500-09-027082-171

COURT OF APPEAL OF QUEBEC

(Montréal)

Appeal from a judgment of the Superior Court, District of Montréal, rendered on September 11, 2017 by the Honourable Justice Stephen W. Hamilton.

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Nº 500-11-048114-157 S.C.M.

In the matter of the Plan of Compromise or Arrangement of Bloom Lake General Partner Limited *et al.*:

HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR, as represented by THE SUPERINTENDENT OF PENSIONS

APPELLANT / INCIDENTAL RESPONDENT
(Mis en cause)

v.

FTI CONSULTING CANADA INC.

RESPONDENT / INCIDENTAL APPELLANT
(Monitor – Petitioner)

- and -

VILLE DE SEPT-ÎLES

MIS EN CAUSE / INCIDENTAL APPELLANT
(Mis en cause)

- and -

BLOOM LAKE GENERAL PARTNER LIMITED

QUINTO MINING CORPORATION

(Style of causes continues on following pages)

INCIDENTAL RESPONDENT'S BRIEF

Dated April 11, 2018

8568391 CANADA LIMITED

CLIFFS QUÉBEC IRON MINING ULC

WABUSH IRON CO. LIMITED

WABUSH RESOURCES INC.

RESPONDENTS
(Debtors)

- and -

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP

BLOOM LAKE RAILWAY COMPANY LIMITED

WABUSH MINES

ARNAUD RAILWAY COMPANY

WABUSH LAKE RAILWAY COMPANY LIMITED

SYNDICAT DES MÉTALLOS, SECTION LOCALE 6254

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TABLE OF CONTENTS

Incidental Respondent's Brief **Page**

INCIDENTAL RESPONDENT'S ARGUMENT

PART I – FACTS

1. In its incidental appeal, FTI Consulting Canada Inc. (the "**Monitor**") seeks to reverse two determinations of the CCAA Judge that ought to have been uncontroversial.

2. First, the Monitor maintains that a liquidation did not occur during the present CCAA proceedings, despite accepting the "undisputable factual finding" that the Wabush CCAA Parties sold the "quasi-totality of their assets" and that this is a "liquidating CCAA".[1] Second, the Monitor seeks to re-litigate the scope of the deemed trust set out in subsection 32(2) of Newfoundland & Labrador's *Pension Benefits Act*, *1997*, SNL 1996, c P-4.01 ("***NLPBA***") even though this very issue was the subject of a recent and comprehensive advisory opinion issued by the Newfoundland & Labrador Court of Appeal.

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[1] Brief of the Incidental Appellant, FTI Consulting Canada Inc., at para. 157.

PART II – QUESTIONS IN ISSUE

3. The present submission addresses the following issues, ordered and worded according to the Appellants and Incidental Appellants' Chart of Additional Issues:

   A. If the deemed trust of Section 32 NLPBA is operative and enforceable in CCAA proceedings, did the CCAA Judge err in assuming that such deemed trust covers the wind-up deficit of pension plans?

   B. If the deemed trusts under either NLPBA or PBSA are operative and enforceable in CCAA proceedings, did the CCAA Judge err in holding that a liquidation within the meaning of section 32 NLPBA and section 8 PBSA occurred in the present Wabush CCAA proceedings?

   C. If deemed trusts under either NLPBA or PBSA are operative and enforceable in CCAA proceedings and a liquidation did occur, did the CCAA Judge err in finding that such liquidation triggering the deemed trusts had taken place on the date of the initial CCAA filing, i.e. May 19, 2015?

PART III – ARGUMENT

A. The deemed trust set out in subsection 32(2) of the *NLPBA* extends to the entirety of the pension plan's wind-up deficit

i. The Newfoundland & Labrador Court of Appeal has already clarified the scope of subsection 32(2) of the *NLPBA*

4. Earlier this year, the Newfoundland & Labrador Court of Appeal issued a comprehensive advisory opinion on the scope of the *NLPBA*'s deemed trust in *Reference re Section 32 of the Pension Benefits Act*, *1997*, 2018 NLCA 1. The parties to the present CCAA proceeding were all present, and after considering all of their lengthy submissions – including those of the Monitor, whose oral argument alone lasted two hours – the Court of Appeal concluded that a liquidated employer is deemed to hold in trust the pension plan's full wind-up deficit for the benefit of plan beneficiaries, pursuant to subsection 32(2) *NLPBA.*[2] There is no compelling reason to have this determination re-litigated in Quebec.

