File No. 2017 01H 0029

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR COURT OF APPEAL**

**IN THE MATTER OF** Section 13 of Part I of the *Judicature Act*, R.S.N.L. 1990, c. J-4, as amended

**AND**

**IN THE MATTER OF** Section 32 of the *Pension Benefits Act, 1997*, S.N.L. 1996, c. P-4.01

**AND**

**IN THE MATTER OF** a Reference of the Lieutenant Governor in Council to the Court of Appeal, for its hearing, consideration and opinion on the interpretation of the scope of section 32 of the *Pension Benefits Act, 1997*

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# FACTUM OF THE ATTORNEY GENERAL OF NEWFOUNDLAND AND LABRADOR

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Rolf Pritchard QC / Philip Osborne
**Solicitors for the Attorney General of Newfoundland and Labrador**
Whose address for service is:
Office of the Attorney General
Department of Justice & Public Safety
4th Floor, East Block,
Confederation Building
P. O. Box 8700, St. Johns, NL A1B 4J6
Phone: (709) 729-0873
Email: rolfpritchard@gov.nl.ca
philiposborne@gov.nl.ca

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## A. INTRODUCTION

1. On March 27, 2017, a series of questions were referred to this Honourable Court pursuant to an order of the Lieutenant-Governor in Council (the "**Reference**").

2. The Reference essentially seeks this Court's advisory opinion on the scope of the deemed trust and lien and charge set out in section 32 of the *Pension Benefits Act*, 1997 SNL 1996, c. P-4.01 (*"**PBA**"*), and whether they encompass the wind-up deficiency payments set out in section 61 of the *PBA*.

3. The Reference also asks certain pointed questions on the law to be applied to a multi-jurisdictional pension plan registered with the Superintendent of Pensions of Newfoundland & Labrador which includes members who report for work either outside of the province or on a federal undertaking.

4. As early as the Intervenor FTI Consulting Canada Inc.'s Notice of Intervention, dated May 15, 2017, it was argued that this Court should decline to answer the questions posed. It has been argued that the Reference constitutes a collateral attack on the *CCAA* proceedings before Mr. Justice Stephen Hamilton in Montreal, and that the Reference impinges on the stay order granted by the *CCAA* Court over the Wabush *CCAA* parties. These arguments have been reprised in the written submissions of several of the Intervenors.

5. This Honourable Court dismissed these concerns in a *per curiam* judgment dated June 9, 2017.

> ***Re Section 32 of the Pension Benefits Act, 1997*, "Ruling on Application for Directions" (June 9, 2017)**

6. This Court recognized that a reference is simply "an advisory opinion provided by the Court at the request of the Lieutenant-Governor in Council", and that the "CCAA Court … may or may not advert to or apply the opinion provided by this Court". This Court also recognized that the questions posed in the Reference "are not directed at determining parties' rights", but should instead be treated as "raising hypothetical questions". Finally, this Court recognized that the "context of a reference is important", and that "hypotheticals are useful to provide a context within which the questions can be considered".

***Re Section 32 of the Pension Benefits Act, 1997*, "Ruling on Application for Directions" (June 9, 2017), paras 2-3**

7. These conclusions are sufficient, on their own, to respond of the arguments that have been revived and reiterated in the submissions of FTI Consulting Canada Inc., the CCAA parties, Retraite Quebec, and the Ville de Sept-Iles. The Attorney General would, however, offer to supplement this Court's *per curiam* judgment as follows.

## B. EXECUTIVE PREROGATIVE AND THE GOVERNMENT'S INTEREST IN THE ISSUES RAISED IN THE REFERENCE

8. Historically, in common law jurisdictions, the executive branch has been vested with a power to call on judges for their opinion on matters of law. This tradition is so well-established that "[e]vidence of [its] existence will be found as far back as history and tradition throws any light on British legal institutions".

