C A N A D A
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

No: 500-11-048114-157

SUPERIOR COURT
(Commercial Division)
(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. 36, as amended)

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

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

Petitioners

-and-

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, BLOOM LAKE RAILWAY COMPANY LIMITED, WABUSH MINES, ARNAUD RAILWAY COMPANY AND WABUSH LAKE RAILWAY COMPANY, LIMITED

Mises-en-cause

-and-

HER MAJESTY IN RIGHT OF NEWFOUNDLAND & LABRADOR, AS REPRESENTED BY THE SUPERINTENDENT OF PENSIONS

THE ATTORNEY GENERAL OF CANADA, ACTING ON BEHALF OF THE OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS

MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON

UNITED STEEL WORKERS, LOCALS 6254 AND 6285

RÉGIE DES RENTES DU QUÉBEC

MORNEAU SHEPELL LTD., IN ITS CAPACITY AS REPLACEMENT PENSION PLAN ADMINISTRATOR

Mis-en-cause

-and-

FTI CONSULTING CANADA INC.

Monitor

OUTLINE OF ARGUMENT OF THE SUPERINTENDENT OF PENSIONS OF NEWFOUNDLAND & LABRADOR

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1. It is difficult to overstate the importance of protecting pension plan funding.

2. Pension benefits provide aging Canadians with vital financial support. They help compensate employees for years of loyal service, and are widely relied on by employers as a form of deferred wage which "almost invariably" leads employees to accept lower wages and fewer employment benefits.

   - *Buschau v. Rogers Communications Inc.*, [2006] 1 S.C.R. 973, 2006 SCC 28 [**Tab**], at paras. 12-13.

   - *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 SCR 152, 2004 SCC 54 [**Tab**], at para. 1.

   - *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611 [**Tab**], at para. 66.

3. Like similar legislation in force in other provinces, the basic purpose of the *Pension Benefits Act*, 1997, SNL 1996, c. P-4.01 ("*PBA*") is to ensure that pension benefits are adequately funded so that employees receive the retirement income they are depending on.

4. An employer's insolvency obviously threatens pension plan funding. In order to provide some measure of funding protection in these grave circumstances, the *PBA* deems that a liquidated employer holds certain amounts in trust on behalf of pension plan beneficiaries.

5. Put bluntly, the Monitor's Amended Motion for Directions asks whether these vital protections for pension plan funding can be completely sidelined in a CCAA liquidation – alongside the provisions of Québec's *Supplemental Pension Plans Act*, CQLR c. R-15.1 ("*SPPA*"), and the federal *Pension Benefits Standards Act*, 1985 RSC 1985, c. 32 ("*PBSA*").

6. In response, the Superintendent of Pensions of Newfoundland & Labrador has objected vigorously to the Monitor's Amended Motion for Directions. In this Outline of Argument, the Superintendent will submit that:

   a. The Wabush CCAA proceedings are in fact liquidation proceedings;

   b. The *PBA*'s deemed trust – triggered by this "liquidation" – remains operative notwithstanding the beginning of CCAA proceedings. The same may be said of the deemed trust outlined in Québec's *SPPA*;

   c. The *PBA*'s deemed trust includes at least part of the wind-up deficiency, and can attach to the proceeds of property formerly located in the Province of Québec.

7. Otherwise, the Superintendent generally supports the submissions of the Representative Counsel, of the United Steel Workers, and of Morneau Shepell Ltd. The Superintendent will also defer to Retraite Québec on any interpretive issue regarding Québec's *SPPA*, and to the Office of the Superintendent of Financial Institutions of Canada on any interpretive issue regarding the federal *PBSA*.

ANALYSIS

I. The deemed trust outlined in section 32 was triggered by the "liquidation" of the CCAA parties

8. Section 32 of Newfoundland's *PBA* imposes a deemed trust in the event of a "liquidation, assignment or bankruptcy of an employer":

> Amounts to be held in trust
>
> 32. (1) An employer or a participating employer in a multi-employer plan shall ensure, with respect to a pension plan, that
>
> (a) the money in the pension fund;
>
> (b) an amount equal to the aggregate of
>
> (i) the normal actuarial cost, and

(ii) any special payments prescribed by the regulations, that have accrued to date; and

(c) all

(i) amounts deducted by the employer from the member's remuneration, and

(ii) other amounts due under the plan from the employer that have not been remitted to the pension fund

are kept separate and apart from the employer's own money, and shall be considered to hold the amounts referred to in paragraphs (a) to (c) in trust for members, former members, and other persons with an entitlement under the plan.

(2) In the event of a liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that under subsection (1) is considered to be held in trust shall be considered to be 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 money or from the assets of the estate.

(3) Where a pension plan is terminated in whole or in part, an employer who is required to pay contributions to the pension fund shall hold in trust for the member or former member or other person with an entitlement under the plan an amount of money equal to employer contributions due under the plan to the date of termination.

(4) An 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) and (3).

(i) The present CCAA proceedings are liquidation proceedings

9. While the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36 was conceived as a vehicle to restructure insolvent companies – allowing them to emerge from insolvency proceedings as a going concern –, it is now commonplace for companies to resort to the CCAA in order to be liquidated.

10. The term "liquidating CCAA" has since become part of insolvency law jargon:

- For commentary, see Alfonso Nocilla, "Is 'Corporate Rescue' Working in Canada", (2013) 53 CBLJ 382 (*Nocilla, "Corporate Rescue"*) [**Tab**]

- Alfonso Nocilla, "Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36", (2012) 52 CBLJ 226 (*Nocilla, "Asset Sales"*) [**Tab**].

- See also *Target Canada Co. (Re),* 2015 ONSC 303 [**Tab**], paras. 32-33.

11. The Monitor and the Wabush CCAA parties simply cannot be allowed hide behind this traditional conception of CCAA proceedings in order to escape the obvious truth that this is, in fact, a "liquidating CCAA".

12. The Wabush CCAA parties never had any intention of restructuring and emerging from the CCAA process as a going concern. Cliffs Natural Resources Inc. – the parent company to both the Wabush and Bloom Lake entities –, simply wished to disengage from the region.

13. The ensuing CCAA proceedings have been directed – since their very outset – to the sale of all of the Wabush parties' assets and inventory, and to a distribution of the resulting proceeds. As was the case in *Re Puratone*, "the court is faced with a CCAA proceeding which has had from the outset all of the earmarks of a liquidation proceeding".

- *Re Puratone et al*, 2013 MBQB 171 [**Tab**], at para. 20.

14. Shortly after these proceedings commenced, the Monitor launched a process soliciting "liquidation proposals" for the assets and inventories of the Wabush CCAA parties. This process has resulted in the piecemeal sale of a number of important assets, including:

- The Pellet Plant and the Amaud Railway; see Monitor's Report (17th) [**Tab**].

- The Wabush terminal station and sub-station; see Monitor's Report (26th) [**Tab**].

