

CANADA

COURT OF APPEAL

PROVINCE OF QUEBEC
DISTRICT DE MONTREAL

N° : 500-09-027082-171

N° : 500-09-027075-175

N° : 500-09-027077-171

N° : 500-09-027076-173

N° : 500-11-048114-157

N° : 500-09-027082-171

FTI CONSULTING CANADA INC.

RESPONDENT /
DE BENE ESSE INCIDENTAL APPELLANT
Monitor – Petitioner

v.

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

APPELLANT /
DE BENE ESSE INCIDENTAL RESPONDENT
Mise-en-cause

-and-

**BLOOM LAKE GENERAL PARTNER
LIMITED, QUINTO MINING CORPORATION,
8568391 CANADA LIMITED, CLIFFS QUEBEC
IRON MINING ULC, WABUSH IRON CO.
LIMITED AND WABUSH RESOURCES INC.**

RESPONDENTS
Debtors

-and-

**THE BLOOM LAKE IRON ORE MINE LIMITED
PARTNERSHIP, BLOOM LAKE RAILWAY
COMPANY LIMITED, WABUSH MINES,
ARNAUD RAILWAY COMPANY AND
WABUSH LAKE RAILWAY COMPANY
LIMITED**

**MICHAEL KEEPER, TERENCE WATT,
DAMIEN LEBEL AND NEIL JOHNSON**

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

**UNITED STEEL WORKERS,
LOCALS 6254 AND 6285**

VILLE DE SEPT-ÎLES

RETRAITE QUÉBEC

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

**MISES-EN-CAUSE
Mises-en-cause**

N° : 500-09-027075-175

FTI CONSULTING CANADA INC.

**RESPONDENT /
DE BENE ESSE INCIDENTAL APPELLANT
Monitor – Petitioner**

v.

**SYNDICAT DES MÉTALLOS,
SECTION LOCALE 6254**

**SYNDICAT DES MÉTALLOS,
SECTION LOCALE 6285**

**APPELLANTS /
DE BENE ESSE INCIDENTAL RESPONDENTS
Mises-en-cause**

-and-

**BLOOM LAKE GENERAL PARTNER LIMITED
QUINTO MINING CORPORATION,
8568391 CANADA LIMITED,
CLIFFS QUEBEC IRON MINING ULC,
WABUSH IRON CO. LIMITED AND
WABUSH RESOURCES INC.**

**MISES-EN-CAUSE
Debtors**

-and-

**THE BLOOM LAKE IRON ORE MINE LIMITED
PARTNERSHIP, BLOOM LAKE RAILWAY
COMPANY LIMITED, WABUSH MINES,
ARNAUD RAILWAY COMPANY AND
WABUSH LAKE RAILWAY COMPANY
LIMITED**

**MICHAEL KEEPER, TERENCE WATT,
DAMIEN LABEL AND NEIL JOHNSON
ATTORNEY GENERAL OF CANADA**

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

VILLE DE SEPT-ÎLES

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

**MISES-EN-CAUSE
Mises-en-cause**

N° : 500-09-027077-171

FTI CONSULTING CANADA INC.

**RESPONDENT /
DE BENE ESSE INCIDENTAL APPELLANT
Monitor – Petitioner**

v.

**MICHAEL KEEPER, TERENCE WATT,
DAMIEN LABEL AND NEIL JOHNSON**

**APPELLANTS /
DE BENE ESSE INCIDENTAL RESPONDENTS
Representatives of the Salaried and
Non-Union Employees and Retirees**

-and-

**BLOOM LAKE GENERAL PARTNER LIMITED
QUINTO MINING CORPORATION,
8568391 CANADA LIMITED,
CLIFFS QUEBEC IRON MINING ULC,
WABUSH IRON CO. LIMITED AND
WABUSH RESOURCES INC.**

**MISES-EN-CAUSE
Debtors**

-and-

**THE BLOOM LAKE IRON ORE MINE LIMITED
PARTNERSHIP, BLOOM LAKE RAILWAY
COMPANY LIMITED, WABUSH MINES,
ARNAUD RAILWAY COMPANY AND
WABUSH LAKE RAILWAY COMPANY
LIMITED**

**SYNDICAT DES MÉTALLOS,
SECTIONS LOCALES 6254 ET 6285**

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

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

VILLE DE SEPT-ÎLES

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

RETRAITE QUÉBEC

MISES-EN-CAUSE
Mises-en-cause

N° : 500-09-027076-173

FTI CONSULTING CANADA INC.

