500-09-027077-171

Court of Appeal of Québec

Montréal

On appeal from a Judgment of the Superior Court, District of Montréal, rendered on September 11, 2017 by the Honourable Stephen W. Hamilton, J.S.C.

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:*

MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL and NEIL JOHNSON as Representatives of the Salaried / Non-Union Employees and Retirees

APPELLANTS / INCIDENTAL RESPONDENTS
(Mis en cause)

v.

FTI CONSULTING CANADA INC.

RESPONDENT / INCIDENTAL APPELLANT
(Monitor-Petitioner)

-and-

VILLE DE SEPT-ÎLES

MISE EN CAUSE / INCIDENTAL APPELLANT
(Mise en cause)

-and-

INCIDENTAL RESPONDENTS' BRIEF

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Court of Appeal of Québec

Montréal

BLOOM LAKE GENERAL PARTNER LIMITED,
QUINTO MINING CORPORATION,
8568391 CANADA LIMITED,
CLIFFS QUÉBEC IRON MINING ULC,
WABUSH IRON CO. LIMITED,
WABUSH RESOURCES INC.,

MISES 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,
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MISES EN CAUSE –
(Mises en cause)

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CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No. 500-09-027077-171 C.A.
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COURT OF APPEAL

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MISES EN CAUSE –
(Mises en cause)

INCIDENTAL RESPONDENTS' ARGUMENT

PART I – INTRODUCTION

1. This Responding Brief is filed by the Appellants/Incidental Respondents Michael Keeper, Terence Watt, Damien Lebel, and Neil Johnson and all non-union employees and retirees whom they represent (collectively, the "**Salaried Members**") in response to the incidental appeals filed respectively by FTI Consulting Canada Inc., the Monitor in the CCAA proceedings (the "**Monitor**") on March 16, 2018 and Ville de Sept-Îles ("**Sept-Îles**") on March 29, 2018. Capitalized terms not defined herein have the meanings ascribed to them in the Appellant's Main Brief of January 24, 2018.

PART II – ISSUES IN DISPUTE

2. The Salaried Members refer the Court to the summary table of issues included in the Joint Schedules,[1] in which the Monitor and Sept-Îles have articulated the questions raised by their incidental appeals.

PART III – SUBMISSIONS

3. In addition to positions taken in the Appellants' Main Brief of January 24, 2018, the Salaried Members disagree with the following submissions of the Monitor and Sept-Îles:

   (A) the CCAA Judge erred in assuming that the deemed trust under s. 32 of the *Pension Benefits Act*, S.N.L. 1996 Ch. P-4.01, ("**NLPBA**") covers wind-up deficits (Issue # 9);

   (B) the CCAA Judge erred in holding that a "liquidation" has occurred within the meaning of s. 32 NLPBA and s. 8 of the *Pension Benefits Standards Act*, R.S.C., 1985, c. 32 (2nd Supp.) ("**PBSA**") within the Wabush CCAA Proceedings (Issue # 10);

   (C) the CCAA Judge erred in holding that the liquidation triggering the deemed trusts in s. 32 NLPBA and s. 8 PBSA had taken place on the date of the initial CCAA filing, May 19, 2015 (Issue # 11);

   (D) the "triggering event" giving rise to the deemed trust must occur prior to the CCAA Initial Order in order for the deemed trust to be operative (Issue # 12); and

[1] **Joint Schedules ("J.S."), vol. 1, pp. 55 and 60-61.**

(E) the Court of Appeal should answer the question left open by the CCAA Judge as to whether the prior claim of Sept-Îles takes priority over any deemed trust or lien and charge created by pension legislation, pre-existing or not (Issue # 15).

4. The Salaried Members have concerns about the Monitor's positions in these liquidating CCAA proceedings. In this case, all of the funds in the estate belong to the creditors. The only issue is how to distribute those funds. Professor Sarra points out that "the need for the Monitor's impartiality goes to the perception of parties, particularly those parties that are not repeat players in the system, regarding the integrity of the insolvency system".[2] The Monitor's duty is to serve as an independent and impartial officer of the court, but the Monitor in these CCAA proceedings has clearly acted as an adverse party to the Salaried Members and the Union employees.