***Re References by the Governor-General in Council*, [1910] S.C.R. 536, at p. 547. [Tab 1]**

9. When legal questions are put to judges by executive order, judges act as "the official advisers of the executive". Their opinions – advisory in nature – are non-binding, as Taschereau J. described in the *Manitoba Education Reference*:

> [...] [O]ur answers to the questions submitted will bind no one, not even those who put them, nay, not even those who give them, no court of justice, not even this court. We give no judgment, we determine nothing, we end no controversy, and whatever our answers may be, should it be deemed expedient at any time by (an interested party) to impugn the constitutionality of any measure that might hereinafter be taken by the federal authorities ... whether such measure is in accordance with or in opposition to, the answers to this consultation, the recourse in the usual way, to the courts of the country remains open to them.

***Re References by the Governor-General in Council*, [1910] S.C.R. 536, at p. 547 and 592 [Tab 1]**

***Reference re Secession of Quebec*, [1998] 2 SCR 217, at para 25[AGC Tab 19]**

***Manitoba Education Reference* (1894), 22 S.C.R. 577, at p. 678 [Tab 2]**

10. This historic prerogative is enshrined in sweeping and unqualified terms in the law of Newfoundland & Labrador, as the Supreme Court of Canada recognized in the *Patriation Reference*.

***Patriation reference Re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753 [Tab 3]**

11. Section 13 of the *Judicature Act*, RSNL 1990, c J-4, provides simply that "The Lieutenant-Governor in Council may refer a matter to the Court of Appeal and upon the reference the Court of Appeal shall hear and determine that matter". Unlike legislation in place in other Canadian provinces, the *Judicature Act* does not limit this reference jurisdiction to "important" legal questions.[1]

12. The two global issues raised in this Reference form part of this historic tradition.

13. The first issue concerns the scope of the deemed trust, lien and charge set out in section 32 of the *PBA*. This is a distilled but complex legal issue of great importance to certain residents of the province. Indeed, this same question, posed in the context of Ontario's pension legislation, was the subject of a fiercely contested appeal before the Supreme Court of Canada in *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 SCR 271, and which ultimately divided the Supreme Court four judges to three.

[1] See *e.g.* section 53(1) of the *Supreme Court Act*, RSC 1985, c S-26.

14. No court of this province has yet had the opportunity to decide the same issue raised in relation to sections 32 and 61 of the *PBA*. This issue is of clear importance to the government of Newfoundland & Labrador especially since the provincial legislature could in theory amend the *PBA* in light of this Court's advisory opinion on section 32's scope.

15. The fact that this question was posed in the Reference should be uncontroversial. Even Justice Hamilton himself invited the government to refer this question to this Court:

> 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.
>
> ***Bloom Lake (Re)*, 2017 QCCS 284, at para 89**
> **[Monitor Tab 1]**

16. The second question asks this Honourable Court for an advisory opinion on how to determine applicable law in the context of a multi-jurisdictional pension plan. This is a matter of clear public interest for two reasons.

17. First, there are currently over 2,000 registered pension plans in Canada that are multi-jurisdictional. For now, and looking to the future, this will remain a question of some practical importance for residents of this province. Second, this Court's advisory opinion may inform governmental deliberations over whether to enter into the Agreement Respecting Multi-Jurisdictional Pension Plans (**"CAPSA Agreement"**) which provides, *inter alia*, that the substantive provisions of the legislation of the major authority may apply to all plan members, regardless of where they report for work.[2] The *PBA* was even amended in 2012 to enable the government of Newfoundland & Labrador to enter into this CAPSA Agreement, but the government has not done so.

[2] See section 6(1), as explained in the Statement of Fact, at paras. 31 and following.

18. In crafting the Reference questions, the government faced the well-known risk that this Court might decline to answer a question that was too abstract, or too imprecise. Courts have on previous occasions declined to answer reference questions on this basis.[3]

19. The second Reference question therefore situates these issues in a specific factual context - the salaried defined benefit pension plans of the Wabush entities. This was not done with the purpose of compelling this Court to dispose of parties' rights. Instead, as this Court accepted in its decision on June 9, 2017, the Reference should be interpreted as raising "hypothetical questions" which "are useful to provide a context within which the questions can be considered".

> ***Re Section 32 of the Pension Benefits Act, 1997*, "Ruling on Application for Directions" (June 9, 2017)**

20. With the same intention of providing this Court with context within which it may consider and answer the questions posed, this Court has been provided with a Statement of Facts regarding the Wabush Mines insolvency and the defined benefit plans in question. After all, legal opinions should not be developed in a vacuum, divorced from reality.