**RESPONDENT /
DE BENE ESSE INCIDENTAL APPELLANT
Monitor – Petitioner**

v.

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

**APPELLANT /
DE BENE ESSE INCIDENTAL RESPONDENT
Mise-en-cause**

-and-

BLOOM LAKE GENERAL PARTNER LIMITED
QUINTO MINING CORPORATION,
8568391 CANADA LIMITED,
CLIFFS QUEBEC IRON MINING ULC,
WABUSH IRON CO. LIMITED AND
WABUSH RESOURCES INC.

MISES-EN-CAUSE
Debtors

THE BLOOM LAKE IRON ORE MINE LIMITED
PARTNERSHIP, BLOOM LAKE RAILWAY
COMPANY LIMITED, WABUSH MINES,
ARNAUD RAILWAY COMPANY AND
WABUSH LAKE RAILWAY COMPANY
LIMITED

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

MICHAEL KEEPER, TERENCE WATT,
DAMIEN LEBEL AND NEIL JOHNSON

UNITED STEEL WORKERS,
LOCALS 6254 AND 6285

VILLE DE SEPT-ÎLES

RETRAITE QUÉBEC

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

MISES-EN-CAUSE
Mises-en-cause

NOTICE OF INCIDENTAL APPEAL *DE BENE ESSE* BY THE MONITOR
(Articles 352 and 359 of the *Code of Civil Procedure*)

Respondent / Incidental Appellant

Dated November 9, 2017

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1. On September 11, 2017, Mr. Justice Stephen W. Hamilton (the “**Supervisory Judge**”) of the Quebec Superior Court sitting in Commercial Division for the judicial district of Montreal (the “**CCAA Court**”) granted the Amended Motion for Directions with respect to Pension Claims (the “**Pension Priority Motion**”) presented by FTI Consulting Canada Inc., acting as court-appointed monitor (the “**Monitor**”) to

Bloom Lake General Partner Limited, Quinto Mining Corporation, 8568391 Canada Inc., Cliffs Quebec Iron Mining ULC, the Bloom Lake Iron Ore Mine Limited Partnership, Bloom Lake Railway Company and Bloom Lake Railway Company Limited (collectively, the “**Bloom Lake CCAA Parties**”¹) as well as to Wabush Iron Co. Limited, Wabush Resources Inc., Wabush Mines, Arnaud Railway Company and Wabush Lake Railway Company Limited (collectively, the “**Wabush CCAA Parties**”²) in Superior Court file bearing number 500-11-048114-157 (the “**CCAA Proceedings**”), which decision (the “**Pension Priority Decision**”³) has been the object of Notices of Appeal and Applications for Leave to Appeal by:

- (a) Her Majesty in Right of Newfoundland & Labrador, as represented by the Superintendent of Pensions (the “**NL Superintendent of Pensions**”), in Court of Appeal file bearing number 500-09-027082-171;
- (b) United Steel Workers, Local Sections 6254 and 6285 (the “**Union**”), in Court of Appeal file bearing number 500-09-027075-175;
- (c) Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson, as representatives of the Salaried and Non-Union Employees and Retirees (the “**Representatives**”), in Court of Appeal file bearing number 500-09-027077-171; and
- (d) the Attorney General of Canada, acting on behalf of the Office of the Superintendent of Financial Institutions (“**OSFI**”), in Court of Appeal file bearing number 500-09-027076-173;

¹ The initial order pursuant to the *Companies’ Creditor Arrangement Act*, R.S.C. 1985 c. C-36 (“**CCAA**”) with respect to the Bloom Lake CCAA Parties was rendered on January 27, 2015.

² The initial order pursuant to the CCAA with respect to the Wabush CCAA Parties was rendered on May 20, 2015 (the “**Wabush Filing Date**”).

³ Capitalized terms not otherwise defined herein shall have the meaning ascribed thereto in the Pension Priority Decision.

