and the lien extend to assets located outside of Newfoundland and Labrador.

POSITION OF THE PARTIES

[23] All parties agree that (1) the Court has jurisdiction to deal with all of the issues, and (2) the Court has the discretion to request the aid of the NL Court.

[24] Three parties suggest that the Court should exercise that discretion and request the aid of the NL Court:

- The Plan Administrator;
- The representatives of the salaried employees and retirees; and
- The NL Superintendent.

[25] The representatives of the salaried employees and retirees have proposed that the following questions should be resolved by the NL Court:

1. The Supreme Court of Canada has confirmed in *Indalex* 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 [NLPBA] deemed trusts in respect of:

   a) unpaid current service costs;

   b) unpaid special payments; and,

   c) unpaid wind-up liability.

2. The Salaried Plan is registered in Newfoundland and regulated by the NPBA.

a) (i) Does the PBSA 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 PBSA 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?

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?

[26] Three other parties suggest that the Court should not transfer any issues to the NL Court and should decide all of the issues:

- The Monitor;
- The Syndicat des métallos, sections locales 6254 et 6285; and
- The Ville de Sept-Îles.

[27] The Ville de Sept-Îles argues that the request to transfer should be dismissed because it is too late.

[28] Finally, two parties do not take a position on the request to transfer:

- The Attorney–General of Canada, acting on behalf of OSFI; and
- Retraite Québec.

ANALYSIS

1. The jurisdiction of the CCAA Court

[29] In principle, all issues relating to a debtor's insolvency are decided before a single court.[19] This rule is based on the "public interest in the expeditious, efficient and

---

19 *Sam Lévy & Associés Inc.* v. *Azco Mining Inc.*, 2001 SCC 92, par. 25-28.

economical clean-up of the aftermath of a financial collapse."[20] This public interest favours a "single control" of insolvency proceedings by one court as opposed to their fragmentation among several courts.[21]

[30] The Supreme Court in *Sam Lévy* concluded as follows with respect to the relevant test:

> 76 In the present case, we are confronted with a federal statute that *prima facie* establishes one command centre or "single control" (*Stewart*, *supra*, at p. 349) for all proceedings related to the bankruptcy (s. 183(1)). Single control is not necessarily inconsistent with transferring particular disputes elsewhere, but a creditor (or debtor) who wishes to fragment the proceedings, and who cannot claim to be a "stranger to the bankruptcy", has the burden of demonstrating "sufficient cause" to send the trustee scurrying to multiple jurisdictions. Parliament was of the view that a substantial connection sufficient to ground bankruptcy proceedings in a particular district or division is provided by proof of facts within the statutory definition of "locality of a debtor" in s. 2(1). The trustee in that locality is mandated to "recuperate" the assets, and related proceedings are to be controlled by the bankruptcy court of that jurisdiction. The Act is concerned with the economy of winding up the bankrupt estate, even at the price of inflicting additional cost on its creditors and debtors.[22]
>
> (Emphasis added)

[31] Although the *Sam Lévy* case was decided in the context of the *Bankruptcy and Insolvency Act* ("BIA"),[23] the same principles apply in the context of the other insolvency legislation, including the CCAA.[24] The CCAA court has jurisdiction to deal with all of the issues that arise in the context of the CCAA proceedings.[25] The stay of proceedings under the CCAA gives effect to this principle by preventing creditors from bringing proceedings outside the CCAA proceedings without the authorization of the CCAA court.

[32] There are clear efficiencies to having a single court deal with all of the issues in a single judgment.

---

20 *Ibid*, par. 27.
21 *Ibid*, par. 64.
22 *Ibid*, par. 76.
23 R.S.C. 1985, c. B-3.
24 *Century Services Inc.* v. *Canada (Attorney General)*, 2010 SCC 60, par. 22; *Newfoundland and Labrador* v. *AbitibiBowater Inc.*, 2012 SCC 67, par. 21; *Montreal, Maine & Atlantic Canada Co./Montréal, Maine & Atlantique Canada Cie (Arrangement relatif à)*, 2013 QCCS 5194, par. 24-25; *Re Nortel Networks Corporation et al*, 2015 ONSC 1354, par. 24; *Re Essar Steel Algoma Inc.*, 2016 ONSC 595, par. 29-30, judgment of Court of Appeal ordering (i) Cliffs to seek leave to appeal the Order, (ii) the hearing of the leave to appeal motion be expedited, and (iii) the issuance of a stay pending the disposition of the leave to appeal motion, 2016 ONCA 138.
25 Section 16 CCAA provides that the orders of the CCAA court are enforced across Canada.

[33] The general rule is therefore that the Court should rule on all issues that arise in the context of these insolvency proceedings.

2. The discretion to ask for the assistance of another court

[34] There are however situations where another court can deal more efficiently with specific issues. The CCAA Court has jurisdiction to ask for the assistance of another court under Section 17 CCAA:

> **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.

[35] The representative of the salaried employees and retirees also pleaded the notion of *forum non conveniens* under the Civil Code:

> **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.

[36] The Supreme Court held in *Sam Lévy*[26] that Article 3135 C.C.Q. does not apply in bankruptcy matters because of Section 187(7) BIA, which provides:

> **187 (7)** The court, on satisfactory proof that the affairs of the bankrupt can be more economically administered within another bankruptcy district or division, or for other sufficient cause, may by order transfer any proceedings under this Act that are pending before it to another bankruptcy district or division.

[37] While Section 17 CCAA is not as explicit, the Court is satisfied that it is not necessary or appropriate to refer to Article 3135 C.C.Q. in the present context. The CCAA court is not being asked to decline jurisdiction, but rather it is being asked to seek the assistance of another court.

[38] The Court is therefore satisfied that, notwithstanding the general rule that it should rule on all issues that arise in the context of these insolvency proceedings, it can seek the assistance of another court. It is a discretionary decision of this Court, based on factors such as cost, expense, risk of contradictory judgments, expertise, etc.

---

[26] *Supra* note 19, par. 62.

3. Specific grounds

[39] The arguments put forward in support of the referral of the issues to the NL Court can be summarized as follows:

a) Legal considerations:

- These are complex and important issues of provincial law;
- The courts in Newfoundland and Labrador possess far greater expertise in interpreting the NLPBA than does the courts in Québec, although these specific questions have not yet been considered by any court in Newfoundland and Labrador;
- The interpretation of the NLPBA is a question of the intention of the legislator in Newfoundland and Labrador, and the NL Court is better situated to determine this intention;

b) Factual considerations:

- It is a question of purely local concern and it may significantly impact a large number of residents of Newfoundland and Labrador;
- The province of Newfoundland and Labrador is closely connected to the dispute: a majority of the employees reported for work in the province and the Wabush CCAA Parties maintained significant business operations in the province;
- If justice is to be done and be seen to be done it is important that consequential decisions on provincial legislation be made by the courts of that province;
- The representatives of the salaried employees and retirees want the NL Court to interpret the NLPBA;

c) Practical considerations:

- The law of another province is treated as a question of fact in Québec, with the result that the conclusion on a matter of foreign law is not binding on subsequent courts and can only be overturned in the presence of a palpable and overriding error;
- It might be difficult to prove the law of Newfoundland and Labrador in a Québec court given the lack of jurisprudence on the specific issues;

- There will be increased costs if the Québec Court interprets the NLPBA because of the need to retain experts to provide legal opinions;
- There is no reason to believe that fragmenting the proceedings will result in additional delay;
- The judgment to be rendered will be a precedent and only a decision of the courts of Newfoundland and Labrador would be an authoritative precedent;
- Other persons or parties may wish to intervene on the issue of the scope of the Section 32 NLPBA deemed trusts, which would be more practical in the NL Court.

[40] These arguments do not convince the Court that this is an appropriate case to refer the issues to the NL Court.

a) Legal considerations

[41] This is the key argument put forward by the parties suggesting that the NLPBA issues be referred to the NL Court: the issues relate to the NLPBA, and the NL Court is best qualified to interpret the NLPBA.

[42] The Court accepts as a starting point that the NLPBA applies in the present matter: the pension plans are regulated by the NL Superintendent in accordance with the NLPBA (although OSFI also regulates the Union Plan in accordance with the PBSA) and the plans expressly provide that they are interpreted in accordance with the NLPBA.

[43] The Court also accepts the obvious proposition that the NL Court is more qualified to deal with an issue of Newfoundland and Labrador law than the courts of Québec, particularly since Newfoundland and Labrador is a common law jurisdiction and Québec is a civil law jurisdiction.

[44] However, that does not mean that the Court will automatically refer every issue governed by the law of another jurisdiction to the courts of that other jurisdiction.

[45] First, there are rules in the Civil Code with respect to how Québec courts deal with issues governed by foreign law. Articles 3083 to 3133 C.C.Q. set out the rules to determine which law is applicable to a dispute before the Québec courts, and Article 2809 C.C.Q. sets out how the foreign law is proven before the Québec courts.

[46] Further, pursuant to these rules, Québec courts regularly hear matters governed by foreign law. The Court of Appeal recently held that the fact that a dispute is governed by foreign law does not have much weight in a *forum non conveniens* analysis:

> [98] Si on revoie les considérations du Juge, portant sur dix points, pour conclure que le for géorgien est préférable, deux aspects principaux en ressortent, soit les coûts et la loi applicable.
>
> [99] Quant à cette dernière considération, elle n'est pas d'un grand poids, à mon avis. Parce que le débat porte sur les faits plutôt que sur le droit. Parce que la *common law* est tout de même familière aux tribunaux québécois. Parce que faire la preuve de la loi d'un État américain n'est pas un grand défi, c'est même chose courante.
>
> [100] Et surtout, parce que le critère de la loi applicable ne constitue pas en soi un facteur important. Dans tout litige international, les conflits de lois sont l'ordinaire et non l'exception.[27]

[47] In other words, the mere fact that a dispute is governed by foreign law is not a good reason to send the case to the foreign jurisdiction. This principle was applied in a CCAA context in the *MMA* case.[28]

[48] There are examples in the insolvency context of the court with jurisdiction over the insolvency declining to send an issue governed by foreign law to the foreign court. In *Sam Lévy*, the Supreme Court declined to send an insolvency matter to British Columbia simply because there was a choice of B.C. law, stating, "The Quebec courts are perfectly able to apply the law of British Columbia."[29]

[49] In *Lawrence Home Fashions Inc./Linge de maison Lawrence inc. (Syndic de)*, Justice Schrager, then of this Court, stated :

> [18] In any event, should equitable set-off under Ontario law become relevant to the case, Québec judges sitting in such matters, on the presentation of the appropriate evidence, are readily capable of dealing with foreign law issues. Indeed, this is a frequent occurrence particularly in insolvency matters.[30]

[50] The Ontario courts rejected similar arguments in *Essar Algoma*:

> [80] Ontario courts can and do often apply foreign law. In this case I do not consider the fact that the law to be applied is Ohio law much of a factor, if any. [31]

---

27 *Stormbreaker Marketing and Productions Inc.* c. *Weinstock*, 2013 QCCA 269, par. 98-100.
28 *MMA*, *supra* note 24, par. 20.
29 *Sam Lévy*, *supra* note 19, par. 61.
30 2013 QCCS 3015, par. 18.
31 *Supra* note 24, par. 80. See also *Nortel Networks*, *supra* note 24, par. 29.

[51] The Monitor submitted cases in which Québec courts have interpreted different provisions of the pension laws of other provinces.[32] The Court also notes that it dealt to a more limited extent with the deemed trust under the NLPBA in its decision dated June 26, 2015.

[52] There are nevertheless circumstances where the CCAA court has referred legal issues to the courts of another province. The *Curragh*[33] and *Yukon Zinc*[34] judgments were cited as examples of such cases. However, in both cases, the legal issues related to the Yukon *Miners Lien Act*.[35] Justice Farley in *Curragh* wrote :

> This legislation and its concept of the lien affecting the output of the mine or mining claim is apparently unique to the Yukon Territory.[36]

[53] Moreover, both cases involved real rights on property in Yukon.

[54] The parties also pointed to *Timminco* as precedent authority directly on point supporting the transfer of a pension issue by the CCAA court to the jurisdiction where the pension plan is registered and has been administered.[37] However, *Timminco* is not a precedent in that the parties in that case consented to the referral of the issue and Justice Morawetz simply gave effect to their consent.

[55] Without concluding that the Court would only refer a legal issue if the foreign law at issue is unique, the Court concludes that the arguments favouring the referral of a legal issue are stronger when the foreign law is unique.

[56] It is therefore important to examine the issues that might be referred to the NL Court and the uniqueness of the NLPBA provisions that are at issue in the present matter.

[57] The representatives of the salaried employees and retirees identify the relevant questions as being the scope of the deemed trust and of the lien and charge under Section 32 NLPBA, as well as the interaction between the NLPBA and the federal and Québec statutes.

[58] Section 32 NLPBA provides:

---

32 *Emerson Électrique du Canada ltée* c. *Chatigny*, 2013 QCCA 163; *Bourdon* c. *Stelco inc.*, 2004 CanLII 13895 (QC CA).

33 *Canada (Minister of Indian Affairs and Northern Development)* v. *Curragh Inc.*, [1994] O.J. No. 953 (Gen. Div.)

34 *Yukon Zinc Corp. (Re)*, 2015 BCSC 1961.

35 R.S.Y. 2002, c. 151.

36 *Supra* note 33, par. 11. See also *Yukon Zinc*, *supra* note 34, par. 47 and 57.

37 *Timminco Limited (Re)*, 2012 ONSC 5959.

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).

[59] The first point is that there is nothing particularly unique about Section 32 NLPBA.

[60] There is a very similar deemed trust provision in Section 8(1) and (2) PBSA:

8 (1) An employer shall ensure, with respect to its pension plan, that the following amounts are kept separate and apart from the employer's own moneys, and the employer is deemed to hold the amounts referred to in paragraphs (a) to (c) in trust for members of the pension plan, former members, and any other persons entitled to pension benefits under the plan:

(a) the moneys in the pension fund,

(b) an amount equal to the aggregate of the following payments that have accrued to date:

(i) the prescribed payments, and

(ii) the payments that are required to be made under a workout agreement; and

(c) all of the following amounts that have not been remitted to the pension fund:

(i) amounts deducted by the employer from members' remuneration, and

(ii) other amounts due to the pension fund from the employer, including any amounts that are required to be paid under subsection 9.14(2) or 29(6).

(2) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (1) is deemed to be held in trust shall be deemed 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 moneys or from the assets of the estate.

[61] In Québec, the SPPA provides :

49. Until contributions and accrued interest are paid into the pension fund or to the insurer, they are deemed to be held in trust by the employer, whether or not the latter has kept them separate from his property.

[62] There are similar deemed trusts and/or liens in every Canadian province outside Québec except Prince Edward Island: Ontario,[38] British Columbia,[39] Alberta,[40] Saskatchewan,[41] Manitoba,[42] Nova Scotia[43] and New Brunswick.[44]

[63] The second point is that there is no Newfoundland and Labrador jurisprudence interpreting the relevant provisions of the NLPBA. The NL Superintendent pleaded that "the courts of Newfoundland & Labrador possess far greater expertise in interpreting the *PBA* [NLPBA] than does the Superior Court of Québec." While this is undoubtedly true with respect to the NLPBA as a whole, it is not true with respect to Section 32 NLPBA. In an earlier ruling also issued in the *Yukon Zinc* matter, Justice Fitzpatrick of the B.C. Supreme Court refused to decline jurisdiction and refer a matter involving the Yukon *Miners Lien Act* to the courts of Yukon and one of the factors that went against referring the matter to the Yukon court was the lack of jurisprudence in the Yukon court.[45]

[64] Moreover, in this case, because of the similarities between the NLPBA and the federal and other provincial pension laws, the judge interpreting the NLPBA will likely refer to decisions of the courts of other provinces interpreting their legislation or the federal PBSA.

[65] The Québec Court should be in as good a position as the NL Court in that exercise.

[66] Finally, as is typical in these cases, there is a close interplay between the NLPBA and the CCAA. The first question proposed by the representatives of the salaried employees and retirees is: "Assuming there is no issue of paramountcy, what is the scope of section 32 in the NPBA [NLPBA] deemed trusts". The scope of the NLPBA is not relevant if the NLPBA does not apply because of a conflict with the CCAA and federal paramountcy. In that sense, there may not even be a need to deal with the interpretation of the NLPBA.

[67] Moreover, there are issues in this case with the federal PBSA and the Québec SPPA. The representatives of the salaried employees and retirees suggest that the following questions are relevant:

> 2. The Salaried Plan is registered in Newfoundland and regulated by the NPBA.

---

38 Ontario *Pension Benefits Act*, R.S.O. 1990, c. P.8, s. 57.
39 British Columbia *Pension Benefits Standards Act*, S.B.C. 2012, c. 30, s. 58
40 Alberta *Employment Pension Plans Act*, S.A. 2012, c. E-8.1, s. 58 and 60.
41 Saskatchewan *Pension Benefits Act, 1992*, S.S. 1992, c P-6.001, s. 43
42 Manitoba *Pension Benefits Act*, C.C.S.M., c. P32, s. 28.
43 Nova Scotia *Pension Benefits Act*, S.N.S. 2011, c. 41, s. 80.
44 New Brunswick *Pension Benefits Act*, S.N.B. 1987, c P-5.1, s. 51.
45 *Yukon Zinc Corporation (Re)*, 2015 BCSC 836, par. 90.

a) (i) Does the PBSA 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 PBSA 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?

[68] The representatives of the salaried employees and retirees and the NL Superintendent suggest that, in the interests of simplicity and expediency, all of these questions should be referred to the NL Court.