## C. DISCRETION TO DECLINE TO ANSWER A QUESTION

21. The text of the *Judicature Act* does not admit of any discretion to decline to answer a question posed.

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[3] *Reference Re Upper Churchill Water Rights Reversion Act*, (1982) 36 Nfld & PEIR 273, at p. 306 (Nfld CA) [Tab 4]: "It is undesirable for the Court to answer in the abstract questions that may involve consideration of debatable fact and which may affect the rights of persons not represented before it"; see also *Reference regarding the Secession of Quebec*, at para. 30 [AGC Tab 19].

22. Even prior to statutory authority, the prerogative of the Crown to request non-binding advice and opinions from judges is a long standing ancient practice.

> ***Re Criminal Code*, (1910) 43 S.C.R. 434 at 451 [Tab 5]**

23. Notwithstanding the mandatory language of reference statutes, courts have asserted and occasionally exercised a discretion not to answer a question posed on a reference. Indeed, in the *Patriation Reference*, the Supreme Court of Canada considered appeals as of right arising out of three references made, respectively, to the Manitoba Court of Appeal, to the Newfoundland Court of Appeal and to the Quebec Court of Appeal by the respective governments of the three provinces.

> **Peter W. Hogg, *Constitutional Law of Canada*, (5th ed. 2016), 8-20 [AGQ Tab 6]**

24. The Province's reference legislation considered in the *Patriation Reference* provided that:

> 6(1) The Lieutenant-Governor in Council may refer to the Court of Appeal any matter which he thinks fit to refer and the Court shall thereupon hear and consider the matter.

> ***Newfoundland Judicature Act*, R.S.N. 1970, c. 187, s. 6, as amended [Tab 9]**

25. The Court noted the wide terms of the reference legislation under which the various questions were put to the Courts of Appeal. The Supreme Court of Canada noted the wide language in our reference legislation and stated that this Court would have discretion not to answer questions that were not judiciable. At paragraph 19 of that case the Supreme Court of Canada stated:

> 19. . . *The Newfoundland Judicature Act*, R.S.N. 1970, c. 187, s. 6 [am. 1972, c. 43, s. 2; 1974, c. 57, s. 4] similarly provides for a reference by the Lieutenant-Governor in Council to the Court of Appeal of "any matter which he thinks fit to refer". . . . The scope of the authority in each case is wide enough to saddle the respective courts with the

<u>determination of questions which may not be justiciable, and there is no doubt that those courts, and this court on appeal, have a discretion to refuse to answer such questions.</u>

***Patriation Reference*, para 19 [Tab 3]**

26. The Court went on to find that if the question is justiciable that "they must be answered when they raise questions of law." Further, in response to the objection that a question should not be answered as it was a political issue and not justiciable, the Court found that:

> 265 The same submission was made in substance to the three courts below and, in our respectful opinion, rightfully dismissed by all three of them, Hall J.A. dissenting in the Manitoba court of Appeal.
>
> 266 We agree with what Freedman C.J.M. wrote on this subject in the Manitoba reference at p. 13:
>
>> In my view this submission goes too far. Its characterization of Question 2 as 'purely political' overstates the case. That there is a political element embodied in the question, arising from the contents of the joint address, may well be the case. But that does not end the matter. If Question 2, even if in part political, possesses a constitutional feature, it would legitimately call for our reply.
>>
>> In my view, the request for a decision by this Court on whether there is a constitutional convention, in the circumstances described, that the Dominion will not act without the agreement of the Provinces poses a question that it [sic], at least in part, constitutional in character. It therefore calls for an answer, and I propose to answer it.
>
> 267 Question 2 is not confined to an issue of pure legality, but it has to do with a fundamental issue of constitutionality and legitimacy. <u>**Given the broad statutory basis upon** which the governments of Manitoba, Newfoundland and Quebec **are empowered to put questions to their three respective Courts of Appeal, they are, in our view, entitled to an answer to a question of this type**</u>. **(emphasis added)**

***Patriation Reference*, para. 21 and paras 265-267 [Tab 3]**

27. In the *Reference re Canada Assistance Plan*, the Court reaffirmed the validity of the above passage from the judgment of Freedman C.J.M. Further, the Court stated that while the passage speaks to a "constitutional feature," it is equally applicable to a question which possesses a sufficient legal component to warrant a decision by a court.