5. The Quebec Court of Appeal clearly does not possess the same legal authority as the Newfoundland & Labrador Court of Appeal to decide controversial issues of Newfoundland & Labrador law. In Quebec, the law of another province is considered to be foreign law,[3] and courts must simply take note of its content as a matter of fact,[4] established on a balance of probabilities. Quebec courts generally refrain from weighing into controversial legal issues of such "foreign" law. Instead, « *[l]e juge recherche ce qui est admis en fait à l'étranger. Il ne recherche pas ce qui doit être, mais ce qui est. La distinction consiste en ce que le juge est extérieur au système juridique étranger* ».[5] In this case, this Court benefits from the recent opinion of the

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2 The Monitor has since appealed the decision to the Supreme Court of Canada. This as-of-right appeal is currently scheduled to be heard on October 17, 2018.
3 Article 3077 of the *Civil Code of Quebec*.
4 Gérald Goldstein and Ethel Groffier, *Droit international privé*, *Tome I* (1998), at pp. 232-233.
5 *Ibid*.

Newfoundland & Labrador Court of Appeal. The parties could hardly wish for clearer and more compelling proof of that province's law.

6. The Newfoundland & Labrador Court of Appeal also possesses far more expertise in interpreting the law of that province. The CCAA Judge elsewhere accepted this as an "obvious proposition", "particularly since Newfoundland and Labrador is a common law jurisdiction and Québec is a civil law jurisdiction".[6] Their Court of Appeal is more familiar with the *NLPBA*, its legislative context, as well as with the terms and doctrines of the common law that guide its drafting. It is also more familiar with the inner workings and drafting style of the Newfoundland & Labrador legislature, and possesses more expertise in interpreting its pronouncements. In a word, their Court possesses the kind of "habitual familiarity" or "field sensitivity" that compels deference.[7] Local courts are also "more sensitive to the social and cultural context" when interpreting provincial legislation.[8] The courts of Quebec, by contrast, are steeped in this province's distinct "legal traditions and social values".[9]

7. For what it is worth, the Newfoundland & Labrador Court of Appeal also benefited from more time and resources to consider this issue. A two-day hearing was scheduled before that Court in September 2017. The scope of the *NLPBA*'s deemed trust and lien and charge was the principal issue in dispute, and it consumed the lion's share of the parties' oral and written submissions.

8. Finally, the province of Newfoundland & Labrador has a compelling interest in having this issue decided by its own courts. The scope of the *NLPBA*'s deemed trust is

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6 *Arrangement relative à Bloom Lake*, 2017 QCCS 284, at para. 43.

7 In the administrative law context, for instance, these considerations routinely justify deferential review: see e.g. *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] 2 S.C.R. 293, 2016 SCC 47, at para. 33, citing *Dunsmuir v. New Brunswick,* [2008] 1 S.C.R. 190, 2008 SCC 9, at paras. 49 and 68.

8 *Douez v. Facebook*, [2017] 1 S.C.R. 751, 2017 SCC 33, at para. 60.

9 *Reference re Supreme Court Act, ss. 5 and 6*, [2014] 1 S.C.R. 433, 2014 SCC 21, at para. 56.

important to the residents of Newfoundland & Labrador. Indeed, there are very few rights which are as important to a person's welfare in old age as their pension entitlements. Having a hearing in St. John's meant that local residents and members of the local press could be present during the hearing. This kind of open and accessible courtroom helps educate local communities and promotes their confidence in the judicial process,[10] all of which is especially important in a matter which could see vulnerable pensioners denied access to their hard-earned pension benefits. It is partly for this reason that *forum non conveniens* jurisprudence has long-recognized a provincial interest in having provincial issues decided locally.[11] More recently, the Supreme Court agreed that there is an "inherent public good" in having local courts decide important local legal issues.[12]

ii. Subsection 32(2) *NLPBA*[13] deems that a liquidated employer holds the pension plan's entire wind-up deficit in trust for plan beneficiaries

9. In any event, the Newfoundland & Labrador Court of Appeal correctly concluded that subsection 32(2) *NLPBA* deems that a liquidated employer holds the pension plan's entire wind-up deficit in trust on behalf of plan beneficiaries.[14]

10. Subsection 32(2) provides that in the event of "any liquidation", an employer is deemed to hold certain amounts in trust on behalf of plan beneficiaries "whether or not that amount has in fact been kept separate and apart from the employer's own money" [emphasis added].[15] The amounts included in this deemed trust are set out in

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10 See the concurring opinion of Wagner and Karakatsanis JJ. in *Endean v. British Columbia*, [2016] 2 S.C.R. 162, 2016 SCC 42, at paras. 83 and following.

