

C A N A D A

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 LABEL 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 LABEL 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

**APPLICATION FOR LEAVE TO FILE AN INCIDENTAL APPEAL *DE BENE ESSE***  
**BY THE MONITOR**

(Sections 13 and 14 of the *Companies' Creditors Arrangement Act*  
and Articles 351-353 and 359-360 of the *Code of Civil Procedure*)

Respondent / Incidental Appellant

Dated November 9, 2017

---

TO ONE OF THE HONORABLE JUSTICES OF THE COURT OF APPEAL SITTING IN  
AND FOR THE REGISTRY OF MONTREAL, FTI CONSULTING CANADA INC.,  
ACTING AS COURT-APPOINTED MONITOR TO THE WABUSH CCAA PARTIES,  
BEING RESPONDENT AND INCIDENTAL APPELLANT BEFORE THIS COURT,  
RESPECTFULLY SUBMITS IN SUPPORT OF THE PRESENT APPLICATION:

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**”<sup>1</sup>) and Wabush Iron Co. Limited, Wabush Resources Inc., Wabush Mines, Arnaud Railway Company and Wabush Lake Railway Company Limited (collectively, the “**Wabush CCAA Parties**”<sup>2</sup>), in Superior Court file bearing number 500-11-048114-157 (the “**CCAA Proceedings**”), which decision (the “**Pension Priority Decision**”<sup>3</sup>) has already 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 file bearing number 500-09-027082-171;
- (b) United Steel Workers, Local Sections 6254 and 6285 (the “**Union**”), in Court 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 file bearing number 500-09-027077-171;

---

<sup>1</sup> The initial order under 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.

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

<sup>3</sup> Capitalized terms not otherwise defined herein shall have the meaning ascribed thereto in the Pension Priority Decision or in the Monitor’s Notices of Incidental Appeal, as the case may be.

- (d) the Attorney General of Canada, acting on behalf of the Office of the Superintendent of Financial Institutions (“OSFI”), in Court file bearing number 500-09-027076-173;
2. The above-noted Applications for Leave to Appeal were granted on October 31, 2017 by Mr. Justice Patrick Healy of the Court of Appeal. It bears noting that the Monitor did not contest any of them;
  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 Pension Priority Decision granted the Monitor’s Pension Priority Motion, which had been brought with a view to settle the issues arising out of underfunded defined-benefit Pension Plans set up and funded by the Wabush CCAA Parties, and the fact that relating Pension Claims have been asserted as secured claims, the whole as more fully outlined in the Pension Priority Decision;
  5. The Monitor filed Notices of Incidental Appeal on or about November 9, 2017. It did so on a *de bene esse* basis for the reasons set out at paragraphs 10 to 15 of said Notices of Incidental Appeal, which read as follows:
    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 to 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 at 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;
6. Whether or not an incidental appeal was required in the circumstances, the Monitor submits that it has an automatic right to file same without the need to seek and obtain leave to do so from this Court by virtue of Article 359 of the *Code of Civil Procedure* and Section 14(2) of the CCAA;



7. That said, by abundance of caution given the lack of clear authorities on the specific procedural issue of whether leave is required to file an incidental appeal in CCAA matters, and seeing the importance of the issues in dispute for the parties and the practice in general, the Monitor also brings the present Application of Leave to File an Incidental Appeal, on *de bene esse* basis, with a view to raise before the Court of Appeal as incidental appellant the same arguments outlined in the Notices of Incidental Appeal:
  - (a) the deemed trust 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;
8. The Monitor respectfully submits that all four branches of the test to obtain leave to appeal in CCAA matters, outlined by Justice Allan R. Hilton J.A. in *Statoil Canada Ltd. (Arrangement relative à)*, 2012 QCCA 665, are met;
9. Specifically, the Monitor submits that the additional issues raised on a subsidiary and *de bene esse* basis in its Notices of Incidental Appeal are *prima facie* meritorious and important both for the present matter, inasmuch as they aim at achieving a full and final resolution of the issues raised in the Pension Priority Motion, as well as for the insolvency practice generally;
10. The Monitor further submits that granting leave on a *de bene esse* basis, assuming such is required, will not unduly hinder the restructuring, inasmuch as the Court of Appeal has already granted leave to appeal from the Pension Priority Decision in the four above-mentioned matters, and that hearing dates on

the merits have already been tentatively scheduled for June 11 and June 12, 2018, and that a case management hearing to be presided by Madam Justice Manon Savard, J.A., is set to take place on November 21, 2017;