[69] The Court has great difficulty with this suggestion. On what basis should the Court conclude that the NL Court is in a better position to decide whether the Québec SPPA and deemed trust apply to employees who reported for work in Québec (question 2(b)(i) and (iii)) and how the conflict between the NLPBA and the SPPA should be resolved (question 2(b)(ii))? The first are pure questions of Québec law, and the last is a question where the laws of Québec and of Newfoundland and Labrador have equal application. There are similar questions with respect to the federal PBSA (question 2(c)), which the Court is in as good a position to decide as the NL Court.

[70] The Court will not refer issues of Québec law or federal law to the NL Court, and if those issues are too closely interrelated to the NLPBA issues, or if in the interests of simplicity and expediency they should all be decided by the same court, then the solution is not to refer any issues to the NL Court.

[71] In the earlier *Yukon Zinc* ruling where Justice Fitzpatrick refused to refer the matter to the courts of Yukon, she found that the issues related to the interrelationship between the Yukon *Miners Lien Act* and the rights asserted by others under B.C. law, in relation to assets the majority of which were located in British Columbia:

> [89] As for the law to be applied to the various issues, it is clear that whatever forum is used to resolve these issues, there will be a blend of both British Columbian contract law and Yukon miner's lien law. The majority of the concentrate is located in British Columbia and was in this Province well before the 2015 Procon Lien was registered. Further, the contract rights are to be decided in accordance with British Columbian law, particularly as to if, and if so, when, title to the concentrate passed from Yukon Zinc to Transamine.

> [90] This is not akin to the situation discussed in *Ecco Heating Products Ltd. v. J.K. Campbell & Associates Ltd.*, 1990 CanLII 1631 (BC CA), [1990] 48 B.C.L.R. (2d) 36 (C.A.), where the major issue arose under builder's lien legislation in British Columbia and where the court referred to the "extensive existing relevant jurisprudence" in British Columbia: at 43-44. It is common ground here that there is no case law on the issues of scope and priority under the *MLA* that arise here, let alone relevant Yukon jurisprudence.
>
> [91] It is quite apparent that some issues arise under the *MLA* and, in particular, issues relating to Procon's rights in relation to the concentrate remaining in Yukon which is claimed by Transamine under British Columbian law. Transamine argues that this Court can take judicial notice of the *MLA*: see *Evidence Act*, R.S.B.C. 1996, c. 124, s. 24(2)(e). In any event, Procon has fully researched the issues as they arise under the *MLA* and made submissions on them. To turn the tables on Procon, if I were to decline jurisdiction in favour of the Yukon courts, there equally would be issues as to the Yukon court interpreting and applying British Columbian law on the contract issues.
>
> [92] It would be impossible in the circumstances to bifurcate the issues based on the applicable law. Even if bifurcation was available, it would be neither a practical nor an efficient strategy in resolving the issues between Yukon Zinc, Procon and Transamine.
>
> (Emphasis added)

[72] In the present matter, the bulk of the assets on which the deemed trust or the lien created by the NLPBA may apply are the proceeds of the sale of assets in Québec.

[73] On balance, the legal considerations do not favour referring the issues to the NL Court.

b) Factual considerations

[74] The parties suggesting that the NLPBA issues be referred to the NL Court also argue that these are essentially local issues that should be decided by the localcourt.

[75] It is clear that there are significant factual links between these issues and the province of Newfoundland and Labrador.

[76] In particular, the Wabush mine is located in Newfoundland and Labrador and most of the employees reported to that mine. As a result, many of the retirees are currently resident in Newfoundland and Labrador. The representatives of the salaried employees and retirees want the NL Court to interpret the NLPBA.

[77] However, there are equally strong factual links to the province of Québec: the Pointe-Noire facility is in Québec and most of the railway joining the Wabush mine and the Pointe-Noire facility is in Québec. There are almost as many employees and retirees in Québec:

	Salaried Plan	Union Plan
Newfoundland and Labrador	313	1,005
Québec	329	661
Other	14	66[46]

[78] As a result, this is not a matter of purely local concern in Newfoundland and Labrador.

[79] Although the representatives of the salaried employees and retirees want the NL Court to interpret the NLPBA, more than half of the persons that they represent live in Québec.

[80] It is also worth noting that the Union, which represents more employees and retirees, asks that the case remain in Québec, even though most of their members reside in Newfoundland and Labrador.

c) Practical considerations

[81] The parties suggesting that the NLPBA issues be referred to the NL Court argue that the law of Newfoundland and Labrador is in principle a question of fact in a Québec court which is proven with expert witnesses. They argue that this has a series of somewhat inconsistent consequences:

- The parties will have to hire experts, which is costly and time consuming;
- It will be difficult to find experts because these questions have never been litigated before;
- If there is an appeal, the interpretation of the NLPBA will be treated as a question of fact and therefore only subject to be overturned if there is a palpable and overriding error.

---

46 Watt Affidavit, par. 16.

[82] This seems to exaggerate the difficulty. The Court can take judicial notice of the law of another province.[47] This is particularly true when it is an issue of interpreting a statute.[48] In this case, where the parties plead that it will be difficult to find an expert, it seems unlikely that the Court would require expert evidence. This is particularly so when the provisions of the NLPBA which are at issue are similar to the provisions of the federal PBSA with respect to which expert evidence is not admissible. If there is no expert evidence to be offered, then there is no expense. A finding of fact with respect to expert evidence may attract the higher standard for appellate review of a palpable and overriding error.[49] This does not mean that every ruling on an issue of foreign law attracts the same standard. If the judge decides the interpretation of the NLPBA without considering the credibility of expert witnesses, then there is no reason for the Court of Appeal to apply the higher standard for appellate review.

[83] In terms of cost, it is difficult to see how the cost of continuing the proceedings in Québec will be higher than the cost of hiring attorneys in Newfoundland and Labrador and debating part of the issues there. The Union and Sept-Îles argued that it would be more expensive for them to argue the issues in Newfoundland and Labrador, and they added that they pay their own costs, unlike the representatives of the salaried employees and retirees and the Plan Administrator.

[84] Another issue is the delays that the referral might create.

[85] Sept-Îles bases its argument that it is too late now to raise the issue of a transfer on the fact that the Court already dealt with some of these issues 18 months ago. The representatives of the salaried employees and retirees plead that they raised the issue of a possible transfer of issues to the NL Court at the hearing of the motion for approval of the Claims Procedure Order on November 16, 2015.

[86] The Court will not dismiss the issue for lateness. However, it is relevant that the issue is being debated now as opposed to 18 months ago. If the issue had been debated at that time, the Court might have been less concerned about the possible delays that would result from referring the issues to the NL Court.

[87] The parties suggesting that the NLPBA issues be referred to the NL Court plead that there is no reason to believe that fragmenting the proceedings will result in additional delay. They do not however offer the Court any concrete indication of how quickly the case could proceed through the NL Court and any appeal.

[88] The Court is concerned by the possible delay. The parties pointed to *Timminco*, where the CCAA Court transferred a pension issue to the Québec Superior Court, as an example of how these referrals should work. In that case, the parties consented to refer

---

47 Article 2809 C.C.Q.

48 *Constructions Beauce-Atlas inc.* c. *Pomerleau inc.*, 2013 QCCS 4077, par. 14.

49 *Canada (Minister of Citizenship and Immigration)* v. *Asini*, 2001 FCA 311, par. 26.

the Québec pension aspects of the CCAA file that was being litigated in Ontario to a Québec court. Even in those circumstances, the delay between the referral (October 18, 2012)[50] and the final judgment of the Québec court (January 24, 2014)[51] was over 15 months.

[89] Finally, the Court does not consider the question of whether its decision will or will not be treated as a precedent to be a relevant consideration. Similarly, the Court does not consider the possibility of intervenants to be relevant. The Court's focus is on resolving the difficulties of the parties appearing before it. If the government of Newfoundland and Labrador wishes to obtain a judgment from the courts of the province on the interpretation of the NLPBA, it can refer a matter to the Court of Appeal of Newfoundland and Labrador.[52]

CONCLUSION

[90] For all of the foregoing reasons, the Court concludes that it is not appropriate in the present circumstances to refer the proposed questions to the NL Court.

FOR THESE REASONS, THE COURT:

[91] **DECIDES** that it has jurisdiction to deal with the issues related to the interpretation of the Newfoundland and Labrador *Pension Benefits Act* in the context of the present proceedings under the *Companies' Creditors Arrangement Act* and that it will not refer those issues to the Supreme Court of Newfoundland and Labrador;

[92] **THE WHOLE WITHOUT JUDICIAL COSTS.**

Stephen W. Hamilton, J.S.C.

Mtre Bernard Boucher
BLAKE, CASSELS & GRAYDON
For the Petitioners

Mtre Sylvain Rigaud
Mtre Chrystal Ashby
NORTON ROSE FULBRIGHT CANADA
For the Monitor

---

50 *Supra* note 37.
51 2014 QCCS 174.
52 *Judicature Act*, R.S.N.L. 1990, c. J-4, Section 13.

Mtre Nicholas Scheib
SCHEIB LEGAL
Mtre Andrew Hatnay
KOSKIE MINSKY LLP
For the mises en cause Michael Keeper, Terence Watt,
Damien Lebel, and Neil Johnson

Mtre Daniel Boudreault
PHILION, LEBLANC, BEAUDRY
For the mise en cause Syndicat des métallos, sections locales 6254 et 6285

Mtre Ronald A. Pink
PINK LARKIN
For the mise en cause Morneau Shepell Ltd, in its capacity
as replacement pension plan administrator

Mtre Doug Mitchell
Mtre Edward Béchard-Torres
IRVING MITCHELL KALICHMAN
For the mise en cause Her Majesty in Right of Newfoundland and
Labrador, as represented by the Superintendent of Pensions

Mtre Pierre Lecavalier
MINISTÈRE DE LA JUSTICE CANADA
For the mise en cause the Attorney General of Canada, acting on behalf
of the office of the Superintendent of financial institutions

Mtre Sophie Vaillancourt
Mtre Roberto Clocchiatti
RETRAITE QUÉBEC
For the mise en cause Régie des rentes du Québec

Mtre Martin Roy
STEIN MONAST
For the mise en cause Ville de Sept-Îles

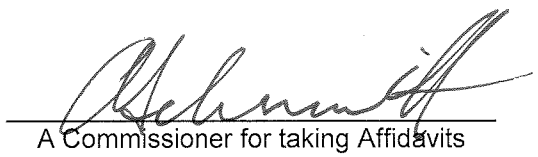
Date of hearing: December 20, 2016

This is **Exhibit "NM-2"** referred to in the

Affidavit of **Nigel Meakin**

sworn before me, this **15th day**

of **May, 2017**



A Commissioner for taking Affidavits

NORTON ROSE FULBRIGHT

Barristers & Solicitors / Patent & Trade-mark Agents

Norton Rose Fulbright Canada LLP
1 Place Ville Marie, Suite 2500
Montréal, Quebec H3B 1R1 Canada

F: +1 514.286.5474
nortonrosefulbright.com

May 9, 2017

Without Prejudice
Sent By E-mail

Rolf Pritchard, Q.C.
Director - Civil Division
Office of the Attorney General
Department of Justice & Public Safety
Government of Newfoundland and Labrador

Sylvain Rigaud
+1 514.847.
sylvain .rigaud@nortonrosefulbright.com

Your reference

Our reference
01028478-0001

Dear Confrère,

In the matter of the plan of compromise or arrangement of: Wabush Iron Co. Limited *et al.*
S.C.M. 500-11-048114-157

We are writing to you to express our concerns and position in connection with the *ex parte* order issued on May 5th, 2017 (the **May 5th Order**) by the Newfoundland & Labrador Court of Appeal in relation to the reference initiated under the authority of Section 13 of the *Judicature Act*, R.S.N.L. 1990, c. J-4 and in furtherance of Orders in Council 2017-103 and 2017-137 (the **Reference**).

As you know, we act on behalf of FTI Consulting Canada Inc., in its capacity as court-appointed monitor (the **Monitor**) to various parties subject to orders issued on January 27th and May 20th, 2015 pursuant to the terms of the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended (the **CCAA**) by the Superior Court of Québec, commercial division, for the District of Montreal (the **CCAA Court**) .

For ease of reference, capitalized terms not otherwise defined in this letter shall have the meaning ascribed to them in the Monitor's Motion for Directions dated September 20, 2016, as amended on April 13, 2017 (the **Motion for Directions**), a copy of which is attached as Schedule A.

The May 5th Order and the three (3) questions to be submitted to the Newfoundland & Labrador Court of Appeal by way of the Reference (the **Reference Questions**), as currently drafted, appear to be inextricably related to the pending proceedings before the CCAA Court in the above-captioned matter, presided and supervised by the Honourable Justice Stephen W. Hamilton, J.S.C. more specifically as they concern the Wabush CCAA Parties (the **Wabush CCAA Proceedings**). As such, there exists in our view a significant risk that the Reference will be in part duplicative in light of the ongoing Wabush CCAA Proceedings, thereby potentially leading certain interested parties to mistakenly believe that issues relating to the Wabush CCAA Parties are open for adjudication before both the CCAA Court and the Newfoundland & Labrador Court of Appeal., We are concerned that the Reference could amount to a collateral attack of orders previously made by the CCAA Court.

We list in Schedule B hereto various orders issued by the CCAA Court (as supplemented by the relevant Motion records, including the Monitor's reports and exhibits) which in our view could have an impact on or be relevant to the Reference Questions to be put before the Newfoundland & Labrador Court of Appeal.

We have reached out on numerous occasions to you and your colleagues (Philip Osborne and Raylene Stokes) to share our views as to the importance of limiting the scope of the proposed Reference Questions to matters of

statutory interpretation *in abstracto* as they relate to Section 32 of the *Pension Benefits Act*, 1997, S.N.L. 1996, c. P-4.01 (**PBA**), without overreaching and veering into the adjudication of the rights of parties already engaged in the Wabush CCAA Proceedings. We have specifically asked to be consulted with respect to the wording of the notices to be sent in connection with the Reference so as to avoid confusion amongst stakeholders and ensure that the Reference process does not run afoul of the current stay of proceedings against the Wabush CCAA Parties or disrupt the conduct of the Wabush CCAA Proceedings.

In this respect, we directed you to paragraph 7 of the Wabush Initial Order, which reads as follows:

> ORDERS that, until and including June 19, 2015*, or such later date as the Court may order the (the "**Stay Period**"), no proceeding or enforcement process in any Court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the CCAA Parties, or affecting the Business operations and activities of the CCAA Parties (the "**Business**") or the Property, including as provided hereinbelow except with the leave of this Court. Any and all proceedings currently under way against any or in respect of the CCAA Parties or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court, the whole subject to subsection 11.1 CCAA.
>
> *The current Stay Period has been extended and is set to expire on June 30, 2017, subject to further order of the CCAA Court.

The ability of the Monitor to seek directions and the CCAA Court's jurisdiction to hear the Motion for Directions are based on paragraph 68 of the Claims Procedure Order, paragraph 65 of the Wabush Initial Order as well as Sections 9(1) and 11 CCAA, which read as follows:

> 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.
>
> (...)
>
> 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.

The CCAA Court issued on January 30th, 2017, its decision (the **January 30th Order**) with respect to various jurisdictional issues and other preliminary objections raised with respect to the Motion for Directions by several parties, including Her Majesty in Right of Newfoundland, as represented by the Superintendent of Pensions. We attach for your convenience copy of the January 30 Order as Schedule C. The position of the parties in relation to said jurisdictional issues is summarized at paragraphs 23 to 28 of the January 30th Order. In declining to refer any of the issues to the courts with jurisdiction in Newfoundland & Labrador, including specifically the questions as formulated by the representatives of the salaried employees and retirees (at paragraph 25) – which have since been adopted *verbatim* as the Reference Questions – the CCAA Court relied on well-established precedents that favour a single forum to hear all disputes relating to an insolvent debtor (at paragraphs 29 to 33) and properly exercised its discretion not to seek the assistance of another court on the basis of legal, factual and practical considerations (at paragraphs 39 to 89), including the position of the United Steel Workers representing the unionized pensioners of the Wabush CCAA Parties, which supported the jurisdiction of the CCAA Court and objected to the referral of certain issues before the courts with jurisdiction in Newfoundland & Labrador (at paragraph 80), as well as the fact that a plurality of non-unionized pensioners are residents in the Province of Quebec (at paragraph 77).

The January 30th Order was not appealed from, and all interested parties, including Her Majesty in Right of Newfoundland, as represented by the Superintendent of Pensions, have since agreed to debate the merits of the Motion for Directions before the CCAA Court on June 26th and 27th, 2017.

As for the Reference Questions, we have already expressed concerns about the formulation of questions 1 and 3 and the extent to which the Newfoundland & Labrador Court of Appeal will be asked to determine the scope and dollar value of the deemed trusts, liens and charges, that may arise pursuant to Section 32 PBA, as this provision applies to the Pension Plans at stake in the Wabush CCAA Proceedings and more specifically the Motion for Directions. Further, the preamble to question 1 appears unduly argumentative and, in our view, obfuscates the interplay between Section 32 PBA and the applicable provisions of the CCAA and the terms of the orders issued to date in the Wabush CCAA Proceedings.

The foregoing was noted by Mr. Justice Hamilton in the January 30th Order (at paragraph 66), wherein he also pointed out that such a question, inasmuch as the Wabush CCAA Parties are concerned, may well be moot:

> Finally, as is typical in these cases, there is a close interplay between the NLPBA and the CCAA. The first question proposed by the representatives of the salaried employees and retirees is: "Assuming there is no issue of paramountcy, what is the scope of section 32 in the NLPBA deemed trusts". The scope of the NLPBA is not relevant if the NLPBA does not apply because of a conflict with the CCAA and federal paramountcy. In that sense, there may not even be a need to deal with the interpretation of the NLPBA.

As previously reported, we also seriously question the appropriateness of seeking the opinion of the courts of another forum than Québec with respect to question 2(b).

