

CANADA  
PROVINCE OF QUÉBEC  
DISTRICT OF MONTRÉAL

COURT OF APPEAL

C.A.:  
S.C.: 500-11-048114-157

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

**CHURCHILL FALLS (LABRADOR) CORPORATION LIMITED**, a legal person with offices at 500 Columbus Drive, P.O. Box 12400, St. John's, NL, A1B 4K7

**APPLICANT** – Mise-en-cause

v.

**BLOOM LAKE GENERAL PARTNER LIMITED**, a legal person with offices at 508-1155 Robert-Bourassa Boulevard, Montréal, QC, H3B 3A7

- and -

**QUINTO MINING CORPORATION**, a legal person with offices at 508-1155 Robert-Bourassa Boulevard, Montréal, QC, H3B 3A7

- and -

**CLIFFS QUÉBEC IRON MINING ULC**, a legal person with offices at 2600-595 Burrard Street, Vancouver, BC, V7X 1L3

- and -

**WABUSH IRON CO. LIMITED**, a legal person with offices at 200 Public Square, Suite 3300, Cleveland, Ohio, United States, 44114

- and -

**WABUSH RESOURCES INC.**, a legal person with offices at 4000-199 Bay Street, Toronto, ON, M5L 1A9

**RESPONDENTS** – Petitioners

- and -

**THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP**, a legal person with offices at 4000-199 Bay Street, Toronto, ON, M5L 1A9

- and -

**BLOOM LAKE RAILWAY COMPANY LIMITED**, a legal person with offices at 508-1155 Robert-Bourassa Boulevard, Montréal, QC, H3B 3A7

- and -

**WABUSH MINES**, a legal person with offices at 4000-199 Bay Street, Toronto, ON, M5L 1A9

- and -

**ARNAUD RAILWAY COMPANY**, a legal person with offices at 3000-1 Place Ville-Marie, Montréal, QC, H3B 4N8

- and -

**WABUSH LAKE RAILWAY COMPANY LIMITED**, a legal person with offices at 235 Water Street, Suite 1100, St. John's, NL, A1C 1B6

- and -

**TWIN FALLS POWER CORPORATION**, a legal person with offices at 500 Columbus Drive, P.O. Box 12400, St. John's, NL, A1B 4K7

**MISES-EN-CAUSE** – Mises-en-cause

- and -

**FTI CONSULTING CANADA INC.**, a legal person with offices at 1200 Waterfront Centre, 200 Burrard Street, Vancouver, BC, V6C 3L6

**MONITOR**

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**NOTICE OF APPEAL**

**(Sections 13 and 14 of the *Companies' Creditors Arrangement Act* (the "CCAA") and Article 352 of the *Code of Civil Procedure*)**

**TO ONE OF THE HONOURABLE JUDGES OF THE COURT OF APPEAL, THE APPLICANT SUBMITS:**

**I. INTRODUCTION**

1. Churchill Falls (Labrador) Corporation Limited (“**CF(L)Co**” or the “**Applicant**”), hereby gives notice of its intention to appeal the judgment and order rendered on July 14, 2021 (the “**Judgment**”) by the Honourable Michel A. Pinsonnault, of the Superior Court of Quebec, Commercial Division, District of Montreal (the “**CCAA Judge**”) in court file 500-11-048114-157 (the “**CCAA Proceedings**”), which Judgment grants FTI Consulting Canada Inc. (the “**Monitor**”) broad and unprecedented investigative powers, to compel third parties to the CCAA proceedings (including the Applicant) to produce documentation and testimony under oath, in contravention of the clear teachings of the Supreme Court of Canada<sup>1</sup>, which confirm that these kinds of coercive judicial powers, can only be granted if specifically delegated in a body of law. A copy of the Judgment is attached hereto as **Schedule 1**.
2. In rendering the Judgment, the CCAA Judge appears to have relied exclusively on the arguments and facts raised by the Respondents and Twin Falls Power Corporation (“**Twinco**”), leaving the impression, that the Applicant’s representations were, for the most part, not even considered. As a result, there are palpable and overriding factual and legal mistakes in the Judgment, which will have a significant impact not only on the case at hand, but the CCAA practice more generally. A copy of the Applicant’s plan of argument submitted in the context of the hearing before the CCAA Judge is attached hereto as **Schedule 2**.