2. The above-noted Applications for Leave to Appeal were not contested and were granted on October 31, 2017 by Mr. Justice Patrick Healy of the Court of Appeal;
3. The hearing of the Pension Priority Motion before the Supervisory Judge lasted two full days on June 28 and June 29, 2017. The parties did not proceed with any examinations out of Court and thus no transcripts were filed, nor did the Supervisory Judge hear any testimonial evidence. The two-day hearing was entirely dedicated to oral arguments from the parties, who had also exchanged detailed argumentation outlines and books of authorities ahead of the hearing;
4. The factual background leading to the Pension Priority Motion is fully described by the Supervisory Judge as follows in the Pension Priority Decision:
 - (a) the Wabush CCAA Parties conducted their operations in two provinces, Newfoundland & Labrador and Quebec, and also owned and operated railways, which are federally regulated, in both (at paragraph 3);
 - (b) the Wabush CCAA Parties created and funded two defined-benefit pension plans (the "**Pension Plans**"), being the Union Plan and the Salaried Plan (at paragraph 4), both of which were underfunded (at paragraphs 18 to 22);
 - (c) by way of the **Suspension Order** rendered on June 26, 2015 (leave to appeal denied), a copy of which is attached hereto as **Appendix A**, the CCAA Court suspended the payment of the monthly amortization payments and the annual lump sum (catch-up) payments owing to the Pension Plans (at paragraphs 8 and 14);
 - (d) both Pension Plans were terminated on December 16, 2015 (at paragraph 9), and Mise-en-cause Morneau Shepell Ltd. was appointed as replacement plan administrator (the "**Replacement Plan Administrator**") on March 30, 2016 (at paragraph 12);
 - (e) proofs of claims asserting secured claims were filed in respect of amounts owing to both Pension Plans (the "**Pension Claims**"), including in each case a wind-up deficit component of over \$20 million (at paragraphs 22 and 23);

- (f) substantially all the assets of the Wabush CCAA Parties have been sold over the course of the CCAA Proceedings, the proceeds of which are held in trust by the Monitor, including from immovable properties located in Sept-Îles subject to unpaid taxes, over which the City of Sept-Îles claims priority (at paragraph 26);
5. On January 30, 2017, the Supervisory Judge had ruled that the CCAA Court had jurisdiction to hear and deal with all the issues raised by the Pension Priority Motion. There was no appeal from that decision (the “**Jurisdiction Order**”), a copy of which is attached hereto as **Appendix B**;
6. Despite this, a concurrent reference has been brought before the Newfoundland & Labrador Court of Appeal to deal with certain issues and questions forming part of the Pension Priority Motion, as explained at paragraphs 48 to 60 of the Pension Priority Decision;
7. The issues raised by the Pension Priority Motion are articulated by the Supervisory Judge at paragraph 47 of the Pension Priority Decision. The position of each party is adequately summarized in paragraphs 27 to 44;
8. By way of the Pension Priority Decision, the Supervisory Judge:
- (a) granted the Pension Priority Motion (at paragraph 223);
- (b) declared that the trusts created under the Quebec *Supplemental Pension Plans Act*, R.S.Q. c. R-15.1 (“**SPPA**”), the federal *Pension Benefits Standards Act*, 1985, R.S.C. 1985, c. 32 (“**PBSA**”), and the Newfoundland & Labrador *Pension Benefits Act*, 1997, S.N.L. 1996, c. T-4.01 (“**NLBPA**”) are not enforceable in CCAA proceedings (at paragraph 224);
- (c) declared that the employee contributions and normal cost payments relating to pension plans are protected to the extent provided for by Sections 6(6) and 36(7) CCAA (at paragraph 225, which mistakenly refers to Section 37(6) instead of 36(7) of the CCAA);

9. The Supervisory Judge also found that:
- (a) a “liquidation” under Sections 8(2) PBSA and 32(2) NLPBA includes a liquidating plan under the CCAA (at paragraph 218a));
 - (b) a “liquidation” within the meaning of Sections 8(2) PBSA and 32(2) NLPBA had commenced as at the Wabush Filing Date (at paragraph 218b));
 - (c) the deemed trust under the NLPBA should not be recognized or enforced against assets located in the Province of Quebec (at paragraph 218g));
 - (d) the wind-up deficit is not protected by the deemed trusts under either the PBSA (at paragraphs 136 and 218d)) or the SPPA (at paragraphs 130 and 218d)). The Supervisory Judge did not reach a conclusion as to whether the deemed trust under Section 32 NLPBA extended to the wind-up deficit (at paragraphs 58, 114, 143, and 218d));
 - (e) the Pension Plans are governed by the PBSA for the railway employees, by the SPPA for the non-railway employees who reported for work in Quebec and by the NLPBA for the non-railway employees who reported for work in Newfoundland & Labrador (at paragraph 219);
 - (f) the protection afforded by Sections 6(6) and 36(7) CCAA only extends to employee contributions and normal cost payments, to the exclusion of special or amortization payments and wind-up deficits (at paragraphs 184 to 186);
 - (g) additional protection afforded in pension legislation to special or amortization payments or wind-up deficits cannot apply once the CCAA is triggered, as a matter of federal paramountcy with respect to the SPPA and the NLPBA (at paragraphs 187 to 210), and as matter of interpretation of Parliament’s intent with respect to the PBSA (at paragraphs 211 to 216);