Before the issuance of the May 5th Order, we had specifically asked that you consider the possibility of coordinating the Reference with the ongoing Wabush CCAA Proceedings, and had asked to discuss the formulation of the Reference Questions and the wording of the notices, the whole in order to avoid any actual or perceived duplication, inconsistency or contradiction in the parallel processes, to no avail to date. We note that a status hearing is set to take place on June 9, 2017 before the Newfoundland & Labrador Court of Appeal, but are of the view that it will be too late at that point to properly address some of the concerns outlined above.

It is our view that the Monitor and its undersigned attorneys should have been consulted in connection with the May 5th Order and that same should not have been granted on an *ex parte* basis. We formally reiterate the invitation to discuss the foregoing with you at your earliest convenience, while we continue to contemplate the possibility to raise these issues directly before the CCAA Court and/or the Newfoundland & Labrador Court of Appeal.

We are of the view that the Reference Questions should be limited to the matters relating exclusively to the interpretation of Section 32 PBA and that all other matters relating to the Wabush CCAA Parties or the Wabush CCAA Proceedings should be dealt with exclusively by the CCAA Court.

We would greatly appreciate a reply with respect to the foregoing by the end of the week.

NORTON ROSE FULBRIGHT

Copy of this letter and of the May 5th Order will be circulated to the parties on the Service List in the Wabush CCAA Proceedings.

Yours truly,

Sylvain Rigaud
Partner

SAR/ch/jrl

Enclosures:

Schedule A – Motion for Directions with Respect to Pension Claims;
Schedule B – List of Relevant Orders with respect to the Wabuth CCAA Parties; and
Schedule C – January 30th Order.

SCHEDULE A : MONITOR'S MOTION FOR DIRECTIONS

CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

N°: 500-11-048114-157

SUPERIOR COURT
Commercial Division
(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., 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.

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-

HER MAJESTY IN RIGHT OF NEWFOUNDLAND & LABRADOR, AS REPRESENTED BY THE SUPERINTENDENT OF PENSIONS

THE ATTORNEY GENERAL OF CANADA, ACTING ON BEHALF OF THE OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS

MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON

UNITED STEEL WORKERS, LOCALS 6254 AND 6285

RETRAITE QUÉBEC

MORNEAU SHEPELL LTD., IN ITS CAPACITY AS REPLACEMENT PENSION PLAN ADMINISTRATOR

Mis-en-cause

-and-

FTI CONSULTING CANADA INC.

Monitor

AMENDED MOTION BY THE MONITOR FOR DIRECTIONS WITH RESPECT TO PENSION CLAIMS
(Sections 11 and 23(k) of the *Companies' Creditors Arrangement Act*)

TO MR. JUSTICE STEPHEN W. HAMILTON, J.S.C. OR TO ONE OF THE HONORABLE JUDGES OF THE SUPERIOR COURT, SITTING IN THE COMMERCIAL DIVISION FOR THE DISTRICT OF MONTRÉAL, THE MONITOR SUBMITS:

I. INTRODUCTION

1. On January 27, 2015, the Honourable Justice Martin Castonguay, J.S.C., issued an Order (as subsequently amended, rectified and/or restated, the **Bloom Lake Initial Order**) pursuant to the *Companies' Creditors Arrangement Act* (**CCAA**) in respect of the Petitioners Bloom Lake General Partner Limited, Quinto Mining Corporation, 8568391 Canada Limited, and Cliffs Québec Iron Mining ULC (**CQIM**), as well as Mises-en-cause The Bloom Lake Iron Ore Mine Limited Partnership and Bloom Lake Railway Company Limited (collectively, the **Bloom Lake CCAA Parties**), as appears from the Court record;

2. Pursuant to the Bloom Lake Initial Order, *inter alia*, FTI Consulting Canada Inc. was appointed as monitor of the Bloom Lake CCAA Parties (the **Monitor**), and a stay of proceedings was granted in respect of the Bloom Lake CCAA Parties until February 26, 2015 (subsequently extended from time to time, and most recently until September 30, 2016 by Order dated April 20, 2016);

3. On May 20, 2015, the Honourable Justice Stephen W. Hamilton, J.S.C., issued an Order (as subsequently amended, rectified and/or restated, the **Wabush Initial Order**) extending the scope of these CCAA proceedings to the Petitioners Wabush Iron Co. Limited (**Wabush Iron**) and Wabush Resources Inc. (**Wabush Resources**), as well as Mises-en-cause Wabush Mines, an unincorporated contractual joint venture (**Wabush Mines**), Arnaud Railway Company (**Arnaud Railway**), and Wabush Lake Railway Company Limited (**Wabush Railway**) (collectively, the **Wabush CCAA Parties**, and together with the Bloom Lake CCAA Parties, the **CCAA Parties**), as appears from the Court record. For ease of reference a copy of the Wabush Initial Order dated May 20, 2015, as rectified on May 28, 2015, is communicated herewith as **Exhibit R-1**;

4. Pursuant to the Wabush Initial Order (R-1), *inter alia*, the Monitor was appointed as the monitor of the Wabush CCAA Parties, and a stay of proceedings was granted in respect of the Wabush CCAA Parties until June 19, 2015 (subsequently extended from time to time, and most recently until September 30, 2016 by Order dated April 20, 2016);

5. On November 5, 2015, the Honourable Justice Stephen W. Hamilton, J.S.C., issued an order (as amended on November 16, 2015, the **Claims Procedure Order**), which approved and established a procedure for the filing of creditors' claims against the CCAA Parties and their directors and officers (the **Claims Procedure**), as appears from the Claims Procedure Order, a copy of which is communicated in support herewith for ease of reference as **Exhibit R-2**;

6. Capitalized terms not otherwise defined herein have the meaning ascribed thereto in the Claims Procedure Order (R-2);

7. Both the Bloom Lake Initial Order and the Wabush Initial Order provide that the Monitor assist the CCAA Parties in dealing with their creditors over the course of the Stay Period, and declare that the Monitor may apply to the Court for directions as becomes necessary in discharging its duties, the whole as appears from, *inter alia*, paragraphs 39 and 65 the Wabush Initial Order (R-1);

8. Moreover, paragraphs 61 and 68 of the Claims Procedure Order (R-2) entitle the Monitor to apply to the Court for advice and directions in connection with the discharge or variation of its powers and duties thereunder;

9. The Monitor hereby applies for directions with respect to the priority of Pension Claims filed by the Plan Administrator pursuant to the Claims Procedure Order (R-2), and the applicability and scope of deemed trusts, if any, under the *Pension Benefits Standards Act*, R.S.C. 1985, c. 32 (2nd Supp.) (**PBSA**) and the Newfoundland & Labrador *Pension Benefits Act*, S.N.L. 1996, c. P-4.01 (**PBA**) as well as the Québec *Supplemental Pension Plans Act*, R.L.R.Q., c. R-15.1 (**SPPA**), the whole as more fully set out below;

10. Specifically, the Monitor is asking the Court to issue an Order in the form of the draft Order communicated herewith as **Exhibit R-3** with respect to the priority of the various components of the Salaried DB Plan Claim and the Union DB Plan Claim (each as defined herein below);

II. OVERVIEW OF WABUSH CCAA PROCEEDINGS

11. As stated in paragraphs 16 to 19 and 21 of the *Motion for the Issuance of an Initial Order* of the Wabush CCAA Parties dated May 19, 2015 (the **Wabush Initial Motion**), a copy of which is communicated herewith as **Exhibit R-4**, there were no operations as of the date of the Wabush Initial Order at either the Wabush Pointe-Noire pellet plant (the **Pointe-Noire Plant**) or the Wabush Mine (as defined in the Wabush Initial Motion);

12. The Pointe-Noire Plant had been shut down in June 2013, while the Wabush Mine was shut down in the first quarter of 2014, and substantially all of the employees at both sites had been terminated or laid off prior to the issuance of the Wabush Initial Order, as stated in paragraphs 37 and 38 and 87 to 96 of the Wabush Initial Motion (R-4);

13. The Wabush Initial Order (R-1) provided for *inter alia*:

a) The creation of non-priming charges, including an Administration Charge for an aggregate amount of $1,750,000, a Directors' Charge for an aggregate amount of $2,000,000, and an Interim Lender Charge for an aggregate amount of $15,000,000 (each as defined in the Wabush Initial Order, and collectively referred to as the **CCAA Charges**);

b) The permission, but no requirement, for the Wabush CCAA Parties to pay normal cost pension contributions payable on or after the date thereof as follows:

> [12] **ORDERS** that the Wabush CCAA Parties shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

(a) all outstanding and future wages, salaries, bonuses, employee and current service pension contributions, expenses, benefits, vacation pay and termination and severance obligations payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; [...] [Emphasis added]

14. On June 9, 2015, the Court issued an order with respect to the Wabush CCAA Parties (the **Wabush Comeback Order**), a copy of which is communicated herewith for ease of reference as **Exhibit R-5**, which provided for *inter alia*:

a) The approval on a *nunc pro tunc* basis of the **SISP** (as defined therein) with respect to the Wabush CCAA Parties;

b) The creation of the **Sale Advisor Charge** (as defined in paragraph 16 thereof);

c) The priority status of the CCAA Charges and the Sale Advisor Charge, to rank ahead of all Encumbrances (as defined therein), subject to the rights of the various parties having objected to the priming of the Interim Lender Charge;

d) The adjournment to June 22, 2015 of the debate as to both the proposed priority of the Interim Lender Charge and the suspension by the Wabush CCAA Parties of its special payments to the DB Plans (as defined below), as follows:

[5] **ORDERS** that paragraph 47 of the Wabush Initial Order shall be amended as follows:

[47] **DECLARES** that each of the CCAA Charges shall rank ahead of all hypothecs, mortgages, liens, security interests, priorities, trusts, deemed trusts (statutory or otherwise), charges, encumbrances or security of whatever nature or kind (collectively, the "**Encumbrances**") [...] affecting the Property of the Wabush CCAA Parties whether or not charged by such Encumbrances [...], with the exception of the Crown deemed trusts for sources deductions described in Section 37(2) CCAA and the sums that could be subject to a claim under Section 38(3) CCAA. For greater certainty, the CCAA Charges only extend to assets or rights against assets over which the Wabush CCAA Parties hold or acquire title and the Interim Lender's Charge is subject to the Permitted Priority Liens (as defined in the Interim Financing Term Sheet). [underlining in the original]

[6] **RESERVES** the rights of Her Majesty in right of Newfoundland and Labrador, as represented by the Superintendent of Pensions, the Syndicat des Métallos, Section Locale 6254, the Syndicat des Métallos, Section 6285 and the Attorney General of Canada to contest the priority of the Interim Lender Charge over the deemed trust(s) as set out in the Notices of Objection filed by each of those parties in response to the Motion, which shall be heard and determined at the hearing scheduled on June 22, 2015. [Emphasis added.]

[...]

[21] **ORDERS** the request by the Wabush CCAA Parties for an order for the suspension of payment by the Wabush CCAA Parties of the monthly amortization payments coming due pursuant to the Contributory Pension Plan for Salaried Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company and the Pension Plan for Bargaining Unit Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company, *nunc pro tunc* to the Wabush Filing Date is adjourned to June 22, 2015; [Emphasis added.]

> [22] **ORDERS** the request by the Wabush CCAA Parties for an order for the suspension of payment by the Wabush CCAA Parties of the annual lump sum "catch-up" payments coming due pursuant to the Contributory Pension Plan for Salaried Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company and the Pension Plan for Bargaining Unit Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company, *nunc pro tunc* to the Wabush Filing Date is adjourned to June 22, 2015; [Emphasis added.]

the whole as it appears from the Wabush Comeback Order (R-5);

15. A copy of the *Motion for the Issuance of an order in respect of the Wabush CCAA parties (1) granting priority to certain CCAA charges, (2) approving a Sale and Investor Solicitation Process nunc pro tunc, (3) authorizing the engagement of a Sale Advisor nunc pro tunc, (4) granting a Sale Advisor Charge, (5) amending the Sale and Investor Solicitation Process, (6) suspending the payment of certain pension amortization payments and post-retirement employee benefits, (7) extending the stay of proceedings, (8) amending the Wabush Initial Order accordingly* of the Wabush CCAA Parties dated May 29, 2015 (the **Wabush Comeback Motion**), which led to the Wabush Comeback Order (R-5), is also communicated herewith for ease of reference as **Exhibit R-6**;

16. By way of judgment dated June 26, 2015, the Court rendered Orders with respect to the priority of the Interim Lender Charge and the suspension of payment of monthly and annual lump sum "catch-up" payments (the **Pension Priority and Suspension Order**), as follows:

> [143] [...] **CONFIRMS** the priority of the Interim Lender Charge over deemed trusts, as set out in paragraph 47 of the Wabush Initial Order, as amended on June 9, 2015;
>
> [144] **ORDERS** the suspension of payment by the Wabush CCAA Parties of the monthly amortization payments coming due pursuant to the Contributory Pension Plan for Salaried Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company and the Pension Plan for Bargaining Unit Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company, *nunc pro tunc* to the Wabush Filing Date;
>
> [145] **ORDERS** the suspension of payment by the Wabush CCAA parties of the annual lump sum "catch-up" payments coming due pursuant to the Contributory Pension Plan for Salaried Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company and the Pension Plan for Bargaining Unit Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company, *nunc pro tunc* to the Wabush Filing Date; [Emphasis added.]

the whole as it appears from the Pension Priority and Suspension Order, a copy of which is communicated herewith as **Exhibit R-7**;

17. Motion for leave to appeal the Pension Priority and Suspension Order (R-7) was dismissed by the Court of Appeal on August 18, 2015, as appears from the judgment of the Honourable Nicholas Kasirer, J.C.A., a copy of which is communicated herewith as **Exhibit R-8;**

18. On February 1, 2016, the Court issued Approval and Vesting Orders with respect to:

a) An Asset Purchase Agreement dated as of December 23, 2015, a copy of which is communicated herewith as **Exhibit R-9**, whereby CQIM, Wabush Resources, Wabush Iron and Arnaud Railway (collectively, the **Port Vendors**) agreed to sell to Investissement Québec (together with Société ferroviaire et portuaire de Pointe-Noire s.e.c., its subsequent assignee pursuant to an agreement dated January 29, 2016, the **Port Purchaser**), substantially all of the assets, with the exception of certain excluded assets, of the Port Vendors relating to the Pointe-Noire Plant, the port facility located in the Bay of Sept-Îles (the **Pointe-Noire Port Facility**), and the Arnaud railway (collectively, the **Port Assets**), the whole as appears from the Approval and Vesting Order dated February 1, 2016 issued with respect to the Port Assets (the **Port Approval and Vesting Order**), communicated herewith as **Exhibit R-10**;

b) An Asset Purchase Agreement dated as of January 26, 2016, a copy of which is communicated herewith as **Exhibit R-11**, whereby Wabush Resources and Wabush Iron (the **Block Z Vendors**) agreed to sell to Administration Portuaire de Sept-Îles / Sept-Îles Port Authority (the **Block Z Purchaser**), the immovable property known as "Block Z" located near the Pointe-Noire Port Facility, the whole as appears from the Approval and Vesting Order dated February 1, 2016 issued with respect to Block Z (the **Block Z Approval and Vesting Order**), communicated herewith as **Exhibit R-12**;

19. The Port Approval and Vesting Order (R-10) and the Block Z Approval and Vesting Order (R-12) provided for the vesting of the assets on a free and clear basis, with the net proceeds from both transactions to stand in "the place and stead" of the Port Assets and the Block Z, respectively:

> **ORDERS** that for the purposes of determining the nature and priority of the Encumbrances, the balance of the Proceeds remaining following deduction for applicable Cure Costs (if any) and Transfer Taxes (if any is payable) that are remitted by the Monitor pursuant to Paragraph 10 of this Order (the "Net Proceeds") shall stand in the place and stead of the Purchased Assets, and that upon the issuance of the Certificate, all Encumbrances except for the Permitted Encumbrances shall attach to the Net Proceeds with the same priority as they had with respect to the Purchased Assets immediately prior to the Closing, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the Closing.
>
> [Para. 21 of the Port Approval and Vesting Order and para. 19 of the Block Z Approval and Vesting Order. Emphasis added.]

20. The total outstanding amount owing to the Interim Lender under the Interim Financing Documents (as defined in the Port Approval and Vesting Order) was repaid by the Monitor using the proceeds of the sale of the Port Assets, as contemplated in the Port Approval and Vesting Order (R-10);

III. DEFINED BENEFIT PENSION PLANS AND CONTRIBUTIONS

A. Defined Benefit Pension Plans

21. Two of the Pensions Plans in place for the CCAA Parties' Employees contained defined benefit schemes:

a) A hybrid pension plan for salaried employees at the Wabush Mine and the Pointe-Noire Port hired before January 1, 2013, known as the Contributory Pension Plan for Salaried Employees of Wabush Mines, Cliffs Mining Company, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company, Limited, registered with the Newfoundland & Labrador Superintendent of Pensions (the **N&L Superintendent**) under member 021314 and the Canada Revenue Agency under number 0343558, as amended and restated effective as of January 1, 1997, together with subsequent amendments thereto[1], communicated herewith as **Exhibit R-23** (the **Salaried DB Plan**), which included both defined benefit and defined contribution components [...]; and

b) A pension plan for unionized hourly employees at the Wabush Mine and the Pointe-Noire Port, known as the Pension Plan for Bargaining Unit Employees of Wabush Mines, Cliffs Mining Company, Managing Agent, Arnaud Railway Company, [...] Wabush Lake Railway Company, Limited, registered with the Newfoundland & Labrador Superintendent of Pensions under number 024699, the Office of the Superintendent of Financial Institutions of Canada (**OSFI**) under number 57777, and the Canada Revenue Agency under number 0555201, as amended and restated effective as of March 1, 1996, together with subsequent amendments thereto[2], communicated herewith as **Exhibit R-24** (the **Union DB Plan**, and together with the Salaried Pension Plan, the **DB Plans**);

both of which were administered by Wabush Mines (the **Plan Administrator**), until the DB Plans were terminated in December 2015. The Plan Administrator was subsequently replaced by Morneau Shepell Ltd. (the **Replacement Plan Administrator**), the whole as further detailed herein below;

22. [...]