- Major mobile equipment including all nine Komatsu 830E haul trucks, 4 Letourneau L-1850 Wheel Loaders, a Komatsu PC5500 6E Front Shovel, a Komatsu PC5500 Front Shovel, a Komatsu WA600-6 Wheel Loader, a Bucyrus Erie MD6640 49RH Crawler Blast Hole Drill and Komatsu D375A-6 Crawler Tractor, and all of the accessories, tires and rims attached thereto; see Monitor's Report (25th) and (23rd) [**Tabs** and, respectively]

- Three generators; see Monitor's Report (21st) [**Tab**].

- Bunker C Fuel;

- Residences in Sept-Îles; see Monitor's Report (34th) [**Tab**].

- The "Block Z Lands"; see Monitor's Report (18th) [**Tab**].

- Forty-eight vacant single family homes, two apartment buildings, and one staff house in Wabush; see Monitor's Report (22nd) [**Tab**].

- Other vacant lands in Wabush; see Monitor's Report (34th) [**Tab**].

15. One of the last major assets remaining is the Wabush Mine, and negotiations are apparently underway to see the Mine sold.

16. In short, the Wabush CCAA parties are in the process of being liquidated, and their business in Labrador and Québec is over.

17. Even in the ideal event that the Wabush Mine is sold to a purchaser intending to revive the iron ore mining business there, such a purchaser would need to invest a lot of time and capital in order to do so.

18. Employment contracts have been terminated, and many former employees have left Wabush altogether. The critical infrastructure needed to support the business, as it was, – and notably the pellet plant, the railway, the haul trucks, the generators, power stations and the employee residences – have all been sold off to various purchasers.

19. It is worth noting that, outside of the context of this Amended Motion for Directions, the Monitor has had no difficulty describing the sales process currently underway as a liquidation. The Monitor sought "liquidation proposals" and refers to what has followed as a "liquidation sales process". The Monitor now updates this Honourable Court from time to time on the "current status of asset realization".

    - See e.g. Monitor's Report (23rd) [**Tab**], at pp. 13-14; and Monitor's Report (19th) [**Tab**], at p. 12.

20. It would therefore lie poorly in the Monitor's mouth to claim that what is actually occurring in these insolvency proceedings is not, somehow, a liquidation. This liquidation would have occurred as of the time of CCAA filing, if not before.

(ii) The term "liquidation" includes both piecemeal liquidations and going concern liquidations

21. In a *pro forma* hearing in October 2016, this Honourable Court asked whether a going concern sale would qualify as a "liquidation…of an employer".

22. In response, the Superintendent would submit that this is a piecemeal liquidation. The Superintendent would also submit, more generally, that it is immaterial whether an employer's assets are sold on a piecemeal basis or as a going concern. The "liquidation...of an employer" occurs whenever all (or substantially all) of an employer's assets are sold, and the resulting proceeds distributed.

- See Nocilla, "Corporate Rescue" [**Tab**], at pp. 383 and 385.

23. This interpretation is supported by the ordinary meaning of the word "liquidation", its wider context in subsection 32(2) of the *PBA*, as well as its protective purpose.

- For the modern approach to statutory interpretation, see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 [**Tab**], at para. 21.

24. Judged on its own, the word "liquidation" connotes a process in which the assets of a debtor are sold in order to discharge its liabilities.

- *Barron's Canadian Law Dictionary* [**Tab**]:

  > The process of liquidating a corporation. The assets of the enterprise are used to discharge liabilities, and the resulting net assets are distributed to the shareholders on a pro rata basis, according to preference.

- *Merriam Webster* (Online) [**Tab**]:

  > Liquidated; liquidating
  >
  > transitive verb
  >
  > 1) a(1): to determine by agreement or by litigation the precise amount of (indebtedness, damages, or accounts) *(2)* : to determine the liabilities (see liability 2) and apportion assets toward discharging the indebtedness of
  >
  > b: to settle (a debt) by payment or other settlement *liquidate a loan*
  >
  > [...]
  >
  > 4) to convert (assets) into cash - *liquidated his securities*

- Bryan Garner, ed., *Black's Law Dictionary*, (7th ed.: 1999) [**Tab**], at pp. 941-942:

liquidate, *vb.* 1. To determine by litigation or agreement the amount of (damages or indebtedness). 2. To settle (an obligation) by payment or other adjustment. 3. To ascertain the liabilities and distribute the assets of (an entity), esp. in bankruptcy or dissolution. 4. To convert (a nonliquid asset) into cash. 5. To liquidate something, such as a debt or corporation. 6. *Slang.* To get rid of (a person), esp. by killing.

liquidating, *n.* 1. The act of determining by agreement or by litigation the exact amount of something (as a debt or damages) that before was uncertain. 2. The act of settling a debt by payment or other satisfaction. 3. The act or process of converting assets into cash, esp. to settle debts.

- Hubert Reid, Ad.E., *Dictionnaire de Droit Québécois et Canadien* (4e éd. : 2010) [**Tab**], at pp. 374-375 :

Liquidation *n.f.*

1. Opération par laquelle une personne, appelée liquidateur, procède au partage d'une masse de biens. Ex. La liquidation d'une entreprise, d'une succession.

   Rem. 1. La liquidation d'une entreprise peut être volontaire ou forcée. Les biens sont alors confiés au liquidateur qui, le cas échéant, termine les activités en cours, désintéresse les créanciers et procède à la vente des actifs en vue d'en distribuer le produit aux personnes y ayant droit. Le *Code civil du Québec* prescrit les règles relatives à la liquidation d'une succession. 2. La liquidation forcée effectuée sous le contrôle des tribunaux porte le nom de liquidation judiciaire.
   Comp. liquidateur, liquider
   Angl. *liquidation, winding up, winding-up*

2. Action de rendre liquide, de déterminer de façon définitive le montant d'une créance ou d'une dette. Ex. La liquidation des dépens. [...]

3. Vente de marchandises à bas prix par une entreprise qui cesse de faire commerce ou qui désire se départir rapidement de certains stocks.
   Angl. *clearance sale*

- *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379 [**Tab**], at para. 12:

> [12] Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

25. This commonly accepted meaning of liquidation does not distinguish between piecemeal or going concern sales, so long as substantially all of the debtor's assets are sold in the process.

26. This explains why one author, writing on the topic of liquidating CCAAs, describes a "liquidation" in the following terms: "liquidation usually involves the sale of 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 [**Tab**], at p. 2, citing Janis Sarra, *Creditors Rights and the Public Interest* (2003), at p. 31.

27. Indeed, many authors refer to "liquidating CCAAs" as an umbrella term including both piecemeal liquidations and "going concern liquidations".

    - Roderick Wood, "Rescue and Liquidation in Restructuring Law" (2013) 53 CBLJ 407 [**Tab**], see esp. pp. 410 and following.

    - Karma Dolkar, "Re-Thinking Rescue: a Critical Examination of CCAA Liquidating Plans" (2011) 27 Banking & Finance Law Review 111 [**Tab**].

    - Nocilla, "Corporate Rescue" [**Tab**], at pp. 385, 387 and following, 396.

