CANADA
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 Arnaud 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.

[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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SUPERINTENDENT OF PENSIONS OF NEWFOUNDLAND & LABRADOR
Our file: 1606-4 | BI0080

C A N A D A

PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

N° : 500-11-048114-157

COUR SUPÉRIEURE
(Chambre commerciale)

Dans l'affaire de la Loi sur les arrangements avec les créanciers des compagnies, L.R.C., 1985, c. C-36:

BLOOM LAKE GENERAL PARTNER LIMITED

QUINTO MINING CORPORATION

8568391 CANADA LIMITED

CLIFFS QUÉBEC IRON MINING ULC

WABUSH IRON CO. LIMITED

WABUSH RESOURCES INC.

Débitrices

-et-

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP

BLOOM LAKE RAILWAY COMPANY LIMITED

WABUSH MINES

ARNAUD RAILWAY COMPANY

WABUSH LAKE RAILWAY COMPANY LIMITED

Mises-en-cause

-et-

SA MAJESTÉ DU CHEF DE TERRE-NEUVE ET LABRADOR, REPRÉSENTÉ PAR LE SURINTENDANT DES PENSIONS DE TERRE-NEUVE-LABRADOR

PROCUREUR GÉNÉRAL DU CANADA

MICHAEL KEEPNER, TERRENCE WATT, DAMIEN LEBEL ET NEIL JOHNSON

UNITED STEEL WORKERS, LOCALS 6254 ET 6285

RETRAITE QUÉBEC (ANCIENNEMENT APPELÉE RÉGIE DES RENTES DU QUÉBEC)

MORNEAU SHEPELL LTD, EN SA

QUALITÉ D'ADMINISTRATEUR PROVISOIRE DES RÉGIMES DE RETRAITE

SYNDICAT DES MÉTALLOS, SECTIONS LOCALES 6254 ET 6285

VILLE DE SEPT-ÎLES

Mis-en-cause

-et-

FTI CONSUTING CANADA INC

Contrôleur

ARGUMENTATION ÉCRITE DE LA MISE-EN-CAUSE
RETRAITE QUÉBEC (ANCIENNEMENT APPELÉE RÉGIE DES RENTES DU QUÉBEC)

I. CONTEXTE

1. La mise en cause, Retraite Québec, doit s'assurer que l'administration et le fonctionnement des régimes de retraite sont conformes à *Loi sur les régimes complémentaires de retraite*, LRRQ, chapitre R-15.1 (ci-après « LRCR »);

2. La LRCR s'applique aux régimes de retraite relatifs à des travailleurs qui se présentent à un établissement de leur employeur au Québec ou qui reçoivent leur rémunération de cet établissement[1];

3. Retraite Québec doit également collaborer avec la province de Terre-Neuve, signataire de l'Accord multilatéral de réciprocité (1986) (ci-après « L'Accord »);

4. Avant le dépôt des procédures, Wabush Mine opérait une mine de fer et des installations de traitement situées près des villes de Wabush et de Labrador (Labrador City) dans la province de Terre-Neuve et Labrador (ci-après « Terre-Neuve ») en plus d'opérer les installations de Pointe-Noire près de Sept-Îles dans la province de Québec;

5. Arnaud Railway et Wabush Lake Railway opéraient des chemins de fer qui servaient au transport du minerai entre Wabush jusqu'au port de Pointe-Noire. Ces entités sont considérées comme des entreprises fédérales en vertu de la Constitution;

6. Les débitrices ont entrepris des procédures en vertu de la *Loi sur les arrangements avec les créanciers*, L.R.C., (1985), c. C-36 (ci-après « la LACC ») et doivent des sommes substantielles en vertu de deux régimes de retraite dont la date de terminaison est le 15 décembre 2015 : le Salaried DB Plan (ci-après « le régime des salariés » et le Union DB Plan (ci-après « le régime des syndiqués »);

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[1] Art. 1 LRCR

7. Ces sommes dues apparaissent au paragraphe 43 de la requête amendée du contrôleur du 13 avril 2017 et concernent autant le déficit de terminaison que les cotisations d'équilibre (« special payments » et « catch-up payments »);

8. Ces deux régimes visent des travailleurs susceptibles d'être régis par trois lois distinctes, soit la LRCR, la Loi sur les normes de prestations du Parlement fédéral (ci-après « LNPP ») et la Pension Benefit Act (ci-après « PBA »);

9. L'administrateur provisoire des régimes, Morneau Shepell Ltd, fait valoir des réclamations tant pour les déficits de terminaison que pour les cotisations d'équilibre, et ce, tant pour le régime des salariés et que pour le régime des syndiqués;

10. L'administrateur provisoire des régimes fait valoir que ces réclamations sont protégées et garanties par une fiducie réputée au terme de la loi provinciale de Terre-Neuve (PBA) ainsi qu'aux termes de la LNPP pour ce qui est des travailleurs du chemin de fer;

11. Retraite Québec fait valoir qu'une portion de ces réclamations portant sur les cotisations d'équilibre dues et afférentes aux droits des participants québécois est garantie et protégée par une fiducie réputée au terme de la LRCR;

12. Le contrôleur prétend que toutes les réclamations afférentes aux régimes de retraite ne sont aucunement protégées par une fiducie réputée et qu'elles constituent ni plus ni moins qu'une créance ordinaire;

II. LES QUESTIONS EN LITIGE

13. Pour Retraite Québec, les questions soumises au Tribunal par le Contrôleur se résument comme suit : est-ce que les cotisations d'équilibre afférentes aux droits des participants québécois (« special payments » et « catch-up special payments ») dues à la date de terminaison des régimes de retraite sont réputées détenues en fiducie hors de la portée des créanciers garantis et ordinaires, en application des articles 49 et 264 de la LRCR ?

14. Avant de rendre sa décision sur la présente requête, est-ce que le Tribunal devrait attendre que le pourvoi en référé déposé par le gouvernement de Terre-Neuve et Labrador à la Cour d'appel de cette province soit terminé par un jugement final ou autrement ?

III. ARGUMENTATION

A. La fiducie réputée de la LRCR

15. La LRCR prévoit à son article 49 que les cotisations sont réputées détenues en fiducie par l'employeur :

« **49.** Jusqu'à leur versement à la caisse de retraite ou à l'assureur, les cotisations et les intérêts accumulés sont réputés détenus en fiducie par l'employeur, que ce dernier les ait ou non gardés séparément de ses biens. »

16. Cette même loi prévoit également que les cotisations versées ou à être versées sont incessibles et insaisissables :

« **264.** Sauf dispositions contraires de la loi, est incessible et insaisissable:
1° toute cotisation versée ou qui doit être versée à la caisse de retraite ou à l'assureur, ainsi que les intérêts accumulés ; (...) »

17. Pour l'application de la fiducie réputée, ces articles visent tous les types de cotisations, sans distinction entre les cotisations d'exercice, les cotisations spéciales ou les cotisations d'équilibre, comme ce qui est réclamé par l'administrateur provisoire des régimes de retraite et décrit dans la requête amendée du Contrôleur (Amended Motion by the Monitor for Directions with Respect to Pension Claims) comme étant les « Normal Cost Payments », « Special Payments » et « Catch-up Special Payments ».

18. Retraite Québec soumet que ces dispositions ont plein effet dans le contexte actuel, et ce, pour les motifs ci-après énoncés;

Application de la LRCR dans le contexte de régimes de retraite interprovinciaux

19. Comme mentionné précédemment, les deux régimes de retraite dont il est question sont visés par la LRCR, du moins à l'égard des participants québécois;

20. En effet, l'article 1 de la LRCR énonce que les régimes de retraite visés par la loi sont ceux relatifs aux travailleurs qui se présentent à un établissement de leur employeur au Québec;

21. En raison de la situation géographique de certaines des installations décrites ci-dessus, plusieurs travailleurs sont visés par cet article;

22. Même si un conflit de lois était au cœur de la présente question, ce qui est nié, l'article 1 règle à lui seul la question de la détermination du domaine d'application internationale ou interprovinciale de la LRCR, laquelle disposition est qualifiée de règle unilatérale de conflit [2];

23. Ainsi, malgré le fait que plusieurs lois puissent être applicables aux participants aux régimes de retraite, aucune ne fait échec à l'application de la LRCR à l'égard des droits des participants québécois (à l'exclusion des participants dont les droits sont régis par la LNPP);

24. Qui plus est, un accord relatif aux régimes de retraite relevant de plus d'une autorité gouvernementale est intervenu entre plusieurs provinces, dont la province de Québec et la

[2] Gérald Goldstein, *Les conflits de lois relatifs aux régimes complémentaires de retraite*, Montréal, Éditions Thémis, 2005, p. 279

province de Terre-Neuve, en 1986 (ci-après « L'Accord »), et ce, en vertu de l'article 74 de la *Loi sur les régimes supplémentaires de rentes*[3];

25. L'article 285 de la LRCR prévoit que cet accord demeure en vigueur jusqu'à ce qu'il soit remplacé, modifié ou alors abrogé;

26. En l'espèce, l'Accord produit toujours des effets entre les provinces de Québec et de Terre-Neuve, lesquelles sont des parties signataires à celui-ci alors qu'aucune autre entente n'est intervenue entre elles postérieurement;

27. À son premier article, l'Accord prévoit que l'autorité où la pluralité des membres du régime sont employés, constitue l'autorité majoritaire aux fins de l'application de celui-ci;

28. Il y est aussi prévu que l'autorité majoritaire est chargée d'exercer les fonctions et les pouvoirs statutaires de chaque autorité minoritaire[4];

29. Ce faisant, il est reconnu sur le plan juridique que l'Accord n'a pas pour effet de soustraire les régimes de retraite interprovinciaux aux dispositions de la Loi du Québec (LRCR) et que chaque autorité majoritaire est alors responsable d'appliquer les lois des autres provinces (ou des autorités minoritaires) [5];

30. Le surintendant des Pensions de Terre-Neuve agit comme autorité majoritaire dans les régimes de retraite des salariés et des syndiqués dont il est question en l'espèce;

31. Le surintendant des Pensions de Terre-Neuve a donc l'obligation de s'assurer du respect de l'application de la LRCR, rôle qui incombe normalement à Retraite Québec;

32. Le versement des cotisations d'équilibre à la terminaison du régime et l'application de la fiducie réputée de l'article 49 LRCR ne concernent pas les aspects mentionnés au paragraphe 28 des présentes;

33. En somme, en raison de la règle de conflit unilatérale que constitue l'article 1 de la LRCR, et à la lumière des dispositions applicables de l'Accord qui a force entre la province de Québec et de Terre-Neuve, les dispositions de la LRCR trouvent application à l'égard des droits des participants québécois.

<u>La portée de la fiducie réputée de la LRCR</u>

34. Une fois établi le domaine d'application de la LRCR, vient la question de déterminer l'étendue et la portée de la fiducie réputée prévue à l'article 49;

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[3] L.R.Q., c. r-17 (cette loi a été remplacée par la LRCR)
[4] Art. 2 de l'Accord
[5] *Régie des rentes du Québec et Commission des régimes de retraite de l'Ontario et MCColl- Frontenac Pétroleum inc*, 2000 CanLII 30139 (ON SCDC) et *Boucher c. Stelco Inc.*, [2005] 3 R.C.S. 279, 2005 CSC 64.