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<sup>1</sup> *P.G. du Qué. et Keable c. P.G. du Can. et autres*, 1978 CanLII 23 (CSC).

## II. OVERVIEW OF THE RELEVANT FACTS

### ***A) The CCAA Proceedings***

3. On January 27, 2015, the Superior Court of Quebec issued an Initial Order commencing the CCAA proceedings in respect of Bloom Lake General Partner Limited, Quinto Mining Corporation, 8568391 Canada Limited and Cliffs Québec Iron Mining ULC and the Mises-en-cause The Bloom Lake Iron Ore Mine Limited Partnership and Bloom Lake Railway Company Limited.
4. On May 20, 2015, the CCAA Court issued an Initial Order extending the scope of the CCAA Proceedings to Wabush Iron Co. Limited ("**Wabush Iron**") and Wabush Resources Inc. ("**Wabush Resources**", together with Wabush Iron, "**Wabush**") and the Mises-en-cause Wabush Mines, Wabush Lake Railway Company Limited, and Arnaud Railway Company.
5. Pursuant to these initial orders, the Monitor was appointed in respect of the business and financial affairs of all of these CCAA parties, including Wabush.
6. Wabush holds a combined 17.062% equity interest in the Newfoundland corporation, Twinco. Twinco is otherwise owned (i) 33.3% by CF(L)Co, and (ii) 49.6% by the Iron Ore Company of Canada ("**IOC**"). Neither CF(L)Co or IOC have registered offices in the Province of Quebec, nor have they been implicated, in any way, in these CCAA Proceedings.

### ***B) The Action Instituted Against the Applicant and Twinco in the CCAA Proceedings***

7. On November 16, 2020, in the context of these CCAA Proceedings, Wabush, as a minority shareholder of Twinco, filed the *Motion for the Winding Up and Dissolution, Distribution of Assets, Reimbursement of Monies and Additional Relief* (the "**Dissolution Motion**", attached as **Schedule 3** hereto), on the basis that it was seeking to monetize its last assets (i.e. its shares in Twinco), which, according

to Wabush, required that the following orders be granted by the CCAA Court as against Twinco and the Applicant:

- a) an order confirming that the Applicant is liable for Twinco's maintenance obligations and environmental liabilities related to a power generating plant (the "**Twinco Plant**") in Newfoundland and Labrador from and after July 1, 1974;
  - b) compelling an accounting from Twinco of all monies expended by Twinco in respect of maintenance and environmental costs that have not been reimbursed by CF(L)Co pursuant to the alleged CF(L)Co Indemnity and CFLCo Maintenance Obligations (as such terms are defined in the Dissolution Motion, collectively, the "**Reimbursable Environmental/Maintenance Costs**"). In this regard, and although completely disregarded in the Judgment, Wabush, as a shareholder with directors nominated to the board of directors of Twinco, has access to the financial statements of Twinco, which in any event, were provided for 2005-2020 and filed as confidential exhibits to CF(L)Co's Amended Contestation of the Dissolution Motion and Expansion Motion (as defined below), which is attached hereto as **Schedule 4**; and
  - c) directing CF(L)Co to reimburse all Reimbursable Environmental/Maintenance Costs to Twinco for distribution to the shareholders as part of the winding up and dissolution of Twinco.
8. The Applicant and Twinco are contesting the jurisdiction relating to the Dissolution Motion on the basis that sections 207 and 214 of the CBCA provide, in no uncertain terms, that only a court in the territorial jurisdiction of the corporation's registered office may order the liquidation and dissolution of said corporation, and accordingly, the liquidation and dissolution of Twinco should occur before the Court of Newfoundland and Labrador, and not the Quebec CCAA Court, since:

- a) Twinco's registered office is situated at P.O. Box 12400, St. John's, Newfoundland and Labrador, A1B 4K7, as appears from a copy of Twinco's Federal Corporation Information Report (Exhibit R-4 to the Dissolution Motion);
  - b) Twinco's head office is located at 500 Columbus Drive, St-John's, Newfoundland and Labrador, A1B 3T5; and
  - c) Since May 2, 1960, Twinco has been registered as an extra-provincial company in Newfoundland and Labrador.
9. The defendants to the Dissolution Motion are Twinco and CF(L)Co, neither of whom have any place of business in the Province of Québec. In addition, the Dissolution Motion raises environmental issues that have arisen in connection with the Twinco Plant in Newfoundland and Labrador. These environmental issues concern land exclusively located in Newfoundland and Labrador, and in this regard, their resolution will be governed by provincial law.
  10. As a result, and in accordance with section 207 of the CBCA, CF(L)Co instituted liquidation proceedings pursuant to section 214(1) of the CBCA before the Newfoundland Court (the "**Liquidation Application**"), which application is suspended until the CCAA Court determines whether it does in fact have jurisdiction to hear the Dissolution Motion, which debate is scheduled for August 6, 2021. A copy of the Liquidation Application is attached as **Schedule 5**.
  11. In an effort to circumvent the jurisdiction debate scheduled for August 6, 2021, Wabush filed the *Motion for the Expansion of the Monitor's Powers* (the "**Expansion Motion**"), in which it sought orders (the "**Investigation Order**") granting the Monitor with unprecedented investigative powers relating to the remedies sought by Wabush against CF(L)Co in the Dissolution Motion, despite the pending jurisdiction debate. A copy of the Expansion Motion is attached hereto as **Schedule 6**.

12. More specifically, Wabush requested that the Court order that the Monitor be granted the powers to:
  - a) compel any person with possession, custody or control to disclose to the Monitor and produce and deliver any books, records, accountings, documents, correspondences or papers, electronically stored or otherwise, relating to the Twinco Interest, CF(L)Co Indemnity and CF(L)Co Maintenance Obligations, including the Twinco Requested Information (the “Requested Information”) in respect of the period from and after January 1, 2010; and
  - b) conduct investigations, including examinations under oath of any person reasonably thought to have knowledge relating to the Twinco Interest, CF(L)Co Indemnity and CF(L)Co Maintenance Obligations, including the Twinco Requested Information, in respect of the Disclosure Period.

### ***C) The Judgment***

13. Following an approximately 3 hour hearing on June 3, 2021, the CCAA Judge issued the Investigation Order on July 14, 2021, relying on sections 11 and 23(c) and (k) of the CCAA to conclude that a CCAA Court does in fact have the power to allow a Monitor to conduct investigations, under oath, of any person who may have knowledge relating to a third party in which a CCAA debtor is a minority shareholder, and in doing so:
  - a) Discounted, or failed to even acknowledge, any of the territorial jurisdictional issues raised by each of CF(L)Co and Twinco;
  - b) Ignored the fact that CF(L)Co had provided copies of Twinco’s financial statements to the Monitor dating back to 2005, despite the contrary findings in the Judgment at paragraph 35, which suggests that only those statements from 2013-2019 were provided. Moreover, the Judgment ignores the fact that the financial statements very clearly outline each of the

maintenance and environmental costs and obligations incurred by Twinco – i.e. the exact information requested by the Monitor.