28. Courts have also recognized that going concern sales can be liquidations.

29. In *Re Puratone et al*, 2013 MBQB 171 [**Tab**], the Manitoba Court of Queen's Bench was confronted with a CCAA proceeding where substantially all of the debtor's assets had been sold to Maple Leaf Foods Inc. on a going concern basis. Still, Justice Dewar observed that "the court is faced with a CCAA

proceeding which has had from the outset all of the earmarks of a liquidation proceeding".

- *Re Puratone et al*, 2013 MBQB 171 [**Tab**], at paras. 5 and 20

30. The only legally meaningful distinction that ought to be drawn would distinguish between cases where the debtor is undergoing a genuine restructuring, so as to continue as a going concern, – via either a BIA proposal or a CCAA plan of arrangement – and cases where the CCAA is being resorted to as a means of disposing of a debtor's assets via an orderly sale, and in which there is neither a legal nor a commercial purpose to submitting a plan or proposal.

31. This interpretation of the *PBA* is further confirmed by the legislative context.

32. Subsection 32(2) lists three triggering events – liquidation, assignment, and bankruptcy – which all share one feature in common: the debtor's property is either sold or transferred to a third-party, with the objective of distributing the proceeds to pay the debtor's creditors (and, possibly, its shareholders).

33. A liquidating CCAA fits naturally within this framework. Indeed, this describes what is happening to the letter.

34. Finally, this commonly accepted interpretation of the word "liquidation" is in line with section 32's protective and remedial purpose, which must guide the interpretive process.

- *Interpretation Act*, RSNL 1990, c. I-19:

  Rule of construction

  16. Every Act and every regulation and every provision of an Act or regulation shall be considered remedial and shall receive the liberal construction and interpretation that best ensures the attainment of the objects of the Act, regulation, or provision according to its true meaning.

- Ruth Sullivan, *Sullivan on the Construction of Statutes* (6th ed.: 2014) [**Tab**], at pp. 488-489.

35. Section 32's purpose is obvious. In the wake of an employer's liquidation, assignment or bankruptcy, there is the risk that pension benefits will not be adequately funded. The (likely) solvency deficiency will become a wind-up deficiency. When this occurs, section 32's deemed trust secures at least some degree of pension plan funding.

36. This grave risk that section 32 is meant to mitigate does not simply disappear when an entire business is sold on a going concern basis. This risk is still present – and still poses the very same threat to pension plan beneficiaries.

37. That is because new employers rarely assume the previous insolvent employer's unpaid pension obligations. That was the case for the employees whose employment was transferred as a result of the Pointe-Noire transaction. It was also the experience of the pension plan members in *Indalex*.

- Monitor's Report (17th) **[Tab]**, at pp. 27, 29.

- See also Ari Kaplan and Mitch Frazer, *Pension Law* (2nd ed: 2013) **[Tab]**, at p. 536.

38. Judged from the vantage point of subsection 32(2)'s protective purpose, the distinction between piecemeal and going concern sales is immaterial. Such a distinction simply cannot be drawn without compromising subsection 32(2)'s protective purpose.

39. Indeed, with "liquidating CCAAs" becoming more and more common – by one estimate, 1/3 of all CCAA proceedings between 2002-2012 resulted in a liquidation under the auspices of the CCAA, and more recent estimates suggest that nearly 3/4 of all recent CCAA proceedings ended in liquidation – drawing a distinction between piecemeal and going concern liquidations would severely compromise the protection that was intended by Newfoundland's *PBA*.

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

(iii) Lien and charge in favour of the plan administrator

40. In the event that this Honourable Court concludes that there has not been a "liquidation" triggering the deemed trust outlined in section 32(2) *PBA*, the Superintendent would submit that subsections 32(1) and (3) *PBA* provide what the Monitor calls a "limited deemed trust" over certain amounts detailed in those subsections.

41. Pursuant to subsection 32(4), the administration of the pension plans "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) and (3)".

II. The *PBA* and *SPPA's* deemed trusts have not been rendered inoperative by the doctrine of federal paramountcy

42. The deemed trust outlined in subsection 32(2) of the *PBA* has therefore been triggered, and the Monitor is now deemed to hold the amounts described in subsection (1) in trust for the plan members. Without any similar condition precedent, the deemed trust described in section 49 of Québec's *SPPA* would also be in effect.

43. The issue now becomes whether these provincial pension laws trigger the doctrine of federal paramountcy by conflicting with provisions of the federal *CCAA*.

44. In the Superintendent's view, the *PBA* and the *SPPA*'s deemed trusts continue to apply during the course of CCAA proceedings, and ought to dictate how part of the sales proceeds are to be distributed.

(i) *Indalex* and the vitality of provincial law in CCAA proceedings

45. Provincial law continues to apply in federal insolvency proceedings so long as the doctrine of federal paramountcy is not triggered.

- See e.g. *Crystalline Investments Ltd. v. Domgroup Ltd.*, [2004] 1 SCR 60, 2004 SCC 3 [**Tab**], at para. 43:

> 43 [...] In any event, so long as the doctrine of paramountcy is not triggered, federally regulated bankruptcy and insolvency proceedings cannot be used to subvert provincially regulated property and civil rights. See *Husky Oil Operations Ltd. v. Minister of National Revenue*, 1995 CanLII 69 (SCC), [1995] 3 S.C.R. 453; *Giffen (Re)*, 1998 CanLII 844 (SCC), [1998] 1 S.C.R. 91.

46. Federal paramountcy is triggered either where there is an "operational conflict", such that it is impossible to comply with both federal and provincial law simultaneously, or where the operation of provincial law "frustrates the purpose" of the federal legislation.

- *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327 [**Tab**], at para. 18

47. Unlike the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, the *CCAA* does not set out a fulsome scheme for the order of collocation or preference of claims. The CCAA actually has very little to say about how the proceeds of a liquidation must be distributed.

- For contrast, see section 136(1) *BIA* and *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 [**Tab**]

48. As a result, there is no risk of a *direct* conflict between the priorities set out in provincial legislation and the federal CCAA. In the absence of a court-ordered super-priority, provincial law priorities will substantially dictate how to distribute the proceeds of a CCAA liquidation.

49. This is the principal proposition that emerges from *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271 [**Tab**]. Deschamps J., writing for a unanimous Court on this point, observed that Parliament "did not expressly apply all bankruptcy priorities [...] to CCAA proceedings". This creates a space in CCAA proceedings in which provincial rights can continue to operate:

> [51] [...] Provincial legislation defines the priorities to which creditors are entitled until that legislation is ousted by Parliament. Parliament did not expressly apply all bankruptcy priorities either to *CCAA* proceedings or to proposals under the *BIA*. Although the creditors of a corporation that is attempting to reorganize may bargain in the shadow of their bankruptcy entitlements, those entitlements remain only shadows until bankruptcy occurs. At the outset of the insolvency proceedings, Indalex opted for a process governed by the *CCAA*, leaving no doubt that although it wanted to protect its employees' jobs, it would not survive as their employer. This was not a case in which a failed arrangement forced a company into liquidation under the *BIA*. Indalex achieved the goal it was pursuing. It chose to sell its assets under the *CCAA*, not the *BIA*.
>
> [52] The provincial deemed trust under the *PBA* continues to apply in *CCAA* proceedings, subject to the doctrine of federal paramountcy (*Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3 (CanLII), [2004] 1 S.C.R. 60, at para. 43). The Court of Appeal therefore did not err in finding that at the end of a *CCAA* liquidation proceeding, priorities may be determined by the *PPSA*'s scheme rather than the federal scheme set out in the *BIA*.