35. Comme mentionné précédemment, les réclamations de l'administrateur provisoire des régimes portent tant sur le déficit de terminaison que sur les cotisations d'équilibre et ce, dans le contexte d'une entreprise protégée par la LACC;

36. Rappelons à ce sujet que Retraite Québec ne prétend à l'application de la fiducie réputée de la LRCR qu'à l'égard des cotisations d'équilibre;

37. Pour qu'une fiducie réputée existe en droit québécois et produise les effets d'une fiducie légale, il faut que le législateur intervienne clairement en ce sens, que le langage utilisé soit sans équivoque et qu'il démontre que les sommes ou biens réputés être détenus en fiducie le soit même en l'absence de leur séparation du reste des actifs de la débitrice[6];

38. Une telle fiducie crée alors un patrimoine d'affectation distinct et autonome et les biens qui s'y retrouvent ne sont ni dans le patrimoine du constituant (l'employeur), ni dans celui du bénéficiaire (caisse de retraite) et ne peuvent donc être saisis par leurs créanciers ou cédés en garantie au bénéfice d'un créancier[7];

39. Or, en l'espèce, les termes de l'article 49 de la LRCR remplissent les exigences précitées. C'est d'ailleurs en ce sens que la Cour supérieure du Québec a statué sur cette même question dans l'affaire Timminco Ltée[8];

40. Dans l'affaire Sun Indalex Finance c. Syndicat des Métallos[9], la Cour suprême du Canada a reconnu que les dispositions provinciales qui créées une telle fiducie réputée s'appliquent aux entreprises protégées en vertu de la LACC;

41. Ainsi, le droit civil provincial s'applique aux entreprises insolvables sauf s'il y a conflit entre les lois provinciales et fédérales, auquel cas la loi fédérale aura préséance en vertu de la doctrine de la prépondérance[10];

42. Or, dans les circonstances, la question n'est pas de déterminer si la fiducie réputée de la LRCR a préséance sur une créance garantie en vertu d'une loi fédérale telle une créance bénéficiant d'une priorité en vertu de la LACC;

43. La question est de statuer sur l'existence ou non de la fiducie réputée de l'article 49 LRCR et de déterminer si elle affecte ou non les réclamations de l'administrateur provisoire, lesquelles concernent tant le déficit de terminaison que les cotisations d'équilibre;

44. Toujours dans l'affaire Timminco, la Cour supérieure du Québec s'est aussi prononcée sur l'étendue de la fiducie réputée de la LRCR et constitue à ce jour l'état du droit sur cette question;

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[6] Timminco Ltée (Arrangement relatif à), 2014 QCCS 174, par.104-105, par.128;
[7] PAYETTE, LOUIS, *Les sûretés réelles dans le Code civil du Québec* , 2010, EYB2010SUR3, paragraphe 63
[8] Timminco Ltée (Arrangement relatif à), préc. note 8
[9] [2013] 1 RCS 271
[10] *Sun Indalex Finance* c. *Syndicat des Métallos*, 2013 1 RCS 271, par.52

45. En effet, la Cour supérieure reconnait que les cotisations d'équilibre sont touchées par l'application de l'article 49 de la LRCR et qu'on ne saurait conclure autrement [11];

46. Elle base son raisonnement sur le libellé des dispositions législatives de la loi pour conclure en ce sens : les articles 37 à 52 de la LRCR établissent la nature des différents types de cotisations et consacre l'obligation de les verser à la caisse de retraite;

47. À ce sujet, elle s'exprime ainsi : « Les cotisations versées ou à être versées par l'employeur regroupent les cotisations salariales et patronales, ces deux éléments constituant les cotisations d'exercice à laquelle la cotisation d'équilibre vient s'ajouter lorsque celle-ci est nécessaire. Vient alors l'article 49 LRCR qui stipule que les cotisations sont réputées détenues en fiducies par l'employeur (...) Il est donc acquis que les cotisations d'équilibre sont touchées par l'application de l'article 49 LRCR.» [12];

48. Ainsi, le terme « cotisation » employé à l'article 49 de la LRCR inclut les cotisations d'équilibre;

49. Qui plus est et sans limiter ce qui précède, la LRCR prévoit également que les cotisations versées et à être versées à la caisse de retraite sont incessibles et insaisissables;

50. En somme, la LRCR s'applique aux droits des participants québécois et crée à son article 49 une fiducie réputée qui produit tous les mêmes effets d'une fiducie légale;

51. Ce faisant, les cotisations à être versées à l'employeur, y compris les cotisations d'équilibre sont protégées dans un patrimoine distinct à l'abri des créanciers. Cette fiducie a plein effet même à l'égard d'une entreprise protégée par la LACC.

52. Ce patrimoine distinct est constitué de tous les biens de l'employeur jusqu'à concurrence des montants de cotisations réclamées avec les intérêts encourus.

53. Cette division du patrimoine des débitrices soustrait les cotisations, qui de plus sont insaisissables, du gage commun des créanciers comme le prévoit l'article 2645 CCQ :

> « **2645.** Quiconque est obligé personnellement est tenu de remplir son engagement sur tous ses biens meubles et immeubles, présents et à venir, à l'exception de ceux qui sont insaisissables et de ceux qui font l'objet d'une division de patrimoine permise par la loi.
>
> Toutefois, le débiteur peut convenir avec son créancier qu'il ne sera tenu de remplir son engagement que sur les biens qu'ils désignent. »

54. La fiducie réputée s'étend également au produit de vente des biens des débitrices, notamment ceux qui sont situés au Québec comme c'est le cas en l'espèce.

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[11] Timminco Ltée (Arrangement relatif à), préc. note 8, par.53,128
[12] Id., par.51

55. Enfin, avec respect pour l'opinion contraire, il n'y a pas d'incohérence d'application de la priorité accordée dans la LACC aux cotisations d'exercice qui sont payables à une caisse de retraite aux articles 6(6) et 36(7), et la fiducie réputée de l'article 49 de la LRCR qui protège les autres types de cotisations dues à une caisse de retraite, dans la mesure où les conditions d'une fiducie réelle sont rencontrée comme en l'espèce.

56. Selon nous, les cotisations d'équilibre ou spéciales sont des versements prévisibles et bien quantifiés. Elles sont des dépenses déterminées dans le cours normal des affaires de l'employeur contrairement au déficit de solvabilité en cas de terminaison qui dépend d'un évènement non prévu et dont le montant ne peut être déterminé à l'avance.

B. La suspension du présent recours en raison du référé à la Cour d'appel de Terre-Neuve

57. Le 27 mars 2017, le lieutenant-gouverneur en conseil de la province de Terre-Neuve a décidé de transmettre les questions suivantes à la Cour d'appel de cette province :

1) The Supreme Court of Canada has confirmed in Sun Indalex Finance, LLC v. United Steelworkers, 2013 SCC 6, that subject only to the doctrine of paramountcy, provincial laws apply in proceedings under the Companies Creditors Arrangement Act, R.S.C. 1985 c. C-36. What is the scope of section 32 of the Pension Benefits Act, 1997, SNL1996cP-4.01 deemed trusts in respect of:

   a. unpaid current service costs;
   b. unpaid special payments; and
   c. unpaid wind-up deficits

2) The Salaried Plan is registered in Newfoundland and Labrador and regulated by the Pension Benefits Act, 1997.

   a.

      i. (i) Does the federal Pension Benefits Standards Act, R.C.S. 1985, c-32 deemed trust also apply to those members of eh Salaried Plan who worked on the railway (i.e. a federal undertaking) ?

      ii. If yes, is there a conflict with Pension Benefits Act, 1997 and Pension Benefits Standards Act? If so, now is the conflict resolved?

   b.

      i. Does the Quebec Supplemental Pension Plans Act, CQLR, c. R-15.1 also apply to those members of the Salaried Plan who reported for work in Quebec?

      ii. If yes, is there a conflict with the Pension Benefits Act, 1997 and the Quebec Supplemental Pension Plans Act? If so, how is the conflict resolved?

      iii. Do the Quebec Supplemental Pension Plans Act deemed trust also apply to Quebec Salaried Plan members?

3) Is the Pension Benefits Act, 1997 lien and charge in favour of the pension plan administrator in section 32 (4) of the Pension Benefits Act, 1997 a valid secured claim in favour of the plan administrator? If yes, what amounts does this secured claim encompass?

58. Le présent tribunal est celui désigné à la LACC à l'exclusion de tout autre pour se prononcer sur toutes les questions que veut soumettre le gouvernement de Terre-Neuve et Labrador à la Cour d'appel de cette province, même sur les questions de prétendus conflits de lois;

59. Le pourvoi en référé fait double emploi et crée une espèce de litispendance qui va à l'encontre des principes d'une saine administration de la justice;

60. Suivant la doctrine et la jurisprudence, le présent tribunal ne peut être lié par la Cour d'appel d'une province. Le jugement que pourrait rendre la Cour d'appel de Terre-Neuve et Labrador ne serait que purement théorique dans le cadre de la présente instance;

61. Le gouvernement de Terre-Neuve et Labrador, ainsi que le groupe de participants au régime de retraite des salariés, tentent de soustraire les questions à trancher de la compétence du présent tribunal parce que celui-ci a refusé de transférer ces questions à la Cour suprême de Terre-Neuve et Labrador;

62. La décision du 31 janvier 2017 du présent Tribunal n'a pas été portée en appel et est passée en force de chose jugée en ce qui concerne sa compétence à l'égard des questions soumises;

IV. CONCLUSIONS

63. Retraite Québec demande à cette honorable Cour de déclarer que la fiducie réputée de l'article 49 de la LRCR s'appliquent et affectent les réclamations de l'administrateur provisoire portant sur les cotisations d'équilibre afférentes aux droits des participants québécois pour les deux régimes et que ces sommes soient hors de la portée des créanciers garantis et ordinaires;

64. Le Tribunal n'a pas à attendre le résultat du pourvoi en référé déposé par le gouvernement de Terre-Neuve et Labrador à la Cour d'appel de cette province avant de statuer sur les présentes.

V. LISTE DES AUTORITÉS

LÉGISLATION ET ACCORD

Loi sur les régimes complémentaires de retraite, RLRQ, c. R-15.1

Loi sur les régimes supplémentaires de rentes, RLRQ., c. R-17, art.74

Accord multilatéral de réciprocité (1986)

Code civil du Québec,

JURISPRUDENCE

Régie des rentes du Québec et Commission des régimes de retraite de l'Ontario et MCColl- Frontenac Pétroleum inc, 2000 CanLII 30139 (ON SCDC)

Boucher c. Stelco Inc., [2005] 3 R.C.S. 279, 2005 CSC 64

Sun Indalex Finance c. *Syndicat des Métallos*, 2013 1 RCS 271

Timminco Ltée (Arrangement relatif à), 2014 QCCS 174

DOCTRINE

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Québec, le 12 mai 2017

Vaillancourt & Clocchiatti

VAILLANCOURT & CLOCCHIATTI
Avocats de la mise en cause
Retraite Québec

N° : 500-11-048114-157

PROVINCE DE QUÉBEC
District de Montréal

COUR SUPÉRIEURE
(Chambre commerciale)

BLOOM LAKE GENERAL PARTNER LIMITED et als

Débitrices

et

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP et als

Mis-en-cause

et

MICHAEL KEEPNER, TERRENCE WATT, DAMIEN LEBEL ET NEIL JOHNSON et als

Mises en cause

et

FTI CONSUTING CANADA INC

Contrôleur

ARGUMENTAIRE DE LA MISE EN CAUSE RETRAITE QUÉBEC

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BM1042

CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

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

WABUSH RESOURCES INC.

Petitioners

-and-

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP

BLOOM LAKE RAILWAY COMPANY LIMITED

WABUSH MINES

ARNAUD RAILWAY COMPANY

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

RETRAITE QUÉBEC

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

VILLE DE SEPT-ÎLES

Mis en cause

-and-

FTI CONSULTING CANADA INC.

Monitor

CONTESTATION OF THE MIS EN CAUSE THE SUPERINTENDANT OF FINANCIAL INSTITUTIONS
of the *Amended Motion by the Monitor for Directions with Respect to the Pension Claims*

INTRODUCTION

1. In the context of business restructuring, situations involving pension plans often give rise to disputes;

2. In this case, the issue is essentially whether the beneficiaries of the plans are entitled to the proceeds from the liquidation of assets to the extent of the unpaid monthly and catch up special payments;

3. It is important to note that the Superintendent of Financial Institutions, as Mis en cause in this proceeding is acting not as a creditor, but as a regulator, and that this dispute is therefore not subject to the principles developed by the Courts concerning deemed trusts in favour of the Crown;

4. We will demonstrate below that the Superintendent of Financial Institutions' position, which seeks to provide some measure of protection to the pension plan beneficiaries, is the one that should be adopted by the Court. This position is an appropriate application of the relevant legislative provisions in the present circumstances; i.e. where the pension plan has already been terminated by the regulators and where no restructuring plan has been filed to the creditors in general, or to the beneficiaries of the pension plan in particular. Moreover, this position is most appropriate considering, on the one hand the unique nature of pension plans, and on the other hand the appropriate balance of social and economic inconvenience that the parties are suffering as a result of the debtors' financial collapse;

1. OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS

A - OSFI's mandate

5. The Office of the Superintendent of Financial Institutions, hereinafter OSFI, was established under section 4 of the *Office of the Superintendent of Financial Institutions Act,* R.S.C., 1985, c. 18 (3rd Supp.) ("OSFI Act");

> **4.** (1) There is hereby established an office of the Government of Canada called the Office of the Superintendent of Financial Institutions over which the Minister shall preside and for which the Minister shall be responsible;

6. Its mandate with respect to pension plans specifically is defined at subsection 4(2.1) of the OSFI Act;

> **4.** (2.1) The objects of the Office, in respect of pension plans, are
>
> (a) to supervise pension plans to determine whether they meet the minimum funding requirements and are complying with the other requirements of *the Pension Benefits Standards Act, 1985* and the *Pooled Registered Pension Plans Act* and their regulations and supervisory requirements under that legislation;
>
> (b) to promptly advise the administrator of a pension plan in the event that the plan is not meeting the minimum funding requirements or is not complying with other requirements of the *Pension Benefits Standards Act, 1985* or the *Pooled Registered Pension Plans Act* or their regulations or supervisory requirements under that legislation and, in such a case, to take, or require the administrator to take, the necessary corrective measures or series of measures to deal with the situation in an expeditious manner; and
>
> (c) promote the adoption by management and boards of directors of financial institutions of policies and procedures designed to control and manage risk."