10. To successfully overturn the Pension Priority Decision, the Appellants will first need to convince the Court of Appeal that the Supervisory Judge erred in finding that pension deemed trusts could not be enforceable in CCAA proceedings;
11. Furthermore, in order to obtain that the Pension Claims be paid in priority to the extent sought in their respective Notices of Appeal, the Appellants will also need, to varying degrees, to address the other issues raised by the Pension Priority Motion;
12. In doing so, the Appellants will no doubt rely on findings by the Supervisory Judge (in some case adverse to the Monitor's position), including the question as to whether and when a "liquidation" within the meaning of Sections 8(2) PBSA and 32(2) NLPBA occurred in the CCAA Proceedings, and the impact of such triggering event occurring after the Wabush Filing Date, as the case may be;
13. Other issues raised by the Pension Priority Motion, which were not settled in the Pension Priority Decision, will also arise, including whether the NLPBA deemed trust or lien and charge extend to and protect the wind-up deficit;
14. Seeing as the Monitor is satisfied with the Pension Priority Decision and intends to argue first and foremost that the Court of Appeal should refrain from intervening in any way, and considering that the Monitor would not pursue an incidental appeal should the Appellants discontinue their own appeals (see Section 359 C.C.P. *a contrario*), it is submitted that no incidental appeal would be required for the Monitor, as Respondent, to raise the following arguments:
 - (a) the deemed trusts under the PBSA and NLPBA were not triggered because there was no "liquidation" of the Wabush CCAA Parties, contrary to what the Supervisory Judge found;
 - (b) in any event, the deemed trusts under the PBSA and NLPBA were not triggered as of the Wabush Filing Date, as no "liquidation" had occurred on or before that date, such that they cannot be enforced in CCAA proceedings;
 - (c) the NLPBA deemed trust and lien and charge do not extend to the wind-up deficit component of the Pension Claims;

15. However, with a view of ensuring that all issues are brought before the Court of Appeal, to allow each party to fully present its arguments with respect to same, to avoid unnecessary procedural arguments, possible undue delays and to promote a fair, efficient and diligent hearing of the four appeals and ultimately a full resolution of the issues raised by the Pension Priority Motion, the Monitor hereby files this Notice of Incidental Appeal on a *de bene esse* basis;
16. With respect to each of the issues above, the Monitor intends to argue as follows:
 - a) **The deemed trusts under the PBSA and NLPBA were not triggered because there was no “liquidation” of the Wabush CCAA Parties.**
17. This issue was discussed at length in the Pension Priority Decision (at paragraphs 155 to 175);
18. The Monitor respectfully submits that the conclusions of the Supervisory Judge (at paragraphs 218(a) and (b)) are ill-founded for the following reasons:
 - a) these conclusions do not take into account the policy considerations highlighted by the Supreme Court of Canada in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 at paragraphs 21 and 22 and in *British Columbia v. Samson Bélair Ltd.*, [1989] 2 S.C.R. 24 at paragraph 33;
 - b) the Supervisory Judge came to the conclusion that a “liquidation” had occurred as of the Wabush Filing Date with hindsight and on the basis of subsequent events (at paragraph 172), which creates undue uncertainty, disrupts the *status quo* amongst creditors and is intrinsically unfair;
 - c) considered as a triggering event, “liquidation” simply cannot be construed as a vague or subjective notion, the occurrence of which is only confirmed in light of subsequent events and the passage of time, on an accretive basis, one that could be possibly revoked by the eventual filing of a plan arrangement that would somehow retroactively eliminate the occurrence of the “liquidation” trigger;