- *Indalex* [**Tab**], para. 52, per Deschamps and Moldaver JJ., with the concurrence of McLachlin C.J., Cromwell and Rothstein JJ. at para. 242, and LeBel and Abella JJ. at para. 265.

- Alain Prévost, "Pension deemed trust: what's left?" (2017) 59 CBLJ 30 [**Tab**], at p. 4:

> [...] the interest of the *Indalex* decision lies primarily in the fact that the Supreme Court confirmed therein that deemed trusts created by provincial legislation continue to apply in respect of companies having obtained court protection under the CCAA, which in principle is not the case for those companies that are liquidated under the BIA.

- See separately *Aveos Fleet Performance Inc. (Re)*, 2013 QCCS 5762 [**Tab**] (per Schrager J., as he then was):

> [79] Given that the liquidation of Aveos took place in a C.C.A.A. context and that this statute provides no order of collocation or preference, provincial priorities continue to apply.

(ii) The misreading of *Indalex* in *Grant Forest*

50. In spite of these clear passages in *Indalex,* counsel for the Monitor has at various times insisted that a deemed trust that arises post-filing is "ineffective" for that reason alone.

51. The authority for this proposition appears to be the first instance decision in *Grant Forest Products Inc. (Re)*, 2013 ONSC 5933 [**Tab**],[1] where Campbell J. observed the following about *Indalex*:

> All of the justices agreed that the deemed trust provision contained in s.57(4) of the *PBA* does not apply to the windup deficit of a pension plan that has not been wound up (the Indalex Executive Plan) at the time of *CCAA* proceedings.
>
> [...]
>
> The Supreme Court of Canada decision in Indalex stands for the proposition that provincial provisions in pension areas prevail prior to insolvency but once the federal statute is involved the insolvency provision regime applies.

- *Grant Forest Products Inc. (Re)*, 2013 ONSC 5933 [**Tab**], paras. 25 and 80.

52. Respectfully, these passages misread the facts and holding of that decision.[2]

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[1] The first instance decision was upheld on appeal, but on other grounds: *Grant Forest Products Inc. (Re)*, 2015 ONCA 192 [**Tab**].

[2] It is worth noting that the hearing in *Grant Forest* occurred before the *Indalex* decision was rendered. The Court subsequently invited counsel to submit written submissions on *Indalex*'s importance to the issues before it: see *Grant Forest* [**Tab**], at para. 49.

53. The deemed trust for the Executive Plan in *Indalex* was not ineffective because it arose post-filing; it was ineffective because the deemed trust did not exist under the terms of Ontario pension law at the time the debtor's assets were sold, and a distribution ordered.

54. Justice Deschamps in *Indalex* writes as follows:

> [46] The situation is different with respect to the Executive Plan. 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 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.

- *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271 [**Tab**], at para. 46.

55. Further clarity is provided by the facts of *Indalex*, elaborated in greater detail in the lower court judgments.

56. The CCAA filing date in *Indalex* was April 3, 2009. On July 20, 2009, the Ontario Superior Court approved the sale of the Indalex parties' assets as a going concern to SAPA Holding AB and ordered that upon closing of the SAPA transaction, the proceeds of sale be paid to the Monitor. Pursuant to that approval and vesting order, the Monitor was ordered and directed to make a distribution to the DIP lenders from these sales proceeds. At the sale approval hearing on July 20, 2009, the former executives and the United Steel Workers asserted deemed trust claims over the sales proceeds, and asked that those amounts be retained by the Monitor as undistributed proceeds.

57. The deemed trust under Ontario pension law is triggered by the winding up of the pension plan. However, at the time of the first instance hearing (July 20th and August 28th, 2009) – where a sale was also approved and a distribution ordered – the "Executive Plan" had not yet been wound up:

> [23] The Executive Plan has not been wound up. The material filed with the Court exhibits an intention on the part of the Applicants to wind up that Plan. The uncontested evidence of

Bob Kavanagh on behalf of the Applicants in his affidavit sworn August 12, 2009 is to the following effect: [...].

[24] The affidavit of Keith Carruthers exhibits a letter of July 13, 2009 on behalf of the Monitor confirming the intention of the Applicants to wind up the Executive Plan in accordance with the provisions of the *PBA*. There are no deficiencies in payments under the Executive Plan as of July 20, 2009. The Executive Plan is not wound up. Given the analysis that follows in respect of the Salaried Plan, I see no basis for a deemed trust of any amount at this time in respect of the Executive Plan.

- *Re Indalex*, 2010 ONSC 1114 **[Tab]**, at paras. 23-24.

58. The Ontario Court of Appeal reasoned as follows:

[69] The CCAA judge dismissed the Former Executives' motion on the basis that since the wind up of the Executive Plan had not yet taken place, there were no deficiencies in payments to that plan as of July 20, 2009. As there were no deficiencies in payments, there was no basis for a deemed trust.

[110] Are the unpaid liability payments owing to the Executive Plan also subject to the s. 57(4) deemed trust? The Former Executives, Superintendent and Morneau all contend that they are. On the plain wording of s. 57(4), I find it difficult to accept this argument -- the introductory words of the provision speak to "where a pension plan is wound up". In other words, wind up of the pension plan appears to be a requirement for s. 57(4) to apply. If that is so, no deemed trust could arise unless and until a plan wind up occurred. As has been noted, the Executive Plan had not been wound up at the relevant time.

- *Indalex Limited (Re)*, 2011 ONCA 265 **[Tab]**, at paras. 69, 110.

59. It is worth adding that even this conclusion – e.g. that the only priorities to be taken into account are those that existed at the time of the sale, vesting, and distribution order – is not without controversy.

60. Schrager J. (as he then was) recently raised the possibility that priorities could be revisited even after a sale, vesting order, and distribution.

- *Aveos Fleet Performance Inc. (Re)*, 2013 QCCS 5762 **[Tab]**, at para. 91:

[91] While the undersigned would not go so far as to say that priorities cannot be revisited following a sale, vesting order and

> distribution as did Campbell, J. recently in *Grant Forest*, I do believe that the Court should be extremely hesitant to alter the Initial Order, retroactively, after such a long period of time has elapsed and salient events in the C.C.A.A. process have occurred.

61. *Indalex* therefore cannot be read as standing for the proposition that any deemed trust that arises post-filing is ineffective for that reason alone. After all, such a conclusion would also be inconsistent with *Indalex*'s key proposition, namely that:

> [52] [...] at the end of a *CCAA* liquidation proceeding, priorities may be determined by the *PPSA*'s scheme rather than the federal scheme set out in the *BIA*.

