

500-09-027076-173

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.

N° 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.:**

**ATTORNEY GENERAL OF CANADA, acting on behalf of the
OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS**

**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

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**8568391 CANADA LIMITED
CLIFFS QUÉBEC IRON MINING ULC
WABUSH IRON CO. LIMITED
WABUSH RESOURCES INC.**

**MIS EN CAUSE
(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
SYNDICAT DES MÉTALLOS, SECTION LOCALE 6285
MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL and NEIL JOHNSON
HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR
MORNEAU SHEPELL LTD.
RETRAITE QUÉBEC**

**MIS EN CAUSE
(Mis en cause)**

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INCIDENTAL RESPONDENT'S ARGUMENT

PART I – FACTS

Overview

1. As discussed in the Attorney General of Canada's Appellant's Brief, this appeal is about ensuring that the intention of Parliament to protect certain amounts due to pension plans is fulfilled.
2. The federal *Pension Benefits Standards Act, 1985*¹ deems a federally-regulated employer to have put aside amounts in respect of federally-regulated workers in trust for those workers. In the event that the employer undergoes any "liquidation, assignment or bankruptcy", those amounts are deemed to form no part of the employer's estate.
3. There is little debate that the trial judge correctly reached the factual conclusion that the Wabush Parties intended to and have in fact liquidated the quasi-totality of their assets. A liquidation has occurred. A liquidation having occurred, the conditions of section 8(2) of the *Pension Benefits Standards Act, 1985* are met, and the amounts due in respect of normal and special payments are deemed to be held separate from and form no part of the estate.

Facts

4. The Attorney General of Canada relies on the facts as set out in its Appellant's Brief. The following chronology may also be of assistance:

2014	Wabush Companies cease operations, permanently idling the mining activities and terminating most employees at that time. ²
Jan. 27, 2015	Bloom Lake Companies are granted protection under the CCAA by an initial order of Justice Hamilton. ³

¹ RSC 1985, c 32 (2nd Supp) ("*PBSA*").

² **Joint Schedules of the parties in support of the proceeding in appeal (hereinafter "JS"), Vol 1, pp 2, 3, 34**, Judgment on appeal at paras 2, 3, 4 and 170.

³ **JS Vol 1, p 520**, Initial Order at para 6.

May 19, 2015	Wabush Companies file Motion for Issuance of an Initial Order. ⁴ Sale and Investor Solicitation Procedures approved. ⁵
May 20, 2015	Wabush Companies are granted protection under the CCAA by the Initial Order of Justice Hamilton of the Quebec Superior Court (the "trial judge"). ⁶
June 26, 2015	Wabush Companies sought and obtained an order of the Superior Court suspending special payments and annual lump sum "catch-up" payments to the two pension plans. ⁷
Dec. 16, 2015	Pension plans are terminated by the federal and provincial regulators. ⁸
Sept. 20, 2016	Monitor files a motion seeking directions in respect of various issues related to the pension claims.
June 2017:	Hearing of amended motion for directions. ⁹

PART II – ISSUES IN DISPUTE

5. The Attorney General of Canada addresses six issues¹⁰ in the present brief:
- I. Preliminary questions: The need for leave to file an incidental appeal, and the role of the Monitor
 - II. Question 10: If deemed trusts under either *NLPBA* or *PBSA*¹¹ are operative and enforceable in CCAA proceedings, did the CCAA Judge err in holding that

⁴ **JS Vol 2, pp 647-685.**

⁵ This Process was initially approved for the Bloom Lake Companies and was approved for the Wabush Companies *nunc pro tunc*: **JS Vol 1, p 514, Comeback Order**, see also **JS Vol 2, p 674**, Motion for Initial Order at para 195.

⁶ **JS, Vol 2, p 518**, Initial Order.

⁷ **JS, Vol 1, p 4**, Judgment on appeal, at para 8; **JS, Vol 2, pp 363-392, esp. 383-388**, Suspension Order dated June 26, 2015.