23. [...]

24. On December 15, 2015, the Wabush CCAA Parties received two notices from the [...] N&L Superintendent announcing the termination, effective as of that date, of both DB Plans (the **N&L Termination Notices**), as appears from the copy of said notices, communicated herewith *en liasse* as **Exhibit R-13**;

---

[1] It would appear that the amendments were only received by the N&L Superintendant on July 30, 2015.

[2] It would appear that the amendments were only received by the N&L Superintendant on July 30, 2015.

25. In the N&L Termination Notice (R-13), the N&L Superintendent noted the following:

a) The Wabush CCAA Parties had discontinued or were in the process of discontinuing all of their business operations within the meaning of Section 59(1)(b) PBA; and

b) The N&L Superintendent was of the opinion that the DB Plans had failed to meet the solvency requirements prescribed by the applicable regulations within the meaning of Section 59(1)(d) PBA;

26. Also on December 15, 2015, the Wabush CCAA Parties received a notice from [...] OSFI, declaring the termination, effective as of that date, of the Union DB Plan (the **OSFI Termination Notice**, and collectively with the N&L Termination Notices, the **Termination Notices**), as appears from a copy of the OSFI Termination Notice, communicated herewith as **Exhibit R-14**;

27. In the OSFI Termination Notice (R-14), OSFI noted the following:

a) Special payments had been suspended in the CCAA Proceedings;

b) The Wabush Mine had been shut down and substantially all the Wabush CCAA Parties' employees had been terminated;

c) OSFI was of the opinion that the DB Plans had failed to meet the prescribed tests and standards for solvency under the PBSA;

d) There had been a cessation of crediting of benefits to plan members;

28. In the Termination Notices (R-13 and R-14), both OSFI and the N&L Superintendent indicated that the Wabush CCAA Parties were required to pay into the pension funds all amounts that would have been required to be paid to meet the prescribed solvency requirements, as well as the amounts necessary to fund the benefits provided for in the DB Plans. Both OSFI and the N&L Superintendent of Pensions also took the position that a deemed trust had arisen in respect of such amounts;

29. On March 30, 2016, upon written requests by the Wabush CCAA Parties, OSFI and the N&L Superintendent appointed the Replacement Pension Plan Administrator in respect to both DB Plans, as appears from the three notices received from OSFI and the N&L Superintendent, communicated herewith *en liasse* as **Exhibit R-15**;

B. Employer Contributions

(i) Normal Costs

30. The normal cost payments were made to the [...] DB Plans by the Wabush CCAA Parties based on the actuarial reports prepared by Towers Watson Canada Inc. (as it then was, now Willis Towers Watson, hereinafter **Towers Watson**) in its capacity as consultant to the Plan Administrator [...] prior to the appointment of the Replacement Pension Plan Administrator;

31. The normal cost payments with respect to the Salaried DB Plan were fully paid as of the Wabush Initial Order, and were in fact overpaid in the amount of $169,961 as of December 15, 2015, the date of the termination of the Salaried DB Plan, as appears from the summary table with respect to the Salaried DB Plan prepared by the Replacement Pension Plan Administrator (the **Salaried DB Plan Summary**), a copy of which is communicated herewith as **Exhibit R-16**;

32. The normal cost payments with respect to the Union DB Plan were fully paid as of the Wabush Initial Order and continued to be paid up until December 15, 2015, the date of the termination of the Union DB Plan, (including a payment of $ 22,893 for December 2015 being the amount for the month prorated to the Union DB Plan termination date), as appears from the summary table with respect to the Union DB Plan prepared by the Replacement Pension Plan Administrator (the **Union DB Plan Summary**), communicated herewith as **Exhibit R-17**. It is noted that the Salaried DB Plan Summary and the Union DB Plan Summary appear to have rounding errors in the some of the totals shown thereon;

(li) Special Payments

33. As appears from Section 2 of the Salaried DB Plan Summary (R-16):

a) The special payments with respect to the Salaried DB Plan required to be paid prior to the date of the Wabush Initial Order were paid in full except for $3;

b) One special payment in the amount of $273,218 was paid after the date of the Wabush Initial Order and before the granting of the Pension Priority and Suspension Order (R-7), which payment constituted an underpayment of $1;

c) The special payments required to be paid after the date of the Pension Priority and Suspension Order (R-7) , and which, in conformity with the Pension Priority and Suspension Order (R-7), were not paid, amount to $ 2,185,752;

the whole based on a Towers Watson actuarial report dated September 12, 2014 for actuarial valuation as at January 1, 2014;

34. As appears from Section 2 of the Union DB Plan Summary (R-17):

a) The special payments with respect to the Union DB Plan required to be paid prior to the date of the Wabush Initial Order were underpaid in the amount of $146,776;

b) One special payment in the amount of $393,337 was paid after the date of the Wabush Initial Order and before the granting of the Pension Priority and Suspension Order (R-7), which payment constituted an overpayment of $16,308;

c) The special payments required to be paid after the date of the Pension Priority and Suspension Order (R-7), and which, in conformity with the Pension Priority and Suspension Order (R-7), were not paid, amount to $3,016,232;

the whole based on a Towers Watson actuarial report dated September 12, 2014 for actuarial valuation as at January 1, 2014;

(iii) Catch-Up Special Payments

35. In the Wabush Comeback Motion (R-6), the Wabush CCAA Parties indicated that lump sum "catch up" special payments (each, a **Catch-Up Payment**) were estimated to be approximately $5.5 million for both DB Plans and would become payable as of July 2015 (at paragraph 88);

36. Subsequently, the Wabush CCAA Parties determined that no such Catch-Up Payment was due in respect of the Salaried DB Plan;

37. The Catch-Up Payment in respect of the Union DB Plan for its part was revised and estimated to be approximately $1.9 million;

38. In fact, pursuant to a Towers Watson actuarial report dated July 1, 2015 for an actuarial valuation as of January 1, 2015, which only became available after the issuance of the Wabush Initial Order, additional special payments in the aggregate amount of $3,525,120 were required with respect to the Union DB Plan, as appears from the Union DB Plan Summary (R-17);

39. As also appears from Section 3 thereof (R-17), these additional special payments with respect to the Union DB Plan were payable by way of a Catch-Up Payment of $1,762,560 due August 26, 2015, and thereafter in additional special payments payable in six monthly instalments of $293,760 starting August 30, 2015;

40. None of these monthly additional special payments were paid or kept separate and apart from their own moneys by the Wabush CCAA Parties, nor was any Catch-Up Payment made (or kept separate and apart by the Wabush CCAA Parties from their own moneys) with respect to the Union DB Plan, the whole as contemplated and authorized by the Pension Priority and Suspension Order (R-7);

(iv) Wind-Up Deficiencies

41. In the Wabush Comeback Motion (at paragraph 83), based on estimates received from Towers Watson, the Wabush CCAA Parties estimated the wind-up deficits to be approximately $18.2 million for the Salaried DB Plan and $23.3 million for the Union DB Plan;

42. [...] The Replacement Pension Plan Administrator [...] later informed the Monitor that it [...] expected the wind-up deficits as at December 16, 2015, to be approximately $26.7 million for the Salaried DB Plan and $27.7 million for the Union DB Plan;

42.1 In December 2016, Morneau Shepell filed a report titled "Wind-Up Actual Valuation as at December 16, 2015" in respect of the Salaried DB Plan (the **Salaried DB Plan Wind-Up Report**), a copy of which is communicated herewith as **Exhibit R-25**;

42.2 Based on the Salaried DB Plan Wind-Up Report (R-25), the financial position of the Salaried DB Plan as of December 16, 2015 presented a wind-up deficit of $27.45 million, as appears from page 3 thereof;

42.3 On December 14, 2016, Towers Watson filed a report titled "Plan Termination as at December 16, 2015" in respect of the Union DB Plan (the **Union DB Plan Wind-Up Report** and together with the Salaried DB Plan Wind-Up Report, the **Wind-Up Reports**[3]), a copy of which is communicated herewith as **Exhibit R-26**;

42.4 Based on the Union DB Plan Wind-Up Report (R-26), the financial position of the Union DB Plan as of December 16, 2015 presented a wind-up deficit of $27,486,548, as appears from pages 8 and 9 thereof. This calculation does not account for the benefits covered by Section 17 PBSA, which is qualified as "Priority no. 2" ranking after the wind-up deficit and would represent an additional wind-up liability of $2,349,912, as appears from pages 4 and 10 of the Union DB Plan Wind-Up Report;

(v) Summary of Amounts Owing

43. In summary and based on the foregoing, the amounts owing to the [...] DB Plans based on payment due date are as follows:

	Salaried DB Plan	Union DB Plan
Normal Cost Payments		
Pre-filing	$0	$0
Post-Filing	$0	$0
Total	**$0**	**$0**
Special Payments		
Pre-filing	$3	$146,776
Post-Filing	$2,185,753	$2,999,924
Total	**$2,185,756**	**$3,146,700**
Catch-up Special Payments		
Pre-filing	$0	$0
Post-Filing	$0	$3,525,120
Total	**$0**	**$3,525,120**
[...] **Wind-Up Deficits**	$27,450,000	$27,486,548[4]

[3] Both Wind-up Reports remain subject to review and approval by the pension regulators.

[4] Excluding the additional wind-up deficit in the amount of $ 2,349,912 (see para. 42.4 above).

IV. PENSION CLAIMS

44. The Claims Procedure Order (R-2) provides for specific procedures with respect to Pension Claims, as follows:

> [32] **ORDERS** that the Plan Administrator will have the sole authority to file Proofs of Claim with respect to any and all Pension Claims.
>
> [32.1] **ORDERS** that the Monitor shall provide to the Pension Regulator and the Representatives' Counsel a copy of each Proof of Claim filed in respect of the Salaried Pension Plan and details of any determination by the Monitor of a Pension Claim in respect of the Salaried Pension Plan.
>
> [32.2] **ORDERS** that the Monitor shall provide to the Pension Regulator and the USW a copy of each Proof of Claim filed in respect of the Union Pension Plan and details of any determination by the Monitor of a Pension Claim in respect of the Union Pension Plan.
>
> [...]
>
> [38.1] **ORDERS** that the Pension Regulator and the Representatives' Counsel may file a Notice of Dispute with respect to any determination by the Monitor of a Pension Claim in respect of the Salaried Pension Plan, including for the purpose of asserting any trust claims in respect of the Salaried Pension Plan, and if no Notice of Dispute is filed within fourteen (14) days of the date of receipt of the Monitor's notice of its determination of a Pension Claim in respect of the Salaried Pension Plan such determination shall be deemed to be the Allowed Claim. If a Notice of Dispute is filed by the Pension Regulator or the Representatives' Counsel within the time specified herein, paragraphs 37 and 46 to 51 hereof shall apply *mutatis mutandi*.
>
> [38.2] **ORDERS** that the Pension Regulator and the USW may file a Notice of Dispute with respect to any determination by the Monitor of a Pension Claim in respect of the Union Pension Plan, including for the purpose of asserting any trust claims in respect of the Union Pension Plan, and if no Notice of Dispute is filed within fourteen (14) days of the date of receipt of the Monitor's notice of its determination of a Pension Claim in respect of the Union Pension Plan such determination shall be deemed to be the Allowed Claim. If a Notice of Dispute is filed by the Pension Regulator or the USW within the time specified herein, paragraphs 37 and 46 to 51 hereof shall apply *mutatis mutandi*.
>
> [38.3] **ORDERS** that the Pension Regulator and the Representatives' Counsel shall be given written notice by the Monitor of, and are entitled to participate in (i) any hearing before a Claims Officer concerning a Pension Claim in respect of the Salaried Pension Plan and (ii) any hearing before the Court concerning a Pension Claim in respect of the Salaried Pension Plan.
>
> [38.4] **ORDERS** that the Pension Regulator and the USW shall be given written notice by the Monitor of, and are entitled to participate in (i) any hearing before a Claims Officer concerning a Pension Claim in respect of the Union Pension Plan and (ii) any hearing before the Court concerning a Pension Claim in respect of the Union Pension Plan. [Emphasis added]

45. On December 18, 2015, the Plan Administrator filed, in accordance with the Claims Procedure Order (R-2), Proofs of Claim with respect to each of the DB Plans, as follows:

a) With respect to the Salaried DB Plan, (i) a secured Claim in the amount of $24,000,000 against Wabush Mines, Arnaud Railway and Wabush Railway (for

the wind-up deficit), and (ii) a Restructuring Claim in the amount of $1,932,940 against Wabush Mines, Arnaud Railway and Wabush Railway (for unpaid special payments), the whole as appears from said Proof of Claim (in the amount finally determined in accordance with the Claims Procedure Order, the **Salaried DB Plan Claim**), a copy of which is communicated herewith as **Exhibit R-18**; and

b) With respect to the Union DB Plan, (i) a secured Claim in the amount of $29,000,000 against Wabush Mines, Arnaud Railway and Wabush Railway (for the wind-up deficit), and (ii) a Restructuring Claim in the amount of $6,059,238 against Wabush Mines, Arnaud Railway and Wabush Railway (for unpaid special payments), the whole as appears from said Proof of Claim (in the amount finally determined in accordance with the Claims Procedure Order, the **Union DB Plan Claim**), a copy of which is communicated herewith as **Exhibit R-19**;

V. APPLICABLE STATUTORY REGIME

46. [...]

46.1 As noted above, the DB Plans are registered with OSFI and/or the N&L Superintendent;

46.2 The PBSA applies to pension plans providing benefits to employees and retirees employed in "included employment", which in turn is defined as work, undertaking of business that falls within the legislation authority of the Parliament of Canada, including navigation and shipping and extra-provincial railways, the whole as provided for in Section 4 PBSA:

> **4 (1)** This Act applies in respect of pension plans.
>
> **(2)** In this Act, pension plan means a superannuation or other plan organized and administered to provide pension benefits to employees employed in included employment (and former employees) and to which the employer is required under or in accordance with the plan to contribute [...]
>
> **(4)** In this Act, included employment means employment, other than excepted employment, on or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada, including, without restricting the generality of the foregoing,
>
> (a) any work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of a ship and transportation by ship anywhere in Canada;
>
> (b) any railway, canal, telegraph or other work or undertaking connecting a province with another province or extending beyond the limits of a province [...]
>
> **(6)** The Governor in Council may make regulations excepting from included employment [...]
>
> (b) any other employment if the Governor in Council, on a report of the Minister, is satisfied that
>
> (i) provision has been made for the coverage of employees employed in that employment under the terms of a pension plan that is organized and administered for the benefit primarily of employees employed in other than included employment and that is required to be registered under the law of a designated province [...] [Emphasis added.]

46.3 No regulation exempting the DB Plans from the application of the PBSA were adopted pursuant to Subsection 4(6)(b) above;

46.4 The PBA applies to pension plans for persons employed in Newfoundland & Labrador, except those to which an Act of the Parliament of Canada applies, as provided for in Section 5 PBA:

> **5.** This Act applies to all pension plans for persons employed in the province [of Newfoundland & Labrador], except those pension plans to which an Act of the Parliament of Canada applies.

46.5 Subsection 2(ee) PBA defines "province of employment" as "the province where an employee reports for work, but if the employee is not required to report for work, the province where an employer's establishment is located from which an employee's remuneration is paid";

46.6 The SPPA applies to pension plans provided for employees who report for work at an establishment of their employer located in Québec, as provided for in Section 1 thereof:

> **1.** This Act applies to pension plans provided
>
> **(1)** for employees who report for work at an establishment of their employer located in Québec or, if not, who receive their remuneration from such an establishment, provided, in the latter case, they do not report for work at any other establishment of their employer;
>
> **(2)** for employees not referred to in paragraph 1 who, while residing in Québec and being employed by an employer whose main establishment is located in Québec, work outside Québec, provided the plans are not governed by an Act of a legislative body other than the Parliament of Québec which provides for a deferred pension.

46.7 The Salaried DB Plan is comprised of 656 members, approximately half of which were employed in the province of Québec, with the other half in Newfoundland & Labrador[5];

46.8 The Union DB Plan is comprised of 1732 members, the majority of which are in the province of Newfoundland & Labrador;

46.9 Following the termination of the Salaried DB Plan, 14 of its members were found to be subject to federal legislation as a result of the nature of their functions, as explained at page 4 of the Salaried DB Plan Wind-Up Report (R-25)[6];

46.10 As for the Union DB Plan, it would appear that 55 of its 1732 members are governed by federal jurisdiction as a result of the nature of their functions;

46.11 Based on the foregoing and the information found in the Wind-Up Reports (R-25 and R-26), the members of both DB Plans appear to be subject to the following jurisdictions:

---

[5] As noted in Appendix C of the Salaried DB Plan Wind-Up Report (R-25, at page 19), the membership data is currently under review and remains subject to change.

[6] See note 3 above with respect to membership data.