- c) Held that Section 23(1)(c) of the CCAA, which provides that the monitor shall “*make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company’s business and financial affairs and the cause of its financial difficulties or insolvency [...]*”, not only gives the Monitor the power to investigate the debtor’s business and affairs, but can also be used to allow the Monitor to investigate solvent third parties who are strangers to the CCAA Proceedings (particularly if read with the discretionary powers granted under section 11 of the CCAA). In this regard, although the CCAA Court finds that Twinco is not a stranger to these proceedings, it chooses to not address this issue as regards to the Applicant, despite the uncontested facts before it that CF(L)Co is a corporation registered and operating in Newfoundland, with no business in Quebec, who up until the filing of the Dissolution Motion, was a complete stranger to these CCAA Proceedings.
- d) Held that the type of additional powers sought by Wabush have been previously granted in one previous CCAA decision, whereby Justice Kalichman, in *Arrangement relatif à 9227-1584 Québec inc.*<sup>2</sup>, granted the Monitor with the power to conduct investigations into shareholders of the CCAA debtor company;
- e) Held that the decision by Ontario Court of Appeal in *Osztrovics Farms Ltd.*<sup>3</sup>, which explicitly relies on sections 163 and 164 of the BIA in deciding that a trustee’s investigatory powers can relate to corporate documentation about another company when the bankruptcy has significantly invested in this

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<sup>2</sup> *Arrangement relatif à 9227-1584 Québec inc.*, 2021 QCCS 1342 (CanLII).

<sup>3</sup> *Osztrovics Estate v. Osztrovics Farms Ltd.*, 2015 ONCA 463 (CanLII).



company, can be extended to a monitor in CCAA proceedings, despite the CCAA not containing the same provisions;

- f) Failed to address the issue raised by the Applicant, that the power to compel witnesses to testify or produce documents can only be granted by law, as confirmed by the Supreme Court of Canada in *P.G. du Qué. et Keable c. P.G. du Can. et autres*<sup>4</sup> and *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Association*<sup>5</sup>.

14. The Applicant submits that:

- a) the CCAA Judge made a palpable and overriding error of law by concluding that Sections 23(c) and (k) and 11 of the CCAA were sufficient for him to grant the CCAA Monitor with the coercive and judicial powers to compel testimony relating to a solvent third-party entity in which a CCAA debtor is a minority shareholder; and
- b) the CCAA Judge committed palpable and overriding errors of law and fact, by rendering a judgment that, for reasons unbeknownst to the Applicant, ignores most of the facts and arguments raised by it, including (i) the uncontested fact that CF(L)Co is a solvent entity that is a stranger to the CCAA proceedings, (ii) that financial statements outlining any environmental and maintenance obligations from 2005 onwards have been provided by CF(L)Co, and (iii) the Supreme Court of Canada has confirmed, in no uncertain terms, that the powers sought in the Investigation Order can only be granted pursuant to an express provision of law, which the Judgment itself appears to recognize, does not exist in the CCAA.

15. These issues are significant in that the granting of the Investigation Powers grants the Monitor and Wabush, the ability to conduct broad and coercive discovery

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<sup>4</sup> *P.G. du Qué. et Keable c. P.G. du Can. et autres*, 1978 CanLII 23 (CSC).

<sup>5</sup> *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Association*, 1993 CanLII 31 (SCC).

processes, despite the ongoing litigation amongst the parties, thereby limiting the rules and protections normally afforded to a party to a civil litigation. In doing so, the Judgment opens up the floodgates, such that a Monitor in a CCAA process now has the power to obtain the judicial authority to compel third parties wherever they may reside, who are in not in any way implicated in a CCAA proceeding, to provide documentation and testify under oath in the hopes that this could bolster litigation against these same parties.

16. Moreover, considering the important implications of the Judgment, and the complete lack of urgency considering the ongoing litigation and eventual liquidation, the Applicant submits that the Investigation Order should not have been declared executory notwithstanding appeal.