⁸ **JS, Vol 1, p 4**, Judgment on appeal, at para 9; **JS, Vol 5, pp 1863-1866**, R-13, Termination letters of NL; **JS, Vol 6, pp 1867-1870**, R-14, Termination letter of OSFI.

⁹ **JS, Vol 1, p 2**, Judgment on appeal, at para 1; **JS, Vol 2, p 544**, Monitor's Amended Motion for directions with respect to pension claims dated Apr. 13, 2017.

¹⁰ The questions are reproduced from the table set out in **JS, Vol 1, pp 49ff.**

¹¹ In Questions 10 through 15, the Attorney General addresses only issues relating to the federal pension benefits legislation.

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- a liquidation within the meaning of Section 32 NLPBA and Section 9 *PBSA* occurred in the present Wabush *CCAA* Proceedings?
- III. Question 11: 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 had taken place as of the *CCAA* filing of the Wabush Parties, i.e. May 19, 2015?
- IV. Question 12: If deemed trusts under either the *NLPBA* or *PBSA* are operative and enforceable in *CCAA* proceedings and a liquidation is found to have occurred, but only after the *CCAA* filing, should the Court of Appeal answer the question left open by the *CCAA* Judge as to whether the triggering event giving rise to the deemed trusts must occur prior to the *CCAA* initial order to be effective?
- V. Question 14: If the deemed trust under the *PBSA* is enforceable and operative in *CCAA* proceedings, should the Court of Appeal determine to which assets (or proceeds thereof) can such deemed trust attach?
- VI. Question 15: If a deemed trust (or lien and charge) arising under either the *SPPA*, *PBSA*, or *NLPBA* is enforceable and operative in *CCAA* proceedings and attaches to assets located in Quebec, should the Court of Appeal answer the question left open by the *CCAA* Judge as to whether the prior claim of the City of Sept-Îles takes priority over any such deemed trust (or lien and charge), whether preexisting or not?
6. The parties other than the Attorney General of Canada seek this Court's views on an array of constitutional questions. None of the constitutional questions before this Court have been the object of a Notice of Constitutional Question.¹² In any case, the present brief of the Respondent on cross-appeal is filed in response to the Monitor's cross-appeal to the Attorney General of Canada's main appeal, in which these

¹² *Code of Civil Procedure*, CQLR c 25.01, s 76; *Guindon v Canada*, 2015 SCC 41 at para 19, *Doucet c Ville de Saint-Eustache*, 2018 QCCA 282 at paras 29-30.

questions are not raised.¹³ The Attorney General of Canada reserves its right to address these issues in its oral argument.

PART III – SUBMISSIONS

I. Preliminary questions

The need for a cross-appeal

7. To the extent that a cross-appeal is required, the ordinary rules for leave apply to appeals and cross-appeals without distinction.¹⁴ Thus a cross-appeal on an issue arising from the present case requires leave of this Court.

The role of the Monitor

8. The role of a monitor is prescribed by law: it is to monitor the company's business and financial affairs.¹⁵
9. A monitor can seek the Court's advice as to a legal issue that arises in the course of its duties. Moreover, the monitor's duty includes to "attend court proceedings held under this Act that relate to the company ... if the monitor considers that his or her attendance is necessary for the fulfilment of his or her duties or functions", those duties and functions being set out at section 23 of the *Companies' Creditors Arrangement Act (CCAA)*.¹⁶

¹³ File number 500-09-027076-173.

¹⁴ *Union des consommateurs c Magasins Best Buy Itée*, 2018 QCCA 445 at paras 35 -38.

¹⁵ *Companies' Creditors Arrangement Act*, RSC 1985 c C-36 s 11.7(1) (CCAA).

¹⁶ *Ibid* at s 23(1) g).