5. The purported purpose of the Monitor's Amended Motion for Directions with Respect to Pension Claims (the "**Monitor's Motion**")[3] to the CCAA Court below was to seek directions from the CCAA Court with respect to the priority of pension claims filed by the Plan Administrator pursuant to the Claims Procedure Order, and the applicability, scope and priority of statutory pension deemed trusts, under the PBSA, the NLPBA and the SPPA.[4] The Monitor is entitled to present to the CCAA Court its position on the interpretation and application of the relevant deemed trusts, but should refrain from zealously advocating against the Salaried Members and the other appellants in an inter-creditor dispute, and challenging by way of an incidental appeal some of the directions it received from the CCAA Court simply because it does not agree with them. The Monitor may be the Court's eyes and ears with a mandate to assist it in its supervisory role, but it is not an advocate for the debtor company nor any other creditor in this liquidating CCAA process.[5]

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2 Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Thomson Carswell, 2013) p. 588.

3 Amended Motion for Directions with Respect to Pension Claims, **J.S., vol. 2, pp. 544-574** (the "**Monitor's Motion**").

4 Monitor's Motion, **J.S., vol. 2, p. 546**, para. 9.

5 *Winalta Inc. (Re)*, 2011 ABQB 399, para. 68, citing Kevin P. McElcheran, *Commercial Insolvency in Canada* (Markham, Ont.: LexisNexis Butterworths, 2005) p. 236.

Preliminary Questions

6. With respect to the preliminary questions surrounding the *de bene esse* incidental appeals, the Salaried Members submit that an incidental appeal was required for the Monitor and Sept-Îles to obtain conclusions that are additional to, or different from, those contained in the judgment *a quo*, as they are seeking in this case.

7. The Salaried Members do not take position on the question of whether it was necessary, from a procedural standpoint, for the Monitor and Sept-Îles to seek leave to bring their respective incidental appeals, or whether leave should be granted, deferring to the Court of Appeal on those procedural issues.

8. However, they respectfully submit that it is highly unusual to allow the Monitor as an officer of the Court that was appointed by the CCAA Court with the task to assist it, to bring an appeal seeking to attack many aspects of the directives it has obtained in its own motion, including findings of fact made by the CCAA Judge.

A. The deemed trust and the lien and charge under s. 32 of the NLPBA cover the entire wind-up deficit, based on the recent determination of Newfoundland and Labrador's own Court of Appeal and the broad and remedial purpose of pension legislation

9. While the Salaried Members argued in first instance that the CCAA Judge should wait for the Reference decision to be rendered by the Newfoundland and Labrador Court of Appeal (the "**NLCA**") with respect to the interpretation of the NLPBA, and in particular the scope of the deemed trust and of the lien and charge created by the NLPBA, it was the Monitor that insisted that all of the issues should be dealt with by the CCAA Judge without waiting for the judgment of the NLCA.[6] It is disingenuous on the part of the Monitor to now argue that the CCAA Judge erred in assuming that the wind-up deficit of pension plans was covered by the NLPBA deemed trust for the purposes of rendering the judgment *a quo*.

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[6] Hamilton Judgment, **J.S., vol. 1, p. 8**, para. 32.

10. The CCAA Judge's decision to assume that the NLPBA deemed trust covered the wind-up deficit was both reasoned and practical in the circumstances.[7] Most importantly, it was correct in regard to the state of Newfoundland and Labrador law, as the same was subsequently confirmed by the NLCA with extensive reasons in its decision rendered on January 15, 2018 (the "**Newfoundland Reference**"), which specifically ruled on this exact question.[8] The NLCA determined that the only possible interpretation of ss. 32 and 61 NLPBA necessarily leads to the conclusion that the wind-up deficit is covered by the statutory pension deemed trust.

11. This NLCA has answered this question with full reasons, which should be accepted by this Court. In addition, this Honourable Court should defer to the NLCA's determinations in the Newfoundland Reference on the proper interpretation of the provisions of a provincial statute of Newfoundland and Labrador, based on the principle of comity.

12. Comity is the deference and recognition that courts of one jurisdiction give to the law, proceedings and judicial decisions of another jurisdiction. It requires, when there is a real and substantial connection between the defendant and the decision making jurisdiction, that a balance be struck.[9] The purpose of comity was recently confirmed by the Supreme Court of Canada in *Chevron Corp. v. Yaiguaje*:

> As this review of the Court's statements on comity shows, the need to acknowledge and show respect for the legal acts of other states has consistently remained one of the principle's core components. Comity, in this regard, militates in favour of recognition and enforcement. Legitimate judicial acts should be respected and enforced, not sidetracked or ignored.[10]

13. By its incidental appeal, the Monitor is requesting this Honourable Court to disavow the NLCA's determination regarding the scope of the deemed trust under the NLPBA, a Newfoundland and Labrador statute, and to render a judgment that directly contradicts the extensive reasons in the Newfoundland Reference. This is not appropriate.

