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Your reference

Our reference
01028478-0001

May 9, 2017

Without Prejudice**Sent By E-mail**

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

Dear Confrère,

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

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

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

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

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

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

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

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

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

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

*The current Stay Period has been extended and is set to expire on June 30, 2017, subject to further order of the CCAA Court.

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

9.(1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

(...)

11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

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

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

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

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

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

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

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

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

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

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

Rolf Pritchard, Q.C.
May 9, 2017

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

Yours truly,



Sylvain Rigaud
Partner

SAR/ch/jrl

Enclosures:

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