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Lenczner Slaght's Trial Lawyers Successful in $259 Million Judgment for Public Sector Funds

In *WSIB Investments (Infrastructure) Pooled Fund Trust v Plenary Group (Canada) Ltd*, our expert litigators were successful in obtaining a $259 million judgment in disgorgement for our clients, two employee pension and injured workers funds, against the Defendants for breach of fiduciary duty, knowing assistance, and knowing receipt. The 7-week trial before the Manitoba Court of King's Bench was the first fully electronic trial to be completed in the province.

This decision reinforces the foundational fiduciary duties owed by general partners to limited partners and the consequences that arise when general partners and their related entities elevate their own interests over those of their limited partners. The Court held that collective actions of jointly controlled fiduciaries, corporate entities, and individuals can result in joint liability for which all are held to account, be it in breach of fiduciary duty, knowing assistance or knowing receipt.

The Defendants, Plenary Group (Canada) Ltd. ("Plenary Canada") and its related entities, were leaders in the P3 (public private infrastructure) investment industry in Canada, and later in the United States, bidding on major public projects and shepherding them through construction and operation. Following the 2008 financial crisis, Plenary sought out a steady and reliable source of funding to provide for its equity contribution to the P3 projects it was investing in.

In 2010, the Plaintiffs agreed to provide this funding on a long-term basis and negotiated a bespoke partnership arrangement with Plenary consisting of a Master Investment Agreement, a Limited Partnership Agreement, and several ancillary agreements and schedules. Pursuant to this arrangement, a Plenary entity acted as the General Partner for the Limited Partnership (or Fund), and the Plaintiffs, as Limited Partners, contributed a pre-determined amount of capital into the Fund. In exchange, Plenary was to bring all P3 investment opportunities that met specific pre-determined criteria to the Plaintiffs during a defined term. Once a suitable P3 project was identified, the Plaintiffs' capital was loaned from the Fund to another Plenary entity (known as a "PIC" in Canada and a "PIA" in the US), to

allow Plenary to meet up to 50% of its required equity contribution for the project. When the capital contributed by the Limited Partners was depleted, further capital was committed, or a new Fund was created based largely on the structure of the previous Fund.

By 2015, the parties had established three highly successful Funds to pursue P3 investments in Canada and the United States. By 2020, the Funds held 33 loans. The loans were all long term, averaging over 30 years, based upon the effective life of each project.

In 2020, Plenary Canada sold its entire business to the Caisse de depot et placement du Quebec (“CDPQ”), including all the loans between Plenary and the three Funds. To effect the sale transaction, Plenary Canada caused its PICs and PIAs to prepay all of the Fund loans *en masse*, at par, effectively collapsing the three Funds, immediately replacing them with identical loans in favour of CDPQ. To do so, Plenary Canada relied on a discrete provision of each individual Loan Agreement (section 2.5(c)), that permitted an individual PIC or PIA borrower to pre-pay each individual loan at par on 5 days notice.

The Court found that section 2.5(c) of each individual loan agreement did not permit Plenary Canada to cause all 33 PICs and PIAs to prepay the Fund loans *en masse* for reasons unrelated to the loans or the individual project for which the loan was providing funding. This discrete provision, drafted as part of a template loan agreement appended as a schedule to Limited Partnership Agreements in Funds I and II, and to the Master Investment Agreement in Fund III, was never intended by the parties to be used as a mechanism to collapse the entire partnership structure.

Based on these findings, the Court concluded that Plenary Canada and the various Plenary entities that acted as the General Partners of the Funds owed fiduciary duties to the Plaintiffs, which they breached by, among other things, orchestrating the *en masse* prepayment of the loans in breach of the Fund documents. The Court held that a number of other Plenary entities and individual officers and directors were liable for knowingly assisting in the breaches of fiduciary duty and in knowing receipt for receiving and profiting from the portion of the proceeds of the CDPQ transaction representing the premium paid by CDPQ for the market value of the Fund loans.

As a result of the misconduct it found, the Court ordered disgorgement of $259,990,657 to the Plaintiffs being the premium paid by CDPQ to the Defendants for the Fund loans, and other diverted opportunities. In the alternative, the Court found that damages amounted to $211,326,913.