10. Before the Court, the monitor's role is that of an officer of the court¹⁷ and of an impartial and neutral trustee of the remaining assets, acting in the best interests of all stakeholders.¹⁸
11. In its Respondent's brief in the present appeal, the Monitor argues vigorously against credible legal appeals brought by the pension claimants and by regulatory bodies, and appears to advocate on behalf of certain other stakeholders.¹⁹
12. The participation of a monitor as an advocate for certain creditors/stakeholders over others on purely legal issues would be in keeping neither with its statutory role nor with the interests of justice. Many of the persons represented before the Court in this file are ordinary Canadians whose livelihoods and retirement savings are in jeopardy. It is essential for the interests of justice that the procedure and outcome be and be perceived to be fair. Such a perception will not be maintained if the Monitor, trusted with a duty of impartiality and neutrality, is seen to be making legal arguments on behalf of a particular position.

The expertise that the monitor brings to the proceedings is financial expertise, not legal expertise. Even where the monitor has retained legal expertise, its role is not to become the advocate of the debtor corporation or any other party. This kind of legal advocacy can lead to failed confidence in the integrity of the system.²⁰

13. If leave is required for the Monitor's arguments, the preceding comments should be taken into account. In any case, in the interests of justice and of confidence in the

¹⁷ Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Carswell, 2013) p 587 (Sarra); See also *Fairview Industries Ltd. et al (Re)* (1991), 11 CBR (3d) 43, 109 NSR (2d) 12 (TD) at para 75; *Siscoe & Savoie v Royal Bank of Canada* (1994), 29 CBR (3d) 1 (NBCA) at para 28, leave to appeal refused (1995), 32 CBR (3d) 179 (SCC).

¹⁸ Sarra, *ibid*, at pp 587 and 590. See also *Re Royal Oak Mines Inc.* (1999), 11 CBR (4th) 122 (Ont. Gen. Div. [Commercial List]), [1999] OJ N° 13 at para 6.

¹⁹ **Respondent's Brief (hereinafter "Monitor's Brief")**, at paras 79, 80, 121, 158, 159, 174, 192; see also paras 52, 54, 110, 124.

²⁰ Sarra, *supra* note 17 at p 588.

integrity of the system, this Court should not endorse the Monitor's approach to this file.

II. Question 10: If deemed trusts under either *NLPBA* or *PBSA*²¹ 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 9 *PBSA* occurred in the present Wabush *CCAA* Proceedings?

14. This question raises two issues: first, the meaning of "liquidation" within the relevant provisions and second, a factual analysis as to whether a "liquidation" occurred.

The meaning of "liquidation" is a question of statutory interpretation

15. The triggering event for the application of section 8(2) of the *Pension Benefits Standards Act, 1985 (PBSA)* is the "event of any liquidation, assignment or bankruptcy of an employer". The trial judge correctly concluded that the word "liquidation" should not be given a restrictive interpretation: the word does not refer to a particular statutory scheme for liquidation and certainly does not refer only to situations arising under the *Bankruptcy and Insolvency Act* or the *Canadian Business Corporations Act*.²² "Liquidation" must include a disposal of assets such as the one that has occurred in the present case.
16. The Monitor's position that the judge erred and that the word "liquidation" in subsection 8(2) of the *PBSA* should only apply where the totality of the employer's assets vest with a third-party officer tasked with their realization is not supported by subsection 8(2). Subsection 8(2) reads as follows:

<p>(2) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (1) is deemed to be held in trust shall be deemed to be</p>	<p>(2) En cas de <u>liquidation, de cession des biens ou de faillite</u> de l'employeur, un montant correspondant à celui censé détenu en fiducie, au titre du paragraphe (1), est réputé</p>
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²¹ In Questions 10 through 15, the Attorney General addresses only issues relating to the federal pension benefits legislation.

²² **JS Vol 1, p 33**, Judgment on Appeal at para 161.