- *Indalex* [**Tab**], para. 52, per Deschamps and Moldaver JJ., with the concurrence of McLachlin C.J., Cromwell and Rothstein JJ. at para. 242, and LeBel and Abella JJ. at para. 265.

(iii) Sections 6(6) and 36(7) of the CCAA only establish minimum standards regarding pension funding protection; they do not "cover the field"

62. The Monitor also seems to be ready to argue that sections 6(6) and 36(7) of the CCAA "cover the field" and provide an exhaustive account of what pension plan members are owed during a CCAA proceeding.

63. Sections 6(6) and 36(7) of the CCAA provide that a court may sanction either a plan of arrangement or a distribution of sales proceeds "only if" certain payments to fund pension plans are assured. These provisions have the practical effect of conferring super-priority status on a narrow set of pension claims.

> *Restriction — pension plan*
>
> (6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if
>
> > (a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:
> >
> > > (i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the *Pooled Registered Pension Plans Act*, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a

prescribed plan, if it were regulated by the *Pooled Registered Pension Plans Act*; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Non-application of subsection (6)

(7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

64. On their face, these provisions do not purport to set out *all* of what pension plan members are due in an insolvency. Instead, they set minimum requirements – a floor – that must be respected before a plan or distribution can be approved by a court.

65. These sections are clearly not in direct conflict with Newfoundland's *PBA* or with Québec's *SPPA*.

66. Both statutes can be complied with simultaneously by conferring super-priority status on the amounts described in section 6(6) of the *CCAA*, and by deeming the balance of the amounts described in section 32 *PBA* (or section 49 *SPPA*) to be held in trust for pension plan members.

- On operational conflict, see generally *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327 [**Tab**], at paras. 18-19, citing *Multiple Access Ltd. v. McCutcheon*, 1982 CanLII 55 (SCC), [1982] 2 S.C.R. 161, at p. 191.

67. Furthermore, Newfoundland's *PBA* does not frustrate the "federal purpose" underlying sections 6(6) and 36(7) CCAA. If what Parliament wanted to do was confer super-priority status for certain pension claims, the *PBA* clearly does not frustrate this purpose by imposing a deemed trust on the balance of what is owed to the pension plans.

68. The Monitor's argument, however, goes one step further, relying on the largely discredited and marginalized doctrine of "negative implication" or "covering the field".

69. According to this theory, in enacting sections 6(6) and 36(7), Parliament made an explicit choice not to afford greater protection to pension plan members during CCAA proceedings. Provincial legislation which would purport to do so would therefore frustrate this choice.

70. This argument breaks with the "dominant tide" of modern federalism jurisprudence, which has emphasized the importance of cooperative federalism while reining in the doctrine of federal paramountcy. Worse still, this position essentially reframes an argument that was recently and explicitly rejected by the Supreme Court of Canada.

71. At nearly every opportunity over the past decade, the Supreme Court has emphasized the importance of allowing for the interplay and overlap between federal and provincial legislation enacted in the pursuit of public interests.

- See especially *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22 [**Tab**], at paras. 22 and 37:

> 22 As the Court noted in that decision, federalism was the legal response of the framers of the Constitution to the political and cultural realities that existed at Confederation. It thus represented a legal recognition of the diversity of the original members. The division of powers, one of the basic components of federalism, was designed to uphold this diversity within a single nation. Broad powers were conferred on provincial legislatures, while at the same time Canada's unity was ensured by reserving to Parliament powers better exercised in relation to the country as a whole. Each head of power was assigned to the level of government best placed to exercise the power. The fundamental objectives of federalism were, and still are, to reconcile unity with diversity, promote democratic participation by

reserving meaningful powers to the local or regional level and to foster co-operation among governments and legislatures for the common good.

[...]

37 The "dominant tide" finds its principled underpinning in the concern that a court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government. In the absence of conflicting enactments of the other level of government, the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest.

- See also *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327 **[Tab]**, at para. 15.

72. In light of this "guiding principle" of cooperative federalism, the doctrine of federal paramountcy must be narrowly construed and applied with great restraint.

- *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419 **[Tab]**, at para. 21.

- *Bank of Montreal v. Marcotte*, [2014] 2 SCR 725, 2014 SCC 55 [**Tab**], at para. 72.

73. The Supreme Court has even identified a "fundamental rule of constitutional interpretation" which requires that "when a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes".

- *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22 **[Tab]**, at para. 75, citing *Attorney General of Canada v. Law Society of British Columbia*, 1982 CanLII 29 (SCC), [1982] 2 S.C.R. 307 **[Tab]**, at p. 356;

- See also *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419 **[Tab]**, at paras. 20-22.

[21] Given the guiding principle of cooperative federalism, paramountcy must be narrowly construed. Whether under the operational conflict or the frustration of federal purpose branches of the paramountcy analysis, courts must take a "restrained approach", and harmonious interpretations of federal and

provincial legislation should be favoured over interpretations that result in incompatibility: *Reference re Securities Act*, 2011 SCC 66 (CanLII), [2011] 3 S.C.R. 837, at paras. 59-60, citing *OPSEU v. Ontario (Attorney General)*, 1987 CanLII 71 (SCC), [1987] 2 S.C.R. 2, at p. 18, per Dickson C.J. (concurring); see also *Canadian Western Bank*, at paras. 37 and 75.

74. Respecting the importance of cooperative federalism means that a province should be allowed to supplement the rights and standards imposed by federal law – and even be allowed to impose more rights or more obligations for certain constituencies than the federal Parliament itself thought desirable.

- *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22 [**Tab**], at para. 72:

  > Thus, according to this test, the mere existence of a duplication of norms at the federal and provincial levels does not in itself constitute a degree of incompatibility capable of triggering the application of the doctrine. Moreover, a provincial law may in principle add requirements that supplement the requirements of federal legislation (*Spraytech*). In both cases, the laws can apply concurrently, and citizens can comply with either of them without violating the other.

- See also: *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536 [**Tab**], at para. 66; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40 (CanLII), [2001] 2 S.C.R. 241 [**Tab**], at paras. 34-42 specifically, and *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419 [**Tab**], at para. 26.

75. This has already occurred in a number of cases, including the following:

- *Construction Montcalm Inc. v. Min. Wage Com.*, [1979] 1 S.C.R. 754, where the Court held that a provincial minimum wage law was applicable to a Crown contractor constructing an airport runway, despite the fact that there was an applicable (less onerous) federal minimum wage law;

- *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40 (CanLII), [2001] 2 S.C.R. 241 [**Tab**], where a municipal by-law restricting the use of pesticides was allowed to supplement – and was not in conflict with – federal legislation setting lower standards regarding the use of pesticides.

- *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13 [**Tab**], where provincial tobacco control legislation

banning all advertising of tobacco products to minors was allowed to supplement – and was not in conflict with – federal legislation allowing retailers to display tobacco products in certain circumstances.