11 J-G. Castel, *Canadian Conflict of Laws* (3rd ed.: 1994) at pp. 245-246; *Hunt v. Durdle*, [1996] N.S.J. No. 327, 153 N.S.R. (3d) 223, at para. 22.

12 *Douez v. Facebook*, [2017] 1 S.C.R. 751, 2017 SCC 33, at para. 58.

13 Note that, in addition to the deemed trust set out in subsection 32(2), subsection 32(4) creates a lien and charge that is likewise triggered by the same conditions set out in subsection 32(2), and attaches to the same amounts described in that section.

14 *Reference re Section 32 of the Pension Benefits Act*, *1997*, 2018 NLCA 1, at paras. 11-27.

15 Section 32(2) of the *NLPBA*.

subsection 32(1), and include all normal actuarial costs, any special payments that have accrued to date, as well as to "all … other amounts due under the plan from the employer that have not been remitted to the pension fund". This sweeping language is "intended to cover all amounts due by the employer to the pension fund".[16]

11. Section 61 *NLPBA* sets out the amounts that the employer must pay into the pension fund upon termination of the pension plan. Section 61(2) posits the obligation to pay into the pension fund the full wind-up deficit. These payments ensure that the plan has sufficient funds so that the value of the benefits promised under the plan may be satisfied.[17]

12. The scope of the *NLPBA*'s deemed trust hinges principally on the relationship between sections 32 and 61 of the *NLPBA*. The Superintendent's view – endorsed by the Newfoundland & Labrador Court of Appeal[18] – is that sections 32 and 61 are complementary and ought to operate in lockstep. Since the wind-up deficiency payments fund benefits provided under the pension plan and are due to the pension fund, they naturally fall within subsection 32's sweeping reference to "all…other amounts due under the plan from the employer that have not been remitted to the pension fund".

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16 See *Bloom Lake, g.p.l.* (Arrangement relatif à), 2015 QCCS 3064, at para. 64. In this passage, Hamilton J. was commenting on section 8 of the federal *Pension Benefits Standards Act*, R.S.C. 1985, c.-32, which is highly similar to section 32 (see para. 82).

17 *Reference re Section 32 of the Pension Benefits Act*, *1997*, 2018 NLCA 1, at paras. 24 and 26.

18 *Ibid*., at paras. 11-27.

13. The *NLPBA's* legislative history lends support to this interpretation.[19] The legislature was gravely concerned about the plight of pensioners, and actively desired to protect and guarantee their pension entitlements. When Mr. Ernie McLean introduced the *NLPBA* for its second reading in December 1996, he stated as follows:

> Mr. Speaker, this act certainly secures the future for people in the Province who are looking to obtain funds from a pension. This act provides enhanced pension benefit coverage for the people of the Province through the increased payments, procedures and conditions, as well as improved investment regulations and monitoring requirements, and the act promotes increased security of pension benefits promised.[20]
>
> [Emphasis added]

14. When subsection 61(2) *NLPBA* was proposed in 2008, the then-Minister of Government Services, Mr. O'Brien, understood that wind-up deficit payments are integral to ensuring that pensioners can continue to live life fully in their retirement:

> [O]ne of the most important aspects of a person's life as they age is their benefit of having a pension that they would have when they retire to get older and enjoy life to the fullest once their work life is over. So, it is very, very important, as the minister responsible for my department, to make sure that we protect the employees in regard to that pension plan, in its fullest, all the way along until their eventual retirement. That is what this amendment does, Mr. Speaker.
>
> [Emphasis added]

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19 *Ibid.*, at para. 22.

20 Legislative Assembly, Hansard, 43rd General Assembly, 1st Sess, No. 55 (December 17, 1996) (Ernie McLean), at p. 73 of the .pdf excerpt.