- d) in June 2015, the Supervisory Judge had previously concluded in the context of the Suspension Order that no “liquidation” had occurred and that the PBSA and NLPBA deemed trusts had not been triggered (at paragraphs 67 to 70 and 79 of the Suspension Order, Appendix A hereto);
 - e) the plain wording of sections 8(2) PBSA and 32(2) NLBPA evidences a clear intent on the legislator’s part to impose deemed trust in the event of a bankruptcy, which is in stark contrast with the conspicuous absence of any reference to CCAA proceedings;
 - f) conflating the notions of “liquidating CCAA” and “liquidation of the employer” clearly runs against the guiding principle that an initial order issued pursuant to the CCAA is meant to preserve the *status quo* amongst creditors *vis-à-vis* the debtors and their assets;
19. As such, the Monitor intends to argue once again before the Court of Appeal that no “liquidation” occurred in the present CCAA Proceedings;
- b) In any event, the deemed trusts under the PBSA and NLPBA were not triggered as at the Wabush Filing Date, as no “liquidation” had occurred on or before that date, such that they cannot be enforced in CCAA proceedings.**
20. The Supervisory Judge explained as follows at paragraph 175 of the Pension Priority Decision why he did not deal with this issue:
- [175] Because the Court has concluded that the triggering event occurred when the CCAA motion was filed, the Court need not decide whether the triggering event must occur prior to the initial CCAA order, or whether it can occur after the initial CCAA order but prior to the sale of the assets.
21. The Monitor submits that allowing deemed trusts to arise post-filing, rather than having been crystalized by the date of the CCAA filing or occurring prior thereto, is radically incompatible with the fundamental *status quo* principle underpinning all

CCAA proceedings, and intends to present once again before the Court of Appeal the following arguments which had been presented to the Supervisory Judge;

22. While the CCAA does not incorporate the scheme of distribution provided for in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, it nevertheless seeks to preserve the *status quo* amongst creditors as against the insolvent debtors and their assets, such that the purported crystallization of statutory deemed trust post-filing, and the ensuing assertion of “secured creditor” status with respect to claims that undeniably remained unsecured as of the date of the Wabush Filing Date, run contrary to the very foundation of insolvency legislation;

23. As a subsidiary argument, even if the Court of Appeal were to rule that a “liquidation” within the meaning of Sections 8(2) PBSA or 32(2) NLPBA can occur under the umbrella of the CCAA, including by way of a so-called “liquidating CCAA” proceeding, the Monitor will argue that these CCAA Proceedings ought not to be considered as such;

c) The NLPBA deemed trust and lien and charge do not extend to the wind-up deficit component of the Pension Claims.

24. The Supervisory Judge declined to settle this issue, having concluded that the deemed trust created under the SPPA, PBSA and NLPBA were in any event not enforceable in CCAA proceedings (at paragraph 224);

25. Should the Court of Appeal overturn this conclusion, and, despite the foregoing arguments, further find that a “liquidation” triggering a deemed trust has occurred in the present CCAA Proceedings, the Monitor will subsidiarily argue that the wind-up deficit component of the Pension Claims is not covered by the deemed trust nor lien and charge provided at Section 32 NLPBA, for the following reasons;

26. While the wording of Sections 61(1) of the NLPBA and 32(1) of the NLPBA defining the amounts secured by the deemed trust are identical, Section 61(2), which provides for the obligation to pay the wind-up deficit, and Section 61(1) are mutually exclusive;

27. The obligation to pay the wind-up deficit upon termination is based on Section 61(2) NLPBA. Based on the fact that the wording of Sections 32(1) and 61(1) NLPBA are identical and that the amounts payable under Sections 61(1) and 61(2) NLPBA are mutually exclusive, it follows that the wind-up deficit is not subject to either the deemed trust pursuant to Section 32(1) NLPBA nor to the lien and charge pursuant to Section 32(4) NLPBA;
28. Section 25.1 of the *Pension Benefits Act Regulations*, NLR 114/96, which pertains to the wind-up deficit, when read in conjunction with Section 60(2) NLPBA, clearly provides that the first payment to be made on account of the wind-up deficit is to be made no later than two weeks following the date of the wind-up report, itself to be filed within six months of the effective date of termination, such that any payments due on account of the wind-up deficit cannot be considered as "... amounts due to the pension from the employer that have not been remitted to the pension fund at the date of termination", within the meaning of Sections 32(1)(c) or 61(1)(c) NLPBA;
29. Section 61 NLPBA was amended in 2008 by the addition of paragraph 2. Section 32 NLPBA was not amended at that time to reflect the changes made to Section 61(2) NLPBA. It follows that the amounts to be held in trust under the NLPBA are limited to certain amounts detailed in Sections 32(1), (2) and (3). Clearly, it does not provide for the wind-up deficit to be held in trust, seeing as Sections 61(2) and 61(1) are mutually exclusive;
30. The combined wording of Sections 32 and 61 NLPBA is very different from and can easily be contrasted with Section 57(4) of the Ontario *Pension Benefits Act*, which was analysed by the Supreme Court of Canada in the matter of *Sun Indalex Finance, LLC v. United Steel Workers*, [2013] 1 S.C.R. 271, as the NLPBA does not contain a specific deemed trust triggered upon the termination or wind-up of a plan, nor clear wording extending the deemed trust to all contribution owing "even if not yet due", nor a specific priority rule similar to the one contained in Section 30(7) of the Ontario *Personal Property Security Act*, R.S.O. 1990, c. P.10;