11. With respect to the issues raised on a subsidiary and *de bene esse* basis in its incidental appeal, the Monitor intends to argue:

**a) The deemed trusts under the PBSA and NLPBA were not triggered because there was no “liquidation” of the Wabush CCAA Parties.<sup>4</sup>**

12. This issue was discussed at length in the Pension Priority Decision (at paragraphs 155 to 175);

13. 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

---

<sup>4</sup> Paragraphs 12 to 14 of the present Motion are equivalent to paragraphs 17 to 19 of the Monitor’s Notice of Incidental Appeal.

arrangement that would somehow retroactively eliminate the occurrence of the “liquidation” trigger;

- d) the Supervisory Judge had previously concluded that no “liquidation” had occurred and that the PBSA and NLPBA deemed trusts had not been triggered (see paragraphs 67 to 70 and 79 of the **Suspension Order** issued on June 26, 2015, leave to appeal denied, **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;
14. 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 of the Wabush Filing Date, as no “liquidation” had occurred on or before that date, such that they cannot be enforced in CCAA proceedings.<sup>5</sup>**
15. 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

---

<sup>5</sup> Paragraphs 15 to 18 of the present Motion are identical to paragraphs 20 to 23 of the Monitor’s Notice of Incidental Appeal.

CCAA order, or whether it can occur after the initial CCAA order but prior to the sale of the assets.

16. The Monitor submits that allowing deemed trusts to arise post-filing, rather than having been crystallized 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;
17. 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;
18. 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.<sup>6</sup>**

19. 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);

---

<sup>6</sup> Paragraphs 19 to 26 of the present Motion are identical to paragraphs 24 to 31 of the Monitor’s Notice of Incidental Appeal.

20. 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;
21. 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;
22. 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;
23. 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;
24. 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;

25. 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;
26. For all of the foregoing reasons, and with a view to achieving a full and final resolution of the issues raised in the Pension Priority Motion, the Monitor, should leave be found to be required in the circumstances and should it be granted, 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 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.**



27. The present Application for Leave to File an Incidental Appeal *de bene esse* is well founded;

**FOR THESE REASONS, MAY AND PLEASE THE COURT:**

**GRANT** the present Application;

**AUTHORIZE** the Monitor to file an Incidental Appeal of the judgment rendered on September 11, 2017 by the Honorable Steven W. Hamilton of the Superior Court, Commercial Division with respect to each of the appeals brought by: (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;

**THE WHOLE** without costs, save in case of contestation.

Montreal, November 9, 2017



**NORTON ROSE FULBRIGHT CANADA LLP**

(Mes Sylvain Rigaud and Chrystal Ashby)

Attorneys of the Applicant Monitor

Respondent / *De Bene Esse* Incidental Appellant

**FTI Consulting Canada Inc.**

1 Place Ville Marie, Suite 2500

Montréal (Quebec) H3B 1R1

Telephone: (514) 847-4747

Fax: (514) 286-5474

[sylvain.rigaud@nortonrosefulbright.com](mailto:sylvain.rigaud@nortonrosefulbright.com)

[chrystal.ashby@nortonrosefulbright.com](mailto:chrystal.ashby@nortonrosefulbright.com)

[notifications-mtl@nortonrosefulbright.com](mailto:notifications-mtl@nortonrosefulbright.com)

Our reference: 10007517-1000155731

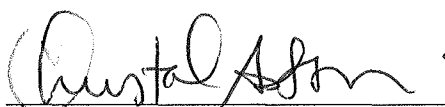
## AFFIDAVIT OF CHRYSTAL ASHBY

---

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:

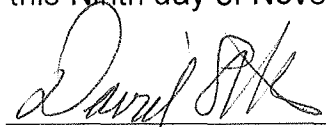
- 1 I am an associate at the firm Norton Rose Fulbright Canada LLP. Our firm has represented FTI Consulting Canada Inc. acting as court-appointed Monitor since the outset of the Wabush CCAA proceedings in Superior Court file bearing number 500-11-048114-157.
- 2 Me Sylvain Rigaud and myself represented 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 Application for Leave to file an Incidental Appeal *De Bene Esse* by the Monitor are true and correct to the best of my knowledge.