15. The Member for Signal Hill-Quidi Vidi, Ms. Michael, later spoke of the intolerable hardship that ensues when the law fails to ensure that pension plans are adequately funded:

> We know that we have that issue in the Province, that we do have pensioners who are living in poverty. We have pensioners who are going to food banks. We have pensioners who cannot afford to pay for all their prescription drugs.

16. It was once thought that deemed trusts had to be interpreted narrowly, so as to accommodate the general principle that a debtor's assets are the common pledge of his creditors. This view is now outdated. A broad and purposive interpretation should instead be favoured,[21] in line with section 16 of Newfoundland & Labrador's *Interpretation Act*, RSNL 1990, c. I-19, which provides that every act and regulation should be "considered remedial and shall receive the liberal construction and interpretation that best ensures the attainment of [its] objects […] according to its true meaning".[22]

17. In *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, Justice Deschamps adopted a similarly broad and purposive interpretation of the equivalent provisions of Ontario's *Pension Benefits Act*. Noting that the "Ontario legislature has consistently expanded the protection afforded in respect of pension plan contributions", and that adopting a "narrow interpretation" would be contrary to this legislative trend "toward broadening the protection", Justice Deschamps concluded on behalf of the majority as follows:

> [44] […] The deemed trust provision is a remedial one. Its purpose is to protect the interests of plan members. This purpose militates against adopting the limited scope proposed by Indalex and some of the interveners. <u>In the case of competing priorities between creditors, the remedial purpose favours an approach</u>

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21 *Reference re Section 32 of the Pension Benefits Act*, *1997*, 2018 NLCA 1, at para. 18.

22 See also Ruth Sullivan, *Sullivan on the Construction of Statutes* (6th ed.: 2014), at pp. 488-489 ("Sullivan, *Construction of Statutes*").

> that includes all wind-up payments in the value of the deemed trust in order to achieve a broad protection.[23]
>
> [Emphasis added]

18. Finally, this interpretation of sections 32 and 61 is strengthened by comparing the *NLPBA* to the federal *PBSA*, one of the most similar pieces of pension legislation in Canada.[24] Sections 8 and 29 of the federal *PBSA* are similarly-worded to sections 32 and 61 of the *NLPBA*. However, subsections 29(6.2) and (6.5) of the *PBSA* specifically exclude the wind-up deficit from the section 8 deemed trust.[25] The *NLPBA* simply has no equivalent provision; accordingly, its deemed trust must be broader.

19. The Monitor argues that the apparent symmetry between the amounts described in subsections 32(1) and 61(1), coupled with the distinction between subsections 61(1) and 61(2), suggests that the wind-up deficit payments outlined in subsection 61(2) are not included in the amounts described in 32(1).

20. In the Superintendent's view, the delineation between subsections 61(1) and 61(2) is of no import to interpreting section 32. The payments set out in subsection 61(2) may have been delineated from those outlined in subsection 61(1) so that the *Pension Benefits Act Regulations*, NLR 114/96 ("***Regulations***") could impose a specific payment schedule for the wind-up deficit payments specifically. There are also conditions placed on the payments set out in subsection 61(2) – namely, that the plan must have been terminated after April 1, 2008, and the plan must not be a

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23 *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at paras. 38, 43 and 44.

24 In *Bloom Lake, g.p.l.* (Arrangement relatif à), 2015 QCCS 3064, after stating that section 8 of the *PBSA* is "intended to cover all amounts due by the employer to the pension fund" (para. 64), Hamilton J. observes that section 32(2) of the *PBA* is "virtually identical" to section 8(2) of the *PBSA*, and that "much of the analysis" regarding section 8's interpretation applies to section 32 of the *PBA* as well (para. 82).

25 *Aveos Fleet Performance Inc. (Re)*, 2013 QCCS 5762, at para. 82.

"multi-employer pension plan" as defined in section 2(v) of the *NLPBA* – that may also explain the need for this delineation.

21. The Monitor also relies on subsection 32(3), a subsection which establishes a separate deemed trust that is triggered by the mere termination of a pension plan, and that appears to be more limited than the deemed trust outlined in subsections 32(1) and 32(2). Specifically, it provides that where a pension plan is terminated, an employer who is required to pay contributions shall hold in trust "an amount of money equal to employer contributions due under the plan to the date of termination".

22. However, this distinct deemed trust is not relevant to interpreting the scope of the separate[26] deemed trust set out in subsection 32(2).