> ***Reference re Canada Assistance Plan (Canada)*, para 34 [Tab 6]**

28. In the *Same Sex Reference* the Court noted that it has rarely exercised its discretion not to answer a reference question reflecting its perception of the seriousness of its advisory role. However, the Court did note that it may refuse to answer a question where to do so would be problematic, because it lacks sufficient legal content or because answering it would be for other reasons problematic. The Court cited from the *Succession Reference* wherein the Court outlined two broad categories where the Court has refused to answer a question, that is if the question is "too imprecise or ambiguous to permit a complete or accurate answer", or where "the parties have not provided sufficient information to allow the Court to provide a complete or accurate answer". The Quebec Court of Appeal reiterated these exceptional circumstances only a few months ago.

> ***Reference Re Same Sex Marriage*, paras 61-63 [Monitor Tab 2]**
>
> ***Reference regarding the Secession of Quebec*, [1998] 2 S.C.R. 217, paras. 25-30 [AGC Tab 19]**
>
> ***Renvoi relatif à la réglementation pancanadienne des valeurs mobilières*, 2017 QCCA 756, at para. 21 [Tab 7]**

29. However, in the *Same Sex Reference*, the Court stated that these categories were not closed. The Court went on to consider a unique set of circumstances that had the combined effect of persuading the Court that it would be "unwise and inappropriate to answer the question." Those factors included among other things the fact that Parliament

indicated that regardless of the opinion of the Court that it was going to address the issue of same sex marriage by introducing legislation.

> ***Reference re Same Sex Marriage*, para 64 [Monitor Tab 2]**

30. The questions posed in this Reference are clearly justiciable, and, in the Attorney General's respectful submission, this Court has been provided with sufficient information to answer them.

31. With respect to the suggestion by the Attorney General for Canada that this Court should consider the purpose of the Reference when determining if you should answer the questions, this Court considered and rejected a similar argument by the Attorney General for Canada in in the *Reference re Effect & Validity of Amendments to the Constitution of Canada*. In that decision, this Court recognized that the question undoubtedly had some political connotation, but stated that the questions were of a constitutional nature and therefore required an answer. The Court went on to state that as judges ". . . we do not and cannot intimate any opinion upon the merits of the legislative proposals embodied in them, as to their practicability or in any other respect."

> ***Reference re Effect & Validity of Amendments to the Constitution of Canada Sought in Proposed Resolution for a Joint Address to Her Majesty the Queen Respecting the Constitution of* Canada 1981 CarswellNfld 34, 118 D.L.R. (3d) 1, 29 Nfld. & P.E.I.R. 503, 82 A.P.R. 503, 8 A.C.W.S. (2d) 22 [Tab 8]**

32. It is submitted that it would be inappropriate and improper for the Court to try to infer purpose in determining if the Court has the discretion not to answer a question. Further, the Attorney General strongly rebukes any suggestion that this Reference is for an improper purpose.

33. Some of the Intervenors argue that this Court ought to decline to answer the Reference questions because the Reference usurps the *CCAA* Court's exclusive jurisdiction over the Wabush proceedings, because the Reference purports to ask this Court to dispose of rights

of parties and to consider questions of fact, and because the Reference risks wasting litigants' resources.

34. These concerns are unfounded.

35. The Reference will not impinge on the exclusive jurisdiction of the *CCAA* Court. This Court's advisory opinion will not be legally binding, and Hamilton J. may decide not to follow the opinion of this Court. Indeed, this Court's opinion may not even impact the parties' debate in the *CCAA* proceedings. If Hamilton J. determines that the doctrine of federal paramountcy is triggered by the commencement of federal insolvency proceedings, the scope of section 32 of the *PBA* will have no impact on the rights of the pensioners in the Wabush proceedings. Further, the Supreme Court has indicated that while considering the appropriateness of answering a question, the Court should not focus on whether the reference disposes of cognizable rights.