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7 Hamilton Judgment, **J.S., vol. 1, pp. 13-14**, paras. 56-60.
8 *Reference re Section 32 of the Pension benefits Act, 1997*, 2018 NLCA 1 ["**Newfoundland Reference**"], **J.S. vol. 2, pp. 686.6-686.11**, paras. 11-27.
9 *Anderson v. Anderson*, 2012 ABQB 743, para. 23.
10 *Chevron Corp. v. Yaiguaje*, 2015 SCC 42, para. 53.

14. The law of another province is treated as a question of fact in Quebec. Article 2809 CCQ sets out how the foreign law is proven before the Quebec courts. This may be done, among other means, by expert testimony or by the production of a certificate drawn up by a jurisconsult, or by judicial notice provided it has been pleaded. In this case, the state of the law with respect to the scope of the deemed trust and the lien and charge created by the NLPBA was provided by the highest court in Newfoundland and Labrador, specifically in reference to the factual backdrop of these CCAA Proceedings.

15. Respectfully, the courts in Newfoundland and Labrador, and chiefly the highest court in that province, possess greater expertise in interpreting the NLPBA than do the courts in Québec, and are better qualified to deal with an issue of Newfoundland and Labrador statute law than the courts of Quebec.[11]

16. In the Newfoundland Reference, the NLCA specifically rejected the arguments raised by the Monitor in this case. It did so after a careful exercise in statutory interpretation, following the principles arising from the jurisprudence of the Supreme Court of Canada on the precise issue of the scope of the pension deemed trust (in the Ontario *Pension Benefits Act*), where "benefits conferring legislation" should "be liberally construed so as to advance the benevolent purpose of the legislation."[12]

17. The Monitor exaggerates that the statutory language in the Ontario *Pension Benefits Act* considered in *Indalex*[13] is substantially different from that in the Newfoundland deemed trust legislation. It argues that the payments for the wind-up deficit required to be made pursuant to s. 61(2) NLPBA cannot be considered as "other amounts due under the plan from the employer that have not been remitted to the pension fund",[14] as contemplated by s. 32(1)(c)(ii), notably because s. 25.1(1) of the *Pension Benefits Act Regulations* ("**NLPBA Reg. 114/96**")[15] allows for payment over time. The Monitor is patently incorrect on this point. As was correctly determined by the NLCA:

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[11] The CCAA Judge viewed this as "an obvious proposition": Judgment on the Preliminary Jurisdictional Issue on the Motion for Directions, January 30, 2017, **J.S., vol. 2, p. 351**, para. 43.

[12] *Ruth Sullivan, Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada, 2014) at 509; See also *Rizzo & Rizzo Shoes Ltd.* (Re), [1998] 1 S.C.R. 27, para. 36.

[13] *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 SCR 271 ["***Indalex***"].

[14] Monitor's Brief, para. 149.

[15] *Pension Benefits Act Regulations*, NLR 114/96, **J.S., vol. 4, pp. 1171-1172**.

> The fact that an employer may make payments required under section 61(2) over time does not lead to the conclusion that the amounts are not, in fact, "due to the pension fund" at the date of termination. As explained by Deschamps J. in *Sun Indalex*, liabilities for payments under the pension plan "are completely constituted at the time of the wind up, because no pension entitlements arise after that date" (paragraph 36). While the language used in the Ontario legislation is slightly different from that used in the Newfoundland legislation, the explanation set out by Deschamps J. would apply equally to both.[16]

18. Besides, it is clear that s. 25.1 NLPBA Reg. 114/96, which allows an employer to amortize its wind-up payments for the wind-up deficit over a period of up to five years, is intended to ease cashflow demands for an operating company and obviously does not apply in the case of an insolvent employer that has ceased to carry on any operations and is proceeding with the liquidation and then distribution of the proceeds of all of its assets to its creditors.

19. In its review of the legislative history of ss. 32 and 61 NLPBA, the Monitor attempts to parse out its own version of the legislative intent of the Newfoundland legislator. It refers to the explanations of Minister O'Brien regarding the 2008 amendments to the NLPBA, as referenced at para. 22 of the Newfoundland Reference, to argue that the amendments to s. 61 NLPBA were limited exclusively to funding obligations of the employer and not intended to extend the scope of the deemed trust. This is a direct contradiction of the plain language used by the Minister, who states unequivocally that changes to the NLPBA are to "to make sure that we protect the employees in regard to that pension plan, in its fullest."[17] It also contradicts the interpretation of the NLCA, which cites that quote of the Minister as support for a broad interpretation of the protections provided under the NLPBA.