23. Properly interpreted, subsection 32(3) only applies when a solvent employer wilfully terminates a pension plan. This subsection is plainly not meant to apply in the context of an employer's insolvency and liquidation. Indeed, it only obliges the employer to hold certain amounts in trust. On its own, it does not create a deemed trust that can be enforced against third parties.

24. Subsection 32(2) governs what occurs specifically in the event of an employer's liquidation, assignment, or bankruptcy. This deemed trust is expressly tailored to the insolvency context. Unlike subsection 32(3), it <u>does</u> contain the formula required to create a valid deemed trust enforceable against third parties, regardless of whether the employer actually held these amounts separately or not.[27] This feature is vital in

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[26] Subsection 32(4) of the *PBA* suggests that these deemed trusts are distinct where it provides that the administrator of a pension plan "has a lien and charge on the assets of the employer in an amount equal to the amount required to be held in trust under subsections (1) <u>and</u> (3)" [emphasis added].

[27] This formulation provides that the amounts that are "considered to be held in trust <u>shall be considered to be separate</u> from and form no part of the estate in liquidation, assignment or bankruptcy, <u>whether or not that amount has in fact been kept separate and apart from the employer's own money</u>" [Emphasis added].

situations where a former employer is being liquidated and pensioners must compete with other creditors.

25. Subsection 32(2) also represents the more specific rule, the *lex specialis*. An employer's insolvency will nearly always be followed by the pension plan's termination.[28] However, the content of this insolvency deemed trust is set out in subsection 32(1), and not 32(3). In order to respect this legislative choice, subsection 32(2) must be interpreted to the exclusion of subsection 32(3), the latter provision being left to apply only to a solvent employer's wilful termination of a pension plan.

26. In any event, for insolvent employers who are in the process of being liquidated, the wind-up deficit payments set out in section 61(2) are clearly "due" at the date of termination, and therefore fall within even this limited trust set out in subsection 32(3).[29] According to the *Regulations,* the wind-up deficit is determined as of the date of termination, and interest begins accruing as of that date.[30] As the Court of Appeal concluded, the amounts "due" under the plan to the date of termination therefore include "all amounts necessary to make the plan actuarially sound going forward".[31]

27. While section 25.1 of the *Regulations* provides an optional five-year schedule to fund the wind-up deficit,[32] this optional payment schedule is only meant to benefit ongoing, solvent businesses, which might face financial peril if they were bound to fund the entire wind-up deficit in one single payment.[33]

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28 The Superintendent is even empowered to declare a pension plan terminated when the employer has been declared bankrupt or where the employer has discontinued all or a substantial portion of its business: see *NLPBA*, at sections 59(b) and (c); see also Ari Kaplan and Mitch Frazer, *Pension Law* (2nd ed: 2013), at p. 539 ("Kaplan and Frazer, *Pension Law*").

29 *Reference re Section 32 of the Pension Benefits Act*, *1997*, 2018 NLCA 1, at paras. 21, 25-26.

30 *Pension Benefits Act Regulations*, NLR 114/96, at section 25.1(2).

31 *Reference re Section 32 of the Pension Benefits Act*, *1997*, 2018 NLCA 1, at para. 26.

32 Kaplan and Frazer, *Pension Law*, *supra* note 26, at p. 538.

33 *Indalex Limited (Re)*, 2011 ONCA 265*,* at para. 103; the Ontario Court of Appeal's analysis on this point was affirmed on appeal by Deschamps J. for a majority of the Supreme Court of Canada in *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271.

28. Where the employer is *already* insolvent and is being liquidated, there is simply no reason to spread these funding payments over a five-year period. It is commonly accepted that courts may "read down"[34] over-inclusive legislation or regulation in order to avoid such absurdities and to only give effect to the intended legislative or regulatory purpose.[35] Consistent with these accepted principles of statutory interpretation, this optional payment schedule set out in the *Regulations* only applies to solvent employers. For an insolvent employer in the process of being liquidated, the full wind-up deficit clearly becomes "due" immediately on termination. *Even for solvent employers*, the full wind-up deficit could be said to be "due" upon termination, even though employers may benefit from an optional five-year schedule to fund those amounts.[36]

B. The CCAA Parties were liquidated during the present CCAA Proceedings, triggering the deemed trust set out in subsection 32(2) of the *NLPBA*

29. Even though the CCAA was conceived as a vehicle to restructure insolvent companies, liquidating CCAAs are now commonplace.[37] By one estimate, 1/3 of all CCAA proceedings concluded between 2002-2012 resulted in a liquidation of the debtor.[38]

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34 In this context, "reading down" refers to interpreting the text of legislation or regulation as if it contained additional qualifying words, limiting the scope of the rules set out therein. See Ruth Sullivan, *Construction of Statutes*, *supra* note 20, at pp. 195-196.