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



CHRYSTAL ASHBY

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



Commissioner of Oaths for Quebec



## NOTICE OF PRESENTATION

---

### NOTICE IS HEREBY GIVEN 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

Mes Pierre Lecavalier and Michelle Kellam  
**Department of Justice – Canada**  
East Tower – 9<sup>th</sup> floor  
200 René-Lévesque Boulevard West  
Montreal, Quebec H2Z 1X4

Attorneys for the Attorney General of  
Canada, acting on behalf of the Office of the  
Superintendent of Financial Institutions

Mes Mark E. Meland and Nicolas Brochu  
**Fishmen Flanz Meland Paquin LLP**  
Suite 4100  
1250, René-Lévesque Ouest Boulevard  
Montreal, Quebec H3B 4W8

Proposed Co-Attorneys for the  
Representatives of the Salaried and  
Non-Union Employees and Retirees

Mes Doug Mitchell and  
Edward Béchard-Torres  
**Irving Mitchell Kalichman LLP**  
Suite 1400  
3500, de Maisonneuve Boulevard West  
Montreal, Quebec H3Z 3C1

Attorneys for Her Majesty in Right of  
Newfoundland and Labrador, as  
represented by the Superintendent of  
Pensions

Mr. Andrew J. Hatnay, Mr. Demetrios  
Yiokaris, Ms. Amy Tang and  
Mr. Jules Monteyne  
**Koskie Minsky LLP**  
Suite 900  
20 Queen Street West  
Toronto, Ontario M5H 3R3

Attorneys for the Representatives  
of the Salaried and Non-Union  
Employees and Retirees

Mr. Ronald Pink, Q.C. and  
Ms. Bettina Quistgaard  
**Pink Larkin LLP**  
Suite 201  
1463 South Park Street  
Halifax, Nova Scotia B3J 3S9

Attorneys for the Replacement Plan  
Administrator, Morneau Shepell Ltd.

Me Daniel Boudreault  
**Philion Leblanc Beaudry Avocats S.A.**  
Suite 280  
5000 des Gradins Boulevard  
Quebec, Quebec G2J 1N3

Attorney for the United Steel Workers,  
Local Sections 6254 and 6285

Mes Louis Robillard and Roberto Clocchiatti  
**Vaillancourt et Clocchiatti,  
Contentieux de Retraite Québec**  
1055 René-Lévesque Boulevard East  
Montreal, Quebec H2L 4S5

Attorneys for Retraite Quebec


Me Martin Roy  
**Stein Monast LLP**  
Suite 300  
70 Dalhousie Street  
Quebec, Quebec G1K 4B2

Attorney for Ville de Sept-Îles

Take notice that the present Application for Leave to Appeal *de bene esse* will be presented for adjudication before one the honorable judges of the Court of Appeal, sitting in and for the district of Montreal, in the Ernest Cormier building, located at 100, Notre-Dame Street East, Montreal, Quebec, on **November 17, 2017**, at 9:30 a.m., in room RC-18.

**DO GOVERN YOURSELF ACCORDINGLY.**

Montreal, November 9, 2017



**NORTON ROSE FULBRIGHT CANADA LLP**

(Mes Sylvain Rigaud and Chrystal Ashby)

Attorneys of the Applicant Monitor

Respondent / *De Bene Esse* Incidental Appellant

**FTI Consulting Canada Inc.**

1 Place Ville Marie, Suite 2500

Montréal (Quebec) H3B 1R1

Telephone: (514) 847-4747

Fax: (514) 286-5474

[sylvain.rigaud@nortonrosefulbright.com](mailto:sylvain.rigaud@nortonrosefulbright.com)

[chrystal.ashby@nortonrosefulbright.com](mailto:chrystal.ashby@nortonrosefulbright.com)

[notifications-mtl@nortonrosefulbright.com](mailto:notifications-mtl@nortonrosefulbright.com)

Our reference: 10007517-1000155731

NO: 500-09-027077-171  
500-09-027082-171  
500-09-027075-175  
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

**APPLICATION FOR LEAVE TO FILE AN  
INCIDENTAL APPEAL  
*DE BENE ESSE*  
(Articles 352 and 359 C.C.P.)**

ORIGINAL

BO-0042 #10007517-10000155731

Mtres Sylvain Rigaud and Chrystal Ashby  
**NORTON ROSE FULBRIGHT CANADA LLP**  
ATTORNEYS  
1 Place Ville Marie, suite 2500  
Montreal, Quebec H3B 1R1 CANADA  
Telephone: +1 514.847.4702  
Telephone: +1 514.847.6076  
Telecopieur : +1 514.286.5474  
[notifications-mtl@nortonrosefulbright.com](mailto:notifications-mtl@nortonrosefulbright.com)