### **III. GROUND FOR APPEAL**

17. The CCAA Judge has granted an Investigation Order which allows the Monitor to compel representatives of CF(L)Co, who are otherwise strangers to these CCAA proceedings, to provide documentation and testify under oath, outside of the realms of the ongoing litigation with Wabush relating to its Dissolution Motion, in which it seeks, among things, to argue that CF(L)Co is liable for certain Reimbursable Environmental/Maintenance Costs.
18. The CCAA Judge concluded that it was appropriate to grant such investigation powers to the Monitor on the basis that it would further the purposes of the CCAA, despite the fact that the CCAA itself does not grant such powers on the Monitor, and that the information requested has been provided, at least in large part, and any additional information will be disclosed in the context of the ongoing litigation amongst Wabush and CF(L)Co, which as mentioned above, was already instituted by Wabush before it advanced its claim.
19. The result of the Judgment is that the Monitor now has the unprecedented powers and rights, greater even than what Wabush would have, as a shareholder of Twinco and a party to the ongoing litigation, such that CF(L)Co's rights as a

defendant and third party are necessarily adversely affected, forcing CF(L)Co to incur substantial costs relating to these document requests and out-of-court examinations, in addition to having to eventually engage in a similar discovery process in the context of the Dissolution Motion.

20. While the scope of a CCAA monitor's powers has evolved and expanded in recent years<sup>6</sup>, the Judgment goes far beyond this expanded role, by allowing a CCAA Monitor to investigate and compel third parties to testify under oath, despite the fact that the CCAA does not explicitly delegate these coercive powers to court-appointed monitors.
21. As mentioned above, the Applicant argued before the CCAA Court, that the power to compel witnesses, which is what is being requested in the Investigation Order, is a coercive and judicial power, which can only be done by a court of justice, failing which all powers must be granted explicitly by law.<sup>7</sup> This argument is not considered nor even addressed in the Judgment.
22. In fact, and as raised in the CF(L)Co's plan of argument at first instance (Schedule 2), in *P.G. du Qué. et Keable c. P.G. du Can. et autres*, the Supreme Court of Canada confirms that the power to compel a witness to testify or to produce documents can only be granted by law. Similarly, in *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Association*, the Supreme Court of Canada also confirmed that the power to compel witnesses is normally reserved uniquely for courts of law, and that extending these powers to any other party is exceptional in nature and done by law or regulation, and accordingly, said powers must be interpreted restrictively and in accordance with the clear language of the law in question. Neither of these cases is considered nor even addressed in the Judgment.

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<sup>6</sup> *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2020 QCCA 659; *Ernst & Young Inc v. Essar Global Fund Limited*, 2017 ONCA 1014.

<sup>7</sup> Ouellette, Yves, *Les tribunaux administratifs au Canada, Procédure et preuve*, Les Éditions Thémis, 1997.

23. Instead, and even though it is recognized that there is nothing in the CCAA, including sections 11 and 23, that explicitly grant the Monitor with the power to compel third party witnesses to testify and produce documents, the Court relies on these provisions to expand the Monitor's powers, such that he can conduct investigations and compel the production of testimony and documentation relating to a corporation registered in Newfoundland (Twinco) in which a CCAA debtor is a minority shareholder, as well as one of the other shareholders (CF(L)Co) of Twinco, both of whom are solvent third parties, outside the scope of these CCAA proceedings.
24. To the knowledge of the Applicant, there is no case law in Canada, even when considering *Arrangement relatif à 9227-1584 Québec inc.*, where a monitor has been granted such broad investigative powers with respect to third parties, and instead, the Judgment contravenes the clear teachings of the Supreme Court of Canada.
25. In this regard, there is a fundamental question of justice at play, since the Investigation Order will function to grant the Monitor with powers of coercion, despite the absence of this explicit power in the CCAA, and in circumstances where the plaintiffs (Wabush) would not themselves have these rights in the context of the ongoing litigation (both through the Oppression and Dissolution Motion and the Liquidation Application).
26. As such, given the question the Applicant purports to raise has never been answered by this Court and considering the broad judicial discretion conferred under Section 11 of the CCAA and the increasingly extensive powers granted to CCAA monitors, the matter on appeal is of great significance to the practice of insolvency in Canada. The Applicant submits that clarity regarding the actual powers of the Monitor to act as a judicial body capable of compelling testimony and document production from entities that are strangers to a CCAA process is essential.