35 Sullivan, *Construction of Statutes*, *supra* note 19, at pp. 195-196; Ruth Sullivan, "Statutory Interpretation in Canada: The Legacy of Elmer Driedger" (Online), pp. 6-8; Ruth Sullivan, "Statutory Interpretation in the Supreme Court of Canada", (1998-1999) 30:2 Ottawa Law Review 175, at pp. 199-200; for examples, see *Krayzel Corp. v. Equitable Trust Co.*, [2016] 1 S.C.R. 273, 2016 SCC 18; *Apotex Inc. v. Merck & Co. Inc.*, [2010] 2 F.C.R. 389, at paras. 88-89 (FCA); *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141; *Re Vabalis,* (1983) 2 DLR (4th) 382 (Ont C.A.); *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727.

36 For the reasons set out in *Reference re Section 32 of the Pension Benefits Act*, *1997*, 2018 NLCA 1, at paras. 21-24, and 26.

37 See Alfonso Nocilla, "Is 'Corporate Rescue' Working in Canada?" (2012), 53 Can. Bus. L.J. 382, at p. 385; Roderick Wood, "Rescue and Liquidation in Restructuring Law" (2013) 53 CBLJ 307, at pp. 410 and ff.; Alfonso Nocilla, "Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36", (2012) 52 CBLJ 226; *Puratone et al. (Re),* 2013 MBQB 171, at para. 20; *Target Canada Co. (Re)*, 2015 ONSC 303, paras. 32-33; *Aveos Fleet Performance Inc. (Re)*, 2012 QCCS 6796, at para. 50.

38 Alfonso Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada" (2014) 56 CBLJ 73, at p. 8.

30. During the course of the present proceedings, the Wabush CCAA Parties have sold substantially all of their assets on a piece-meal basis to a variety of third parties,[39] and even the Monitor now accepts that this a "liquidating CCAA".[40]

31. The deemed trust set out in subsection 32(2) of the *NLPBA* is triggered "[i]n the event of any liquidation, assignment or bankruptcy" of the employer [emphasis added]. An employer's liquidation during CCAA proceedings naturally falls within this reference to "any liquidation".[41] Interpreting identical language, the Supreme Court judged that there was "no reason not to give the word 'liquidation' its wide meaning in usual language".[42]

32. This interpretation is supported by the legislature's underlying objective. In a typical bankruptcy, subsection 32(2) is intended to protect pensioners against the risk of being left destitute when their former employer is liquidated and the proceeds are distributed to other creditors. Even the buyers of going concern businesses rarely – if ever – assume the former employer's pension liabilities.[43] This is the very same risk pensioners face in a CCAA liquidation. If the provincial legislature intended for this protection in a bankruptcy liquidation, it must have also intended for this protection in a CCAA liquidation.

33. The Monitor argues that an employer being liquidated in a CCAA proceeding is not an "estate in liquidation". Judged from the perspective of the legislation's underlying

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39 CCAA Judgment, at paras. 160 and 172.

40 This term has now become part of insolvency law's lexicon. See CCAA Judgment, at para. 160, and the Brief of the Incidental Appellants FTI Consulting Canada Inc., at para. 157.

41 The term liquidation is commonly defined as the sale of all or nearly all of a debtor's assets "on a piece-meal or going concern basis to a third party": Karma Dolkar, "Re-Thinking Rescue: a Critical Examination of CCAA Liquidating Plans" (2011) 27 Banking & Finance Law Review 111, at p. 2, citing Janis Sarra, *Creditors Rights and the Public Interest* (2003), at p. 31; see also *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 12; *Dauphin Plains v. Xyloid Industries Ltd. and the Queen*, [1980] 1 S.C.R. 1182, at pp. 1200-1201; Bryan Garner, ed., *Black's Law Dictionary*, (7th ed.: 1999), at pp. 941-942; Hubert Reid, Ad.E., *Dictionnaire de Droit Québécois et Canadien* (4e éd.: 2010), at pp. 374-375.