	Salaried DB Plan[7]	Union DB Plan	TOTAL
Newfoundland & Labrador PBA	313	1005	1318
Québec SPPA	329	661	990
Federal PBSA	14	66	80
TOTAL	**656**	**1732**	**2388**

46.12 Sections 6.1 PBSA, 8(2) PBA and 249 SPPA each provide for the entering into of multilateral agreements as between the federal government and that of provinces with a view to determine, *inter alia*, the legislative regime applicable to multi-jurisdictional pension plans;

V.1 DEEMED TRUSTS

46.13 The PBSA, the PBA and the SPPA all include provisions with respect to deemed trusts applicable under certain circumstances with respect to unpaid pension contributions;

A. PBSA

47. Section 8(1) of the PBSA requires an employer to segregate funds from its own moneys, including for certain types of payments owing to the pension fund, and further provides that a trust is deemed to have arisen with respect to said funds for the benefit of the pension members:

> **8 (1)** An employer shall ensure, with respect to its pension plan, that the following amounts are kept separate and apart from the employer's own moneys, and the employer is deemed to hold the amounts referred to in paragraphs (a) to (c) in trust for members of the pension plan, former members, and any other persons entitled to pension benefits under the plan:
>
> **(a)** the moneys in the pension fund,
>
> **(b)** an amount equal to the aggregate of the following payments that have accrued to date:
>
> (i) the prescribed payments, and
>
> (ii) the payments that are required to be made under a workout agreement; and
>
> **(c)** all of the following amounts that have not been remitted to the pension fund:
>
> (i) amounts deducted by the employer from members' remuneration, and
>
> (ii) other amounts due to the pension fund from the employer, including any amounts that are required to be paid under subsection 9.14(2) or 29(6).
>
> [Emphasis added.]

---

[7] See note 3 above with respect to membership data.

48. Section 8(2) PBSA provides that the amounts deemed to be held in trust pursuant to Section 8(1) shall not form part of the estate of the employer upon in the event of its liquidation, assignment or bankruptcy:

> **(2)** In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (1) is deemed to be held in trust shall be deemed 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 moneys or from the assets of the estate.
>
> [Emphasis added.]

49. Section 29 PBSA permits OSFI to declare the whole or part of a pension plan terminated in certain circumstances, and further provides for payments by the employer into the pension fund upon termination:

> **29** [...] **(2)** The Superintendent may declare the whole or part of a pension plan terminated where
>
> **(a)** there is any suspension or cessation of employer contributions in respect of all or part of the plan members;
>
> **(b)** the employer has discontinued or is in the process of discontinuing all of its business operations or a part thereof in which a substantial portion of its employees who are members of the pension plan are employed; or
>
> **(c)** the Superintendent is of the opinion that the pension plan has failed to meet the prescribed tests and standards for solvency in respect of funding referred to in subsection 9(1).
>
> **(2.1)** The Superintendent may also declare the whole of a pension plan terminated if there is a cessation of crediting of benefits to the plan members.
>
> **(3)** In a declaration made under subsection (2) or (2.1), the Superintendent shall declare a pension plan or part of a pension plan, as the case may be, to be terminated as of the date that the Superintendent considers appropriate in the circumstances.
>
> [...]
>
> **(6)** If the whole of a pension plan is terminated, the employer shall, without delay, pay into the pension fund all amounts that would otherwise have been required to be paid to meet the prescribed tests and standards for solvency referred to in subsection 9(1) and, without limiting the generality of the foregoing, the employer shall pay into the pension fund
>
> **(a)** an amount equal to the normal cost that has accrued to the date of the termination;
>
> **(b)** the amounts of any prescribed special payments that are due on termination or would otherwise have become due between the date of the termination and the end of the plan year in which the pension plan is terminated;
>
> **(c)** the amounts of payments that are required to be made under a workout agreement that are due on termination or would otherwise have become due between the date of the termination and the end of the plan year in which the pension plan is terminated;
>
> **(d)** all of the following amounts that have not been remitted to the pension fund

at the date of the termination:

(i) the amounts deducted by the employer from members' remuneration, and

(ii) other amounts due to the pension fund from the employer; and

(e) the amounts of all of the payments that are required to be made under subsection 9.14(2).

[...]

(6.4) On the winding-up of the pension plan or the liquidation, assignment or bankruptcy of the employer, the amount required to permit the plan to satisfy any obligations with respect to pension benefits as they are determined on the date of termination is payable immediately.

(6.5) Subsection 8(1) does not apply in respect of the amount that the employer is required to pay into the pension fund under subsection (6.4). However, it applies in respect of any payments that have accrued before the date of the winding-up, liquidation, assignment or bankruptcy and that have not been remitted to the fund in accordance with the regulations made for the purposes of subsection (6.1). [...]

B. PBA

50. The PBA contains similar provisions to those described above in respect of the PBSA. Section 32 PBA deems a trust to come into existence under certain circumstances:

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).

51. Sections 59 PBA sets out the circumstances in which the N&L Superintendent may declare a plan to be terminated;

> **59 (1)** The superintendent may declare the whole or part of a pension plan terminated where
>
> **(a)** there is a suspension or cessation of employer contributions in respect of all or part of the plan membership, except where surplus is used to meet funding requirements;
>
> **(b)** the employer has discontinued or is in the process of discontinuing all of its business operation or a part in which a substantial portion of its employees who are members of the plan are employed;
>
> **(c)** the employer is bankrupt within the meaning of the *Bankruptcy Act* (Canada);
>
> **(d)** the superintendent is of the opinion that the plan has failed to meet the requirements prescribed by the regulations for solvency in respect of funding; or
>
> **(e)** all or part of the business or assets of a predecessor employer's business are sold, assigned or otherwise disposed of and the successor employer who acquired the business or assets does not provide a pension plan for the members of the predecessor employer's plan who become employees of the successor employer.
>
> **(2)** A declaration made under subsection (1) shall declare the whole or part of a pension plan to be terminated as of a date determined by the superintendent.

52. The wind-up of a pension plan commences immediately after the termination of the plan unless the N&L Superintendent postpones the wind-up by giving written approval, pursuant to Section 60(3) PBA;

53. Section 61 PBA provides for certain termination payments as follows:

> **61 (1)** On termination of a pension plan, the employer shall pay into the pension fund all amounts that would otherwise have been required to be paid to meet the requirements prescribed by the regulations for solvency, including
>
> **(a)** an amount equal to the aggregate of
>
> (i) the normal actuarial cost, and
>
> (ii) special payments prescribed by the regulations,
>
> that have accrued to the date of termination; and
>
> **(b)** all
>
> (i) amounts deducted by the employer from members' remuneration, and
>
> (ii) other amounts due to the pension fund from the employer
>
> that have not been remitted to the pension fund at the date of termination.
>
> **(2)** Where, on the termination, after April 1, 2008, of a pension plan, other than a multi-employer pension plan, the assets in the pension fund are less than the value of the benefits provided under the plan, the employer shall, as prescribed by the regulations, make the payments into the pension fund, in addition to the payments required under subsection (1), that are necessary to fund the benefits provided under the plan.

C. SPPA

53.1 The only deemed trust provided for under the SPPA is that found in Section 49 thereof with respect to unpaid contributions and accrued interest:

> **49.** Until contributions and accrued interest are paid into the pension fund or to the insurer, they are deemed to be held in trust by the employer, whether or not the latter has kept them separate from his property.

53.2 In addition, Section 264 SPPA provides that contributions payable into the pension fund are unassignable and unseizable:

> **264.** Unless otherwise provided by law, the following amounts or contributions are unassignable and unseizable:
>
> (1) all contributions paid or payable into the pension fund or to the insurer, with accrued interest; [...]

53.3 With respect to the employer's obligations upon termination of a pension plan, Sections 228-230 SPPA provides:

> *§4 – Debts of the employer*
>
> **228.** The amount to be funded to ensure full payment of the benefits of the members or beneficiaries affected by the withdrawal of an employer from a multi-employer pension plan or the termination of a pension plan shall constitute a debt of the employer. The amount to be funded shall be established at the date of termination.
>
> If, at the date of termination, the employer has failed to pay contributions into the pension fund or to the insurer, as the case may be, the debt shall be the amount by which the amount to be funded exceeds such contributions. [...]
>
> 229. Any amount owed by an employer under section 228 must, upon its determination, be paid into the pension fund or to the insurer, as the case may be. However, Retraite Québec may, on the conditions it determines, allow any employer to spread the payment of such amount over a period of not more than five years.
>
> Any amount not paid into the pension fund or to the insurer shall bear interest from the date of default, at the rate determined pursuant to section 61 that was applicable at the date of termination.
>
> 230. Any amount paid by an employer under this subdivision, including any amount recovered after the date of termination, particularly in respect of contributions outstanding and unpaid at the date of termination, shall be applied to the payment of benefits of members or beneficiaries in the order of priority established under this Act.

such that the termination deficit, if any, is a debt of the employer and not a "contribution" subject to a deemed trust;

D. SUMMARY OF AVAILABLE DEEMED TRUSTS

54. The [...] PBSA and PBA provisions set out above provide for two types of deemed trust:

(1) a trust that is deemed to exist while the employer continues in business and that covers amounts that the employer is required to keep separate and apart from its own moneys (Sections 8(1) PBSA and 32(1) PBA, hereinafter referred to as **limited deemed trusts**); and

(2) a trust that arises in the event of any liquidation, assignment or bankruptcy of an employer and that covers amounts that the employer is required to keep separate and apart from its own moneys, whether or not the amounts have in fact been kept separate and apart from the employer's own moneys or assets (Sections 8(2) PBSA and 32(2) PBA, hereinafter referred to as **liquidation deemed trusts**);

55. In the case at hand, OSFI and the N&L Superintendent issued the Termination Notices (R-13 and R-14) with respect to the DB Plans after the CCAA Proceedings had commenced;

V.2 MULTI-JURISDICTIONAL AGREEMENTS AND CONFLICT OF LAWS

56. While the assets of the Wabush CCAA Parties have not been fully realized to date, the Court may need to consider whether any eventual shortfall between the sale proceeds of the Wabush CCAA Parties' assets in Newfoundland and the amounts potentially duly secured by a pension deemed trust created under the PBA could possibly extend to the sale proceeds of the Wabush CCAA Parties' assets formerly located in Quebec;

57. Should it determine that the amounts potentially duly secured by a pension deemed trust created under the PBA exceed the value of sale proceeds generated from assets located in Newfoundland, this Court will need to consider applicable conflict rules so as to determine whether the applicable pension deemed trust under the PBA could extend to the sale proceeds of assets formally located in Quebec;

58. Under the general conflict rules in Quebec, real rights and by extension priority disputes over property are governed by the laws where the property is located, subject to an exception for property in transit (3097 C.c.Q.);

59. The Province of Quebec is also party to certain multi-jurisdictional agreements in relation to pension matters that may provide in certain circumstances for the application of laws of another jurisdiction by way of incorporation where the Quebec government has agreed to do so and its supervisory authority has delegated its authority to the supervisory authority of another jurisdiction;

60. In 2011, the Canadian Association of Pension Supervisory Authorities (**CAPSA**) developed an Agreement Respecting Multi-Jurisdictional Pension Plans (the **2011 Agreement**), which was adopted by the Provinces of Ontario and Quebec, a copy of which is communicated herewith as **Exhibit R-20**;

61. CAPSA also developed in 2016 a revised version thereof (the **2016 Agreement**), which was adopted by the Provinces of British Columbia, Nova Scotia, Ontario, Quebec and Saskatchewan, a copy of which is communicated herewith as **Exhibit R-21**;

62. These 2011 and 2016 Agreements (R-20 and R-21) provide *inter alia* that:

> **6 (1)** While a pension supervisory authority is the major authority for a pension plan in accordance with this Agreement:
>
> **(a)** the provisions of the pension legislation of the major authority's jurisdiction in respect of matters referred to in Schedule B[1] apply to the plan instead of those of the corresponding provisions of the pension legislation of any minor authority's jurisdiction that would apply to the plan if this Agreement did not exist; and
>
> **(b)** subject to the provisions of this Agreement, the provisions of the pension legislation of each jurisdiction that are applicable to the plan under the terms of such legislation apply to the plan in respect of matters not referred to in Schedule B.[1]

[1] Schedule B states: "8. Legislative provisions respecting: [...] (c) requirements that the pension fund be held separate and apart from the employer's assets and deeming the pension fund to be held in trust for the active members or other persons; (d) an administrator's lien and charge on the employer's assets equal to the amounts deemed held in trust [...]".

63. However, Newfoundland & Labrador is not a party to the 2011 and 2016 Agreements (R-20 and R-21);

64. The only applicable multi-jurisdictional agreement between the governments of Quebec and Newfoundland & Labrador is a Memorandum of Agreement[8], to which the government of Newfoundland & Labrador became a party in 1986, communicated herewith as **Exhibit R-22**;

65. The Memorandum of Agreement (R-22) does not provide for the incorporation and application of legislative provisions and administrative powers by the participating pension supervisory authorities, but merely provides for a certain delegation of powers as follows:

> **2.** The major authority[1] for each plan shall exercise both its own statutory functions and powers and the statutory functions and powers of each minor authority for such plan.
>
> [...]
>
> **9.** Where a major authority is unable to exercise a particular power of enforcement available to one of the minor authorities, it shall so advise that minor authority.

[1] According to the Memorandum of Agreement (R-22), "major authority" means, with respect to a plan, the participating authority of the province where the plurality of the plan members are employed, excluding members employed in a province not having a participating authority.

[8] The Memorandum of Agreement (R-22) remains effective, as provided by Section 284 SPPA.

66. As such, the Memorandum of Agreement (R-22) could not serve as the basis for the application of the PBA in relation to property located in Quebec;

67. In view of the foregoing and absent a multi-jurisdictional agreement providing for the application in Quebec of the laws of Newfoundland & Labrador, it is submitted that this Court is bound to apply the laws applicable in the Province of Quebec to adjudicate a dispute with respect to tangible assets located in Québec (or the proceeds standing in their stead);

68. The Monitor notes Article 3079 of the *Civil Code of Québec*:

> **3079.** Where legitimate and manifestly preponderant interests so require, effect may be given to a mandatory provision of the law of another State with which the situation is closely connected.
>
> In deciding whether to do so, consideration is given to the purpose of the provision and the consequences of its application.

but is of the view that this exception is not applicable in the circumstances as the possible application of the PBA could have been properly achieved by way of a multi-jurisdictional agreement and absent the execution of the 2011 and 2016 Agreements (R-20 and R-21) by Newfoundland & Labrador it could not justify why its legislation should override Quebec law in the present circumstances, including Articles 2644 and 2647 C.c.Q.;

VI. DIRECTIONS WITH RESPECT TO PENSION CLAIMS

69. Based on its review of the relevant statutes and applicable case-law, the Monitor is of the view that:

a) Unpaid and accrued normal costs or special costs owing at the date of the Wabush Initial Order would be subject to a limited deemed trust pursuant to subsections 8(1) of the PBSA and 32(1) of the PBA;

b) A liquidation deemed trust did not arise prior to or since the Wabush Initial Order pursuant to subsections 8(2) PBSA or 32(2) PBA, as none of the applicable triggering events, including a "liquidation", have occurred, either before or since the date of the Wabush Initial Order;

c) In any event, any liquidation deemed trust triggered after the Wabush Initial Order with respect to unpaid amortization payments as a result of a "liquidation" would be ineffective given the terms of the Wabush Initial Order and applicable stay thereunder, the terms of the Pension Priority and Suspension Order, the fact that the special costs were assessed on the basis of a deficit which existed as of the Wabush Initial Order and were calculated for past services rendered as of a pre-filing reference date, the treatment of special costs under the CCAA generally, and legislative choices made with respect to same;

d) As a matter of statutory interpretation of the applicable pension legislation alone, the full amount of the wind-up deficit of the DB Plans would not be subject to a pension deemed trust pursuant to the PBSA or the PBA;

e) Even if the wind-up deficits of the DB Plans were to be subject to a pension deemed trust pursuant to the terms of PBSA or the PBA, such deemed trust would be ineffective considering the Wabush Initial Order and applicable stay thereunder, the pre-filing nature of deficits of the DB Plans even if crystalized post-filing upon termination of the DB Plans, the treatment of pension deficits under the CCAA and legislative choices made with respect to same;

f) Even if the deemed trusts under the PBA were to cover assets located outside of Newfoundland & Labrador, this Court should not recognize and enforce it to the extent applicable the PBA deemed trust against assets located in this Province or the sale proceeds thereof;

70. The Monitor accordingly seeks an Order determining the priority of the various components of the Salaried DB Plan Claim (R-18) and the Union DB Plan Claim (R-19) to be as follows:

a) normal costs and special payments outstanding as at the date of the Wabush Initial Order to be subject to a limited deemed trust;

b) normal costs and special payments payable after the date of the Wabush Initial Order, including additional special payments and Catch Up Payments established on the basis of actuarial reports issued after the Wabush Initial Order to constitute an unsecured Claim;

c) wind-up deficiency to constitute an unsecured Claim;

d) any trust created pursuant to the PBA may only charge property located in Newfoundland & Labrador;

71. Pursuant to paragraphs 38.1 and following of the Claims Procedure Order (R-2), reproduced above, the Pension Regulators, Representatives' Counsel and well as USW are all entitled to challenge the adjudication of Pension Claims by the Monitor;

72. The Monitor fully expects that various other stakeholders will have an interest in the determination of these priority issues;

73. The Monitor submits that it is proper to seek and obtain directions at this stage in respect of questions outlined above. [....] The amounts and the membership data included herein, including the wind-up deficits, are based on the information appearing in the Wind-Up Reports and are provided solely as information, as it is not necessary to know the actual quantum of the Pension Claims in order to determine their relative priority in these CCAA Proceedings;

74. In any event, should a dispute over the quantum of the wind-up deficits or any other factual information affecting the quantum of the Pension Claims arise, that issue could easily (and efficiently) be bifurcated and resolved independently from the directions sought herein;

75. The Monitor further submits that any proposed distribution of proceeds to creditors, including the choice of the mechanism to effect same, will be impacted by the issues set out herein above;

76. Based on the foregoing, the Monitor hereby submits that the Court will need to deal with the following questions:

Liquidation giving rise to a liquidation deemed trust

a) What is the proper meaning of "liquidation" pursuant to subsections 8(2) PBSA and 32(2) PBA?

b) Did a "liquidation" within the meaning of subsections 8(2) PBSA and 32(2) PBA occur prior or since the Wabush Initial Order?

c) Would such a liquidation deemed trust (...) be effective if triggered by a "liquidation" occurring after the Wabush Initial Order?