**_Succession Reference_, para 26 [AGC Tab 19]**

36. In this light, the Reference resembles cases where the same issues are raised during the course of parallel proceedings. The judges of one court are free to advert to the opinion of other courts – and may indeed welcome the insight of their colleagues in another jurisdiction – but are by no means bound to do so.

37. This often happens in reference proceedings. References regarding the proposed *Canadian Securities Act* proceeded before both the Quebec Court of Appeal and the Alberta Court of Appeal before ultimately being heard by the Supreme Court of Canada, while references regarding certain aspects of Canada's repatriation were heard by the Courts of Appeal of Newfoundland & Labrador, Manitoba, and Quebec before being heard by Canada's apex Court.[4] In fact, in the *Patriation Reference*, three of the four questions considered by our Court were also raised before the Manitoba Court of Appeal.

38. It is also not unusual for a reference question to raise a legal issue that was first uncovered in the context of an actual, litigated case.

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[4] See *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837

39. For instance, the questions posed in the reference regarding the constitutionality of Justice Nadon's appointment to the Supreme Court of Canada[5] were raised after proceedings for declaratory judgment had been instituted before the Ontario Superior Court of Justice.

40. Legal historians may also remember that the seminal "McNaughton rules" regarding the defense of insanity were initially formulated in a reference opinion in the 1840s. The House of Lords had requested such an advisory opinion in light of the legal issues that had been raised in the criminal trial of Daniel M'Naghten, who was acquitted in 1843.

41. This story is recounted in *Re References by the Governor-General in Council*, and the outcome is relevant to this Reference:

> Here not only was there no litigated question before the Lords, but not even any pending legislative question. The Lords, in the course of their debates, having fallen into a discussion about a case recently tried at the central criminal court, but not in any way before them, a case developing interesting questions in the law relating to insanity, conceived that they would like to know a little more accurately what the law on those points was. They accordingly put a set of "abstract questions" to the judges – questions not arising out of any business before them, actual or contemplated. One of the judges protested against this proceeding and his objections bear a close resemblance to those urged in support of this preliminary objection, *e.g.*, that the questions put
>
> > do not appear to arise out of and are not put with reference to a particular case, or for a particular purpose, which might explain or limit the generality of the terms, that he had heard no argument;
>
> the Lords took notice of this and while courteously thanking the judge for their opinions, expressed a unanimous judgment that it was proper and in order for the Lords to call for opinions on "abstract questions of existing law".
>
> > For your Lordships (said Lord Campbell) may be called on, in your legislative capacity, to change the law and before doing so it is proper that you should be satisfied beyond a doubt what the law really is.

[5] *Reference re Supreme Court Act*, ss. 5 and 6, [2014] 2014 SCC 21

***Re References by the Governor-General in Council*, at pp 548-549 [Tab 1]**

42. There is also nothing unusual about a reference raising issues of mixed fact and law. The *Judicature Act* provides in broad and unqualified terms that the Lieutenant Governor-in-Council may refer "a matter" to this Court for its opinion. Legislation in other jurisdictions specifies that a Court may be referred both questions of "law or fact" concerning "any matter".[6]

43. There is also a fairly long history of references raising explicitly factual issues. In the *Milgaard* and *Murray Truscott* cases,[7] for instance, convictions had been entered at first instance and upheld on appeal. Leave to appeal to the Supreme Court had been denied. But the matters were subsequently referred to the Supreme Court, which was tasked with whether or not there had been a mistrial. It did not matter that the references raised issues of mixed fact and law that were already the subject of a trial.

44. More fundamentally, though, this Reference does not seek to determine the rights of any parties. The questions raised are framed as hypothetical fact-patterns, and this Court's opinion will not be binding on either the parties or on the *CCAA* Court.