27. The Applicant respectfully submits that there is no basis on which to conclude that an expeditious appeal would unduly hinder the progress of the action. The CCAA Proceedings were instituted in 2015, and Wabush only recently instituted its action against the Applicant, in what itself describes are the final steps in a liquidation process. Moreover, the litigation will continue in its normal course, whether or not the Monitor is undertaking its own discovery process in parallel.

#### **IV. CONCLUSIONS SOUGHT**

28. To the best of the Applicant's knowledge, the present case concerns the first time a Monitor has been granted such broad investigative powers to compel documentation and testimony under oath in connection with a third party solvent entity, who is in no way implicated in the CCAA proceedings. It is therefore manifestly in the interest of the practice for this court to consider the palpable and overriding errors identified herein and to confirm the basic principle, that the power to coerce, belongs solely with a court of law, unless explicitly provided for in specific rules.

#### **FOR THESE REASONS, MAY IT PLEASE THE COURT TO:**

**ALLOW** the appeal;

**SET ASIDE** the judgment rendered on July 14, 2021 by the Honourable Michel A. Pinsonnault of the Superior Court of Québec in file number 500-11-048114-157 (the "**Judgment**");

**CONDEMN** the respondents to pay the appellant legal costs both in first instance and on appeal.

MONTREAL, August 4, 2021

*Stikeman Elliott*

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**Attorneys for the Applicant**

**Churchill Falls (Labrador) Corporation Limited**

**LIST OF APPELLANT'S SCHEDULES**  
**IN SUPPORT OF THE NOTICE OF APPEAL\***

(Dated August 4, 2021)

***\*NOTE : The Schedules in support of the Notice of Appeal were filed in support of the Application for Leave to Appeal and to Suspend Provisional Execution***

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- SCHEDULE 1:** Judgment rendered on July 14, 2021 by the Honourable Michel A. Pinsonnault, of the Superior Court of Quebec, District of Montreal in court file 500-11-048114-157
- SCHEDULE 2:** Copy of the Applicant's plan of argument submitted in the context of the hearing before the CCAA Judge
- SCHEDULE 3:** Copy of Wabush's *Motion for the Winding Up and Dissolution, Distribution of Assets, Reimbursement of Monies and Additional Relief* dated November 16, 2020
- SCHEDULE 4:** Copy of CF(L)Co's *Amended Contestation of the Dissolution Motion and Expansion Motion* dated May 19, 2021
- SCHEDULE 5:** Copy of CF(L)Co's *Originating Application for the Issuance of a Court-Supervised Liquidation and Dissolution Order* pursuant to section 214(1)(b)(ii), 215 and 217 of the *Canada Business Corporations Act* dated January 14, 2021
- SCHEDULE 6:** Copy of Wabush's *Motion for the Expansion of the Monitor's Powers* dated May 6, 2021

**MONTRÉAL**, August 4, 2021

***Stikeman Elliott***

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

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Q.S.C. N<sup>o</sup>. 500-11-048114-157

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CANADA  
PROVINCE OF QUÉBEC  
DISTRICT OF MONTREAL

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

CHURCHILL FALLS (LABRADOR) CORPORATION LIMITED  
APPLICANT – Mise-en-cause

V.

BLOOM LAKE GENERAL PARTNER LIMITED, QUINTO MINING  
CORPORATION, CLIFFS QUÉBEC IRON MINING ULC, WABUSH IRON CO.  
LIMITED, WABUSH RESOURCES INC.

RESPONDENTS – Petitioners

- and -

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, BLOOM LAKE  
RAILWAY COMPANY LIMITED, WABUSH MINES, ARNAUD RAILWAY  
COMPANY, WABUSH LAKE RAILWAY COMPANY LIMITED, TWIN FALLS  
POWER CORPORATION

MISES-EN-CAUSE – Mises-en-cause

FTI CONSULTING CANADA INC.

MONITOR

**BS0350**

**Our file: 030192-1029**

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NOTICE OF APPEAL

*(Sections 13 and 14 of the Companies' Creditors Arrangement Act (the  
"CCA") and Articles 357 and 661 of the Code of Civil Procedure)*

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ORIGINAL

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