<p>separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate.</p>	<p>ne pas faire partie de la masse des biens assujettis à la procédure en cause, que l'employeur ait ou non gardé ce montant séparément de ceux qui lui appartiennent ou des actifs de la masse.</p>
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[our emphasis]

17. As previously discussed in the Attorney General of Canada's Appellant's brief at paragraphs 39 and following,²³ subsection 8(2), like other aspects of the *PBSA*, provides a minimal level of protection to pension plans without imposing an excessive burden on employers. This protection attaches to amounts due to pension plans in contexts in which those amounts ought to be kept separate but are not. As written by Parliament, these contexts include events of "liquidation, assignment or bankruptcy". Given the overall aims of the *PBSA* to provide a minimum level of protection for the public interest in stable and reliable pension benefits, these terms cannot be read restrictively.²⁴ This is all the more confirmed by Parliament's choice to precede these terms with the word "any".
18. Though the Monitor favours²⁵ an interpretation of "liquidation" as "a mechanism whereby the totality of the employer's assets vest with a third-party officer tasked with their realization", there is no basis in the ordinary sense of the word, nor in the context of the *PBSA*, to read down the word "liquidation" to such a specific meaning. Nor does "liquidation" require that the employer no longer be a going concern at all, as suggests the Monitor,²⁶ though that is certainly a relevant indicator. Had

²³ File no. 500-09-027076-173.

²⁴ *Interpretation Act* RSC 1985, c I-21, ss 10, 12; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, Ont: LexisNexis, 2014) at p 1.

²⁵ **Monitor's Brief**, at para 162.

²⁶ **Monitor's Brief**, at para 165.

Parliament intended a restrictive meaning, it would surely not have opted simply for the words “any liquidation”.

19. Similarly, the premise that these words refer to specifically protection under other federal laws must be rejected. When Parliament wishes to refer in one act of Parliament to another act of Parliament, it does so.²⁷ Parliament is demonstrably able to refer in the *PBSA* to a situation in which an employer is subject to proceedings under the *CCAA* or the *Bankruptcy and Insolvency Act* when it wishes to do so.²⁸
20. The Monitor's argument that the word “liquidation” used in subsection 8(2) of the *PBSA* must be interpreted as essentially a synonym for “assignment” and “bankruptcy” contradicts the rules of statutory interpretation and cannot be accepted. The law is always speaking,²⁹ the use of three words, “liquidation, assignment, or bankruptcy” expresses a legislative intent to cover three distinct circumstances. The use of “or” in this clause makes this clear.
21. As such, the word “liquidation” must be given an ordinary and unrestrictive meaning. Since the purpose of this provision is to protect amounts owed but not remitted to the pension plan, “liquidation” must include a disposal of assets such as the one that has occurred in the present case.³⁰ Trial judges are perfectly adept at making determinations of fact such as whether or not such an event has occurred, and, like any other determination of fact, can be called upon to reach this conclusion after the event has taken place.³¹

²⁷ See for example *BIA*, s 81.5.

²⁸ See for example *PBSA* s 29.07(3)(b).

²⁹ *Interpretation Act*, *supra*, s 10.

³⁰ See for example, *Davey v Gibson*, [1930] 65 OLR 379 at para 6.

³¹ See **Monitor's Brief**, at para 161.

The CCAA Judge was correct to conclude that a liquidation occurred in this case

22. The CCAA Judge concluded that “[i]t is clear in the present matter that the Wabush Parties have liquidated their assets. With the sale of the Wabush mine in June, the Wabush Parties have sold all or substantially all of their assets.”³²
23. The Monitor uses the term “liquidating CCAA” and does not contest the finding that the Wabush Parties sold the quasi-totality of their assets.³³ Nor does it clearly oppose the characterization of this sale as a liquidation.
24. These characterizations are factually correct and supported by the record. The motion for issuance of an initial order specifically mentions that the debtors had ceased operations in Canada.³⁴ The operations of the companies had been discontinued and the employees terminated or laid off in 2014,³⁵ prior to the filing of the CCAA motions in May, 2015. From the start of the process in May 2015, the debtors said they intended to liquidate their assets;³⁶ in fact, the first item in the debtors’ objectives in filing for an Initial Order mentions a Sale and Investor Solicitation Process.³⁷
25. The Monitor’s principal argument against a finding that a liquidation has occurred relates to the use of the word “estate” in subsection 8(2). The Monitor suggest that “estate” in subsection 8(2) must refer to an estate in the hands of a third party such as a trustee. Without deciding this point, the trial judge noted that while the debtor remains in possession of his assets, there is a court-appointed monitor and the process is under the supervision of the court, making it akin to an estate in assignment or bankruptcy.³⁸

³² **JS Vol 1, p 33**, Judgment on Appeal at para 160.