7. In pursuing its legislated objectives, OSFI must strive to protect the rights and interests of plan members and other beneficiaries.

> **4.** (3) In pursuing its objects, the Office shall strive
>
> (a) in respect of financial institutions, to protect the rights and interests of depositors, policyholders and creditors of financial institutions, having due regard to the need to allow financial institutions to compete effectively and take reasonable risks; and
>
> (b) in respect of pension plans, to protect the rights and interests of members of pension plans, former members and any other persons who are entitled to pension benefits or refunds under pension plans.

B - OSFI's interest in this proceeding

8. Under section 5(1) of the *Pension Benefits Standards Act,1985*, R.S.C. 1985, c. 32 (2nd Supp.), hereinafter the PBSA, the Superintendent is responsible for the administration of this Act;

9. Section 5.(1) states:

> The Superintendent, under the direction of the Minister, has the control and supervision of the administration of this Act and has the powers conferred by this Act.

10. Section 33.2(1) of the PBSA provides as follows:

> In addition to any other action that the Superintendent may take in respect of a pension plan, the Superintendent may bring against the administrator, employer or any other person any cause of action that a member, former member or any other person entitled to a benefit from the plan could bring.

11. In *Buschau v Rogers Communications Inc* 2006 SCC 28, the Supreme Court of Canada stated at paragraph 20:

> 20 In essence, the Superintendent plays a crucial role in the protection of beneficiaries. Although most of his interventions relate to supervision of the solvency requirements, he also acts as a gatekeeper for the distribution of a pension fund. The Superintendent has unique duties and responsibilities *vis-à-vis* beneficiaries that may make it possible to avoid resorting to a common law rule that was designed for an environment totally different from that of pension law.

2. QUESTIONS AND CONTESTED MATTERS

12. For the reasons discussed hereinafter, OSFI contests the April 13 Amended Monitor's Motion and, more specifically, the conclusions sought regarding the normal and special payments (including monthly and catch-up);

13. OSFI submits that the issues in dispute as submitted by the Monitor were not developed with the consent of the interested parties;

14. OSFI submits that the proper question before this Court should be:

> In the context where:
>
> a) The debtors obtain authorization from the Court to suspend the special payments to the pension plan;
>
> b) The assets have been liquidated under the CCAA;
>
> c) The pension plan has been terminated by the regulators following the Initial Order;

d) No plan has been offered (or will be offered) to the creditors and the beneficiaries of the pension plan

Does section 6(6) of the CCAA or any other section of this Act, allow the Court to not apply the protections granted by sections 8 and 29 of the PBSA?

15. OSFI also disagrees with the Monitor's method of calculating the normal payments for December 2015 as a fraction related to the termination date of December 16, 2015 (16 days out of 31 days) of the amount normally due. This calculation would be contrary to the pension plan itself, which provides that members receive credited service for the entire month in the event of plan termination prior to the end of the month;

16. OSFI contests the conclusion sought by the Monitor for a declaration that normal and special payments are ordinary claims;

17. Based on Exhibit R-26 filed by the Petitioner, the Towers Watson report "Plan Termination as at December 16, 2015", which is currently under review by the regulator, and as summarized in paragraph 43 of the Petitioner motion, the following amounts are due to the Salaried and Union DB Plans;

	Salaried DB Plan	**Union DB Plan**
Normal Cost Payments		
Pre-filing	$0	$0
Post-Filing	$0	$0
Total	**$0**	**$0**
Special Payments		
Pre-filing	$3	$146,776
Post-Filing	$2,185,753	$2,999,924
Total	**$2,185,756**	**$3,146,700**
Catch-up Special Payments		
Pre-filing	$0	$0
Post-Filing	$0	$3,525,120
Total	**$0**	**$3,525,120**
Estimated Wind-up Deficiency	$27,450,000	$27,486,548

18. While the normal cost payments made subsequent to the initial Order were all paid until the termination of the plan by the Superintendent on December 16, 2015, a *pro rata* calculation was made by the Monitor for the month of December 2015 pursuant to which the Debtors only paid 16/31 of the amount due for that month;

19. Since the initial Order, and in accordance therewith, the Debtors have suspended both special and catch-up payments, for a total amount of $8 857 576.00;

20. Considering that the pension plans expressly provide that in the event of termination, the entire current month must be paid, the amount of $44 356, not $22 893, should have deposited in the pension plans;

3. PURPOSE OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT (CCAA)*

21. As stated by the authors Houlden & Worawetz[1]:

> « The decided cases have identified the following purposes of the legislation:
>
> - to permit an insolvent company to avoid or be discharged from bankruptcy by making a composition or arrangement with its creditors : *Browne* v. *Southern Canada Power Co.* (1941), 23 C.B.R. 131, 71 Que. K.B. 136 (Que. C.A.); *Multidev Immobilia Inc.* v. *S.A. Just Invest.* (1988), 1988 CarswellQue 38, 70 C.B.R. (N.S.) 91, [1988] R.J.Q. 1928 (Que. S.C.);
> - to preserve the insolvent company as a viable operation and to reorganize its affairs to the benefit not only of the debtor but of the creditors : *Quintette Coal Ltd.* v. *Nippon Steel Corp.* (1990), 80 C.B.R. (N.S.) 98, 1990 CarswellBC 425 (B.C. S.C.); *Milner Greenhouses, supra; Re D.W. McIntosh Ltd.* (1939), 1939 CarswellOnt 87, 21 C.B.R. 206 (Ont. S.C.); *Re Avery Construction Co.* (1942), 1942 CarswellOnt 86, 24 C.B.R. 17, [1942] 4 D.L.R. 558 (Ont. S.C.) *Re Arthur Flint Co.* (1944), 1944 CarswellOnt 59, 25 C.B.R. 156, [1944] O.W.N. 325, [1944] 3 D.L.R. 13 (Ont. S.C.); *Citibank Canada* v. *Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3d) 165, 1991 CarswellOnt 182, 2 P.P.S.A.C. (2d) 21 (Ont. Gen. Div.);
> - to maintain the *status quo* for a period to provide a structured environment in which an insolvent company can continue to carry on business and retain control over its assets while the company attempts to gain approval of its creditors for a proposed arrangement that will enable the company to remain in operation for the future benefit of the company and its creditors: *Meridian Dev. Inc.* v. *Toronto Dominion Bank, supra; Quintette Coal Ltd.* v. *Nippon Steel Corp.* (1990), 80 C.B.R. (N.S.) 98, 1990 CarswellBC 425 (B.C. S.C.); *Re Canadian Airlines Corp. (2000),* 19 C.B.R. (4th) 1, 2000 CarswellAlta 622 (Alta. Q.B.); *Milner Greenhouses Ltd.* v. Saskatchewan (2004), 2004 CarswellSask 280, [2004] 9 W.W.R. 310, 50 C.B.R. (4th) 214, 2004 SKQB 160 (Sask Q.B.); *Re Blue Range Resource Corp.* (2000), 192 D.L.R. (4th) 281, 2000 ABCA 239, 20 C.B.R. (4th) 187, 2000 CarswellAlta 1004 (Alta. C.A.);
> - to protect the interests of creditors and to permit an orderly administration of the debtor company's affairs: *Meridian Development Inc.* v. *Toronto Dominion Bank* (1984), 1984 CarswellAlta 259, 52 C.B.R. (N.S.) 109, 32 Alta L.R. (2d) 150, [1984] 5 W.W.R. 215, 53 A.R. 39 (Q.B.);
> - to protect an insolvent company from proceedings by creditors that would prevent it from carrying out the terms of a compromise or arrangement: *Feifer* v. *Frame Manufacturing. Corp.* (1947), 1947 CarswellQue 15, 28 C.B.R. 124, [1947] Que. K.B. 348 (Que. C.A.);

[1] Bankruptcy and Insolvency Law of Canada (p 11.6.1)

- to permit equal treatment of creditors of the same class: *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1, 1990 CarswellNS 33, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (T.D.);
- to permit a broad balancing of stakeholder interests in the insolvent corporation: *Nova Metal Products Inc.* v. *Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, 41 O.A.C. 282, 1990 CarswellOnt 139, 1 O.R. (3d) 289 (Ont. C.A.); *Re Air Canada [Greater Toronto Airport Authority re gates at new terminal (Toronto)]* (2004), 47 C.B.R. (4th) 189, 2004 CarswellOnt 870 (Ont. S.C.J.) [Commercial List]);
- in appropriate circumstances to effect a sale, winding-up or liquidation of a debtor company and its assets: *Re Anvil Range Mining Corp.* (2002), 34 C.B.R. (4th) 157, 2002 CarswellOnt 2254 (Ont. C.A.).»

22. The authors add (page 11-8):

> « The Supreme Court of Canada held that Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected, notably creditors and employees; and that a workout that allowed the company to survive was optimal. It held that courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed. The Supreme Court of Canada has held that reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs: *Re Ted Leroy Trucking Ltd.*, 2010 CarswellBC 3419, 2010 CarswellBC 3420, [2010] 3 S.C.R. 379, 72 C.B.R. (5th) 170, 2010 SCC 60 (S.C.C.). For a full discussion of this case see No 101 "Claims under the *Excise Tax Act*". »

23. As pointed out by Justice Gascon, then of the Superior Court, in *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 2152:

> « [4] Si la familiarité des nombreux intervenants avec le processus varie grandement, l'objectif de cette loi est tout de même bien connu. La *LACC* vise à permettre à AbitibiBowater de restructurer ses affaires, ses opérations et sa dette.
>
> [5] Le moyen que la loi met à sa disposition est l'élaboration, la négociation et la mise en œuvre d'un plan d'arrangement juste et raisonnable avec ses créanciers et sur lequel ils seront appelés à voter.
>
> [6] Le processus est avant tout celui des débitrices et de ses créanciers. Le rôle du Tribunal en est un de supervision. Le but ultime recherché est la conclusion d'un plan d'arrangement fructueux dans une perspective de continuité des opérations et de survie de l'entreprise. Il en va de l'intérêt de tous les intervenants, voire celui de la société en général selon certains. Pour paraphraser les propos du juge Blair dans l'arrêt *Metcalfe*[4], l'on parle ici d'une loi qui comporte un « *broader social economic purpose* » et un « *wider public interest* ». »

24. Justice Deschamps in *Century Services Inc.* v *Canada (AG)* [2010] 3 SCR 379, summarized the restructuring procedure under the CCAA as follows:

> [14] Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

25. The CCAA, contrary to the *Bankruptcy and Insolvency Act*, does not contain a scheme of distribution and, consequently, does not contain a priority plan;

26. Section 6(6) of the CCAA provides that the Court may not sanction a plan that does not provide for the payment of certain amounts to a prescribed pension plan, such as the plans at issue here. Specifically, in the context of a defined benefit pension plan, the court must be satisfied, at a minimum, that an arrangement provides for the payment of normal cost amounts owed to the fund and amounts deducted from employees' remuneration. By definition, this provision is only applicable in situations where the debtor has in fact submitted a plan to its creditors;

27. In such a scenario, it is the creditors themselves who will decide whether to accept or refuse the proposal presented to them;

4. ABSENCE OF PRIORITY RANKING IN THE *CCAA* AND CONSEQUENCE OF THAT ABSENCE WHERE PLAN NOT PROVIDED

28. The debtors, with the monitor's consent, opted to liquidate their assets under the CCAA, when it was clear from the outset that no restructuring would be possible given that the employees were dismissed and the mines were closed even before the beginning of the process. Although a debtor can choose to liquidate its assets under the CCAA instead of the BIA, this choice is not without consequence: the result for the respondent that authorizes the debtor to proceed with liquidation under the CCAA is that the deemed trust created by section 8(2) of the PBSA continues to apply;

29. Justice Deschamps, in fact, held in *Indalex*:

> [51] In order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements. Yet this does

> not mean that courts may read bankruptcy priorities into the *CCAA* at will. 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, [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*.
>
> *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6

30. Applying that principle to this case, it follows that, by operation of the PBSA, a federal statute that continues to apply during the procedures, amounts owed to the plan under section 8(1) of the PBSA, which includes accrued special payments, attach to the proceeds of the liquidation of assets and are deemed not to form any part of the estate. Consequently, the amounts owed as normal and special payments after the Wabush Initial Order must be deposited into the pensions plans;