20. The Monitor ignores the broader context in which pension legislation is situated and reduces the applicable sections of the NLPBA to mere words on a page. The Newfoundland legislature has made it clear that its intention in s. 32 is to promote "increased security of pension benefits".[18]

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[16] Newfoundland Reference, **J.S., vol. 2, p. 686.9**, para. 21.
[17] Newfoundland Reference, **J.S., vol. 2, p. 686.9**, para. 222.
[18] Newfoundland and Labrador, Legislative Assembly, Hansard, 43rd General Assembly, 1st Sess, No 55 (17 December 1996) (Ernie McLean), p. 73.

21. Further, the Monitor's inappropriately technical and narrow approach does not adequately interpret the words of the section. Section 32 NLPBA is expansively drafted. The NLCA is correct in its interpretation of the Newfoundland legislation.

22. Finally, the Salaried Members note that the Monitor has appealed the decision of the NLCA as of right to the Supreme Court of Canada. That appeal is scheduled to be heard in October of this year. The Monitor has therefore asked this Court to make a determination of law, in direct contradiction of the NLCA's decision on the exact same issue, and in the face of an imminent Supreme Court decision that will be binding on this Court. This Court should decline to answer.

B. The CCAA Judge correctly held that a liquidation within the meaning of Section 32 NLPBA and Section 8 PBSA occurred in the present Wabush CCAA Proceedings

23. The issue of whether the Wabush CCAA proceedings constitute a "liquidation" and when the liquidation began for purposes of the PBSA and the NLPBA deemed trusts elicited the most stringent language on the part of the Monitor in its Brief. Rather than accepting the "directions" given to the Monitor by the CCAA Judge, the Monitor reacted like an aggrieved commercial litigant with a financial stake in the outcome. It appears that the Monitor is vigorously disputing this finding on liquidation since it recognizes the likelihood that pension deemed trusts are, in fact, effective in a liquidating CCAA scenario and is determined to continue to try and defeat the statutory deemed trusts.

24. The Monitor's argument that the term "liquidation" should not be given its proper meaning and that the statutory pension deemed trusts should only be triggered when the "employer's assets vest with a third-party officer" would render the deemed trust provisions virtually meaningless when an "insolvent" employer liquidates. The pension legislators could not possibly have intended such an absurd result.

25. The applicable standard of review in respect of a finding of fact made by the CCAA Judge is "palpable and overriding error". However, the Monitor argues that this Court should review the CCAA Judge's determination that a liquidation had occurred on a standard of correctness.[19] It cites no authority for this proposition. The standard of review of

[19] Monitor's Brief, para. 155.

correctness is reserved for questions of pure law, as determined by the Supreme Court of Canada in *Housen v. Nikolaisen*,[20] and this was clearly not a determination of pure law, rather it was a determination of the particular facts surrounding the CCAA proceedings and whether, taken as a whole, these proceedings constitute a liquidation of the employer. However, even if this issue were to be considered to be one of mixed fact and law, the Supreme Court was clear on the standard of review:

> ...Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule, as stated in *Jaegli Enterprises*, *supra*, is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.[21]

26. The Monitor attacks the CCAA Judge's path to his conclusion, and criticizes the CCAA Judge's interpretation of liquidation as being "construed as a vague or subjective notion, the occurrence of which is only confirmed in light of subsequent events and the passage of time, on an accretive basis..."[22] The Monitor is thus attempting to improperly convert what is a clear factual determination into a pure legal question.

27. The Monitor argues that a liquidation that "triggers" the deemed trusts under the PBSA and the NLPBA has not occurred, and raises an alleged inconsistency on the part of the CCAA Judge between the finding *a quo* and his earlier ruling on the Pension Priority Order.[23] In that earlier ruling, the CCAA Judge accepted the advice of the Monitor that a going concern sale was possible and could be achieved through the SISP process and, consequently, determined that the PBSA deemed trust does not prevent the Court from granting priority to a DIP Lender. However, as the CCAA Judge became more exposed to the evidence in this case over time, he re-evaluated his initial assessment and, in the particular facts of the case, to give the word "liquidation" its proper meaning. In para. 160, he concludes, as a pure finding of fact, that: "[i]t is clear in the present matter that the Wabush CCAA parties have liquidated their assets" and that the likely outcome of the

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[20] *Housen v. Nikolaisen*, 2002 SCC 33, paras. 8-12.
[21] *Ibid*, para. 36.
[22] Monitor's Brief, para. 156.
[23] Monitor's Brief, para. 160.