Deficit upon termination

d) 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?

e) Would such a wind-up deficit deemed trust be effective if triggered by a termination occurring after the Wabush Initial Order?

Enforcement or recognition of a PBA deemed trust charging assets located in Québec

f) Is the deemed trust arising under the PBA specifically or implicitly limited to assets of the employer located in Newfoundland & Labrador?

g) 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)?

VII. CONCLUSIONS AND PROCEDURAL MATTERS

77. The Monitor submits that the notices given of the presentation of the present Amended Motion, the initial iteration of which was originally notified to all Persons on the Service List on September 20, 2016, are proper and sufficient;

78. Pursuant to paragraph 56 of the Wabush Initial Order (R-1), all motions in these CCAA Proceedings are to be brought on no less than ten (10) calendar days' notice to all Persons on the Service List;

78.1 Following discussions amongst the Monitor and various interested parties, the Motion was first made returnable on a *pro forma* basis on October 28, 2016;

78.2 Prior to the October 28, 2016 hearing, the following Notices of Objection were filed:

a) Notice of Objection dated October 7, 2016 filed by the USW;

b) Notice of Objection dated October 7, 2016 filed by the Representatives; and

c) Notice of Objection dated October 7, 2016 filed by the Replacement Plan Administrator;

the whole as appears from the Court record;

79. [...] Both before and after the October 28, 2016, the Monitor has made efforts in order [...] to agree to a timetable for the filing of materials and the presentation of the Motion with the CCAA Parties, Representative Counsel, the USW, the Replacement Plan Administrator and the relevant regulators that would allow relevant parties sufficient opportunity to respond and ensure the efficient hearing of the present Motion [...];

79.1 The N&L Superintendent went on to file a Notice of Objection on December 15, 2016, as appears from the Court record. While they have not filed a formal Notice of Objection, the Monitor also understands that OSFI and Retraite Québec intend to take position with respect to the issues raised in the Motion;

79.2 A hearing was held on December 20, 2016 to debate the preliminary issues raised in the Notices of Objection, mainly the jurisdictional argument raised by the Representatives as to whether the Court should refer parts or all of the questions arising in the Motion to the Supreme Court of Newfoundland & Labrador;

79.3 On January 30, 2017, the Court issued a ruling whereby it determined that it had jurisdiction to deal with all issues stemming from this Motion, including the interpretation of the PBA in the context of the CCAA Proceedings and therefore refused to refer the matter to the Supreme Court of Newfoundland & Labrador;

79.4 During a case management hearing held on April 5, 2017, hearing dates on the merits were set (June 28 and 29, 2017), with the Court reserving the right of all parties to submit their position concerning the legal issues this Court needed or ought to rule on to resolve the issues raised by the present Motion;

79.5 The service of the present Amended Motion serves as notice pursuant to [...] paragraph 56 of the Wabush Initial Order (R-1);

80. [...];

81. The CCAA Parties have been consulted by the Monitor and support the conclusions sought herein;

82. The present Motion is well founded in fact and in law.

FOR THESE REASONS, MAY IT PLEASE THE COURT TO:

GRANT the present Amended Motion;

ISSUE an Order [...] determining the various priority disputes and issues raised by the present Amended Motion;

WITHOUT COST, save and except in case of contestation.

Montréal, April 13, 2017

Norton Rose Fulbright Canada LLP

NORTON ROSE FULBRIGHT CANADA, LLP
Mtre Sylvain Rigaud and Mtre Chrystal Ashby
Attorneys of the Monitor FTI Consulting Canada Inc.

Suite 2500 - 1 Place Ville Marie
Montreal, Quebec H3B 1R1
Telephone : (514) 847-4702 and (514) 847-6076
Fax : (514) 514-286-5474
notifications-mtl@nortonrosefulbright.com
Our reference : 01028478-0001

NOTICE OF PRESENTATION

TO: SERVICE LIST

TAKE NOTICE that the present *Amended Motion by the Monitor for Directions with Respect to Pension Claims* will be presented for adjudication before the Honourable Stephen W. Hamilton, J.S.C., or another of the honourable judges of the Superior Court, Commercial Division, sitting in and for the district of Montréal, in the Montréal Courthouse located at 1, Notre-Dame Street East, Montréal, Québec, on a date, at a time and in in a room to be determined by the Court.

DO GOVERN YOURSELF ACCORDINGLY.

Montréal, April 13, 2017

Norton Rose Fulbright Canada LLP

NORTON ROSE FULBRIGHT CANADA, LLP
Mtre Sylvain Rigaud and Mtre Chrystal Ashby
Attorneys of the Monitor FTI Canada Consulting Inc.

Suite 2500 - 1 Place Ville Marie
Montreal, Quebec H3B 1R1
Telephone : (514) 847-4702 and (514) 847-6076
Fax : (514) 514-286-5474
notifications-mtl@nortonrosefulbright.com
Our reference : 01028478-0001

CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

SUPERIOR COURT
Commercial Division
(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended)

N°: **500-11-048114-157**

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

BLOOM LAKE GENERAL PARTNER LIMITED *et al*

Petitioners

-and-

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

Mises-en-cause

-and-

HER MAJESTY IN RIGHT OF NEWFOUNDLAND & LABRADOR, AS REPRESENTED BY THE SUPERINTENDENT OF PENSIONS

THE ATTORNEY GENERAL OF CANADA, ACTING ON BEHALF OF THE OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS

MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON

UNITED STEEL WORKERS, LOCALS 6254 AND 6285

RÉGIE DES RENTES DU QUÉBEC

MORNEAU SHEPELL LTD., IN ITS CAPACITY AS REPLACEMENT PENSION PLAN ADMINISTRATOR

Mis-en-cause

-and-

FTI CONSULTING CANADA INC.

Monitor

AMENDED LIST OF EXHIBITS IN SUPPORT OF THE AMENDED MOTION BY THE MONITOR FOR DIRECTIONS WITH RESPECT TO PENSION CLAIMS

Exhibit R-1	Wabush Initial Order dated May 20, 2015, as rectified on May 28, 2015;
Exhibit R-2	Claims Procedure Order dated November 5, 2015, as amended on November 16, 2015;
Exhibit R-3	Draft Order;
Exhibit R-4	Wabush Initial Motion dated May 19, 2015;
Exhibit R-5	Wabush Comeback Order dated June 9, 2015;
Exhibit R-6	Wabush Comeback Motion dated May 29, 2015;
Exhibit R-7	Pension Priority and Suspension Order dated June 26, 2015;
Exhibit R-8	Decision of Justice Kasirer, J.C.A. dated August 18, 2015;
Exhibit R-9	Asset Purchase Agreement (Port Assets) dated December 23, 2015;
Exhibit R-10	Port Approval and Vesting Order dated February 1, 2016;
Exhibit R-11	Asset Purchase Agreement (Block Z) dated January 26, 2016;
Exhibit R-12	Block Z Approval and Vesting Order dated February 1, 2016;
Exhibit R-13	N&L Termination Notices dated December 15, 2015;
Exhibit R-14	OSFI Termination Notice dated December 15, 2015;
Exhibit R-15	Notices with respect to the Replacement of the Pension Plan Administrator dated March 30, 2016;
Exhibit R-16	Salaried DB Plan Summary Table;
Exhibit R-17	Union DB Plan Summary Table;
Exhibit R-18	Salaried DB Plan Proof of Claim dated December 18, 2015;
Exhibit R-19	Union DB Plan Proof of Claim dated December 18, 2015;
Exhibit R-20	2011 CAPSA Agreement Respecting Multi-Jurisdictional Pension Plans;
Exhibit R-21	2016 CAPSA Agreement Respecting Multi-Jurisdictional Pension Plans;
Exhibit R-22	Memorandum of Agreement entered into by Newfoundland & Labrador in 1986;
Exhibit R-23	Salaried DB Plan, together with Amendments;
Exhibit R-24	Union DB Plan, together with Amendments;

Exhibit R-25 Salaried DB Plan Wind-Up Report;

Exhibit R-26 Union DB Plan Wind-Up Report.

Montréal, April 13, 2017

Norton Rose Fulbright Canada LLP

NORTON ROSE FULBRIGHT CANADA, LLP
Mtre Sylvain Rigaud and Mtre Chrystal Ashby
Attorneys of the Monitor
Suite 2500 - 1 Place Ville Marie
Montreal, Quebec H3B 1R1
Telephone : (514) 847-4702 and (514) 847-6076
Telecopieur : (514) 514-286-5474
Notifications-mtl@nortonrosefulbright.com
Our reference : 01028478-0001

NO: 500-11-048114-157

SUPERIOR COURT
DISTRICT OF MONTREAL

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

BLOOM LAKE GENERAL PARTNER LIMITED ET AL

Petitioners

-and-

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP ET AL.

Mises-en-cause

-and-

HER MAJESTY IN RIGHT OF NEWFOUNDLAND & LABRADOR, AS REPRESENTED BY THE SUPERINTENDENT OF PENSIONS ET AL.

Mis-en-cause

-and-

FTI CONSULTING CANADA INC.

Monitor

AMENDED MOTION BY THE MONITOR FOR DIRECTIONS WITH RESPECT TO PENSION CLAIMS
(Sections 11 and 23(k) of the *Companies' Creditors Arrangement Act*)

ORIGINAL

BO-0042 # 01028478-0001
Mtre. Sylvain Rigaud and Mtre. Chrystal Ashby
NORTON ROSE FULBRIGHT CANADA LLP
BARRISTERS & SOLICITORS
1 Place Ville Marie, Suite 2500
Montréal, Quebec H3B 1R1 CANADA
Telephone: 514-847-4702
Telephone: 514-847-6076
Fax: +1 514.286.5474
Notifications-mtl@nortonrosefulbright.com

SCHEDULE B: LIST OF RELEVANT ORDERS WITH RESPECT TO THE WABUSH CCAA PARTIES

SCHEDULE B : LIST OF RELEVANT ORDERS WITH RESPECT TO THE WABUSH CCAA PARTIES

1. May 20, 2015, order (as subsequently amended, rectified and/or restated) granted by the Honourable Justice Stephen W. Hamilton, J.S.C., in respect of the Petitioners Wabush Iron Co. Limited and Wabush Resources Inc. as well as Mises-en-cause Wabush Mines, an unincorporated contractual joint venture, Arnaud Railway Company, and Wabush Lake Railway Company Limited (the **Wabush Initial Order**);

2. November 5, 2015, order (as amended on November 16, 2015) granted by the Honourable Justice Stephen W. Hamilton, J.S.C. (the **Claims Procedure Order**);

3. June 9, 2015 order granted by the Honourable Justice Stephen W. Hamilton, J.S.C. (the **Wabush Comeback Order**);

4. June 26, 2015 order granted by the Honourable Justice Stephen W. Hamilton, J.S.C. (the **Pension Priority and Suspension Order**);

5. August 18, 2015 order denying leave to appeal from the Pension Priority and Suspension Order issued by the Honourable Nicholas Kasirer, J.C.A. of the Quebec Court of Appeal;

6. February 1, 2016 order granted by the Honourable Justice Stephen W. Hamilton, J.S.C. approving an asset purchase agreement dated as of December 23, 2015, as amended with respect to Port Transaction (the **Port Transaction Approval and Vesting Order**);

7. February 1, 2016 order granted by the Honourable Justice Stephen W. Hamilton, J.S.C. approving an asset purchase agreement dated as of January 26, 2016 with respect to the Block Z Transaction (the **Block Z Approval and Vesting Order**);

8. January 30, 2017 Order rendered by the Honourable Justice Stephen W. Hamilton, J.S.C. with respect to preliminary jurisdictional issue (**January 30 Order**).

SCHEDULE C : JANUARY 30 ORDER

SUPERIOR COURT

(*Commercial Division*)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

No: 500-11-048114-157

DATE: January 30, 2017

PRESIDED BY THE HONOURABLE STEPHEN W. HAMILTON, J.S.C.

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.
Petitioners

And

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP
BLOOM LAKE RAILWAY COMPANY LIMITED
WABUSH MINES
ARNAUD RAILWAY COMPANY LIMITED
WABUSH LAKE RAILWAY COMPANY LIMITED
Mises en cause

And

MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON
SYNDICAT DES MÉTALLOS, SECTIONS LOCALES 6254 ET 6285
MORNEAU SHEPELL LTD, IN ITS CAPACITY AS REPLACEMENT PENSION PLAN ADMINISTRATOR
HER MAJESTY IN RIGHT OF NEWFOUNLAND AND LABRADOR, AS REPRESENTED BY THE SUPERINTENDENT OF PENSIONS

JH5439

THE ATTORNEY GENERAL OF CANADA, ACTING ON BEHALF OF THE OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS
RÉGIE DES RENTES DU QUÉBEC
VILLE DE SEPT-ÎLES
Mises en cause
And
FTI CONSULTING CANADA INC.
Monitor

JUDGMENT

INTRODUCTION

[1] The debtors have filed proceedings under the *Companies' Creditors Arrangement Act* ("CCAA").[1] They owe substantial liabilities under two pension plans, including special payments, catch-up special payments and wind-up deficiencies. The Monitor has filed a motion for directions with respect to the priority of the various components of the pension claims.

[2] A preliminary issue has arisen as to whether the Court should request the aid of the Supreme Court of Newfoundland and Labrador (the "NL Court") with respect to the scope and priority of the deemed trust and other security created by the Newfoundland and Labrador *Pension Benefit Act* ("NLPBA"),[2] which regulates in part the pension plans.

CONTEXT

[3] On May 19, 2015, the Petitioners Wabush Iron Co. Limited and Wabush Resources Inc. and the Mises-en-cause Wabush Mines (a joint venture of Wabush Iron and Wabush Resources), Arnaud Railway Company and Wabush Lake Railway Company Limited (together the "Wabush CCAA Parties") filed a motion for the issuance of an initial order under the CCAA, which was granted the following day by the Court.

[4] Prior to the filing of the motion, Wabush Mines operated (1) the iron ore mine and processing facility located near the Town of Wabush and Labrador City, Newfoundland and Labrador, and (2) the port facilities and a pellet production facility at Pointe-Noire, Québec. Arnaud Railway and Wabush Lake Railway are both federally regulated

---

1 R.S.C. 1985, c. C-36.
2 S.N.L. 1996, c. P-40.1.

railways that transported iron ore concentrate from the Wabush mine to the Pointe-Noire port. The operations had been discontinued and the employees terminated or laid off prior to the filing of the CCAA motion.

[5] The Wabush CCAA Parties have two pension plans for their employees which include defined benefits:

- A hybrid pension plan for salaried employees at the Wabush mine and the Pointe-Noire port hired before January 1, 2013, known as 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

- A pension plan for unionized hourly employees at the Wabush mine and Pointe-Noire port, known as 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").

[6] Wabush Mines was the administrator of both plans.

[7] The majority of the employees covered by the plans reported for work in Newfoundland and Labrador while some reported for work in Québec. Moreover, some of the employees covered by the Union Plan worked for Arnaud Railway, which is a federally regulated railway. The result is that the Salaried Plan is governed by the NLPBA, while the Union Plan is governed by both the NLPBA and the federal *Pension Benefits Standards Act* ("PBSA").[3] Further, the Union suggests that the Québec *Supplemental Pension Plans Act* ("SPPA")[4] might be applicable to employees or retirees who reported for work in Québec. Both plans are subject to regulatory oversight by the provincial regulator in Newfoundland and Labrador, the Superintendent of Pensions (the "NL Superintendent"), while the Union Plan is also subject to regulatory oversight by the federal pension regulator, the Office of the Superintendent of Financial Institutions ("OSFI"). The Québec regulator, Retraite Québec, might also have a role to play.

[8] On June 26, 2015, in the context of approving the interim financing of the debtors, the Court ordered the suspension of payment by the Wabush CCAA Parties of the monthly amortization payments and the annual lump sum "catch-up" payments coming due under the plans, and confirmed the priority of the Interim Lender Charge over the deemed trusts with respect to the pension liabilities. The Court also ordered the

---

3 R.S.C. 1985 (2nd Supp.), c. 32.
4 CQLR, c R-15.1, s. 49.

suspension of payment of other post-retirement benefits, including life insurance, health care and a supplemental retirement arrangement plan.[5]

[9] On December 16, 2015, the NL Superintendent terminated both plans effective immediately on the basis that the plans failed to meet the solvency requirements under the regulations, the employer has discontinued all of its business operations and it was highly unlikely that any potential buyer of the assets would agree to assume the assets and liabilities of the plans.[6] On the same date, OSFI terminated the Union Plan effective immediately for the same reasons.[7]

[10] Both the NL Superintendent and OSFI reminded the Wabush CCAA Parties of the employer's obligation upon termination of the plan to pay into the pension fund all amounts that would be required to meet the solvency requirements and the amount necessary to fund the benefits under the plan. They also referred to the rules with respect to deemed trusts.[8]

[11] On January 26, 2016, the salaried retirees received a letter from Wabush Mines notifying them that the NL Superintendent had directed Wabush Mines to reduce the amount of monthly pension benefits of the members by 25%.[9] Retirees under the Union Plan had their benefits reduced by 21% on March 1, 2016.[10]

[12] On March 30, 2016, the NL Superintendent and OSFI appointed Morneau Shepell Ltd as administrator for the plans.[11]

[13] The Wabush CCAA Parties paid the monthly normal cost payments for both plans up to the termination of the plans on December 16, 2015. As a result, the monthly normal cost payments for the Union Plan were fully paid as of December 16, 2015.[12] The monthly normal cost payments for the Salaried Plan had been overpaid in the amount of $169,961 as of December 16, 2015.[13]

---

5 2015 QCCS 3064; motion for leave to appeal dismissed, 2015 QCCA 1351.
6 Exhibit R-13.
7 Exhibit R-14.
8 Exhibits R-13 and R-14.
9 Exhibit RESP-7.
10 Affidavit of Terence Watt, sworn December 14, 2016, par. 19.
11 Exhibit R-15.
12 There is a debate as to whether the Wabush CCAA Parties were required to pay the full monthly payment for December or only a pro-rated portion. The amount at issue for the period from December 17 to 31, 2015 is $21,462.
13 Exhibit R-16.