³³ **Monitor’s Brief**, at para 157.

³⁴ **JS Vol 2, pp 657, 659, 660**, *Motion for the Issuance of an Initial Order* at paras 76-77, 89, 90, 95.

³⁵ **JS Vol 1, p 2**, Judgment on Appeal at para 3.

³⁶ **JS Vol 2, pp 653, 657, 674**, *Motion for the Issuance of an Initial Order*, see for example, paras 28(c), 69, 195(a), 196.

³⁷ **JS Vol 2, p 676**, *Motion for the Issuance of an Initial Order* at para 216.

³⁸ *Ibid* at **p 33**, para 163.

26. In any case, the ordinary use of the word *estate* does not require the presence of or the vesting in a third party.³⁹ Indeed, both the Monitor and the Wabush Parties refer to the Wabush Parties' estate.⁴⁰
27. It should be emphasized that this word is not used by Parliament in describing the triggering event of "any liquidation, assignment or bankruptcy" but rather to explain from what the deemed trust is deemed to be kept separate. As such, in whose hands the estate lies cannot be determinative of the existence of any liquidation event.
28. The trial judge did not err in concluding that a liquidation event for the purposes of subsection 8(2) of the *PBSA* occurred in this file.

III. Question 11: 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 had taken place as of the *CCAA* filing of the Wabush Parties, i.e. May 19, 2015?

29. The trial judge found that a liquidation occurred as of May 19, 2015.
30. This determination is a question of fact. The applicable standard of review is for the trial judge to have made a palpable and overriding error. The Attorney General of Canada submits that said determination contains no such error, and in fact that the Monitor has not seriously alleged that such an error was made.
31. As noted above, most, if not all, of the employees of the Wabush Parties were already terminated in 2014. The Wabush Parties' operations had already ceased. In January 2015, the original Bloom Lake Initial Order provided that the Bloom Lake debtors could liquidate their assets⁴¹ and on April 17, 2015, the trial judge issued the *Sale and Investor Solicitation Process Order*,⁴² granting a motion that would lead

³⁹ "Estate", John A. Yogis, *Canadian Law Dictionary*, 5th ed, (USA: Barrons, 2003); Bryan A. Garned, ed., *Black's Law Dictionary*, 9th ed, (Toronto: Thomson Reuters, 2009).

⁴⁰ E.g., **JS Vol 2, p 612**, Motion for Approval of Allocation Methodology, May 19, 2017, par 9; **JS Vol 2, p 674**, Motion for the Issuance of an Initial Order, May 19, 2015 para 198.

⁴¹ *Arrangement relatif à Bloom Lake, g.p.l.*, 2015 QCCS 169, subpara 33(b).

⁴² *In the matter of Bloom Lake* (17 April 2015), Montréal, 500-11-048114-157 (CS) (unreported).

to the sale of “substantially all the property, assets and undertakings [...]”⁴³, including interests in the Wabush Parties' assets.

32. The Wabush Parties' application for an initial order demonstrated an intent to liquidate, subject to the approval of the court. The May 19, 2015 Motion for an Initial Order expressly referred to the intent to include the Wabush Parties in the sale of assets.⁴⁴
33. It is not contested that as of May 19, 2015, the date of the Initial Order, the Wabush Parties had taken steps intended to lead to the liquidation, or selling off, of the quasi-totality of their assets.
34. The facts subsequent to May 19, 2015 served to confirm that the order rendered on that date was in fact the beginning of a liquidation, or selling off, of the quasi-totality of their assets.
35. It is true, as the Monitor emphasizes⁴⁵ and the trial judge recognized,⁴⁶ that it may be difficult in some cases to pinpoint the date of the liquidation. But the facts render the Monitor's argument in this regard moot in the present case: as the trial judge noted, “[i]n the present matter, the date that the liquidation began is fairly clear.”⁴⁷
36. The fact that the Wabush Parties' boards remained in place, as reported by the Monitor at paragraph 165 is irrelevant. They remain in place to approve the sale of assets, but their existence is not indicative that a liquidation of assets has not occurred.
37. Similarly, the date of the termination of the pension plans⁴⁸ is not relevant to the determination of the date of the employers' liquidation. As it appears from the termination letter, OSFI terminated the plan primarily on the basis of the pension

⁴³ **JS Vol 2, pp 620ff**, Motion for the issuance of an order in respect of the Wabush CCAA parties approving a sale and investor solicitation process, dated May 29, 2015 at para 40.