CCAA process was always a piecemeal sale of the assets of the Wabush CCAA Parties in the context of a liquidating CCAA.[24]

28. While the Monitor accepts the concept of a "liquidating CCAA" in its Brief, it does not accept that a liquidating CCAA provides a triggering event that "can be clearly ascertained and situated in time with precision." Once again, the Monitor is adopting contradictory positions. On the importation of the BIA scheme of distribution into the CCAA, the Monitor posits at para. 119 of its Brief that the conclusion of the CCAA Judge importing such a BIA scheme "must be read in the context of these Wabush CCAA Proceedings, where all or substantially all of the debtors' assets have been sold [and] where the CCAA Parties no longer have any going concern to preserve". However, in the case of the application of statutory pension deemed trusts, the Monitor invites this Court to reject "symmetry between the types of insolvency proceedings" by distinguishing between a bankruptcy and a liquidating CCAA and to parse the wording of the pension statutes to deprive them of any practical meaning.[25] However, just as the date of a bankruptcy can be clearly ascertained in time, so can the determination of a liquidating CCAA.

C. The Liquidation "Triggering Event" Occurred on May 19, 2015

29. The Monitor takes particular exception to the finding of the CCAA Judge that "the Wabush CCAA parties sold off all or essentially all of their assets in piecemeal fashion" and baldly asserts that the CCAA Judge made a "patent error".[26] The Monitor purports to demonstrate such alleged patent error by reference to evidence relating to the sale of two components of the Wabush assets to parties with the intent of operating those specific components. However, the CCAA Judge was fully aware of the evidence of those specific sales and nevertheless concluded, as a finding of fact, that the outcome was always the liquidation of the CCAA Parties.

30. The CCAA Judge also references the fact that the SISP contemplated "liquidation proposals" to support his conclusion that the Wabush CCAA was a liquidating CCAA from

[24] Hamilton Judgment, **J.S., vol. 1, p. 33 and 35**, paras. 160 and 172.
[25] Monitor's Brief, para. 171.
[26] Monitor's Brief, paras. 174-175.

the outset. Once again, this cannot constitute a palpable and overriding error that should be overturned by this Court.

31. Finally, the United States parent of the Wabush CCAA Parties, Cliffs Natural Resources Inc. ("**Cliffs**"; recently re-named "**Cleveland Cliffs**"), admitted that this insolvency process was always intended to be a liquidation so it could exit from its eastern Canada mining operations. According to its own press releases, Cliffs began idling operations in Wabush as early as 2014 as part of a planned exit from the Canadian market.[27] As appears from its own statements, the CCAA proceedings were always intended as a mechanism to facilitate this exit, meaning that Cliffs always intended to liquidate its Canadian operations and that there would be no going concern business remaining after the CCAA process.

D. The Deemed Trust is Effective Even if it is Crystallized After the CCAA Initial Order

32. The crystallization of the statutory wind-up deemed trust is not affected by the date of the Initial Order.[28] The deemed trust is effective in the CCAA (subject only to paramountcy), and whether the pension plan was wound up after the date of the Initial Order is irrelevant. The Supreme Court decision in *Indalex* makes clear that the effectiveness of the wind-up deemed trust is to be determined *as of the date of the sale/distribution motion* when there was a dispute over an intended distribution between creditors. The only condition precedent is that the pension plan must be wound up for the wind-up deemed trust to apply. It applies no condition or significance to the date of the CCAA Initial Order for the effectiveness of the wind-up deemed trust:

> Unlike s. 57(3), which provides that the deemed trust protecting employer contributions exists while a plan is ongoing, s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up. This is a choice made by the Ontario legislature. I would not interfere with it. Thus, ***the deemed trust entitlement arises only once the condition precedent of the plan being wound up has been fulfilled. This is true even if it is certain that the plan will***

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[27] *Press Releases by Cliffs Natural Resources*, **J.S., vol. 7, pp. 2306-2314**.

[28] Nor would it be affected by an eventual subsequent bankruptcy: *Her Majesty the Queen v. Callidus Corporation*, 2017 FCA 162 (leave to appeal to the Supreme Court of Canada granted); *Urbancorp Cumberland 2 GP Inc. (Re)*, 2017 ONSC 7156.