- *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419 **[Tab]**, where a provincial law imposing an initial 150-day delay to commence an action was allowed to supplement – and was not in conflict with – the federal *BIA*, which provided for a much shorter 10-day delay to appoint a national receiver.

76. When Parliament "covers the field", it closes off any provincial action with regards to a certain subject matter, preventing provinces from enacting legislation to pursue their own vision of the public good in areas of recognized competence. This is antithetical and repugnant to everything that cooperative federalism stands for.

77. As a result, Parliament's ability to "occupy the field" has been very narrowly circumscribed. Professor Peter Hogg has even concluded that, for all intents and purposes, the "covering the field" test of inconsistency has been abolished in Canada.

> Canadian courts, by confining the doctrine of paramountcy to such a narrow compass, have rejected a "covering the field" (or negative implication) test of inconsistency, which is employed by the courts of the United States and Australia. [...] Under this test [...] a federal law may be read as including not only its express provisions, but also a "negative implication" that those express provisions should not be supplemented or duplicated by any provincial law on the same subject.
>
> [...]
>
> A series of cases has decided that the negative implication test no longer has any place in Canadian constitutional law. [...]

- Peter Hogg, *Constitutional Law of Canada* (5th ed., supplemented) **[Tab]**, at pp. 16-10.6 to 16-11.

78. The Supreme Court of Canada, for its part, has not been willing to declare the "covering the field" doctrine officially dead. However, the Court has repeatedly insisted that Parliament should only be interpreted as intending to "cover the field" if it explicitly states so in "very clear statutory language".

- *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 SCR 188, 2005 SCC 13 **[Tab]**, at para. 21:

> 21 I do not accept the respondent's argument that Parliament, in enacting s. 30, intended to make the retail display of tobacco products subject only to its own regulations. In my view, to impute to Parliament such an intention to "occup[y] the field" in the absence of very clear statutory language to that effect would be to stray from the path of judicial restraint in questions of paramountcy that this Court has taken since at least *O'Grady* (p. 820).

- *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419 [**Tab**], at para. 27:

> [27] And, as previously noted, paramountcy must be applied with restraint. In the absence of "very clear" statutory language to the contrary, courts should not presume that Parliament intended to "occupy the field" and render inoperative provincial legislation in relation to the subject: *Canadian Western Bank*, at para. 74, citing *Rothmans, Benson & Hedges Inc.*, at para. 21.

- *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22 [**Tab**], at para. 74:

> 74 [...] The fact that Parliament has legislated in respect of a matter does not lead to the presumption that in so doing it intended to rule out any possible provincial action in respect of that subject.

79. These cases demonstrate the very high burden incumbent on any party wishing to claim that the federal Parliament has "covered the field". It is not enough to show that Parliament *could* have done more, but explicitly chose not to. There must be compelling evidence – indeed, nothing less than "clear statutory language" – that Parliament intended to specifically close off any provincial action in relation to a given question. Otherwise, courts ought to interpret the federal legislation so as to make it harmonious with overlapping provincial law.

80. These fundamental tenets of modern federalism jurisprudence were applied recently in an insolvency matter: *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419.

81. In that case, a secured creditor had brought an application for the appointment of a national receiver pursuant to section 243(1) of the *BIA*. The *BIA* provides that a national receiver may be appointed 10 days after notice is sent. However, the *Saskatchewan Farm Security Act*, S.S. 1988-89, c. S-17.1 requires that a person seeking to commence an action with regard to farm land wait until the expiry of an initial 150-day notice period.

82. The issue before the Supreme Court was whether the federal purpose underlying the 10-day delay to appoint a national receiver was "frustrated" by the operation of the *Saskatchewan Farm Security Act*'s (much longer) 150-day notice period.

83. In the view of the dissenting judge, Justice Côté, there was such a frustration of federal purpose. Justice Côté observed that the *BIA*'s 10-day delay represented a careful balance struck by Parliament between the competing interests of "secured creditors in obtaining a timely remedy and that of insolvent debtors in being afforded enough time either to commence restructuring proceedings or to arrange their financial affairs and pay their creditors." Parliament could have balanced these conflicting interests differently, but chose not to. And in imposing a much longer 150-day delay, Justice Côté reasoned, the province clearly frustrated this balance struck by Parliament.

- *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419 [**Tab**], at paras. 82, 122-128.

84. The argument put forward by the Monitor closely resembles this very argument, made by the dissenting Justice Côté, and rejected by the majority of the Court.

85. The majority in *Lemare Lake*, true to the fundamental tenets of modern federalism jurisprudence, refused to accept that the federal Parliament could have "occupied the field" in this way without explicit statutory language:

> [46] Section 243(1.1) states that, in the case of an insolvent person in respect of whose property a notice is to be sent under s. 244(1), the court may not appoint a receiver under s. 243(1) before the expiry of 10 days after the day on which the secured creditor sends the notice, unless the insolvent person consents or the court considers it appropriate to appoint a receiver sooner. The effect of the provision is to set a minimum waiting period. This does not preclude *longer* waiting periods under provincial law. There is nothing in the words of the provision suggesting that this waiting period should be treated as a ceiling, rather than a floor, nor is there any authority that supports treating the waiting period as a maximum.
>
> [48] [...] Nothing in the text of the provision or the *BIA* more generally suggests that s. 243 is meant to be a comprehensive remedy, exclusive of provincial law. [...]

86. Moreover, nothing in the federal *BIA*'s legislative history demonstrated that Parliament intended to both introduce a 10-day delay period *and* to rule out any possible provincial action in this regard.

- *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419 **[Tab]**, at paras. 51 and following.

87. In other areas, the law recognizes a requirement of clear and explicit statutory language in order to abrogate important principles. For instance, Parliament and the provincial legislatures can only abrogate solicitor-client and litigation privilege with "clear, explicit and unequivocal language". A similar rule – with similar justifications – is at play here.

- See e.g. *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 (CanLII), [2008] 2 S.C.R. 574; *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, [2016] 2 S.C.R. 521.

88. In the case at bar, sections 6(6) and 36(7) of the CCAA do not rule out any possible provincial action with "very clear statutory language".

89. The text of sections 6(6) and 36(7) suggest that they merely represent minimum requirements that must be met in order for a CCAA court to approve a plan of arrangement, or a distribution.

90. The words of the majority in *Lemare Lake* are indeed apposite: "The effect of the provision is to set a minimum waiting period. This does not preclude *longer* waiting periods under provincial law" (at para. 46).

91. These provisions even seem to allow for the possibility that a plan or arrangement could be agreed to that would provide for *more* than what is described in section 6(6). It is difficult, in light of this, to claim that section 6(6) represents a ceiling on what pension benefits may be paid out in an insolvency.

92. The absence of any explicit statutory language "covering the field" is made all the more conspicuous by the fact that Parliament actually *did* rule out the continued application of provincial law elsewhere in the CCAA. Most glaringly, Parliament explicitly ruled out the continued application of some provincial deemed trusts in favour of the Crown in section 37:

> 37 (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

93. Parliament also ruled out the continued application of provincial shareholder approval requirements in section 36(1) CCAA, which states that a court may approve a sale or disposition of assets "[d]espite any requirement for shareholder approval, including one under federal or provincial law".