[14] However, the Wabush CCAA Parties ceased making the special payments in June 2015 pursuant to the order issued by the Court, with the result that unpaid special payments as of December 16, 2015 total $2,185,752 for the Salaried Plan[14] and $3,146,696 for the Union Plan.[15]

[15] Further, the Wabush CCAA Parties did not make the lump sum "catch-up" special payments that came due after June 2015. The amount payable is now calculated to be $3,525,125.[16] These amounts became known with certainty only when the actuarial report was completed and filed in July 2015, but some of these amounts may relate to the pre-filing period.

[16] Finally, the plans are underfunded. The Plan Administrator estimates the wind-up deficits as at December 16, 2015 to be approximately $26.7 million for the Salaried Plan and approximately $27.7 million for the Union Plan.

[17] As a result, according to the Monitor, the total amounts owing are approximately $28.7 million to the Salaried Plan and $34.4 million to the Union Plan.

[18] The Plan Administrator filed a proof of claim in respect of the Salaried Plan that includes a secured claim in the amount of $24 million and a restructuring claim in the amount of $1,932,940,[17] and a proof of claim with respect to the Union Plan that includes a secured claim in the amount of $29 million and a restructuring claim in the amount of $6,059,238.[18]

[19] The differences in the numbers are not important at this stage. It is sufficient to note that there are very large claims and that the Plan Administrator claims the status of a secured creditor with respect to a substantial part of its claims.

[20] It is also important to note that the Wabush CCAA Parties held assets both in Newfoundland and Labrador and in Québec. Many of the Québec assets have been sold and have generated substantial proceeds currently held by the Monitor.

[21] The Monitor is now working through the claims procedure. In that context, the Monitor applies to the Court for an order declaring that:

a) normal costs and special payments outstanding as at the date of the Wabush Initial Order are subject to a limited deemed trust;

---

14 Exhibit R-16.
15 Exhibit R-17.
16 Exhibit R-17.
17 Exhibit R-18.
18 Exhibit R-19.

b) normal costs and special payments payable after the date of the Wabush Initial Order, including additional special payments and catch up payments established on the basis of actuarial reports issued after the Wabush Initial Order, constitute unsecured claims;

c) the wind-up deficiencies constitute unsecured claims; and

d) any deemed trust created pursuant to the NLPBA may only charge property in Newfoundland and Labrador.

[22] Those issues are not yet before the Court. A preliminary issue has arisen as to whether the Court should request the aid of the NL Court with respect to the scope and priority of the deemed trust and the lien created by the NLPBA and whether the deemed trust and the lien extend to assets located outside of Newfoundland and Labrador.

POSITION OF THE PARTIES

[23] All parties agree that (1) the Court has jurisdiction to deal with all of the issues, and (2) the Court has the discretion to request the aid of the NL Court.

[24] Three parties suggest that the Court should exercise that discretion and request the aid of the NL Court:

- The Plan Administrator;
- The representatives of the salaried employees and retirees; and
- The NL Superintendent.

[25] The representatives of the salaried employees and retirees have proposed that the following questions should be resolved by the NL Court:

1. The Supreme Court of Canada has confirmed in *Indalex* 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 [NLPBA] deemed trusts in respect of:

   a) unpaid current service costs;

   b) unpaid special payments; and,

   c) unpaid wind-up liability.

2. The Salaried Plan is registered in Newfoundland and regulated by the NPBA.

a) (i) Does the PBSA 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 PBSA 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?

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?

[26] Three other parties suggest that the Court should not transfer any issues to the NL Court and should decide all of the issues:

- The Monitor;
- The Syndicat des métallos, sections locales 6254 et 6285; and
- The Ville de Sept-Îles.

[27] The Ville de Sept-Îles argues that the request to transfer should be dismissed because it is too late.

[28] Finally, two parties do not take a position on the request to transfer:

- The Attorney–General of Canada, acting on behalf of OSFI; and
- Retraite Québec.

ANALYSIS

1. The jurisdiction of the CCAA Court

[29] In principle, all issues relating to a debtor's insolvency are decided before a single court.[19] This rule is based on the "public interest in the expeditious, efficient and

---

19 *Sam Lévy & Associés Inc.* v. *Azco Mining Inc.*, 2001 SCC 92, par. 25-28.

economical clean-up of the aftermath of a financial collapse."[20] This public interest favours a "single control" of insolvency proceedings by one court as opposed to their fragmentation among several courts.[21]

[30] The Supreme Court in *Sam Lévy* concluded as follows with respect to the relevant test:

> 76 In the present case, we are confronted with a federal statute that *prima facie* establishes one command centre or "single control" (*Stewart*, *supra*, at p. 349) for all proceedings related to the bankruptcy (s. 183(1)). Single control is not necessarily inconsistent with transferring particular disputes elsewhere, but a creditor (or debtor) who wishes to fragment the proceedings, and who cannot claim to be a "stranger to the bankruptcy", has the burden of demonstrating "sufficient cause" to send the trustee scurrying to multiple jurisdictions. Parliament was of the view that a substantial connection sufficient to ground bankruptcy proceedings in a particular district or division is provided by proof of facts within the statutory definition of "locality of a debtor" in s. 2(1). The trustee in that locality is mandated to "recuperate" the assets, and related proceedings are to be controlled by the bankruptcy court of that jurisdiction. The Act is concerned with the economy of winding up the bankrupt estate, even at the price of inflicting additional cost on its creditors and debtors.[22]
>
> (Emphasis added)

[31] Although the *Sam Lévy* case was decided in the context of the *Bankruptcy and Insolvency Act* ("BIA"),[23] the same principles apply in the context of the other insolvency legislation, including the CCAA.[24] The CCAA court has jurisdiction to deal with all of the issues that arise in the context of the CCAA proceedings.[25] The stay of proceedings under the CCAA gives effect to this principle by preventing creditors from bringing proceedings outside the CCAA proceedings without the authorization of the CCAA court.

[32] There are clear efficiencies to having a single court deal with all of the issues in a single judgment.

---

20 *Ibid*, par. 27.
21 *Ibid*, par. 64.
22 *Ibid*, par. 76.
23 R.S.C. 1985, c. B-3.
24 *Century Services Inc.* v. *Canada (Attorney General)*, 2010 SCC 60, par. 22; *Newfoundland and Labrador* v. *AbitibiBowater Inc.*, 2012 SCC 67, par. 21; *Montreal, Maine & Atlantic Canada Co./Montréal, Maine & Atlantique Canada Cie (Arrangement relatif à)*, 2013 QCCS 5194, par. 24-25; *Re Nortel Networks Corporation et al*, 2015 ONSC 1354, par. 24; *Re Essar Steel Algoma Inc.*, 2016 ONSC 595, par. 29-30, judgment of Court of Appeal ordering (i) Cliffs to seek leave to appeal the Order, (ii) the hearing of the leave to appeal motion be expedited, and (iii) the issuance of a stay pending the disposition of the leave to appeal motion, 2016 ONCA 138.
25 Section 16 CCAA provides that the orders of the CCAA court are enforced across Canada.

[33] The general rule is therefore that the Court should rule on all issues that arise in the context of these insolvency proceedings.

2. The discretion to ask for the assistance of another court

[34] There are however situations where another court can deal more efficiently with specific issues. The CCAA Court has jurisdiction to ask for the assistance of another court under Section 17 CCAA:

> **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.

[35] The representative of the salaried employees and retirees also pleaded the notion of *forum non conveniens* under the Civil Code:

> **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.

[36] The Supreme Court held in *Sam Lévy*[26] that Article 3135 C.C.Q. does not apply in bankruptcy matters because of Section 187(7) BIA, which provides:

> **187 (7)** The court, on satisfactory proof that the affairs of the bankrupt can be more economically administered within another bankruptcy district or division, or for other sufficient cause, may by order transfer any proceedings under this Act that are pending before it to another bankruptcy district or division.

[37] While Section 17 CCAA is not as explicit, the Court is satisfied that it is not necessary or appropriate to refer to Article 3135 C.C.Q. in the present context. The CCAA court is not being asked to decline jurisdiction, but rather it is being asked to seek the assistance of another court.

[38] The Court is therefore satisfied that, notwithstanding the general rule that it should rule on all issues that arise in the context of these insolvency proceedings, it can seek the assistance of another court. It is a discretionary decision of this Court, based on factors such as cost, expense, risk of contradictory judgments, expertise, etc.

---

[26] *Supra* note 19, par. 62.

3. Specific grounds

[39] The arguments put forward in support of the referral of the issues to the NL Court can be summarized as follows:

a) Legal considerations:

- These are complex and important issues of provincial law;
- The courts in Newfoundland and Labrador possess far greater expertise in interpreting the NLPBA than does the courts in Québec, although these specific questions have not yet been considered by any court in Newfoundland and Labrador;
- The interpretation of the NLPBA is a question of the intention of the legislator in Newfoundland and Labrador, and the NL Court is better situated to determine this intention;

b) Factual considerations:

- It is a question of purely local concern and it may significantly impact a large number of residents of Newfoundland and Labrador;
- The province of Newfoundland and Labrador is closely connected to the dispute: a majority of the employees reported for work in the province and the Wabush CCAA Parties maintained significant business operations in the province;
- If justice is to be done and be seen to be done it is important that consequential decisions on provincial legislation be made by the courts of that province;
- The representatives of the salaried employees and retirees want the NL Court to interpret the NLPBA;

c) Practical considerations:

- The law of another province is treated as a question of fact in Québec, with the result that the conclusion on a matter of foreign law is not binding on subsequent courts and can only be overturned in the presence of a palpable and overriding error;
- It might be difficult to prove the law of Newfoundland and Labrador in a Québec court given the lack of jurisprudence on the specific issues;

- There will be increased costs if the Québec Court interprets the NLPBA because of the need to retain experts to provide legal opinions;
- There is no reason to believe that fragmenting the proceedings will result in additional delay;
- The judgment to be rendered will be a precedent and only a decision of the courts of Newfoundland and Labrador would be an authoritative precedent;
- Other persons or parties may wish to intervene on the issue of the scope of the Section 32 NLPBA deemed trusts, which would be more practical in the NL Court.

[40] These arguments do not convince the Court that this is an appropriate case to refer the issues to the NL Court.

a) Legal considerations

[41] This is the key argument put forward by the parties suggesting that the NLPBA issues be referred to the NL Court: the issues relate to the NLPBA, and the NL Court is best qualified to interpret the NLPBA.

[42] The Court accepts as a starting point that the NLPBA applies in the present matter: the pension plans are regulated by the NL Superintendent in accordance with the NLPBA (although OSFI also regulates the Union Plan in accordance with the PBSA) and the plans expressly provide that they are interpreted in accordance with the NLPBA.

[43] The Court also accepts the obvious proposition that the NL Court is more qualified to deal with an issue of Newfoundland and Labrador law than the courts of Québec, particularly since Newfoundland and Labrador is a common law jurisdiction and Québec is a civil law jurisdiction.

[44] However, that does not mean that the Court will automatically refer every issue governed by the law of another jurisdiction to the courts of that other jurisdiction.

[45] First, there are rules in the Civil Code with respect to how Québec courts deal with issues governed by foreign law. Articles 3083 to 3133 C.C.Q. set out the rules to determine which law is applicable to a dispute before the Québec courts, and Article 2809 C.C.Q. sets out how the foreign law is proven before the Québec courts.

[46] Further, pursuant to these rules, Québec courts regularly hear matters governed by foreign law. The Court of Appeal recently held that the fact that a dispute is governed by foreign law does not have much weight in a *forum non conveniens* analysis:

> [98] Si on revoie les considérations du Juge, portant sur dix points, pour conclure que le for géorgien est préférable, deux aspects principaux en ressortent, soit les coûts et la loi applicable.
>
> [99] Quant à cette dernière considération, elle n'est pas d'un grand poids, à mon avis. Parce que le débat porte sur les faits plutôt que sur le droit. Parce que la *common law* est tout de même familière aux tribunaux québécois. Parce que faire la preuve de la loi d'un État américain n'est pas un grand défi, c'est même chose courante.
>
> [100] Et surtout, parce que le critère de la loi applicable ne constitue pas en soi un facteur important. Dans tout litige international, les conflits de lois sont l'ordinaire et non l'exception.[27]

[47] In other words, the mere fact that a dispute is governed by foreign law is not a good reason to send the case to the foreign jurisdiction. This principle was applied in a CCAA context in the *MMA* case.[28]

[48] There are examples in the insolvency context of the court with jurisdiction over the insolvency declining to send an issue governed by foreign law to the foreign court. In *Sam Lévy*, the Supreme Court declined to send an insolvency matter to British Columbia simply because there was a choice of B.C. law, stating, "The Quebec courts are perfectly able to apply the law of British Columbia."[29]

[49] In *Lawrence Home Fashions Inc./Linge de maison Lawrence inc. (Syndic de)*, Justice Schrager, then of this Court, stated :

> [18] In any event, should equitable set-off under Ontario law become relevant to the case, Québec judges sitting in such matters, on the presentation of the appropriate evidence, are readily capable of dealing with foreign law issues. Indeed, this is a frequent occurrence particularly in insolvency matters.[30]

[50] The Ontario courts rejected similar arguments in *Essar Algoma*:

> [80] Ontario courts can and do often apply foreign law. In this case I do not consider the fact that the law to be applied is Ohio law much of a factor, if any. [31]

---

27 *Stormbreaker Marketing and Productions Inc.* c. *Weinstock*, 2013 QCCA 269, par. 98-100.
28 *MMA*, *supra* note 24, par. 20.
29 *Sam Lévy*, *supra* note 19, par. 61.
30 2013 QCCS 3015, par. 18.
31 *Supra* note 24, par. 80. See also *Nortel Networks*, *supra* note 24, par. 29.

[51] The Monitor submitted cases in which Québec courts have interpreted different provisions of the pension laws of other provinces.[32] The Court also notes that it dealt to a more limited extent with the deemed trust under the NLPBA in its decision dated June 26, 2015.

[52] There are nevertheless circumstances where the CCAA court has referred legal issues to the courts of another province. The *Curragh*[33] and *Yukon Zinc*[34] judgments were cited as examples of such cases. However, in both cases, the legal issues related to the Yukon *Miners Lien Act*.[35] Justice Farley in *Curragh* wrote :

> This legislation and its concept of the lien affecting the output of the mine or mining claim is apparently unique to the Yukon Territory.[36]

[53] Moreover, both cases involved real rights on property in Yukon.

[54] The parties also pointed to *Timminco* as precedent authority directly on point supporting the transfer of a pension issue by the CCAA court to the jurisdiction where the pension plan is registered and has been administered.[37] However, *Timminco* is not a precedent in that the parties in that case consented to the referral of the issue and Justice Morawetz simply gave effect to their consent.

[55] Without concluding that the Court would only refer a legal issue if the foreign law at issue is unique, the Court concludes that the arguments favouring the referral of a legal issue are stronger when the foreign law is unique.

[56] It is therefore important to examine the issues that might be referred to the NL Court and the uniqueness of the NLPBA provisions that are at issue in the present matter.

[57] The representatives of the salaried employees and retirees identify the relevant questions as being the scope of the deemed trust and of the lien and charge under Section 32 NLPBA, as well as the interaction between the NLPBA and the federal and Québec statutes.

[58] Section 32 NLPBA provides:

---

32 *Emerson Électrique du Canada ltée* c. *Chatigny*, 2013 QCCA 163; *Bourdon* c. *Stelco inc.*, 2004 CanLII 13895 (QC CA).

33 *Canada (Minister of Indian Affairs and Northern Development)* v. *Curragh Inc.*, [1994] O.J. No. 953 (Gen. Div.)

34 *Yukon Zinc Corp. (Re)*, 2015 BCSC 1961.

35 R.S.Y. 2002, c. 151.

36 *Supra* note 33, par. 11. See also *Yukon Zinc*, *supra* note 34, par. 47 and 57.

37 *Timminco Limited (Re)*, 2012 ONSC 5959.

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).

[59] The first point is that there is nothing particularly unique about Section 32 NLPBA.

[60] There is a very similar deemed trust provision in Section 8(1) and (2) PBSA:

8 (1) An employer shall ensure, with respect to its pension plan, that the following amounts are kept separate and apart from the employer's own moneys, and the employer is deemed to hold the amounts referred to in paragraphs (a) to (c) in trust for members of the pension plan, former members, and any other persons entitled to pension benefits under the plan:

(a) the moneys in the pension fund,

(b) an amount equal to the aggregate of the following payments that have accrued to date:

(i) the prescribed payments, and

(ii) the payments that are required to be made under a workout agreement; and

(c) all of the following amounts that have not been remitted to the pension fund:

(i) amounts deducted by the employer from members' remuneration, and

(ii) other amounts due to the pension fund from the employer, including any amounts that are required to be paid under subsection 9.14(2) or 29(6).

(2) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (1) is deemed to be held in trust shall be deemed 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 moneys or from the assets of the estate.

[61] In Québec, the SPPA provides :

49. Until contributions and accrued interest are paid into the pension fund or to the insurer, they are deemed to be held in trust by the employer, whether or not the latter has kept them separate from his property.