⁴⁴ *Supra* note 37.

⁴⁵ **Monitor's Brief**, at para 178.

⁴⁶ **JS Vol 1, p 34**, Judgment on Appeal at para 168.

⁴⁷ *Ibid* at para 169.

⁴⁸ **Monitor's Brief**, at para 177.

plan's failure to meet prescribed tests and standards for solvency.⁴⁹ The conditions for the termination of a plan are connected to the solvency and the administration of the pension plan, and not necessarily to the solvency or administration of the employer.

38. The fact that the entire liquidation did not occur on a single day cannot be determinative of whether or not an amount is deemed to be kept separate. Nor is it problematic that a finding of whether or not one is in a "liquidation" may be made retroactively.⁵⁰ Findings of fact usually are made by courts with the benefit of hindsight. No practical impediment exists, as the proceeds of sale are still available.

39. In summary, the trial judge was correct to rule that the liquidation occurred on May 19, 2015.

IV. Question 12: If deemed trusts under either the *NLPBA* or *PBSA* are operative and enforceable in *CCAA* proceedings and a liquidation is found to have occurred, but only after the *CCAA* filing, should the Court of Appeal answer the question left open by the *CCAA* Judge as to whether the triggering event giving rise to the deemed trusts must occur prior to the *CCAA* initial order to be effective?

40. As set out in the Attorney General of Canada's Appellant's Brief, the *PBSA* deemed trust is operative and enforceable in *CCAA* proceedings, and as set out above, the separation of the deemed trust amounts from the estate is in fact triggered by a liquidation in this case on the date of the initial order. The Court need not respond to this question.

41. In the alternative, the Attorney General of Canada takes the position that the "temporal question" raised by the Monitor cannot affect the effectiveness of *PBSA* deemed trusts.

⁴⁹ **JS Vol 6, pp 1867-1868**, R-14, *Termination Notice by OSFI, December 16, 2015*.

⁵⁰ **Monitor's Brief**, at para 156.

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42. There is no additional qualification in subsection 8(2) that a liquidation must occur before or after a *CCAA* initial filing order in order for the deemed trust to be effective.
 43. The protection afforded by Parliament in the *PBSA* is specific, explicit, and exceptional. Not only does it create a deemed trust, but it deems that amount to be held separate from the employer's estate. What matters for the purposes of the *PBSA* is the presence of a liquidation. As soon as an employer disposes of its assets outside the normal course of its operations, the activity is a liquidation within the meaning of subsection 8(2) and the deemed separation of the trust amount from the estate begins. This is the very essence of the protection under subsection 8(2).
 44. Even if a trigger, such as a liquidation, were to arise post-filing, the deemed trust itself already existed. The trigger would not appear to affect priorities or constitute differential treatment.

Status quo

45. Contrary to the Cross-Appellants' arguments, the application of subsection 8(2) discussed above does not change the status quo amongst the creditors.
46. Pursuant to subsection 8(1) of the *PBSA*, a deemed trust always exists in respect of prescribed amounts accrued to a pension plan. These amounts are known or knowable to all stakeholders. On liquidation, the separation of these amounts from the estate is confirmed. The status quo, that is, that amounts owing to the pension plans are not subject to claims of other creditors, is maintained.
47. This position is coherent from a policy perspective as well. The amounts owing to the pension plans are known, predictable, and protected. In such a situation, all parties would have a strong incentive to work towards the goal of proposing a plan that would be acceptable to all.