42 *Dauphin Plains v. Xyloid Industries Ltd. and the Queen*, [1980] 1 S.C.R. 1182, at pp. 1200-1201.

43 Kaplan and Frazer, *Pension Law*, *supra* note 26, at p. 536.

purpose, this is a distinction without a difference: the risk to pensioners is the same regardless of whether the debtor remains in possession of its assets, or whether they are held by a trustee or receiver. Moreover, as the CCAA Judge rightly noted, while the debtor may remain in possession, the sales process still occurs under the close supervision of the Monitor and the CCAA Court.[44]

34. The Monitor also insists that a "liquidation" cannot be something which is only confirmed in light of subsequent events. In its view, to decide otherwise would create potential uncertainty for other secured creditors. Respectfully, this position fails for several reasons.

35. First, the Monitor's preferred policy outcome does not actually underlie the statute under scrutiny, the *NLPBA*. The Monitor has effectively proposed a heartless trade-off – to compromise pensioners' statutory rights so that a few other secured creditors may have the benefit of absolute certainty about where their claim stands on the order of priority – without any evidence that this is the result desired by the legislature or compelled by the statute's text.

36. Second, the Monitor's position is plainly inconsistent with the Supreme Court of Canada's decision in *Dauphin Plains*.[45] In that case, the Court was tasked with deciding whether the sale of all of the assets of an insolvent debtor by a receiver was a "liquidation, assignment or bankruptcy" capable of triggering the deemed trust set out in the *Income Tax Act*. Much like CCAA proceedings, a receivership does not necessarily result in a liquidation of the debtor's assets, although it had in that case. Pigeon J. concluded that this was sufficient to trigger the deemed trust:

> We are not concerned with a situation where the receivership does not end up in a liquidation, just as when considering a distribution in bankruptcy one is not concerned with the situation where the receiving order is discharged. We are here dealing with

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44 CCAA Judgment, at para. 163.

45 *Dauphin Plains v. Xyloid Industries Ltd. and the Queen*, [1980] 1 S.C.R. 1182.

> a receivership which was completed by the sale and distribution of all the assets of the employer company.
>
> […]
>
> It appears to me that there is no reason not to give the word "liquidation" its wide meaning in usual language.[46]
>
> [Emphasis added]

37. Third, while the Monitor may pretend otherwise for strategic purposes, informed observers always understood exactly what was going to occur during the present proceedings. As was the case in *Re Puratone,* these proceedings "had from the outset all of the earmarks of a liquidation proceeding".[47]

38. It was for this reason that the CCAA Judge concluded that the liquidation began on May 19, 2015,[48] a conclusion which suffers from no palpable or overriding error. Prior to the filing of the CCAA motion, operations at the Wabush Mine had been permanently shut down, and employees were already either terminated or laid off. By that time, the Wabush CCAA Parties had already tried to find buyers or investors for the Wabush Mine, but were unsuccessful.[49] The sale and investor solicitation process that was approved was always principally directed towards soliciting "liquidation proposals". Indeed – to no one's surprise – the Monitor only received offers to purchase discrete assets, and no actual proposals for investment. In the CCAA Judge's own words, "this was a liquidating CCAA from the outset".[50]

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46 *Dauphin Plains v. Xyloid Industries Ltd. and the Queen*, [1980] 1 S.C.R. 1182, at pp. 1200-1201.
47 *Re Puratone et al*, 2013 MBQB 171, at para. 20.
48 CCAA Judgment, at paras. 169-173.
49 *Ibid*.
50 CCAA Judgment, at para. 173.

PARTS IV – CONCLUSIONS

For these reasons, may it please this Honourable Court to:

DISMISS the Incidental Appellant FTI Consulting Canada Inc.'s incidental appeal;

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of April, 2018.

Montréal, April 11, 2018

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PART V – AUTHORITIES

Jurisprudence **Paragraph(s)**

Jurisprudence *(cont'd)* **Paragraph(s)**

Doctrine

Doctrine *(cont'd)* **Paragraph(s)**

ATTESTATION

We undersigned, IMK LLP, do hereby attest that the above Incidental Respondent's Brief does comply with the requirements of the *Civil Practice Regulation of the Court of Appeal*.

Length of time requested for the oral presentation of the arguments: 2 hours.

Montréal, April 11, 2018

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