31. The powers granted to the Court under the CCAA are broad enough to allow it to order, now, that the amounts due be deposited into the pension plan;

32. Neither the debtor, the creditors, nor the regulators can remain in limbo about an arrangement under the CCAA that is not an arrangement;

33. Although it is acknowledged that a debtor may, with the Court's approval, liquidate its assets under the CCAA. This law does not permit a debtor to avail himself of the advantages of the *CCAA*, such as the writing-off of debts, without also respecting the *sine qua non* obligation imposed by the *CCAA*, that is, to submit a plan or arrangement to his creditors;

5- PRE- AND POST- CLAIMS AND THE NECESSITY TO FILE A PLAN TO THE BENEFICIARIES

34. Pursuant to sections 19 and 2 of the *CCAA* and sections 2 and 121 of the *BIA*, all payments, other than normal cost payments, that were due at the time of the initial Order may be the

objects of a compromise through the filing of a Plan of Arrangement, but only insofar as such a Plan is actually filed;

35. Indeed, the Debtors, with the approval of the Monitor, followed this reasoning: on one hand, they made the normal cost payments after the Order until the termination of the plan and on the other hand, they asked the Court for leave to suspend the special and catch-up payments subsequent to the Order;

36. Under paragraph 12 (a) of the Rectified Initial Order, the debtors were authorized to stay its monthly special payments to the pension plans;

37. This authorization, usually granted in the course of a business restructuring under the CCAA, was intended to permit a debtor to restructure. Although the Debtors were authorized under the terms of the initial order to stay the payment of their special payments, the fact remains that the debtors remain subject to the PBSA during the process;

38. From the time when the assets were sold and it became clear that there would be no Plan of Arrangement presented to the creditors, and given that the amounts due to the pension fund belong, by virtue of the wording of the *PBSA*, to neither the Debtors nor the estate, it became unfair to deprive the pension plan beneficiaries of these amounts;

39. Moreover, an authorization to stay payments to a pension plan does not in any way imply that those payments are set aside or expunged;

40. As Justice Mayrand wrote in *AbitibiBowater Inc. (Arrangement retatif à)*, 2009 QCCS 2028:

> [TRANSLATION]
>
> 51 Moreover, *Abitibi*, in conjunction with all its creditors, employees, lenders and suppliers may successfully overcome the impasse by agreeing to an arrangement to put the business back on the right track in the short or medium term. Terms and conditions for the repayment of the stayed contributions can be agreed on with the approval of the appropriate authorities. This will be done at another stage.

41. Justice Mayrand authorized a stay of payments to the pension plan, taking care to state that the terms and conditions for the repayment of those amounts could ultimately be agreed on once the restructuring was completed and in a context where not staying these payments would jeopardize the chances of restructuring and, as a result, the closing of the business and the loss of jobs;

> [TRANSLATION]
>
> 49 The consequences of the measures sought and disputed by both groups are substantial. If Abitibi cannot restructure its affairs because it is making amortization payments and, in doing so, its survival is at risk, the first spectre arises, the closure of the business, loss of jobs and the termination and winding-up of pension plans.

42. *A fortiori,* in this case, where the debtor has already dismissed its employees, liquidated its assets, where no recovery plan will be presented to the creditors and the pension plans have already been terminated, and where the sale proceeds of the assets are more than enough to pay the amortization payments, the total amount due should be deposited in the pension plan;

43. Justice Pepall came to a similar conclusion in *Fraser Papers Inc. (Re)*, 2009 Can LII 39776:

> [21] The relief requested by the Applicants, importantly in my view, does not extinguish or compromise or even permit the Applicants to compromise their obligations with respect to special payments. Indeed, the proposed order expressly provides that nothing in it shall be taken to extinguish or compromise the obligations of the Applicants, if any, regarding payments under the pension plans. Failure to stay the obligation to pay the special payments would jeopardize the business of the Applicants and their ability to restructure. The opportunity to restructure is for the benefit of all stakeholders including the employees. That opportunity should be maintained.

44. Justice Farley in *United Air Lines Inc. (Re,)* 9 CBR (5th) 159, had even dismissed the application for authorization to stay payments to the pension fund, stating, in particular, that the debtor had the necessary funds and that these payments were not up against the ceiling of the DIP financing:

> **4** UAL has not run out of money nor of liquidity, albeit that it must husband its available funds and liquidity in a very prudent manner. However, there is no evidence before me that UAL either (i) does not have sufficient funds to make the pension funding payments or (ii) that its DIP arrangements are such that it cannot make such payments (in this latter (ii) situation, neither is there any evidence that even if it were up against the ceiling of its DIP requirements, that an application was made to the DIP lenders for consent to make such payments).

45. The Debtors cannot request, with the Monitor's assistance and approval, the protection of the Court in order to sell the Debtors' assets while asking that special payments due to the pension plan be stayed, and then have those very payments essentially expunged by remitting the proceeds of sale of its assets to the secure creditors who, by the very wording of section 8(2) of the PBSA, are not entitled to them, all in a context in which no plan is proposed to the creditors in general nor to the beneficiaries of the plans in particular;

46. Although everyone recognizes the general principle, often pointed out by the courts, that in a restructuring under the CCAA everyone must make sacrifices, we submit that this principle must be weighed where there is a liquidation under the CCAA that does not result in any restructuring plan, where almost all the employees were dismissed before the beginning of the process and where the plans have been terminated since. In addition to the loss of their jobs, these employees have lost the benefit of the continuation of their pension plan. Furthermore, members of the pension plan (as well as retirees with little if any future income

prospects) are facing large reductions in their pension entitlements, regardless of the outcome of this Motion. The special payments would make an important difference to the funded status of the pension plans, but these plans would still remain significantly underfunded. Full payment of the outstanding special payments to both the DB Union and DB Salaried Plans would still leave each plan funded (on a solvency basis) at only about 85.5% and 77%, respectively. Members' pensions, earned through their many years of service, have been sacrificed because of this situation. The amount at stake is, in short, minimal when compared to the totality of the companies' indebtedness;

47. OSFI finds it difficult to understand how the Debtors could ask the Court to suspend post-order special payments and, at the same time, make post-order normal cost payments, only to later assert that these claims constituted pre-order ordinary claims;

48. Furthermore, given that most of the employees had been laid off and that the Debtors had asked the Court to ratify their liquidation plan, the Regulators terminated the pension plans on December 16, 2015, several months after the initial Order;

49. Section 29(6.4) of the *PBSA* makes all amounts due on the date of the pension termination plan. Prior to plan termination, normal cost and special payments accrue on a month-to-month basis, as they become due. In this circumstance, the pension claim, which represents amounts that became payable or fully constituted after the Wabush Initial Order date, cannot be characterized as a "pre-order" claim;

50. As previously mentioned, the ultimate purpose of the CCAA is to enable a company in difficulty to recover in order to continue its activities;

51. As such, the CCAA safeguards for employees and pensioners are intended only to further this objective;

52. Although section 6(6) only addresses a compromise that preserves normal cost payments owing to a pension plan, it applies in the context of the ratification of a plan, which implies that the affected creditors voted in favour of the plan;

53. To the extent that this minimum provided for under section 6(6) of the *CCAA* can supersede the deemed trust protections over accrued special payments provided under the *PBSA*, it can only be accepted by the creditors and cannot be imposed on them before the filing of a plan;

54. The conclusion sought by the Monitor's Motion would have the effect, in the context of the *CCAA*, of depriving the beneficiaries of the pension plans of their rights without a plan even having been submitted to them;

55. The judgment of June 15, 2015 held that the Deemed Trust, pursuant to section 8 of the *PBSA*, does not apply;

56. However, with respect, this decision appeared to be made in light of the protections afforded by s. 6(6) of the CCAA. At the time of the judgment, some or all of the Debtors left open the possibility that they would file a plan to the creditors. This is no longer the case, or, at least, no plan had been proposed to the beneficiaries of the pension plans neither before, nor after the filing of the Monitor's Motion;

57. Furthermore, after the judgment of June 15, 2015, the pension plans were terminated by the Regulators;

58. It would be contrary to the spirit of the law, in a context where no plan is filed with the creditors, to now claim that the Deemed Trust cannot apply and that all the sums due to the pension plans, other than the normal cost payments outstanding as of the date of the Initial Order, constitute ordinary claims;

59. The Monitor, through the framing of the issues in dispute and through the conclusions sought, attempts to eliminate the PBSA Deemed Trust even in a context where no plan was submitted and without even knowing how the Debtors intend to leave the CCAA;

60. As mentioned by the Supreme Court of Canada in the decision *Century Services Inc v Canada (Attorney General)* 2010 SCC 60 :

> [60] Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).
>
> [...]

> [70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.
>
> [71] It is well established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*'s purposes, the ability to make it is within the discretion of a *CCAA* court.

61. The objective of the Act and the intervention of the Court must be geared towards the restructuring of the company in difficulty and to the continuation of its business. The Debtors cannot be allowed to take refuge under the protection of the CCAA for over two years and sell virtually all their assets, and then evade their obligations under the PBSA without offering anything to the creditors or to the beneficiaries of the pension plans and without even informing the creditors on how they intend to terminate proceedings under the CCAA;

62. Even though section 6(6) provides a minimum, which must be approved by the creditors, there is nothing in the CCAA that authorizes the Court to apply this minimum in the absence of any restructuring plan to the creditors in general and to the beneficiaries of the pension plans in particular;

63. Moreover, the suspension of the special payments authorised by the Court did not have the effect of rendering the Deemed Trust pursuant to the *PBSA* inapplicable, it only delayed the requirement to pay into the Pension Plan until the filing of a plan, which, in this instance, has not occurred;

64. The termination of the pension plans on December 15, 2015 crystallized, at that date, all sums due to the pension plans until December 31, 2015;

65. Section 29 of the PBSA provides :

> (6) If the whole of a pension plan is terminated, the employer shall, without delay, pay into the pension fund all amounts that would otherwise have been required to be paid to meet the prescribed tests and standards for solvency referred to in

subsection 9(1) and, without limiting the generality of the foregoing, the employer shall pay into the pension fund

(a) an amount equal to the normal cost that has accrued to the date of the termination;

(b) the amounts of any prescribed special payments that are due on termination or would otherwise have become due between the date of the termination and the end of the plan year in which the pension plan is terminated;

(c) the amounts of payments that are required to be made under a workout agreement that are due on termination or would otherwise have become due between the date of the termination and the end of the plan year in which the pension plan is terminated;

(d) all of the following amounts that have not been remitted to the pension fund at the date of the termination:

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

(ii) other amounts due to the pension fund from the employer; and

(e) the amounts of all of the payments that are required to be made under subsection 9.14(2).

66. Since the pension plans have been terminated and no restructuring plan has been presented to the pension plan beneficiaries, the Monitor and the Debtors cannot claim that only the normal cost payments are protected. Nothing in the *CCAA* provides for this type of situation. On the contrary, section 29(6)(b) of the PBSA applies to capture unpaid special payments as of termination;

67. In similar circumstances, the *PBSA* continues to apply and the regular, special and catch-up payments that have become due by virtue of section 29 of the *PBSA* are protected by the Deemed Trust created by section 8 of the same Act;

68. In the absence of an agreement with the pension plan beneficiaries that is ratified by the Court, neither the Debtors, nor the Monitor may unilaterally impose on the beneficiaries an amount less than that which the *PBSA* provides for and protects;

CONCLUSIONS SOUGHT

THE OFFICE OF THE SUPERINTENDANT OF FINANCIAL INSTITUTIONS THEREFORE ASKS THAT THE COURT :

GRANTS the present Notice of Objection;

DECLARES that the amount of $8,857,576 (subject to change) are subject the deemed trust created by section 8 of the Pension Benefits Standards Act, 1985 RSC 1985 c 32 (2nd suppl);

THE WHOLE WITHOUT COSTS

MONTRÉAL, May 12, 2017

Attorney General of Canada

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Ref. : 8072696

N° 500-11-048114-157

SUPERIOR COURT
District of MONTREAL
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 *ET AL.*
Petitioners

-and-

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP *ET AL.*
Mises en cause

-and-

HER MAJESTY IN RIGHT OF NEWFOUNDLAND & LABRADOR, AS REPRESENTED BY THE SUPERINTENDENT OF PENSIONS *ET AL.*
Mis en cause

-and-

FTI CONSULTING CANADA INC.
Monitor

CONTESTATION OF THE MIS EN CAUSE THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS
of the *Amended Motion by the Monitor for Directions with Respect to Pension Claims*

ORIGINAL

ATTORNEY GENERAL OF CANADA
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Our File No. : 8072696

CANADA
PROVINCE OF QUEBEC
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, WABUSH RESOURCES INC.