> ***be wound up in the future***. ***At the time of the sale***, the Executive Plan was in the process of being, but had not yet been, wound up. Consequently, the deemed trust provision does not apply to the employer's wind-up deficiency payments in respect of that plan. [emphasis added] [29]

33. The date on which a CCAA Initial Order is issued merely flows from the application of the debtor employer to the court for CCAA creditor protection. There is no legal significance to that date for the purposes of the effectiveness of the deemed trust; the CCAA filing date is merely the date chosen by the company to apply to the court for CCAA protection. In this case, the CCAA filing date significance is limited to establishing the point in time when the "liquidation" by the employer commenced.

34. While their recourses are stayed by the CCAA Initial Order, creditors' rights and priorities may continue to evolve during CCAA proceedings, as they would under normal company operations. Priority contests are properly analyzed and resolved when the competing creditors' interests come into conflict:

    (A) In *Indalex*, the majority of the Supreme Court analyzed the rights of the competing creditors *as of the date of sale approval/distribution motion* (i.e., not as of the date of the CCAA filing); and

    (B) The Ontario Superior Court of Justice has held that priority contests between competing secured creditors "must be resolved as of the time when their respective security interests came into conflict"[30] (i.e., not as of the date of the filing of an insolvency proceeding).

35. Therefore, based on *Indalex* caselaw, insolvency practices, and recognizing the practical process of how a pension plan wind-up occurs in a CCAA proceeding where the employer has abandoned the pension plan, the pension deemed trust can readily become applicable if a pension plan is wound-up *after* the CCAA filing date. There should be no surprise or uncertainty with such a result.

36. The decision in *Grant Forest Products Inc. v. Toronto-Dominion Bank*,[31] as referenced in the Monitor's arguments, is of no assistance in this case. As is clear from the following,

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[29] *Indalex*, *supra*, footnote 13, para. 46.
[30] *Textron Financial Canada Limited v. Beta Limitee/Beta Brands Limited*, 2007 CanLII 43908, para. 38.
[31] *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570 ["***Grant Forest Products Inc.***"].

the Ontario Court of Appeal distinguishes *Indalex* on the basis of the BIA implications in *Grant Forest*:

> ...the BIA played no part in *Indalex*. In this case, however, the BIA was implicated from the beginning of the CCAA Proceeding. Prior to the issuance of the Initial Order, one of the debtor companies' creditors (GE Canada) had issued a bankruptcy application, which was stayed by the Initial Order. Further, and importantly, at the time the priority contest came to be decided in this case, both the Pension Motion and the Bankruptcy Motion were before the CCAA judge and he found that there was no point to continuing the CCAA proceeding.
>
> [...]
>
> As I already explained, because of the point in the proceedings at which the Motions were heard, the primary issue for the CCAA judge in this case was whether to lift the CCAA stay and order the Remaining Applicants into bankruptcy.[32]

37. *Grant Forest* was not a case about the effectiveness of the deemed trust after the Initial Order, but rather dealt with whether or not the CCAA judge in that case exercised his discretion correctly in lifting the CCAA stay and allowing a bankruptcy application to proceed at the end of a liquidating CCAA proceeding. Any commentary in that case about the effectiveness of the deemed trust on a pension plan wind-up that occurs after the CCAA Initial Order is at most *obiter*, was not approved by the Ontario Court of Appeal, and is not persuasive in the present appeals.

E. This Court should not determine the question left open by the CCAA Judge as to whether the prior claim of the City of Sept-Îles takes priority over any of the statutory pension deemed trusts (or plan administrator's lien and charge)

38. Respectfully, the Court of Appeal should decline to decide on the alleged prior secured claim of Sept-Îles for unpaid municipal taxes in the context of this appeal. The Salaried Members submit that the issue of the relative ranks of the various creditors in these CCAA proceedings, including Sept-Îles, should properly be determined by the CCAA Judge, based on the evidentiary record, and not by the Court of Appeal through the addition of a new question and conclusion introduced by way of incidental appeals.

39. This appeal and the concurrent appeals brought by the other appellants pertain to the decision rendered by the CCAA Judge specifically with respect to the pension claims. The

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[32] *Grant Forest Products Inc., supra,* footnote 31, paras. 131 and 133.

issue of whether Sept-Îles holds a prior secured claim, pre-existing or not, that takes priority over the statutory deemed trust (or lien and charge) in favour of the pension plans was not the subject matter of the judgment *a quo*. By way of their incidental appeals, Sept-Îles and the Monitor are seeking to introduce a whole new issue, in addition to the very numerous issues that the parties already have to deal with in these appeals.