V. Question 14: If the deemed trust under the *PBSA* is enforceable and operative in *CCAA* proceedings, should the Court of Appeal determine to which assets (or proceeds thereof) can such deemed trust attach?

48. The Attorney General of Canada submits that these questions should be returned to the trial judge for determination. This issue was not explicitly before the trial judge and should be addressed by him.

49. In the alternative, with respect to the *PBSA*, it is not necessary to answer this question exhaustively. *At a minimum*, the protection accorded under the *PBSA* in relation to employees of the Federal Works would attach to assets of the Federal Works, that is, to the assets of the railways. The proceeds of sale of the assets of the railways are sufficient to meet the obligations created by the *PBSA*.

VI. Question 15: If a deemed trust (or lien and charge) arising under either the *SPPA*, *PBSA*, or *NLPBA* is enforceable and operative in *CCAA* proceedings and attaches to assets located in Quebec, should the Court of Appeal answer the question left open by the *CCAA* Judge as to whether the prior claim of the City of Sept-Îles takes priority over any such deemed trust (or lien and charge), whether preexisting or not?

50. This issue, raised by the City of Sept-Îles, a creditor, seeks a declaratory judgment by the Court of Appeal that would set out the order of priority as between the pension claims and the claim of Sept-Îles.

51. The Attorney General of Canada submits that these questions, if necessary, should be placed by motion before the trial judge for determination. This issue was not properly before the trial judge or the Court of Appeal.

52. The present appeal originates with the Monitor's *Motion for directions with respect to pension claims*. The conclusions sought by that motion were set out in a draft order.⁵¹ The issue of Sept-Îles' priority was not raised by the Motion for directions.

⁵¹ **JS Vol 5, p 1687**, R-3, Draft Order.

The Motion for directions was amended on April 13, 2017 but no amendment in relation to this issue was made.⁵²

53. The Question 15 issue was raised in Sept-Îles' plan of argument filed on June 14, 2017, two weeks before the hearing before the trial judge, and the same date on which the plans of argument of all other parties were due. At the hearing, parties put forward the position that the court was not seized of the matter raised by Sept-Îles. The trial judge did not include it in the list of issues before him,⁵³ and based on other findings, did not need to address the issue.
54. The priority of Sept-Îles claim was legally and factually different than the other issues raised before the trial judge. There was no adversarial debate on its merits and no judgment was rendered on it. Raising it on appeal is akin to raising a new issue on appeal.⁵⁴ Sept-Îles has not explained why it would be in the interests of justice for the Court of Appeal to rule on this issue rather than to remit it to the trial judge who is empowered by the CCAA to answer any legal question arising from this case.
55. The Attorney General of Canada submits that requiring this issue to be raised before the trial judge would allow for a full and adversarial debate. In the alternative, the Attorney General of Canada notes that Sept-Îles relies in its arguments upon *Indalex* and arguments related to the application or operation of provincial law. No basis is proposed by Sept-Îles on which to oust the clear intention of Parliament in the *PBSA*.

PART IV – CONCLUSIONS

56. The Attorney General of Canada submits that questions 10, 11, 12, 14 and 15 should be answered as follows, with respect to the *Pension Benefits Standards Act, 1985*:

⁵² **JS Vol 2, pp 566, 567, 572**, Amended Motion for Directions with Respect to Pension claims, para 70, 76, Amended list of exhibits.

⁵³ **JS Vol 1, p 7**, Judgment on appeal at para 27.

⁵⁴ *Quan v Cusson*, 2009 SCC 62 at para 38.

(10) If deemed trusts under either *NLPBA* or *PBSA*⁵⁵ 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 9 *PBSA* occurred in the present Wabush *CCAA* Proceedings?

No. The trial judge did not err in concluding that a liquidation within the meaning of section 8 of the *Pension Benefits Standards Act, 1985*, occurred.

(11) 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 had taken place as of the *CCAA* filing of the Wabush Parties, i.e. May 19, 2015?

No. The trial judge did not err in concluding that the liquidation occurred as of May 19, 2015.