Petitioners

-and-

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

Mises-en-cause

-and-

HER MAJESTY IN THE 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 STEELWORKERS, LOCAL 6254, UNITED STEELWORKERS, LOCAL 6285

RETRAITE QUÉBEC

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

Mises-en-cause

-and-

FTI CONSULTING CANADA INC.

Monitor

OUTLINE OF ARGUMENT OF MORNEAU SHEPELL, IN ITS CAPACITY AS THE REPLACEMENT PENSION PLAN ADMINISTRATOR, IN RESPONSE TO THE MONITOR'S MOTION FOR DIRECTIONS WITH RESPECT TO PENSION CLAIMS
(Sections 11, 17 and 23(k) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

TO THE HONOURABLE MR. JUSTICE STEPHEN W. HAMILTON, J.S.C., OR TO ONE OF THE HONOURABLE JUDGES SITTING IN THE COMMERCIAL DIVISION IN AND FOR THE JUDICIAL DISTRICT OF MONTRÉAL, THE OBJECTING PARTY-MISE-EN-CAUSE RESPECTFULLY SUBMIT THE FOLLOWING:

1. Morneau Sheppell, in its capacity as the Replacement Pension Plan Administrator, has had the opportunity to review the Outline of Argument of the Superintendent of Pensions of Newfoundland & Labrador, Representative Counsel, and USW, Locals 6254 and 6285. Morneau Shepell agrees with adopts the positions and submissions made therein.

2. With respect to any issue relating to the interpretation and application of the Québec *Supplemental Pension Plans Act*, CQLR c. R-15.1, Morneau Shepell defers to Retraite Québec.

3. With respect to any issue relating to the interpretation of the *Pension Benefits Standards Act*, 1985 RSC 1985, C. 32, Morneau Shepell defers to the Office of the Superintendent of Financial Institutions of Canada.

4. Morneau Shepell reserves its right to respond to any reply submissions of the Monitor, Petitioners, or any other party.

PINK LARKIN
Ronald A. Pink, Q.C. and Bettina Quistgaard

Attorneys for Morneau Shepell in its capacity as the Replacement Pension Plan Administrator

No. 500-11-048114-157
SUPERIOR COURT
(Commercial Division)
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:
THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP
AND
WABUSH RESOURCES INC.
AND
WABUSH IRON CO. LIMITED
PETITIONERS
AND
FTI CONSULTING CANADA INC.
MONITOR
AND
MORNEAU SHEPELL, in its capacity as Replacement Pension Plan Administrator
MISE-EN-CAUSE

OUTLINE OF ARGUMENT OF MORNEAU SHEPELL ON THE MONITOR'S MOTION FOR DIRECTIONS ON PENSION CLAIMS

ORIGINAL

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CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

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

No.: 500-11-048114-157

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

WABUSH RESOURCES INC. *ET AL.*

Petitioners

-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

MOTION FOR DIRECTIONS WITH RESPECT TO PENSION CLAIMS: OUTLINE OF ARGUMENTS OF THE MONITOR

I. PRELIMINARY MATTERS

1. As stated in the Monitor's Motion for Directions with Respect to Pension Claims dated September 20, 2016 (docket # 385) as amended on April 13, 2017 (docket # 494, the **Pension Motion**[1]), the Monitor is not asking that this Court liquidate the amounts owing as unpaid current or special costs in respect of the DB Plans nor confirm the extent of the wind-up deficits further to their termination.

2. The Monitor has filed, as Exhibit R-25, copy of the Salaried DB Plan Wind-Up Report and, as Exhibit R-26 (together, the **Wind-Up Reports**), copy of the Union DB Wind-Up Report, noting that they remain subject to formal approval by the Newfoundland & Labrador Superintendent of Pensions (the **N&L Superintendent**), the Office of the Superintendent of Financial Institutions (**OSFI**) and Retraite Québec (collectively, the **Pension Regulators**) with respect to, *inter alia*, the calculation of the wind-up deficits as well as the composition of sub-group of members subject to different pension legislations.

3. Subject to the foregoing limitations, the Monitor is nevertheless of the view that the tables below, also forming part of the Pension Motion, provide useful information to guide this Court in answering the various questions raised by the Pension Motion:

- Summary of Amounts Owing based on Monitor's Analysis:

	Salaried DB Plan	Union DB Plan
Normal Cost Payments		
Pre-filing	$0	$0
Post-Filing	$0	$0[2]
Total	**$0**	**$0**
Special Payments		
Pre-filing	$3	$146,776
Post-Filing	$2,185,753	$2,999,924
Total	**$2,185,756**	**$3,146,700**
Catch-up Special Payments		
Pre-filing	$0	$0
Post-Filing	$0	$3,525,120
Total	**$0**	**$3,525,120**
Wind-Up Deficits	$27,450,000	$27,486,548[3]

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1 Capitalized terms not otherwise defined herein shall have the meaning ascribed thereto in the Pension Motion.

2 The right to pro-rate the December 2015 payment is challenged by the Objecting Parties (see paragraph 32 of the Pension Motion – the amount in dispute is $ 22,893).

- Composition of Members of the DB Plans:[4]

	Salaried DB Plan	Union DB Plan	TOTAL
Newfoundland & Labrador PBA	313	1005	1,318
Québec SPPA	329	661	990
Federal PBSA	14	66	80
TOTAL	**656**	**1732**	**2,388**

4. For ease of reference, the undersigned attorneys will refer to the parties having filed their Argumentation Outlines (or **AO**) and Book of Authorities (**BOA**) on May 12, 2017, including the Pension Regulators, as the **Objecting Parties**.[5]

5. The *Pension Benefits Act*, S.N.L., 1996, c. P-401 will be referred to as the **NL PBA**, the *Supplemental Pension Plans Act*, R.L.R.Q., c. R-15.1, as the **SPPA**, and the *Pension Benefits Standards Act*, R.S.C. 1985, c 32 (2nd Supp.) as the **PBSA**. Collectively, all three will be referred to as the **Pension Legislation**.

6. The Monitor refers this Court to its 36th Report (at paragraphs 51 to 62) and the supporting appendixes thereto, including Appendix A: The May 5 Reference Order; Appendix B: May 9 Letter (of the undersigned attorneys); and Appendix C: The Monitor's Reference Application, with respect to reference initiated by way of Orders in Council OC 2017-103 and OC 2017-137 under the authority of Sections 13 and 19 of *The Judicature Act* of Newfoundland and Labrador (the "**Reference**").

7. On June 9, 2017, the undersigned attorneys appeared before the Newfoundland & Labrador Court of Appeal to make similar representations with respect to the Reference and to explain that unless the Reference was limited solely to questions of interpretation of Section 32 of the NL PBA in the abstract and without reference to the Wabush CCAA Parties, the Wabush CCAA Proceedings, the CCAA and orders of the CCAA Court, that it would ask this Court to deal with all the issues during the upcoming hearing on June 28 and 29, and that this Court had indicated during the May 31, 2017 hearing that it would in all likelihood not wait in the circumstances to receive the benefit of a "consultative opinion" of the Newfoundland and Labrador Court of Appeal.

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3 Based on the information included in the Wind-Up Reports, but excluding, with respect to the Union DB Plan, the additional wind-up deficit in the amount of $ 2,349,912 described at para. 42.4 of the Pension Motion.

4 Based on the information included in the Wind-Up Reports. See also paras. 46.7 to 46.11 of the Pension Motion.

5 See paras. 78.2 to 79.2 of the Pension Motion for a detailed list of the Notices of Objection (or lack thereof) filed on behalf of the Objecting Parties.

8. After due consideration of the submissions made before it, including by the Newfoundland & Labrador Attorney General which took the position that the Newfoundland & Labrador Court of Appeal had no jurisdiction before the merits to decline or to reformulate reference questions and it would not reformulate same, the Newfoundland & Labrador Court of Appeal decided that it would hear the Reference Questions "as is", using the Wabush CCAA Proceeding as an "hypothetical" fact scenario.[6]

II. SCOPE OF APPLICATION OF PENSION LEGISLATION

9. Before examining the different questions submitted by the Monitor by way of the Pension Motion, it is essential to determine the proper scope of the Pension Legislation as it applies to the DB Plans.

10. The Monitor notes that the Objecting Parties offer divergent views on this crucial issue, especially with respect to the potential extension of the NL PBA in favour of Quebec and "federal" members, such that they too could benefit from the NL PBA deemed trust provisions — assuming that the NL PBA deemed trust extends to the wind-up deficit and that the deemed trust was effectively triggered in the present case (both assumptions being contested by the Monitor for the reasons more fully set-out below).

A. Position of the Objecting Parties

(i) Representative Counsel and Replacement Plan Administrator

11. In its Argumentation Outline, "Representative Counsel [...] submits that the [NL PBA], and its deemed trust provisions, apply to all Wabush pension plan members, including those who performed work in Sept-Iles, Québec, and those who worked on [the] Wabush Mines railways" (para. 81).

12. They further reserve (or attempt to) their "right to make supplementary submissions on the applicability of the deemed trust provisions in the SPPA and PBSA relating to the affected Wabush Mines Salaried Plan members."[7] The Monitor is of the view that such reserve is inappropriate and urges Representative Counsel to make full submissions on all issues at hand without such unnecessary bifurcations, the whole as clearly directed by this Court in light of its January 30, 2017 ruling.[8]

(ii) N&L Superintendent

13. The N&L Superintendent, for its part, merely states that "[the NL PBA] would apply, at the very least, to the benefit of all of the employees who reported for work in the province", relying in doing on Section 5 NL PBA.[9]

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6 See **Schedule A** : Newfoundland and Labrador Court of Appeal Ruling on Application for Directions dated June 9, 2017.

7 Representative Counsel AO, at para. 82.

8 *Arrangement relatif à Bloom Lake*, 2017 QCCS 284, at paras. 70, 90-91. Representative Counsel, BOA, Tab 2.

9 N&L Superintendent AO, at para. 98.

(iii) Retraite Québec

14. Retraite Québec clearly states its position at paragraphs 23 and 33 of its Argumentation Outline: according to it, the entitlements of Quebec members, including any statutory protection by way of a deemed trust provision, are exclusively governed by the SPPA:

> 23. Ainsi, malgré le fait que plusieurs lois puissent être applicables aux participants aux régimes de retraite, aucune ne fait échec à l'application de la LRCR [or SPPA] à l'égard des droits des participants québécois (à l'exclusion des participants dont les droits sont régis par la LNPP [fédérale, or PBSA]); [...]
>
> 33. En somme, en raison de la règle de conflit unilatérale que constitue l'article 1 de la LRCR [SPPA], et à la lumière des dispositions applicables de l'Accord [Memorandum of Agreement, Exhibit R-22 in support of the Pension Motion] qui a force entre la province de Québec et de Terre-Neuve, les dispositions de la LRCR [SPPA] trouvent application à l'égard des droits des participants québécois.

(iv) Union

15. The Union submits that this Court should extend to all members and beneficiaries of the Union DB Plan the benefit of the most advantageous deemed trust provisions provided for in the Pension Legislation. It concludes at paragraph 44 of its Argumentation Outline:

> 44. Ainsi, la Cour devra conclure que la fiducie réputée la plus généreuse s'applique pour le régime de retraite [Union DB Plan] afin de respecter l'ensemble des dispositions minimales d'ordre public;

(v) OSFI

16. OSFI does not take any specific position on this issue in its Argumentation Outline.

(vi) Specific Argument of Reverse Paramountcy

17. In its Argumentation Outline (para. 80(b)), Representative Counsel submits, based on the contested assumption that, unlike the PBSA, the NL PBA deemed trust provisions protect the wind-up deficits, that the NL PBA ought to have paramountcy over the PBSA.

18. This argument is based on Section 94A of *The Constitution Act*,[10] which provides that:

> **OLD AGE PENSIONS**
>
> **94A.** The Parliament of Canada may make laws in relation to old age pensions and supplementary benefits, including survivors' and disability benefits irrespective of age, but no such law shall affect the operation of any law present or future of a provincial legislature in relation to any such matter.

19. The Monitor is of the view that Representative Counsel's argument of reverse paramountcy rests in part on an unwarranted and misguided extension of Section 94A to

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[10] *The Constitution Act*, 1867, 30 & 31 Victoria, c. 3.

privately sponsored regimes and, in any event, that any such purported paramountcy is barred by the clear wording of Section 5 of the NL PBA, which reads as follows:

> **5.** This Act applies to all pension plans for persons employed in the province, except those pension plans to which an Act of the Parliament of Canada applies.