40. The question of the validity and, as the case may be, the rank of Sept-Îles' claim was not properly before the CCAA Judge. It was not one of the questions put to the CCAA Judge pursuant to the Monitor's Motion.[33] Sept-Îles was not a mise-en-cause on the Monitor's Motion, and never filed a notice of objection nor any formal notice of intervention with respect to the Monitor's motion, contrary to the Appellants.

41. The judgment *a quo* specifically did not deal with Sept-Îles' alleged prior claim[34] and there are no conclusions in the judgment regarding the respective ranks of the pension claims relative to Sept-Îles' alleged prior claim. The CCAA Judge held that it was not necessary to decide the priority issues between the claim for unpaid property and water taxes of Sept-Îles and the pension deemed trust claims of the Appellants.[35]

42. In addition, the Court of Appeal is not in a position from an evidentiary standpoint to rule on the issues being raised in the incidental appeals with respect to Sept-Îles' claim. Proper and sufficient evidence of Sept-Îles' alleged prior claim has not been adduced in the record to allow this Court to concretely decide the issue on a proper evidentiary record.

43. In its Brief, Sept-Îles makes several peremptory assertions which it ostensibly posits as facts, but which do not flow from the evidence that form part of the Court of Appeal record.

44. For example, Sept-Îles has not produced the actual tax statements on which it bases its claim. The only documents produced consist of (a) a summary table ostensibly compiling information regarding the Wabush CCAA Parties' unpaid property and water taxes;[36] (b) a valuation notice, in the name of Wabush Resources Inc., pertaining to certain identified

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[33] Monitor's Motion, **J.S., vol. 2, pp. 565-566 and 567**, paras 69-70 and 76.
[34] Hamilton Judgment, **J.S., vol. 1, p. 10**, para. 47.
[35] Hamilton Judgment, **J.S., vol. 1, p. 28**, para. 128.
[36] **J.S., vol. 7, pp. 2385-2396.**

and other unidentified immovable properties,[37] and (c) a duplicate invoice issued to Wabush Resources Inc. in respect of water supplied pertaining to certain identified and other unidentified immovable properties during the period May 1, 2014 to August 31, 2014.[38]

45. In its Brief, Sept-Îles asserts that a total amount of $3,000,000 in unpaid municipal taxes, plus interest, is currently owed by the Wabush CCAA Parties.[39] Sept-Îles also asserts that the priority attached to its claim predates the date on which the deemed trusts and "lien and charge" in favour of the pension funds became effective.[40] However, the quantum and the validity of Sept-Îles' claim have not been established and do not form part of the record, nor any of the information that would be necessary in order to determine the relevant priorities, including, *inter alia*, the date on which the particular taxes comprised in the amount of $3,000,000 that allegedly remains unpaid became due, the particular immovable properties for which each of these amounts is due, the particular sale proceeds on which the alleged prior claims of Sept-Îles would attach in priority to the deemed trusts and "lien and charge" in favour of the pension funds, etc.

46. In the Declaratory Judgment with respect to Municipal Taxes rendered by the CCAA Judge on November 17, 2016, an amount of $1,071,001.54 in principal and interest, due to Sept-Îles as at the date of the Initial Order, was mentioned by the CCAA Judge "qu'à titre indicative", the CCAA Judge noting in this regard that the said amounts "ne sont pas admis par les requérantes".[41]

47. In its 36th Report, dated May 26, 2017, the Monitor stated:

> "Various claims for property taxes have been made by the Ville de Fermont and the Ville de Sept Iles. **Those claims include both pre- and post-filing amounts, amounts relating periods subsequent to the closing of the sale of the real estate which have been assumed by the relevant purchaser, interest and amounts subject to contestation or appeal as discussed in earlier reports of the Monitor. In addition, if the contestations and appeals are successful,**

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[37] **J.S., vol. 7, p. 2397.**
[38] **J.S., vol. 7, p. 2398.**
[39] Sept-Îles' Brief, para. 20.
[40] Sept-Îles' Brief, para. 114.
[41] Declaratory Judgment with respect to Municipal Taxes, November 17, 2016, **J.S., vol. 2, p. 431**, para. 4, footnote 2.