45. It is also important to stress that this Reference does not raise issues of "debatable fact" which may impact the "rights of persons not represented". [8] In this case, none of the "facts" are debatable. The Statement of Facts was drafted with the input of many of the

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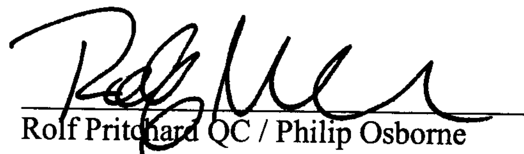
[6] *Supreme Court Act*, RSC 1985, c S-26, at section 53(2).
[7] *Reference re Milgaard (Can.)*, 1992 CanLII (SCC), [1992] 1 S.C.R. 866; *Reference re Steven Murray Truscott*, [1967] S.C.R. 309
[8] In this, the Intervenor cites *Reference Re Upper Churchill Water Rights Reversion Act*, (1982) 36 Nfld & PEIR 273, at p. 306 (Nfld CA) [**Monitor Tab 6**]; see also *A.G. for Canada v. A.G. for Ontario, Quebec and Nova Scotia*, [1898] AC 700, at 717 [**Monitor Tab 4**]; *A.G. of Canada v. Canadian Pacific Railway Company*, [1958] SCR 285, at p. 294

Intervenors, and any outstanding objections to the Statement of Facts concern the need or appropriateness of having such a statement at all, and not on the veracity of the facts set out therein. the legal conclusions this Court is asked to draw do not depend on any particular finding of fact. And, for what it is worth, all of the parties that made submissions before Hamilton J. in the context of the *CCAA* proceedings are represented before this Honourable Court. There is therefore not the same risk that this Court might determine a factual issue without the representations of an interested party.

46. Finally, concerns about inefficiencies should not be persuasive at this stage of the Reference proceedings. All of the parties have already drafted and filed their written submissions, and have already committed to a two-day hearing before the Court.

**THE WHOLE RESPECTFULLY SUBMITTED**

**DATED** at St. John's, in the Province of Newfoundland and Labrador, this 8th day of September, 2017.



Rolf Pritchard QC / Philip Osborne
**Solicitors for the Attorney General of Newfoundland and Labrador**
Whose address for service is:
Office of the Attorney General
Department of Justice & Public Safety
4th Floor, East Block,
Confederation Building
P. O. Box 8700, St. Johns, NL A1B 4J6
Phone: (709) 729-0873
Email: rolfpritchard@gov.nl.ca
philiposborne@gov.nl.ca

## INDEX OF AUTHORITIES

### APPENDIX "A"

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| *A.G. for Canada v. A.G. for Ontario, Quebec and Nova Scotia*, [1898] AC 700 | **Monitor Tab 4** |
| *Bloom Lake (Re)*, 2017 QCCS 284 | **Monitor Tab 1** |
| Peter W. Hogg, *Constitutional Law of Canada*, (5th ed. 2016), 8-20 | **AGQ Tab 6** |
| *Manitoba Education Reference* (1894), 22 S.C.R. 577 | **Tab 2** |
| *Patriation reference Re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753 | **Tab 3** |
| *Reference re Canada Assistance Plan (Canada)* [1991] 2 S.C.R. 525 | **Tab 6** |
| *Re Criminal Code*, (1910) 43 S.C.R. 434 | **Tab 5** |
| *Reference re Effect & Validity of Amendments to the Constitution of Canada Sought in Proposed Resolution for a Joint Address to Her Majesty the Queen Respecting the Constitution of* Canada 1981 CarswellNfld 34, 118 D.L.R. (3d) 1, 29 Nfld. & P.E.I.R. 503, 82 A.P.R. 503, 8 A.C.W.S. (2d) 22 | **Tab 8** |
| *Re References by the Governor-General in Council*, [1910] S.C.R. 536 | **Tab 1** |
| *Reference Re Same Sex Marriage* [2014] 3 S.C.R. 698 | **Monitor Tab 2** |
| *Reference re Secession of Quebec*, [1998] 2 SCR 217 | **AGC Tab 19** |
| *Reference Re Upper Churchill Water Rights Reversion Act* [1984] 1 S.C.R. 297 | **Monitor Tab 6** |
| *Reference Re Upper Churchill Water Rights Reversion Act*, (1982) 36 Nfld. & PEIR 273 (Nfld. C.A.) | **Tab 4** |
| *Renvoi relative á la réglemntation pancanadienne des valeurs mobiliéres, 2017 QCCA 756* | **Tab 7** |

### APPENDIX "B"

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|---|---|
| *The Newfoundland Judicature Act*, R.S.N. 1970, c. 187, s. 6, as amended | **Tab 9** |