20. Both the plain wording and the historical background of Section 94A confirm that it is limited to old age pension regimes, i.e. publicly funded regimes, rather than privately sponsored pension plans such as the DB Plans at stake here. The Alberta Court of Queen's Bench in *McLeod* v. *Canada (Attorney General)*[11] provides some relevant guidance and historical perspective on Section 94A:

> [11] Section 94A as it currently reads confers on the Federal Parliament the power to make laws in relation to old age pensions and supplementary benefits. It also acknowledges the existence of concurrent provincial power. As a result, this section belongs to a small group of constitutional provisions wherein there is federal and provincial concurrency. In Canada, exclusivity is the rule and concurrency the exception.
>
> [12] In *Constitutional Law of Canada* (Carswell, Toronto, 1992), Professor Peter Hogg points out that when the section was enacted it was the first instance of federal inter-delegation being used by the federal and provincial governments to lend each other needed legislative powers. Specifically, the federal government sought to establish a scheme of old age pensions financed by contributions from employees, the federal government, and the provincial governments. In turn, the provincial governments wanted the power to levy an indirect retail sales tax. The objective was to attack extreme disparities in income across the country and to provide a greater measure of equality of opportunity to all Canadians. A Bill was subsequently introduced in the Nova Scotia legislature to carry out the provincial side of the inter-delegation scheme. The Bill was then referred to the Supreme Court of Canada for a reference on its constitutionality. In *Nova Scotia (Attorney General)* v. *Canada (Attorney General)*, 1950 CanLII 26 (SCC), [1951] S.C.R. 31 (Nova Scotia Inter-delegation), the Bill was declared to be invalid because it would disturb the scheme of distribution of powers in the Constitution.
>
> [13] Following this decision, the federal government decided that the best course for achieving the desired result was constitutional amendment. It then proposed two constitutional amendments: one to confer on the federal government the power to enact a pension scheme and the other to confer on the provincial Legislatures the power to levy an indirect sales tax. The pension amendment was eventually passed with the unanimous consent of the ten provincial governments while the sales tax amendment was not unanimously supported and so died.
>
> [14] In 1951, the Parliament at Westminster enacted s. 94A. Soon after, the Old Age Security Act, 1951, was passed. It provided for payment of an old age pension and for the financing of this pension by Federal taxation. In 1964, s. 94A was amended by the Constitution Act, 1964 (U.K.), R.S.C. 1985, App. II, No. 38, consent having been obtained from all provinces. The wording was altered to

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[11] *McLeod* v. *Canada (Attorney General)*, 1993 CanLII 7250 (AB QB). **Tab 1.**

> enable benefits to be paid to young survivors of disabled contributors. The following year, in 1965, the Canada Pension Plan was introduced.
>
> [15] When, in 1966, a system of old age pensions was inaugurated by the Province of Quebec (S.Q. 1965, 13-14 Eliz. II, vol. 1, c. 24), the federal legislation became inoperable in that province by reason of the fact that s. 94A provided for provincial paramountcy where the provincial government passed laws in relation to old age pensions and supplementary benefits which were affected by the federal laws already in place. This exemplifies a situation where a federal law affects a provincial law in relation to old age pensions and supplementary benefits. Such is the case because the Quebec provincial law and federal law are in conflict as they are in relation to the same subject matter – a public pension plan. The result is that the federal legislation is deemed inoperable in this particular provincial jurisdiction.
>
> [...]
>
> [23] At this juncture I point out the relevant differentiation between private employment pensions and government funded old age pensions. The Canada Pension Plan provides for the division of old age pension credits upon the dissolution of marriage. With respect to occupational pensions, their division has been read into the *Alberta Matrimonial Property Act in Lenner* v. *Lenner* (1991), 1991 ABCA 293 (CanLII), 125 A.R. 231 (C.A.).
>
> [24] Accordingly, the public and private plans operate independently with the hope that together they will provide coverage for all Canadians. The gaps in coverage which currently exist could be filled by either expanding the Canada Pension Plant Quebec Pension Plan or by requiring every employer to set up a pension plan. The former would require federal government financing, the latter the introduction of provincial legislation. Alternatively, both the federal government as well as provincial legislatures could take steps to fill gaps in the current regime. These suggestions bear in mind, however, the differences between the nature of public and private plans as well as their respective legal regulation. My comments are intended to draw awareness to both the existence of this distinction as well as its potential implications.
>
> [Our underlining]

21. The constitutional analysis of Section 94A and its historical underpinnings offered by Professor Hogg also confirms that it only applies to publicly funded old age pensions.[12]

22. The reverse paramountcy argument and its proposed extension to the DB Pension Plans to justify the application of the NL PBA to "federal employees" would also run contrary to the 2011 and 2016 Agreements elaborated by the Canadian Associated of Pension Supervisory Authorities with respect to multi-jurisdictional pension plans.[13]

23. As a matter of fact, Newfoundland and Labrador is not party to either of the CAPSA Agreements. While they are not applicable here as a result, it nonetheless bears noting that the CAPSA Agreements' clearly highlight that the federal jurisdiction over pension

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[12] Peter W. Hogg, *Constitutional Law of Canada*, Volume 1, Fifth Edition Supplemented (Toronto: Thomson Reuters, 2007-2016) at pp. 6-15, 33-8 and 33-9. **Tab 2**.

[13] Exhibits R-20 and R-21 in support of the Pension Motion (hereinafter, the **CAPSA Agreements**).

legislation by reason of the nature of the business, work or undertaking of the plan member's employer is not subject to or in any way ancillary to the provincial jurisdiction over pensions by reason of the nature or place of the plan members' residence or employment.[14] Both connecting factors operate in conjunction, without the provincial priming the federal.

B. Position of the Monitor

24. Pension plans are subject to and impacted by various legal rules under various different and interacting legal regimes, including statutory pension legislation, contract law, labour and employment law, tax law, insolvency law, trusts law, estate law, family law, property law and administrative law.[15]

25. Pension Legislation provides various rules governing *inter alia* the registration of pension plans and amendments thereto, the administration of pension plans, including the functions and duties of plan administrators, the funding of pension plans, reporting requirements in respect of same, and termination of pension plans.

26. The Pension Legislation applicable to the DB Plans include the NL PBA in respect of those employees that worked in Newfoundland and Labrador, the SPPA in respect of those employees that reported to work in Quebec and the PBSA for those employed by or in connection with a federal undertaking, the whole as more fully set out below.

27. The scope of application of the NL PBA[16] and of the SPPA[17] is dictated by the place of employment of plan members.

28. Unlike the NL PBA and the SPPA, the scope of application of the PBSA is determined on the basis of the nature of the activities of the employer.[18]

29. Moreover, both the NL PBA[19] and the SPPA[20] provide for the possibility of a multi-jurisdictional agreement.

30. The Memorandum of Agreement entered into by Quebec in 1968 and by Newfoundland and Labrador in 1986[21] is the only multi-jurisdictional pension agreement in force between the two provinces.

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14 CAPSA Agreements, Recital II.

15 Ari Kaplan and Mitch Frazer, *Pension Law*, Second Edition (Toronto: Irwin Law Inc., 2013) at p. 9. **Tab 3**.

16 Section 5 NL PBA also provides for an exception in favor of pension plans to which an Act of the Parliament of Canada applies. The Monitor is of the view that this exception applies to employees who are federally regulated.

17 Section 1 SPPA.

18 Section 4 PBSA.

19 Section 8.2 NL PBA.

20 Section 249 SPPA.

21 Exhibit R-22 in support of the Pension Motion.

31. The Monitor notes that the Memorandum of Agreement (R-22) merely eliminates the need to register pension plans in more than one jurisdiction so as to simply their administration. It delegates authority to the superintendent of the province in which "the plurality of the plan members are employed", which then becomes the jurisdiction of registration (or "major authority").[22] The superintendent of "any province where one or more plan members are employed, but does not include the major authority" is referred to as a "minor authority".[23]

32. The Memorandum of Agreement (R-22) does not provide for the incorporation by way of reference of the major authority's pension legislation as a whole to apply to members stemming from the minor authority province. Rather, it merely operates a delegation of statutory powers and functions as between the major authority and minor authority, the whole as set out in Section 2 thereof:

> The major authority for each plan shall exercise both its own statutory functions and powers and the statutory functions and powers of each minor authority for such plan.
>
> [Our underlining]

33. The major authority will apply its pension legislation with respect to the administration of the pension plan.[24] It will also apply, as provided by Section 2 of the Memorandum of Agreement (R-22), the statutory functions and powers of each minority authority:

> What this means is that while a multi-jurisdictional pension plan need only be registered in one province, it does not necessarily mean that the laws of the other province do not apply in respect of employees working in that other province. For example, when a multi-jurisdictional pension plan is being wound up, the administrator is required to allocate and account for the assets and benefits by province. Moreover, where the legislation is silent on a matter, the regulator of the province in which the plan is registered, "as a matter of constitutional law", may be required to apply other provinces' pension standards laws.[25]
>
> [References omitted]

34. The Monitor is of the view that there is little support for the proposition advanced by Representative Counsel[26] and by the Union[27] that the NL PBA deemed trust, to the extent it purports to secure the payment of the wind-up deficit, should also do so in respect of employees reporting to work in Quebec and of "federal" employees, the whole as further explained below.

35. First, the Memorandum of Agreement (R-22) does not purport to extend the application of the substantive provisions of the NL PBA to employees reporting to work in Quebec or

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22 Memorandum of Agreement (R-22), section 1(d).

23 *Ibid*, section 1(c).

24 Gérald Goldstein, *Les conflits de lois relatifs aux régimes complémentaires de retraite* (Montréal: Les éditions Thémis, 2005) at p. 5. **Tab 4**.

25 Ari Kaplan and Mitch Frazer, *supra* note 15 at p. 106. **Tab 3**.

26 Representative Counsel AO, at paras. 64-80.

27 Union AO, at para. 44.

to federally regulated employees. As mentioned above, only "functions and powers" are being delegated.

36. Second, the Monitor notes that Newfoundland and Labrador is not party to either CAPSA Agreements (R-20 and R-21), both of which would have then provided for the applicability of the NL PBA in relation to certain matters specifically set out in Schedule B thereof, including the requirements that the pension fund be held separate and apart from the employer's assets and deeming the pension fund to be held in trust for the active members or other persons[28] as well as the administrator's lien and charge on the employer's assets equal to the amounts deemed held in trust.[29] It is agreed by all parties that the CAPSA Agreements (R-20 and R-21) are not applicable in the present matter.

37. Third, the Monitor also notes that neither Retraite Québec[30] nor the N&L Superintendent submit that the NL PBA deemed trust, to the extent it purports to cover the wind-up deficit, should benefit employees that reported to work in Quebec, including "federal" employees. The Monitor also notes that this position is not supported either by OSFI and further notes that OSFI is not even a party to the Memorandum of Agreement (R-22).

38. Fourth, *Stelco Inc. v. Ontario (Superintendent of Pensions)*[31] and *Régie des rentes du Québec v. Commission des régimes de retraite de l'Ontario*[32], discussed below, both illustrate the need in certain circumstances to allow for the application of a minor authority's pension legislation by the major authority. Such exercise does not entail applying two statutes to any given legal issue or extending the more favorable regime when determining the entitlements of members.

    38.1. The pension plan at stake in *Stelco Ontario* was registered in the province of Ontario but included employees reporting for work in more than one province. As part of a reorganization of its operations, the employer had shut three plants down within the province of Quebec, leading some of the laid-off employees to seek pension benefits.

    38.2. Stelco's pension plan then in effect specifically provided that "(a) This Plan shall be construed and interpreted in accordance with the laws of the Province of Ontario" and "(b) In the event of the termination or wind up of the Plan such wind up will be carried out in accordance with the Pension Benefits Act of Ontario."[33]

    38.3. Following the plant closures, the Superintendent of Ontario ordered a partial wind-up of the plan and approved the partial wind-up report, which provided for early retirement benefits for plan members employed in Ontario only. For the

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28 CAPSA Agreements (R-20 and R-21), Schedule B, section 8(c).

29 CAPSA Agreements (R-20 and R-21), Schedule B, section 8(d).

30 Retraite Québec AO, at paras. 23 and 33.

31 *Stelco Inc.* v. *Ontario (Superintendent of Pensions)*, 126 DLR (4th) 767 (Ont. C.A.) (***Stelco Ontario***). **Tab 5.**

32 *Régie des rentes du Québec* v. *Commission des régimes de retraite de l'Ontario* (2000), 189 DLR (4th) 304 (Ont. Div. Ct.) (also known as the ***Leco*** decision). **Tab 6.**

33 *Stelco Inc.* v. *Ontario (Superintendent of Pensions)*, 115 DLR (4th) 437 (Ont. Div. Ct.), at para. 6. **Tab 5.**

plan members employed in the province of Quebec, the Superintendent applied the SPPA and the entire amount of the pension was deferred until the normal age of retirement. Therefore, the Superintendent of Ontario applied the SPPA to Quebec employees and the Ontario *Pension Benefits Acts*, R.S.O. 1990, c. P-8 (the **OPBA**) to Ontario employees, despite the fact that the Plan contained a choice of law clause pursuant to which it was to be construed and interpreted by Ontario law.