31. Based on the foregoing reasons, the Monitor submits that the NLPBA does not afford priority status or otherwise protect the wind-up deficit component of the Pension Claims, and intends to argue same before the Court of Appeal;
32. Also in the spirit of reaching a full and final resolution of the issues raised by the Pension Priority Motion, the Monitor takes note of the Incidental Appeal brought by the City of Sept-Îles and will ask the Court of Appeal, as a subsidiary conclusion, to determine the respective ranking of the Pension Claims and the prior claim of the City of Sept-Îles;
33. For all of the foregoing reasons, the Monitor will ask the Court of Appeal to:

[A] DISMISS the appeals of: (i) Her Majesty in Right of Newfoundland & Labrador, as represented by the Superintendent of Pensions, in Court file bearing number 500-09-027082-171; (ii) United Steel Workers, Local Sections 6254 and 6285, in Court file bearing number 500-09-027075-175; (iii) Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson, as representatives of the Salaried and Non-Union Employees and Retirees, in Court file bearing number 500-09-027077-171; and (iv) the Attorney General of Canada, acting on behalf of the Office of the Superintendent of Financial Institutions, in Court file bearing number 500-09-027076-173;

OR, SUBSIDIARILY, SHOULD THE COURT OF APPEAL GRANT THE APPEALS, IN WHOLE OR IN PART, AND FIND THAT THE SUPERVISORY JUDGE ERRED IN THAT NO DEEMED TRUST ARISING UNDER EITHER THE SPPA, PBSA OR NLPBA CAN BE ENFORCEABLE IN CCAA PROCEEDINGS:

[B] GRANT the present Incidental Appeal on a *de bene esse* basis and deliver the following declaratory conclusions, as may be required for a full resolution of the issues in dispute:

[C] DECLARE that, notwithstanding the issue of their enforceability in CCAA Proceedings, no deemed trust or lien and charge protecting the Pension Claims arose in the present matter pursuant to either Section 32 NLPBA, Section 8 PBSA, or Section 49 SPPA;

OR, SUBSIDIARILY, SHOULD THE COURT OF APPEAL FIND THAT ONE OR MORE DEEMED TRUST OR LIEN AND CHARGE DID ARISE IN THE PRESENT MATTER:

WITH RESPECT TO SCOPE OF APPLICATION:

- [D] DECLARE** that any deemed trust or lien and charge arising under Section 32 NLPBA only covers those portions of the Pension Claims accrued and due in respect of employees and retirees who are or were persons employed in the province of Newfoundland and Labrador within the meaning of Section 5 NLPBA, as well as their surviving spouses and other eligible related beneficiaries;
- [E] DECLARE** that any deemed trust arising under Section 8 PBSA only covers those portions of the Pension Claims accrued and due in respect of employees and retirees who are or were employed in “included employment” within the meaning of Section 4 PBSA, as well as their surviving spouses and other eligible related beneficiaries;
- [F] DECLARE** that any deemed trust arising under Section 49 SPPA only covers those portions of the Pension Claims accrued and due in respect of employees and retirees who are or were reporting for work in Quebec or otherwise qualify under Section 1 SPPA, as well as their surviving spouses and other eligible related beneficiaries;

WITH RESPECT TO AMOUNTS PROTECTED:

- [G] DECLARE** that any deemed trust or lien and charge arising under Section 32 NLPBA does not cover the wind-up deficit component of either Pension Claims;
- [H] DECLARE** that any deemed trust or lien and charge arising under either Section 32 NLPBA, Section 8 PBSA, or Section 49 SPPA only covers outstanding payments or contributions that had accrued at the time of the Initial Order;