[62] There are similar deemed trusts and/or liens in every Canadian province outside Québec except Prince Edward Island: Ontario,[38] British Columbia,[39] Alberta,[40] Saskatchewan,[41] Manitoba,[42] Nova Scotia[43] and New Brunswick.[44]

[63] The second point is that there is no Newfoundland and Labrador jurisprudence interpreting the relevant provisions of the NLPBA. The NL Superintendent pleaded that "the courts of Newfoundland & Labrador possess far greater expertise in interpreting the *PBA* [NLPBA] than does the Superior Court of Québec." While this is undoubtedly true with respect to the NLPBA as a whole, it is not true with respect to Section 32 NLPBA. In an earlier ruling also issued in the *Yukon Zinc* matter, Justice Fitzpatrick of the B.C. Supreme Court refused to decline jurisdiction and refer a matter involving the Yukon *Miners Lien Act* to the courts of Yukon and one of the factors that went against referring the matter to the Yukon court was the lack of jurisprudence in the Yukon court.[45]

[64] Moreover, in this case, because of the similarities between the NLPBA and the federal and other provincial pension laws, the judge interpreting the NLPBA will likely refer to decisions of the courts of other provinces interpreting their legislation or the federal PBSA.

[65] The Québec Court should be in as good a position as the NL Court in that exercise.

[66] Finally, as is typical in these cases, there is a close interplay between the NLPBA and the CCAA. The first question proposed by the representatives of the salaried employees and retirees is: "Assuming there is no issue of paramountcy, what is the scope of section 32 in the NPBA [NLPBA] deemed trusts". The scope of the NLPBA is not relevant if the NLPBA does not apply because of a conflict with the CCAA and federal paramountcy. In that sense, there may not even be a need to deal with the interpretation of the NLPBA.

[67] Moreover, there are issues in this case with the federal PBSA and the Québec SPPA. The representatives of the salaried employees and retirees suggest that the following questions are relevant:

> 2. The Salaried Plan is registered in Newfoundland and regulated by the NPBA.

---

38 Ontario *Pension Benefits Act*, R.S.O. 1990, c. P.8, s. 57.
39 British Columbia *Pension Benefits Standards Act*, S.B.C. 2012, c. 30, s. 58
40 Alberta *Employment Pension Plans Act*, S.A. 2012, c. E-8.1, s. 58 and 60.
41 Saskatchewan *Pension Benefits Act, 1992*, S.S. 1992, c P-6.001, s. 43
42 Manitoba *Pension Benefits Act*, C.C.S.M., c. P32, s. 28.
43 Nova Scotia *Pension Benefits Act*, S.N.S. 2011, c. 41, s. 80.
44 New Brunswick *Pension Benefits Act*, S.N.B. 1987, c P-5.1, s. 51.
45 *Yukon Zinc Corporation (Re)*, 2015 BCSC 836, par. 90.

a) (i) Does the PBSA 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 PBSA 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?

[68] The representatives of the salaried employees and retirees and the NL Superintendent suggest that, in the interests of simplicity and expediency, all of these questions should be referred to the NL Court.

[69] The Court has great difficulty with this suggestion. On what basis should the Court conclude that the NL Court is in a better position to decide whether the Québec SPPA and deemed trust apply to employees who reported for work in Québec (question 2(b)(i) and (iii)) and how the conflict between the NLPBA and the SPPA should be resolved (question 2(b)(ii))? The first are pure questions of Québec law, and the last is a question where the laws of Québec and of Newfoundland and Labrador have equal application. There are similar questions with respect to the federal PBSA (question 2(c)), which the Court is in as good a position to decide as the NL Court.

[70] The Court will not refer issues of Québec law or federal law to the NL Court, and if those issues are too closely interrelated to the NLPBA issues, or if in the interests of simplicity and expediency they should all be decided by the same court, then the solution is not to refer any issues to the NL Court.

[71] In the earlier *Yukon Zinc* ruling where Justice Fitzpatrick refused to refer the matter to the courts of Yukon, she found that the issues related to the interrelationship between the Yukon *Miners Lien Act* and the rights asserted by others under B.C. law, in relation to assets the majority of which were located in British Columbia:

> [89] As for the law to be applied to the various issues, it is clear that whatever forum is used to resolve these issues, there will be a blend of both British Columbian contract law and Yukon miner's lien law. The majority of the concentrate is located in British Columbia and was in this Province well before the 2015 Procon Lien was registered. Further, the contract rights are to be decided in accordance with British Columbian law, particularly as to if, and if so, when, title to the concentrate passed from Yukon Zinc to Transamine.

> [90] This is not akin to the situation discussed in *Ecco Heating Products Ltd. v. J.K. Campbell & Associates Ltd.*, 1990 CanLII 1631 (BC CA), [1990] 48 B.C.L.R. (2d) 36 (C.A.), where the major issue arose under builder's lien legislation in British Columbia and where the court referred to the "extensive existing relevant jurisprudence" in British Columbia: at 43-44. It is common ground here that there is no case law on the issues of scope and priority under the *MLA* that arise here, let alone relevant Yukon jurisprudence.
>
> [91] It is quite apparent that some issues arise under the *MLA* and, in particular, issues relating to Procon's rights in relation to the concentrate remaining in Yukon which is claimed by Transamine under British Columbian law. Transamine argues that this Court can take judicial notice of the *MLA*: see *Evidence Act*, R.S.B.C. 1996, c. 124, s. 24(2)(e). In any event, Procon has fully researched the issues as they arise under the *MLA* and made submissions on them. To turn the tables on Procon, if I were to decline jurisdiction in favour of the Yukon courts, there equally would be issues as to the Yukon court interpreting and applying British Columbian law on the contract issues.
>
> [92] It would be impossible in the circumstances to bifurcate the issues based on the applicable law. Even if bifurcation was available, it would be neither a practical nor an efficient strategy in resolving the issues between Yukon Zinc, Procon and Transamine.
>
> (Emphasis added)

[72] In the present matter, the bulk of the assets on which the deemed trust or the lien created by the NLPBA may apply are the proceeds of the sale of assets in Québec.

[73] On balance, the legal considerations do not favour referring the issues to the NL Court.

b) Factual considerations

[74] The parties suggesting that the NLPBA issues be referred to the NL Court also argue that these are essentially local issues that should be decided by the localcourt.

[75] It is clear that there are significant factual links between these issues and the province of Newfoundland and Labrador.

[76] In particular, the Wabush mine is located in Newfoundland and Labrador and most of the employees reported to that mine. As a result, many of the retirees are currently resident in Newfoundland and Labrador. The representatives of the salaried employees and retirees want the NL Court to interpret the NLPBA.

[77] However, there are equally strong factual links to the province of Québec: the Pointe-Noire facility is in Québec and most of the railway joining the Wabush mine and the Pointe-Noire facility is in Québec. There are almost as many employees and retirees in Québec:

	Salaried Plan	Union Plan
Newfoundland and Labrador	313	1,005
Québec	329	661
Other	14	66[46]

[78] As a result, this is not a matter of purely local concern in Newfoundland and Labrador.

[79] Although the representatives of the salaried employees and retirees want the NL Court to interpret the NLPBA, more than half of the persons that they represent live in Québec.

[80] It is also worth noting that the Union, which represents more employees and retirees, asks that the case remain in Québec, even though most of their members reside in Newfoundland and Labrador.

c) Practical considerations

[81] The parties suggesting that the NLPBA issues be referred to the NL Court argue that the law of Newfoundland and Labrador is in principle a question of fact in a Québec court which is proven with expert witnesses. They argue that this has a series of somewhat inconsistent consequences:

- The parties will have to hire experts, which is costly and time consuming;
- It will be difficult to find experts because these questions have never been litigated before;
- If there is an appeal, the interpretation of the NLPBA will be treated as a question of fact and therefore only subject to be overturned if there is a palpable and overriding error.

---

46 Watt Affidavit, par. 16.

[82] This seems to exaggerate the difficulty. The Court can take judicial notice of the law of another province.[47] This is particularly true when it is an issue of interpreting a statute.[48] In this case, where the parties plead that it will be difficult to find an expert, it seems unlikely that the Court would require expert evidence. This is particularly so when the provisions of the NLPBA which are at issue are similar to the provisions of the federal PBSA with respect to which expert evidence is not admissible. If there is no expert evidence to be offered, then there is no expense. A finding of fact with respect to expert evidence may attract the higher standard for appellate review of a palpable and overriding error.[49] This does not mean that every ruling on an issue of foreign law attracts the same standard. If the judge decides the interpretation of the NLPBA without considering the credibility of expert witnesses, then there is no reason for the Court of Appeal to apply the higher standard for appellate review.

[83] In terms of cost, it is difficult to see how the cost of continuing the proceedings in Québec will be higher than the cost of hiring attorneys in Newfoundland and Labrador and debating part of the issues there. The Union and Sept-Îles argued that it would be more expensive for them to argue the issues in Newfoundland and Labrador, and they added that they pay their own costs, unlike the representatives of the salaried employees and retirees and the Plan Administrator.

[84] Another issue is the delays that the referral might create.

[85] Sept-Îles bases its argument that it is too late now to raise the issue of a transfer on the fact that the Court already dealt with some of these issues 18 months ago. The representatives of the salaried employees and retirees plead that they raised the issue of a possible transfer of issues to the NL Court at the hearing of the motion for approval of the Claims Procedure Order on November 16, 2015.

[86] The Court will not dismiss the issue for lateness. However, it is relevant that the issue is being debated now as opposed to 18 months ago. If the issue had been debated at that time, the Court might have been less concerned about the possible delays that would result from referring the issues to the NL Court.

[87] The parties suggesting that the NLPBA issues be referred to the NL Court plead that there is no reason to believe that fragmenting the proceedings will result in additional delay. They do not however offer the Court any concrete indication of how quickly the case could proceed through the NL Court and any appeal.

[88] The Court is concerned by the possible delay. The parties pointed to *Timminco*, where the CCAA Court transferred a pension issue to the Québec Superior Court, as an example of how these referrals should work. In that case, the parties consented to refer

---

47 Article 2809 C.C.Q.

48 *Constructions Beauce-Atlas inc.* c. *Pomerleau inc.*, 2013 QCCS 4077, par. 14.

49 *Canada (Minister of Citizenship and Immigration)* v. *Asini*, 2001 FCA 311, par. 26.

the Québec pension aspects of the CCAA file that was being litigated in Ontario to a Québec court. Even in those circumstances, the delay between the referral (October 18, 2012)[50] and the final judgment of the Québec court (January 24, 2014)[51] was over 15 months.

[89] Finally, the Court does not consider the question of whether its decision will or will not be treated as a precedent to be a relevant consideration. Similarly, the Court does not consider the possibility of intervenants to be relevant. The Court's focus is on resolving the difficulties of the parties appearing before it. If the government of Newfoundland and Labrador wishes to obtain a judgment from the courts of the province on the interpretation of the NLPBA, it can refer a matter to the Court of Appeal of Newfoundland and Labrador.[52]

CONCLUSION

[90] For all of the foregoing reasons, the Court concludes that it is not appropriate in the present circumstances to refer the proposed questions to the NL Court.

FOR THESE REASONS, THE COURT:

[91] **DECIDES** that it has jurisdiction to deal with the issues related to the interpretation of the Newfoundland and Labrador *Pension Benefits Act* in the context of the present proceedings under the *Companies' Creditors Arrangement Act* and that it will not refer those issues to the Supreme Court of Newfoundland and Labrador;

[92] **THE WHOLE WITHOUT JUDICIAL COSTS.**

Stephen W. Hamilton, J.S.C.

Mtre Bernard Boucher
BLAKE, CASSELS & GRAYDON
For the Petitioners

Mtre Sylvain Rigaud
Mtre Chrystal Ashby
NORTON ROSE FULBRIGHT CANADA
For the Monitor

---

50 *Supra* note 37.
51 2014 QCCS 174.
52 *Judicature Act*, R.S.N.L. 1990, c. J-4, Section 13.

Mtre Nicholas Scheib
SCHEIB LEGAL
Mtre Andrew Hatnay
KOSKIE MINSKY LLP
For the mises en cause Michael Keeper, Terence Watt, Damien Lebel, and Neil Johnson

Mtre Daniel Boudreault
PHILION, LEBLANC, BEAUDRY
For the mise en cause Syndicat des métallos, sections locales 6254 et 6285

Mtre Ronald A. Pink
PINK LARKIN
For the mise en cause Morneau Shepell Ltd, in its capacity as replacement pension plan administrator

Mtre Doug Mitchell
Mtre Edward Béchard-Torres
IRVING MITCHELL KALICHMAN
For the mise en cause Her Majesty in Right of Newfoundland and Labrador, as represented by the Superintendent of Pensions

Mtre Pierre Lecavalier
MINISTÈRE DE LA JUSTICE CANADA
For the mise en cause the Attorney General of Canada, acting on behalf of the office of the Superintendent of financial institutions

Mtre Sophie Vaillancourt
Mtre Roberto Clocchiatti
RETRAITE QUÉBEC
For the mise en cause Régie des rentes du Québec

Mtre Martin Roy
STEIN MONAST
For the mise en cause Ville de Sept-Îles

Date of hearing: December 20, 2016

This is **Exhibit "NM-3"** referred to in the

Affidavit of **Nigel Meakin**

sworn before me, this **15th day**

of **May, 2017**

A Commissioner for taking Affidavits

Meakin, Nigel

From: Rigaud, Sylvain <sylvain.rigaud@nortonrosefulbright.com>
Sent: Monday, May 15, 2017 11:29 AM
To: Meakin, Nigel
Subject: In the matter of the Plan of Compromise or Arrangement of: Cliffs Québec Iron Mining ULC (500-11-048114-157)

NM-3.

Sylvain Rigaud
Partner

Norton Rose Fulbright Canada S.E.N.C.R.L., s.r.l. / LLP
1, Place Ville Marie, Bureau 2500, Montréal, QC, H3B 1R1, Canada
T: +1 514.847.4702 | F: +1 514.286.5474
sylvain.rigaud@nortonrosefulbright.com

NORTON ROSE FULBRIGHT

De : Rigaud, Sylvain
Envoyé : 12 mai 2017 11:38
À : 'Pritchard, Rolf'
Cc : Osborne, Philip; Bernard Boucher (bernard.boucher@blakes.com); STEVEN.WEISZ@blakes.com; Terry Rowe; Kenneth Jerrett (kjerrett@mwhslaw.com); Fortin, AndréAnne
Objet : In the matter of the Plan of Compromise or Arrangement of: Cliffs Québec Iron Mining ULC (500-11-048114-157)

Dear confrère:

We already expressed our concerns about the scope of the reference questions and of the notices prior and since the May 5 Order.

In our May 9 letter, we explained why these issues needed to be addressed prior to the June 9 status hearing. Given the terms of the May 5 Order, we expect that your client will not proceed with the publication of notices over the week-end, as we intend to file early next a notice of appearance, and a notice of intervention to be heard on an expedited basis before the Newfoundland & Labrador Court of Appeal before May 26, 2017.

Best regards,

Sylvain Rigaud
Partner

Norton Rose Fulbright Canada S.E.N.C.R.L., s.r.l. / LLP
1, Place Ville Marie, Bureau 2500, Montréal, QC, H3B 1R1, Canada
T: +1 514.847.4702 | F: +1 514.286.5474
sylvain.rigaud@nortonrosefulbright.com

NORTON ROSE FULBRIGHT

De : Pritchard, Rolf [mailto:rolfpritchard@gov.nl.ca]
Envoyé : 11 mai 2017 21:38
À : Rigaud, Sylvain
Cc : Osborne, Philip; Bernard Boucher (bernard.boucher@blakes.com); STEVEN.WEISZ@blakes.com; Terry Rowe

Objet : RE: In the matter of the Plan of Compromise or Arrangement of: Cliffs Québec Iron Mining ULC (500-11-048114-157)

Dear Mr. Rigaud,

Thank you for your correspondence of May 9, 2017 setting out your concerns and positions with respect to the Order we provided to you on May 8, 2017.

As you are aware the Reference Questions were formulated and referred to the Court of Appeal by the Lieutenant Governor in Council by Orders in Council 2017-103 and 2017-137. While we remain open to having further discussions with you, we note that the Reference Questions have already been formally inscribed by the Court of Appeal.

As we have indicated to you in our earlier teleconferences, we previously raised your concerns regarding your interpretation of the Stay Order and the formulation of Reference Questions with the Chief Justice of the Court of Appeal. With the greatest respect, we do not share your opinion; however, as we have previously noted, you may raise any issues you have, including your objection to the Order being granted *ex parte*, at the June 9, 2017 status hearing.

You have indicated that there are orders before the CCAA Court, which in your view could have an impact on or be relevant to the Reference Questions. As noted in the Order, you are at liberty to adduce evidence on the Reference by the filing of materials, subject to further direction and order of the Court of Appeal.

Kindest Regards,

Rolf Pritchard QC/Philip Osborne

Rolf Pritchard, Q.C.
Director – Civil Division
Office of the Attorney General
Department of Justice & Public Safety
Government of Newfoundland and Labrador

t (709) 729-2597, f (709) 729-2129

From: Rigaud, Sylvain [mailto:sylvain.rigaud@nortonrosefulbright.com]
Sent: Tuesday, May 09, 2017 7:09 PM
To: Pritchard, Rolf
Cc: Osborne, Philip; Bernard Boucher (bernard.boucher@blakes.com); STEVEN.WEISZ@blakes.com; Terry Rowe
Subject: In the matter of the Plan of Compromise or Arrangement of: Cliffs Québec Iron Mining ULC (500-11-048114-157)
Importance: High

Dear Confrère,

See attached letter.

Best regards,

Sylvain Rigaud
Partner

Le droit à l'échelle mondiale
Law around the world
nortonrosefulbright.com