(12) If deemed trusts under either the *NLPBA* or *PBSA* are operative and enforceable in *CCAA* proceedings and a liquidation is found to have occurred, but only after the *CCAA* filing, should the Court of Appeal answer the question left open by the *CCAA* Judge as to whether the triggering event giving rise to the deemed trusts must occur prior to the *CCAA* initial order to be effective?

No. The Court of Appeal need not answer this question. In the alternative, the moment of the liquidation event is not determinative of the effectiveness of the deemed trust created by section 8 of the *Pension Benefits Standards Act, 1985*.

(14) If the deemed trust under the *PBSA* is enforceable and operative in *CCAA* proceedings, should the Court of Appeal determine to which assets (or proceeds thereof) can such deemed trust attach?

⁵⁵ In Questions 10 through 15, the Attorney General addresses only issues relating to the federal pension benefits legislation.

No. This question should be submitted by motion to the trial judge for determination. In the alternative, the *PBSA* deemed trust attaches at least to the assets (or proceeds thereof) of the Federal Works.

(15) If a deemed trust (or lien and charge) arising under either the *SPPA*, *PBSA*, or *NLPBA* is enforceable and operative in *CCAA* proceedings and attaches to assets located in Quebec, should the Court of Appeal answer the question left open by the *CCAA* Judge as to whether the prior claim of the City of Sept-Îles takes priority over any such deemed trust (or lien and charge), whether preexisting or not?

No. These questions should be returned to the trial judge for determination.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

DISMISS the Monitor's cross appeal;

DISMISS the City of Sept-Îles' cross appeal.

Montréal, April 11th, 2018

Attorney General of Canada

**Attorney General of Canada
Per M^{es} Michelle Kellam and Antoine Lippé
Counsel for the Attorney General of
Canada, acting on behalf of the Office of
the Superintendent of Financial
Institutions**

PART V – AUTHORITIES**Jurisprudence****Paragraph(s)**

<i>Guindon v Canada</i> , 2015 SCC 41	6
<i>Doucet c Ville de Saint-Eustache</i> , 2018 QCCA 282	6
<i>Union des consommateurs c Magasins Best Buy ltée</i> , 2018 QCCA 445	7
<i>Fairview Industries Ltd. et al (Re)</i> (1991), 11 CBR (3d) 43, 109 NSR (2d) 12 (TD)	10
<i>Siscoe & Savoir v Royal Bank of Canada</i> (1994), 29 CBR (3d) 1 (NBCA), leave to appeal refused (1995), 32 CBR (3d) 179 (SCC)	10
<i>Re Royal Oak Mines Inc.</i> (1999), 11 CBR (4 th) 122 (Ont. Gen. Div. [Commercial List]), [1999] OJ N° 13	10
<i>Rizzo & Rizzo Shoes Ltd. (Re)</i> , [1998] 1 SCR 27	17
<i>Davey v Gibson</i> , [1930] 65 OLR 379	21
<i>In the matter of Bloom Lake</i> (17 April 2015), Montréal, 500-11-048114-157 (CS)	31
<i>Quan v Cusson</i> , 2009 SCC 62	54

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Sarra, J. P., <i>Rescue! The Companies' Creditors Arrangement Act</i> , 2 nd ed. (Toronto: Carswell, 2013)	10,12
Sullivan, R., <i>Sullivan on the Construction of Statutes</i> , 6 th ed (Markham, Ont: LexisNexis, 2014)	17
Yogis, J. A., <i>Canadian Law Dictionary</i> , 5 th ed, (USA: Barrons, 2003)	26
Garned, B. A., ed., <i>Black's Law Dictionary</i> , 9 th ed, (Toronto: Thomson Reuters, 2009)	26

Attestation

ATTESTATION

We undersigned, Attorney General of Canada, 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: 30 minutes

Montréal, April 11th, 2018

Attorney General of Canada

**Attorney General of Canada
Per M^{es} Michelle Kellam and Antoine Lippé
Counsel for the Attorney General of
Canada, acting on behalf of the Office of
the Superintendent of Financial
Institutions**