> **refunds may be owing to the CCAA Parties**, creating a potential amount that may be set-off against the amounts owing." [emphasis added][42]

48. Out of a total aggregate amount of $5,444,000 in principal and interest that had been asserted by Sept-Îles in respect of the Wabush CCAA Parties, the Monitor indicated that an amount of $5,879,800 was disputed. The undisputed amounts would have resulted in a net credit of $435,000 in favour of the Wabush CCAA Parties.[43] Similarly, in its 38th Report dated June 21, 2017, the Monitor reported, a few days before the hearing on the Monitor's Motion, that "the CCAA Parties have identified and are pursuing a number of potential opportunities for municipal tax contestation that, based on current estimates, could result in reductions of approximately $17 million in pre-filing claims if successful".[44]

49. In addition to the foregoing, Sept-Îles claims a priority in respect of certain amounts that include compensation for the supply of water, which Sept-Îles asserts ought to be assimilated to property taxes based on s. 244.7 of the *Act respecting municipal taxation*, CQLR c F-2.1.[45] However, s. 244.7 expressly provides that such compensation cannot be regarded as property tax (and thus benefit from the same priority as that provided by Article 2654.1 CCQ for property tax), if the owner of the immovable is not the person in whose name the unit of assessment that includes the immovable is entered on the roll. The evidence in the record does not permit a determination as to whether that is the case, and in fact, it suggests the opposite.[46]

50. Pursuant to their incidental appeals, Sept-Îles and the Monitor would have the Court of Appeal render a judgment based on assumptions and hypotheticals. This is not proper procedure, and it is respectfully submitted that this Court should decline to do so.

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[43] Monitor's 36th Report, May 26, 2017, **J.S., vol. 7, p. 2464**, para. 46.
[43] Monitor's 36th Report, May 26, 2017, **J.S., vol. 7, p. 2464**, para. 46.
[44] Monitor's 38th Report, June 21, 2017, **J.S., vol. 7, p. 2420**, para. 29.
[45] Sept-Îles' Brief, paras. 5, 122 and 127.
[46] By way of example, according to the Declaratory Judgment with respect to Municipal Taxes, **J.S., vol. 2, pp. 443-446**, and the Approval and Vesting Order with respect to the Sale of Certain Assets (Port Assets), February 1, 2016, **J.S., vol. 2, 483-485**, Wabush Iron Co. Limited was the undivided owner of 26.83% of some of the immovable properties that were sold in the course of the CCAA proceedings; however its name is not the one entered in any of the documents produced by Sept-Îles in support of its claim (**J.S., vol. 7, pp. 2385-2398**).

PART IV – CONCLUSIONS

FOR THESE REASONS, MAY IT PLEASE THIS HONOURABLE COURT :

DISMISS the *De Bene Esse* Incidental Appeal filed by the Respondent/Incidental Appellant, FTI Consulting Canada Inc.;

DISMISS the *De Bene Esse* Incidental Appeal filed by the Mis-en-cause/Incidental Appellant, Ville de Sept-Îles;

THE WHOLE RESPECTFULLY SUBMITTED.

Toronto and Montreal, this 11th day of April, 2018

(S) KOSKIE MINSKY

KOSKIE MINSKY LLP

(S) FISHMAN FLANZ MELAND PAQUIN

FISHMAN FLANZ MELAND PAQUIN s.e.n.c.r.l./LLP

Court-appointed Representative Counsel to the Appellants/Incidental Respondents, Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson as Court-appointed Representatives of all non-union employees and retirees of the Wabush CCAA Parties

PART V – AUTHORITIES

Paragraph(s)

Jurisprudence

Doctrine

ATTESTATION

We, the undersigned, **KOSKIE MINSKY LLP** (Me Andrew J. Hatnay and Me Amy Tang) and **FISHMAN FLANZ MELAND PAQUIN LLP** (Me Mark E. Meland and Me Nicolas Brochu) hereby attest that this appeal brief is in compliance with the Civil Practice Regulation of the Court of Appeal. No transcripts were necessary for this appeal.

The time requested for our oral arguments on the incidental appeals is 45 minutes.

Toronto and Montreal, this 11th day of April, 2018

(S) KOSKIE MINSKY

KOSKIE MINSKY LLP

(S) FISHMAN FLANZ MELAND PAQUIN

FISHMAN FLANZ MELAND PAQUIN s.e.n.c.r.l./LLP

Court-appointed Representative Counsel to the Appellants/Incidental Respondents, Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson as Court-appointed Representatives of all non-union employees and retirees of the Wabush CCAA Parties