94. Provincial law is also explicitly excluded in certain matters relating to the monitor's personal liability (subsections 11.8(1), (3), and (5) CCAA).

95. That Parliament chose not to use such language with regards to all deemed trusts under provincial pension law – but rather just the trusts in favour of the Crown – actually suggests that Parliament accepts that provincial law may supplement the minimum federal requirements outlined in section 6(6). This interpretation, which harmonizes federal and provincial law, must be favoured over its alternative.

- *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22 [**Tab**], at para. 75, citing *Attorney General of Canada v. Law Society of British Columbia*, 1982 CanLII 29 (SCC), [1982] 2 S.C.R. 307 [**Tab**], at p. 356

III. The *PBA*'s deemed trust covers the deficit payments upon termination of the pension plans

96. For these reasons, the deemed trusts created by both Newfoundland's *PBA* and Québec's *SPPA* continue to apply in a CCAA liquidation.

97. The next question is what amounts these deemed trusts include.

98. As is more fully outlined in the submissions of Representative Counsel and USW, there are deemed trusts created by Newfoundland's *PBA* (s. 32), Québec's *SPPA* (s. 49), as well as the federal *PBSA* (s. 8). Newfoundland's *PBA* would apply, at the very least, to the benefit of all of the employees who reported for work in the province (s. 5 *PBA*).

99. With regards to Québec's *SPPA*, the deemed trust in s. 49 includes normal costs and special payments, but appears to exclude wind-up deficiency payments.

- *Timminco ltée (Arrangement relative à)*, 2014 QCCS 174, at paras. 132, 166-167.

100. The deemed trust in s. 8 of the federal *PBSA* also includes normal costs and special payments, and excludes wind-up deficiency payments. This appears to be the result of recent amendments to s. 29 of the *PBSA*.

- *Aveos Fleet Performance Inc.*, 2013 QCCS 5762, at para 82.

101. However, these specific amendments to the federal *PBSA* were not introduced to Newfoundland's *PBA*, which is otherwise highly similar.

(i) This Honourable Court ought to defer to the reference currently before the Newfoundland & Labrador Court of Appeal

102. On March 27, 2017, the Lieutenant-Governor in Council for Newfoundland referred the following question to the Newfoundland & Labrador Court of Appeal, pursuant to its authority under section 13 of the *Judicature Act*:

> What is the scope of section 32 of the *Pension Benefits Act*, 1997, SNL 1996 c. P-4.01 deemed trusts in respect of:
> a) unpaid current service costs;
> b) unpaid special payments; and
> c) unpaid wind-up deficits?

103. On May 5, 2017, the Chief Justice of Newfoundland and Labrador ordered that the Reference be inscribed for hearing. The Attorney General of Newfoundland & Labrador was ordered to notify interested parties. Notified parties will have until May 31, 2017, to file a notice of intention to intervene.

104. A status hearing is to be held on June 9, 2017, and the Chief Justice expects that this matter may be heard in early September 2017. The Court of Appeal's opinion might plausibly be rendered this year.

105. The Superintendent is respectfully of the view that this Honourable Court should decline to answer this interpretive issue of Newfoundland law until such a time as the opinion of the Newfoundland Court of Appeal is rendered.

106. Doing so would mitigate the risk of conflicting judgments, and would also promote the interests of justice.

107. This Honourable Court has already accepted what it called "the obvious proposition" that the courts of Newfoundland are "more qualified to deal with an issue of Newfoundland and Labrador law than the courts of Québec".

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

108. It is also generally preferable for complex and consequential issues of Newfoundland law to be decided by the courts of Newfoundland - and especially that province's apex court.

109. The other issues put to this Honourable Court could of course be decided in advance of the Court of Appeal's Reference opinion.

(ii) The deemed trust outlined in subsection 32(2) *PBA* includes the wind-up deficiency payments

110. If this Honourable Court does intend to decide this issue without the benefit of the opinion of the Newfoundland Court of Appeal, then the Superintendent's submissions are as follows.

111. Pursuant to section 32 *PBA*, the following amounts are deemed to be held in trust by the employer:

> (a) the money in the pension fund;
>
> (b) an amount equal to the aggregate of (i) the normal actuarial cost, and (ii) any special payments prescribed by the regulations, that have accrued to date; and
>
> (c) all (i) amounts deducted by the employer from the member's remuneration, and (ii) other amounts due under the plan from the employer that have not been remitted to the pension fund.

112. This section must be read alongside section 61 *PBA,* which requires that, following termination, the employer must make certain payments into the pension fund in order to fund any wind-up deficiencies:

> 61 (2) Where, on the termination, after April 1, 2008 , of a pension plan, other than a multi-employer pension plan, the assets in the pension fund are less than the value of the benefits provided under the plan, the employer shall, as prescribed by the regulations, make the payments into the pension fund, in addition to the payments required under subsection (1), that are necessary to fund the benefits provided under the plan.

113. The wind-up deficiency payments described in section 61(2) *PBA* are detailed further in the *Pension Benefits Act Regulations*, NLR 114/96.

114. As a starting point, the Representative Counsel states – and the Superintendent agrees – that the purpose of section 32's deemed trust is to help secure the payment of pension benefits:

- Newfoundland and Labrador, Legislative Assembly, Hansard, 43rd General Assembly, 1st Sess, No 55 (17 December 1996) (Ernie McLean) [Book of Authorities of Representative Counsel, Tab 4]:

  > Mr. Speaker, I am pleased to be able to introduce to second reading this legislation, which will provide increased pension

> benefits for workers in the Province. ... 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.

115. Section 61(2) *PBA* shares this objective. The wind-up payments described therein are those that are necessary to fund the future benefits provided under the plan. They effectively represent an "acceleration of pension entitlements".

    - Ari Kaplan and Mitch Frazer, *Pension Law* (2nd ed: 2013) [**Tab**], at pp. 537-539.

116. As a result, when these wind-up payments become "due", they are effectively "amounts due under the plan", falling within the scope of the section 32 deemed trust (and, more specifically, subsection 32(1)(c)(ii)).

117. This interpretation of the scope of the section 32 deemed trust is confirmed by both section 32's underlying purpose – to secure the payment of pension benefits – and also by comparing the *PBA* to the federal *PBSA*.

118. This Honourable Court has on a previous occasion said that their relevant provisions are highly similar (if not nearly identical). For the most part, that is true. However, section 29 of the *PBSA* was recently amended to specifically exclude the wind-up deficiency from the section 8 deemed trust (see sections 26(6.2) and 29(6.5) *PBSA*).

    - *Aveos Fleet Performance Inc.*, 2013 QCCS 5762 [**Tab**], at para 82:

      > [82] The Superintendent also submits that Parliament's intent should also be gleaned from the amendments to the P.B.S.A. in 2009 limiting the deemed trust to the actual payment deficit and not to the whole actuarial deficiency (see Sections 29(6.2) and 29(6.5) P.B.S.A.).