38.4. The Ontario Court of Appeal upheld the Superintendent's order, noting that any "extra-territorial effect" of the order was "necessarily incidental" to the valid exercise of the pension Superintendent's jurisdiction in Ontario.

38.5. Instead of instituting legal proceedings to contest the Ontario Superintendent's decision, the laid-off employees initiated an action against Stelco based on their contracts of employment before the Quebec Superior Court.[34] They argued that they were entitled to early retirement benefits on the basis that the pension plan was subject to Ontario law which permitted such benefits.

38.6. Stelco argued *inter alia* that the Quebec Superior Court lacked jurisdiction to hear the matter, because a final decision had been made and the laid-off employees had not availed themselves of the legal proceedings that were the right recourse under the applicable Ontario law.

38.7. The Quebec Superior Court ruled that the Court had jurisdiction, but dismissed the laid-off employees' challenge on the merits as the OPBA itself limited early retirement benefits to employees who had worked in Ontario. The laid-off employees appealed.

38.8. The majority of the Quebec Court of Appeal[35] upheld the Quebec Superior Court's decision and ruled that the Court had jurisdiction, but that the case failed on its merits. The majority also agreed that Section 74 OPBA did not apply to employees employed in Quebec. The majority then concluded that even if a provision of the pension plan text was stating that the pension plan was to be construed and interpreted under the laws of Ontario, it did not grant any benefits to the pension plan members. The laid-off employees then appealed to the Supreme Court of Canada.

38.9. The Supreme Court of Canada[36] upheld that decision on the basis of jurisdictional issues alone. Writing for a unanimous Court, Justice LeBel confirmed the exclusive authority of the Ontario Superintendent because of the Memorandum of Agreement (R-22) in force and ruled that the authority of the Superintendent could not be by-passed by contesting the matter before the Quebec Superior Court. Thus, the Quebec Superior Court lacked jurisdiction to hear this case, based on the principle of *res judicata*.

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[34] *Boucher* c. *Stelco inc.*, 2000 CanLII 18866 (QC CS). **Tab 7.**

[35] *Bourdon* c. *Stelco inc.*, 2004 CanLII 13895 (QC CA). **Tab 7.**

[36] *Boucher* v. *Stelco Inc.*, [2005] 3 S.C.R. 279 (**Stelco SCC**). **Tab 7.**

38.10. With regard to res judicata, Justice LeBel ruled that the conditions for applying this principle pursuant to article 2848 of the *Civil Code of Québec* had been met:

(i) the Quebec legal proceeding required a review of the question of the right to pension benefits, which had already been settled by the Ontario Superintendent;

(ii) the laid-off employees were parties to the process before the Ontario Superintendent;

(iii) the Ontario Superintendent had jurisdiction to make the decision; and

(iv) the principle of *res judicata* applies to the decisions of administrative tribunals or bodies.

38.11. Justice Lebel also ruled that the principle of issue estoppel was applicable as (at paragraph 34):

> 34. These three preconditions are met in the case at bar. The issue, that is, the principal object of the case, is the same as the one decided by the Superintendent. The parties were also involved in the approval procedure for the partial wind up. And the decision that was rendered is final in nature. Also, in my view, the facts of the instant case would not justify the courts in exercising their residual discretion to decline to apply estoppel. Not only the appellants' failure to make use of the usual means of redress — appeal or judicial review — but also the situation in which any other decision would place the respondent, militates against this. Stelco could find itself in the strange position of having to comply with the Superintendent's decision under Ontario law while at the same time being required to execute a Quebec judgment to the contrary, at least with regard to former plan members from Quebec. As the intervener points out, such a result could call into question the benefit calculations for all the retirees and the measures taken to ensure the plan's solvency.

38.12. Apart from *res judicata* and issue estoppel, Justice Lebel also noted that, even if a Quebec court had found it had jurisdiction, it would have been justified to decline such jurisdiction because of the doctrine of *forum non conveniens* (at paragraph 38):

> 38. In this appeal, the application of the most relevant factors would have led a Quebec court to recognize that an Ontario court would be in a better position to hear the action. Indeed, the principal object of the case is the judicial review of the decision of an Ontario administrative body that has been delegated the authority to administer the pension plan even with regard to plan members in Quebec. The natural forum for reviewing this body's decisions would appear to be an Ontario court, if only to reduce the risk of conflicting decisions and to adhere to the principle of administration set out in the memorandum of reciprocal agreement. This conclusion is all the more compelling in that the challenge by the Quebec plan members could affect the plan as a whole and the rights of the other members.

38.13. Finally, Justice Lebel held that the Ontario Superintendent had the authority to approve the partial wind-up report pursuant to the OPBA and the Memorandum

of Agreement (R-22) in force. He noted (at paragraph 3) the following with respect to the Memorandum of Agreement (R-22) :

> 3. [...] A memorandum of reciprocal agreement entrusts the oversight of the plan, and decisions on the management and wind up of the plan, to this regulatory authority [i.e. the major authority].

38.14. At paragraph 26, the Court added:

> 26. The delegation mentioned above, which applied to Stelco's pension plan, accordingly conferred on Ontario's Superintendent of Financial Services the authority to make any necessary decisions for the administration and wind up of the plan. The memorandum of agreement expressly granted him the right to exercise all the powers conferred by the Ontario legislature. On this point, it should be noted that s. 249 of the *Supplemental Pension Plans Act* authorizes such agreements. Moreover, the validity of the delegations of authority resulting from the Memorandum of Reciprocal Agreement has never been contested. It is therefore necessary to refer to the Ontario legislation to determine the scope of the powers delegated to the Superintendent in the context of the partial wind up of Stelco's plan.

38.15. As a result, the analysis of the Memorandum of Agreement (R-22) by Justice LeBel clearly provides that any provincial regulator acting as the major authority under the Memorandum of Agreement (R-22) with all the necessary powers to apply the legislation of the minor authorities to employees subject to such legislation even if it would deprive them of a more favorable treatment under the major authority's pension legislation.

38.16. Also, it shows that any party wishing to contest the application of the pension legislation of a minor authority by the major authority under the Memorandum of Agreement (R-22) will need to do it in accordance with the mechanism applicable to the decisions of the major authority even if the pension plan members to which the legislative provisions of another jurisdiction are being applied are not employed in the jurisdiction of the major authority.

38.17. In other words, *Stelco SCC* clearly demonstrate that a Court of a minor authority should dismiss a claim brought in its jurisdiction or decline jurisdiction on the basis of *forum non conveniens* if the matter has been brought before a Court with proper jurisdiction. *Stelco SCC* does not however support in any way the proposition that employees subject to the legislation of the minor authority, can also invoke more favourable protections found in the legislation of the major authority.

38.18. In *Leco*,[37] a pension plan was registered in the province of Ontario and also included employees in the province of Quebec and elsewhere.

38.19. The pension plan was wound up and the employer applied to the superintendent of Ontario for a withdrawal of surplus funds in accordance with the OPBA.

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[37] *Leco, supra* note 32. **Tab 6.**

Retraite Québec (then Régie des rentes du Québec) objected to Ontario's pension legislation being applied to the Quebec employees. Two judicial review applications of the superintendent of Ontario's decision were filed, one in Quebec and one in Ontario.

38.20. The Ontario Divisional Court ruled that even if it had exclusive jurisdiction to deal with the issue, the superintendent of Ontario was required "as a matter of constitutional law", to interpret and apply Quebec's pension legislation to the surplus withdrawal transaction, because the transaction affected members of the pension plan employed in Quebec. However, we must mention that in this case that the pension plan text expressly provided that the plan would be construed and administered in accordance with the laws of Quebec and Ontario.

39. Fifth, the Monitor also notes that the interpretation advanced by Representative Counsel[38] concerning the *Champagne* v. *The Atomic Energy of Canada Ltd.*[39] arbitral decision fails to mention that it dealt with specific entitlements under Part III of the *Canada Labour Code*[40] (i.e. standard hours, wages, vacations and holidays), which specifically provides the following rule at article 168(1) of the *Canada Labour Code*:

> 168(1) This Part and all regulations made under this Part apply notwithstanding any other law or any custom, contract or arrangement, but nothing in this Part shall be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the employee than his rights or benefits under this Part.

40. Sixth, for the reasons set out more fully herein, there is little basis to expand the scope of the NL PBA to benefit employees which are subject to distinct legislation. The provisions of the DB Plans do not either appear to contemplate the concurrent application of the NL PBA and of the SPPA to Quebec Members,[41] which are subject to specific rules provided by section 14 of the Union DB Plan (R-23), as amended by Amendments No. 6, and by section 14 of the Salaried DB Plan (R-24), as amended by Amendment No. 4, which both provide specific rules with respect to Quebec Members and specifically provide that:[42]

> 14.01 Application
>
> This section applies to Employees who report for work in the Province of Québec and is included in the Plan in order for the Plan to comply with the Supplemental Pension Plans Act (Québec) (the "SPPA") and shall supplement all other

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38 Representative Counsel AO, at para. 80(c).

39 *Champagne* v. *The Atomic Energy of Canada Ltd*, 2012 Carswell Nat 708 (CA Lab. Arb.). Representative Counsel, BOA, Tab 18.

40 *Canada Labour Code*, R.S.C. 1985, c. L-2.

41 As defined in section 2.33 of the Union DB Plan (R-23) and section 2.32 of the Salaried DB Plan (R-24).

42 It shall be noted that section 2.25 of the Salaried DB Plan provides that "'*Pension Benefits Act*' means the Newfoundland *Pension Benefits Act* 1997, S.N. 1996, c. P-4.01, as amended from time to time, and the Regulations thereunder as well as any similar statute applicable in a particular circumstance and any regulation pursuant thereto adopted by the federal or any provincial government".

positions of the Plan which are not inconsistent and shall replace any other provisions which are inconsistent.

41. Seventh, as a matter of Quebec private international law as it relates to employment contracts, Article 3118 of the *Civil Code of Québec* provides that:

> 3118. The choice by the parties of the law applicable to a contract of employment cannot result in depriving the worker of the protection afforded to him by the mandatory rules of the law of the State where the worker habitually carries out his work, even if he is on temporary assignment in another State or, if the worker does not habitually carry out his work in any one State, of the law of the State where his employer has his domicile or establishment.

42. Finally, the Monitor also notes that both the Salaried DB Plan Wind-Up Report (R-25) and the Union DB Plan Wind-Up Report (R-26) calculate benefits based on the proper applicable pension legislation and not by a concurrent application of all three statutes extending the benefit of the most generous statute to members:

- Salaried DB Plan Wind-Up Report (R-25) at page 8:

> Plan member benefits will be settled at the wind-up funded percentage applicable to them at the time of settlement based on their jurisdiction. The actual funded status at settlement may differ from that contained in this report.
>
> (...)
>
> The Plan assets are distributed between the jurisdictions as at the wind-up date in proportion to the wind-up liability applicable to each jurisdiction. When determining the wind-up liability for this purpose, the pension and bridging benefits included in the calculation are those provided for by the Plan terms, the NL PBA, the Quebec SPPA and the Federal PBSA. We note that no Plan member is entitled to additional pension or bridging benefits as a result of applying section 17 of the Federal PBSA.

- Union DB Plan Wind-Up Report (R-26) at page 5:

> The Plan has Newfoundland and Labrador, Quebec and Federal members. Newfoundland and Labrador members are subject to the NFL PBA, Quebec members are subject to the Quebec SPPA, and Federal members are subject to the Federal PBSA. All members' benefits payable by the Plan comply with applicable legislation. Since the last actuarial valuation, the legislation applicable for each member has changed for certain members following due diligence work performed by the plan administrator and discussions with the Company and the Regulators. This data has been provided by the plan administrator. Section 2.2 of this report provides details on how the assets are to be distributed among the applicable legislations.

III. THE PENSION DEEMED TRUSTS AND NL PBA LIEN & CHARGE

43. As explained above, the Pension Motion calls into play different pension deemed trusts under distinct legislation that will apply each exclusively to certain members based on the proper scope of application of the Pension Legislation, as outlined above.

44. The undersigned attorneys refer this Court to the comparative summary of the Pension Legislation and of the OPBA,[43] which has often been considered in case-law, but which contains specific and distinct features that need to be highlighted. Also, with respect to priority disputes involving pension plans governed by the OPBA, it is important to refer to the specific priority rule pursuant to Section 30(7) of the Ontario *Personal Property Security Act*, R.S.O. 1990, c. P.10:

> Deemed trusts
>
> (7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the *Employment Standards Act, 2000*, the *Pension Benefits Act* or the *Pooled Registered Pension Plans Act*, 2015. 2015, c. 9, s. 32.