WITH RESPECT TO ASSETS CHARGED:

- [I] **DECLARE** that any deemed trust arising under Section 32 NLPBA only attaches to assets located in Newfoundland and Labrador and the proceeds thereof, and cannot be enforceable as against assets located in Quebec or the proceeds thereof;
- [J] **DECLARE** that any deemed trust arising under Section 49 SPPA only attaches to assets located in Quebec and the proceeds thereof;
- [K] **DECLARE** that any deemed trust arising under Section 8 PBSA only attaches to railway assets and the proceeds thereof;

WITH RESPECT TO RANK:

- [L] **DECLARE** that any deemed trust or lien and charge arising under either Section 32 NLPBA, Section 8 PBSA, or Section 49 SPPA, ranks after the prior claim of the Mise-en-cause, City of Sept-Îles, for outstanding property taxes pursuant to Sections 2651(5) and 2654.1 of the *Civil Code of Québec* with respect to the taxable immovables to which said prior claim pertain and the proceeds thereof;

THE WHOLE, WITHOUT COSTS.

Montreal, November 9, 2017



NORTON ROSE FULBRIGHT CANADA LLP

(Mes Sylvain Rigaud and Chrystal Ashby)

Attorneys of the Monitor

Respondent / *De Bene Esse* Incidental Appellant

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AFFIDAVIT OF CHRYSTAL ASHBY

I, CHRYSTAL ASHBY, attorney, practicing law at Norton Rose Fulbright Canada LLP, suite 2500, 1 Place Ville Marie, Montreal, Quebec, H3B 1R1, affirm as follows:

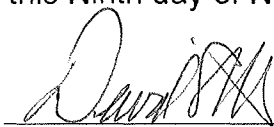
1. I am an associate at the firm Norton Rose Fulbright Canada LLP. Our firm has represented FTI Consulting Canada Inc. acting as court-appointed Monitor since the outset of the Wabush CCAA Proceedings in Superior Court file bearing number 500-11-048114-157.
2. Me Sylvain Rigaud and myself represented the Monitor before Mr. Justice Stephen W. Hamilton during the hearing held on June 28 and 29, 2017 on the Monitor's Amended Motion for Directions with respect to Pension Claims.
3. All the facts alleged in the within Notice of Incidental Appeal *De Bene Esse* of the Monitor are true and correct to the best of my knowledge.

AND I HAVE SIGNED THIS NINTH DAY OF
NOVEMBER 2017, IN MONTREAL, QUEBEC:



CHRYSTAL ASHBY

Solemnly affirmed before me in Montreal,
this Ninth day of November 2017



Commissioner of Oaths for Quebec



NOTICE OF INCIDENTAL APPEAL *DE BENE ESSE*

NOTICE IS HEREBY GIVEN OF THIS INCIDENTAL APPEAL to the following parties:

Me Bernard Boucher and Mr. Steven Weisz
Blake Cassels & Graydon LLP
Suite 2200
600 de Maisonneuve West Blvd.
Montreal, Quebec H3A 3J2T

Attorneys for the Wabush CCAA Parties

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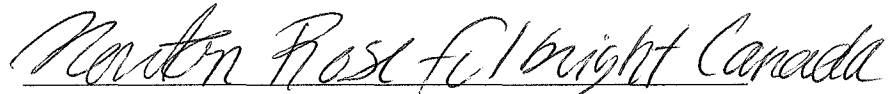
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LIST OF APPENDICES
TO THE NOTICE OF INCIDENTAL APPEAL *DE BENE ESSE*

APPENDIX	DESCRIPTION
A	Suspension Order, June 26, 2015, 2015 QCCS 3064 (leave to appeal denied, 2015 QCCA 1351);
B	Jurisdiction Order, January 30, 2017, 2017 QCCA 284.

Montreal, November 9, 2017



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500-09-027076-173

COURT OF APPEAL
DISTRICT OF MONTREAL

FTI CONSULTING CANADA INC.
RESPONDENT /
DE BENE ESSE INCIDENTAL APPELLANT

v.

MICHAEL KEEPER *ET AL*
APPELLANTS /
DE BENE ESSE INCIDENTAL RESPONDENTS

-and-

BLOOM LAKE GENERAL PARTNER LIMITED *ET AL*
MISES-EN-CAUSE

NOTICE OF INCIDENTAL APPEAL
DE BENE ESSE
(Articles 352 and 359 C.C.P.)

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