119. All legislative provisions must be interpreted as having some effect; Parliament does not speak without purpose. It therefore stands to reason that, prior to these amendments to the federal *PBSA*, the deemed trust outlined in section 8 did include the wind-up deficiency payments described in section 29.

120. Since Newfoundland's *PBA* has no equivalent provision to sections 29(6.2) or 29(6.5), then the *PBA*'s deemed trust must still include the wind-up deficiency payments described in section 61.

III. The *PBA*'s deemed trust can attach to proceeds from the sale of property formerly located in the Province of Québec

121. The *PBA*'s deemed trust can be recognized and given effect under the law of Québec pursuant to article 1262 of the *Civil Code of Québec*, RLRQ c. CCQ 1991, which recognizes that a trust can be constituted by force of law.

> 1262. A trust is established by contract, whether by onerous or gratuitous title, by will or, in certain cases, by law. Where authorized by law, it may also be established by judgment.

122. The Superior Court of Québec has recently held that a deemed trust like the one described in section 32(2) *PBA* can be recognized as a trust under art. 1262 CCQ.

- *Timminco ltée (Arrangement relative à)*, 2014 QCCS 174 **[Tab]**

123. Direct effect may also be given to Newfoundland's *PBA* in Québec through article 3079 CCQ.

> 3079. Where legitimate and manifestly preponderant interests so require, effect may be given to a mandatory provision of the law of another State with which the situation is closely connected.
>
> In deciding whether to do so, consideration is given to the purpose of the provision and the consequences of its application.

124. The Wabush insolvency present a compelling instance where article 3079 CCQ should be invoked and relied upon.

125. Firstly, section 32 *PBA* is clearly a "mandatory provision" of "another State"[3].

126. Second, the *PBA* is "closely connected" to this "situation". The "situation" referred to here is the insolvency of the Wabush CCAA parties, who hired employees to work in Newfoundland and registered all of their employees' pension plans with the Newfoundland & Labrador Superintendent of Pensions. The "situation" consists more specifically of a debate about how to distribute the proceeds of the CCAA asset sales, a matter intimately connected to the *PBA* and its deemed trust protecting pension funding.

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[3] Article 3077 CCQ provides that for the purpose of private international law, the law of another province is effectively the law of another State.

127. Thirdly, there are "legitimate and manifestly preponderant interests" that require that local effect be given to the *PBA*.

128. The Wabush CCAA parties together ran a business that straddled the Newfoundland & Quebec border, hiring employees to work in both provinces and establishing two multijurisdictional pension plans.

129. It would be both unjust and inequitable for the employees who reported for work in Quebec to potentially benefit from the deemed trust of s. 49 *SPPA*, while similarly-placed Newfoundland workers have their deemed trust under s. 32 *PBA* languish without property to attach to.

130. The Salaried and Union Plans are multijurisdictional pension plans, the funding for which goes to benefit the plan as a whole. When an employer agrees to establish and sponsor such a multijurisdictional plan, all of the employer's assets in those jurisdictions should be chargeable. Plan members should be entitled to the same protection, regardless of whether they reported for work in Québec or in Newfoundland. The principles of order and interprovincial comity demand nothing less.

131. Furthermore, the CCAA stay prevents either employees or the Superintendent from obtaining a judgment in Newfoundland & Labrador and later enforcing such a judgment against property in this province. Giving direct effect to the *PBA* avoids this unfortunate consequence.

132. Moreover, the purpose of section 32 *PBA* is entirely in line with existing Québec legislation. Both the *PBA* and the *SPPA* attempt to secure some amount of pension funding in the event a sponsoring employer enters insolvency proceedings.

133. This is clearly not a case where the purpose underlying the "foreign" legislation is incompatible with local values and principles, as it has been in so many of the cases where parties sought to invoke art. 3079.

- See e.g. *Globe-X Management Ltd. (Proposition de)*, 2006 QCCA 290, SOQUIJ AZ-50359122, J.E. 2006-558, [2006] R.J.Q. 724 [**Tab**], at para. 44.

134. Indeed, the major apparent difference between the *PBA* and *SPPA* is that the *PBA*'s deemed trust includes the full wind-up deficiency, while the *SPPA*'s does not.

135. However, the Province of Québec has already accepted that, in certain circumstances, another province's pension legislation – including at least one province which recognizes a full wind-up deemed trust – can apply to the

benefit of Quebec plan members and attach, by consequence, to Quebec property.

136. Pursuant to the Agreement Respecting Multi-Jurisdictional Pension Plans, adopted by the provinces of Ontario, Quebec, British Columbia, Nova Scotia and Saskatchewan (Exhibit R-21), the pension legislation of the "major authority's" jurisdiction applies to the plan members, at least with regards to the subject matters listed in Schedule B. As a result, in the event that Ontario is the "majority authority", Ontario's pension deemed trust – which has been held to include the full wind-up deficiency – would apply to the benefit of Québec plan members and attach to property in Québec.

137. The fact that Newfoundland & Labrador decided not to enter the Agreement Respecting Multi-Jurisdictional Pension Plans is of no consequence to the analysis required under art. 3079 CCQ. Quebec, being a member of this Agreement (Exhibit R-21), has already signalled that it is prepared to accept the application of another province's pension legislation, including another province which accepts a fulsome deemed trust capturing the full wind-up deficiency.

V. Final issues

138. The Superintendent has objected to two assertions set out in the Monitor's Amended Motion for Directions.

139. For the reasons set out in the Superintendent's Notice of Objections to the Monitor's Motion for Directions, and elaborated in further detail by the Plan d'argumentation des Opposants, Syndicat des Métallos, sections locales 6254 et 6285, the Superintendent is of the view that:

    a. The normal costs for December 2015 should not have been pro-rated for Union Plan members, as the Monitor suggests in paragraph 32 of its Motion. Plan members are instead owed credited service for the entire month, for a total additional amount of $21,462; and

    b. The Monitor has erred in calculating the catch-up special payments that accrued pre-filing.

CONCLUSION

140. The Superintendent reserves its right to reply to any argument or new issue raised in the submissions of the other parties to this dispute.

141. The Superintendent respectfully requests this Honourable Court to dismiss the Monitor's orders described at paragraph 70 of its Amended Motion for Directions.

142. Respectfully, the Superintendent submits that this Honourable Court's order ought to reflect the following conclusions:

a. All normal costs and special payments – both those outstanding as at the date of the Wabush Initial Order and those that became payable after that date, including additional special payments and catch up special payments - are the subject of a liquidation deemed trust;

b. The payable wind-up deficiency payments are similarly the subject of a liquidation deemed trust;

c. The deemed trust outlined in section 32 *PBA* is not rendered inoperative by the commencement of federal CCAA proceedings;

d. Any trust created pursuant to the *PBA* may charge the proceeds of property formerly located in the Province of Québec.

THE WHOLE RESPECTFULLY SUBMITTED.

MONTREAL, May 12, 2017

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