A. NL PBA (Deemed Trust and Lien & Charge)

(i) General

45. Section 32 of the NL PBA provides for a deemed trust to secure the different amounts described under Sections 32(1)(a), 32(1)(b) and 32(1)(c). Section 32(1) of the NL PBA simply states that the employer shall keep these amounts separate and apart from its own money and it be deemed to hold same in trust, possibly giving rise to a real trust with a deemed intent.

46. The deeming provision of Section 32(2) according to which an amount equal to the amounts described under Sections 32(1)(a), 32(1)(b) and 32(1)(c) are to be considered held in trust and "considered to be separate from and form no part of the estate [...] 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" is only triggered if certain conditions or trigger events occur.

47. These triggers are limited to liquidation, assignment or bankruptcy of the employer. While the scope and meaning of "assignment" or "bankruptcy" appear uncontroverted, there exist fundamental difference of opinions with respect to the proper meaning of "liquidation" as a possible trigger for the crystallization of deemed trusts under the NL PBA and the PBSA: this issue will be discussed below in a distinct section of this Argumentation Outline.

48. Section 32(2) of the NL PBA remains unchanged since its adoption in 1996 and contains deeming wording similar to the previous wording of Sections 227(4) and 227(4.1) of the *Income Tax Act* prior to the **"Sparrow Electric Amendment"**.[44]

(ii) Wind-Up Deficit

49. Upon termination of a plan (in whole or in part), Section 32(3) of the NL PBA merely states that the employer who is required to pay contributions to the plan shall hold in

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[43] See **Schedule B** : Comparative Table of Pension Legislation.

[44] See Debtors' Argumentation Outline dated June 19, 2015 in support of Priority and Suspension Order, attached hereto as **Schedule C**, at paras. 12-33.

trust an equivalent amount of money, without additional deeming language found at Section 32(2) of the NL PBA. Section 32(3) of the NL PBA reads as follows:

> 32(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.

50. In addition to Section 32(3) of the NL PBA (which is very limited in scope and clearly does not extend to the full deficit and which do not include extended deeming provisions charging the assets of the employer), Section 61 of the NL PBA also provides for payments to be made on termination:

> **Termination payments**
>
> 61.(1) On termination of a pension plan, the employer shall pay into the pension fund all amounts that would otherwise have been required to be paid to meet the requirements prescribed by the regulations for solvency, including
>
> (a) an amount equal to the aggregate of
>
> (i) the normal actuarial cost, and
>
> (ii) special payments prescribed by the regulations,
>
> that have accrued to the date of termination; and
>
> (b) all
>
> (i) amounts deducted by the employer from members' remuneration, and
>
> (ii) other amounts due to the pension fund from the employer
>
> that have not been remitted to the pension fund at the date of termination.
>
> (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.

51. It shall be noted that while the wording of Sections 61(1) of the NL PBA and 32(1) of the NL PBA defining the amounts secured by the deemed trust are identical, Sections 61(2) of the NL PBA which provides for the obligation to pay the wind-up deficit and Section 61(1) of the NL PBA are mutually exclusive.

52. The obligation to pay the wind-up deficit upon termination is based on Section 61(2) of the NL PBA. Based on the fact that the wording of Sections 32(1) and 61(1) of the NL PBA are identical and that the amounts payable under Sections 61(1) and 61(2) of the NL PBA are mutually exclusive, it appears that the wind-up deficit is not subject to the deemed trust pursuant to Section 32(1) of the NL PBA or to the lien and charge pursuant to Section 32(4) of the NL PBA.

53. The distinct nature of the payments owing under Sections 61(1) and 61(2) of the NL PBA is echoed by distinct rules under Sections 25 and 25.1 of the *Pension Benefits Act Regulations*, NLR 114/96 (**NL PBA Regulation 114/96**).[45]

54. Section 25.1 of the NL PBA Regulation 114/96, with respect to the wind-up deficit, when read in conjunction with Section 60(2) of the NL PBA, clearly provides that the first payment to be made on the account of the wind-up deficit is to be made no later than 2 weeks following the date of the wind-up report to be filed within 6 months after the effective date of termination, such that any payments due on account of the wind-up deficit cannot be considered as "... amounts due to the pension from the employer that have not been remitted to the pension fund at the date of termination", within the meaning of Sections 32(1)(c) or 61(1)(c) of the NL PBA.

55. Section 61 NLPBA was amended in 2008 by adding paragraph 2. This amendment was done to ensure "that funding of deficits in pension plan windups is fully funded":[46]

> If there is a solvency deficit, the pension plan sponsor is now required to fund that deficit over a five year period. That is what this amendment will do [...] most other provinces across the nation have similar legislation, and changing our legislation will ensure pension plans in this Province for employees whose company operates in more than one jurisdiction will receive the same level of funding on plan windup as those in jurisdictions that already have similar requirements.
>
> [...]
>
> It certainly addresses any deficits on windup of a pension plan over a five-year period so that it would prevent the benefits that would be derived from that pension plan by an employee in the future from being diminished.[47]

56. Section 32 NL PBA was not amended to reflect the changes made in Section 61(2) NL PBA. Thus the amounts to be held in trust are limited to certain amounts detailed in Sections 32(1), (2) and (3). Clearly it does not provide for the wind-up deficit to be held in a trust, since 61(2) and 61(1) are mutually exclusive as stated already.

57. The Monitor has carefully considered the arguments about the scope of deemed trust advanced by the N&L Superintendent and Representative Counsel in their respective Argumentation Outlines.[48] Such arguments cannot be supported.

58. The Monitor notes that the arguments advanced by the Representative Counsel and by the N&L Superintendent are partly based on *Indalex*[49] which was interpreting the OPBA. In *Indalex*, the Supreme Court of Canada had to determine whether the statutory

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45 *Pension Benefits Act Regulations*, NLR 114/96. **Tab 8.**

46 Newfoundland and Labrador, House of Assembly Proceedings, *Hansard*, 46th General Assembly, 1st Session, Vol. XLVI No. 16, (April 24, 2008). **Tab 9.**

47 *Ibid.*

48 Representative Counsel AO at paras. 34-41, 58 and 121-131; N&L Superintendent AO at paras. 50-61 and 110-120.

49 *Sun Indalex Finance, LLC* v. *United Steelworkers*, [2013] 1 S.C.R. 271, 2013 SCC 6 (**Indalex**). N&L Superintendent, BOA, Tab 35 and Representative Counsel, BOA, Tab 8.

deemed trust provided for in Section 57(4) OPBA also applied to the wind-up deficiency payments required by Section 75(1) (b) OPBA.

59. Justice Deschamps, writing for the majority, mentioned that as a question of statutory interpretation, an examination of both the wording and context of the relevant provisions of the OPBA was required.

60. The combined wording of Sections 32 and 61 of the NL PBA is very different and can easily contrasted with Section 57(4) of the OPBA:

> Wind up
>
> (4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations. R.S.O. 1990, c. P.8, s. 57(4).
>
> [Our underlining]

61. The NL PBA, unlike the OPBA which was analysed by the Supreme Court in *Indalex* does not contain a specific deemed trust triggered upon the termination or wind-up of a plan, or clear wording extending the deemed trust to all contributions owing even if not yet due.

62. As stated by Justice Deschamps the wind-up deemed trust provision provided in Section 57(4) OPBA does not place an express limit on the "employer contributions accrued to the date of the wind up but not yet due". Such interpretation cannot be transposed to the present matter. As a matter of fact, Section 61(1)(b)(ii)[50] NL PBA is limited to amounts due at the date of termination.

63. It is respectfully submitted that both the plain wording of Sections 32 and 61 of the NL PBA and their proper interpretation based on a contextual and historical analysis, conducted in accordance with the *Indalex* analysis support the position of the Monitor.

(iii) Plan Administrator's Lien and Charge

64. The lien and charge in favour of the plan administrator pursuant to Section 32(4) of the NL PBA extends to the same amounts secured by the deemed trust in accordance with subsections (1), (2) and (3). Nothing more, nothing less. Again, it does not extend to the wind-up deficit for the same reasons stated above.

65. In addition, the Replacement Plan Administrator cannot claim "secured creditor" status.

66. In *Harbert Distressed Investment, L.P.* v. *General Chemical Canada Ltd.*,[51] the Ontario Court of Appeal held that the Administrator's lien and charge pursuant to Section 57(5) OPBA did not afford secured creditor status for the purposes of the *Bankruptcy and*

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[50] See also 32(1) and 32(3) NL PBA.

[51] *Harbert Distressed Investment Fund, L.P.* v. *General Chemical Canada Ltd.*, 2007 ONCA 600 (CanLII); leave to appeal to the SCC denied: 2008 CanLII 6391 (SCC). **Tab 10.**

Insolvent Act (**BIA**) on the basis that it does not secure a debt owing to the Administrator.

67. The facts of this case were as follows. General Chemical Canada Ltd. was placed in bankruptcy in November 2005 in the context of the non-extension of the CCAA stay of proceedings. The dispute arose in the context of a proposed distribution to Harbert Fund, as secured creditor, of proceeds of sale held by an interim receiver, which distribution was opposed by, amongst others, Morneau in its capacity as pension plan administrator. Morneau relied on its "lien and charge" pursuant to Section 57(5) OPBA to object to the distribution.

68. The key extracts of the Ontario Court of Appeal decision are reproduced below:

> [23] There is no doubt that once GCCL began to fall short of its required contributions to both pension funds in January 2004, s. 57(3) of the PBA applied and GCCL was deemed to hold in trust for the beneficiaries of those plans an amount equal to its unpaid contributions.
>
> [24] However, the Administrator concedes that this section does not create a trust as contemplated by s. 67(1)(a) of the BIA and excludes nothing from the estate of GCCL for the purposes of distribution under the BIA. All parties to this appeal agree that that consequence is dictated by *British Columbia v. Henfrey Samson Belair Ltd.*, 1989 CanLII 43 (SCC), [1989] 2 S.C.R. 24. That case held that s. 67(1)(a) of the BIA does not apply to statutory deemed trusts that lack the common law attributes of a trust, such as the requirement that the property be kept separate and not commingled with the bankrupt's own property.
>
> [25] The Administrator's argument, however, is simply that the lien and charge accorded to it by s. 57(5) of the PBA is separate from the deemed trust created by s. 57(3), and is effective for the purposes of the BIA, even if the deemed trust is not.
>
> [26] For this argument to succeed, however, the first step is that, as holder of a s. 57(5) statutory lien, the Administrator must meet the definition of secured creditor in the BIA.
>
> [27] In my view, it cannot do so. The Administrator does not hold a charge or lien as security for a debt due or accruing due to the Administrator from the debtor GCCL.
>
> [28] The PBA provides that the Administrator is the person that administrates the pension plan. The Administrator is to ensure that the pension plan, and the pension fund maintained to provide benefits under the plan, are administered in accordance with the PBA and its regulations (s. 19(1)). In doing so, the Administrator must exercise the care, diligence and skill that a person of ordinary prudence would exercise in dealing with the property of another person (s. 22(1)). Section 56(1) requires the Administrator to ensure that all contributions due under the pension plan are paid to the pension fund when due. To facilitate this, the Administrator is given the right to commence legal proceedings to obtain payment of contributions due under the pension plan (s. 59).
>
> [29] Section 55(2) sets out the employer's obligation to make contributions under a pension plan. [...]

[30] None of these provisions suggest that the contributions owed by GCCL are a debt due to the Administrator. Rather, GCCL's legal obligation was to make the contributions to the pension funds that were required under the pension plans. Nor is there even any indication that the contributions are owed to the Administrator to be held in trust for the pension funds. Rather, the legislation contemplates that those contributions are owed to the pension funds pursuant to the pension plans, and are not the property of the Administrator.

[31] The Administrator's right to commence legal proceedings simply permits it to seek to compel the employer to pay the contributions to the pension funds due under the pension plans.

[32] The consequence of this is that the lien and charge accorded to the Administrator secures the employer's obligation to pay the unpaid contributions required by the pension plans to the pension funds. It does not secure a debt owed to the Administrator. Hence s. 57(5) does not qualify the Administrator as a secured creditor for the purposes of the BIA.

[Our underlining]

69. It shall be noted that the relevant provisions of the NL PBA and of the OPBA are very similar:

OPBA	NL PBA
57 (1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.	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.
(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the	(2) In the event of a liquidation, assignment or bankruptcy of an employer, an amount equal to the

beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund	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.
(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.	(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.
(5) The administrator of the pension plan has a lien and charge on the assets of the employer in an amount equal to the amounts deemed to be held in trust under this section.	(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).

[Our underlining]

70. In first instance, Justice Mesbur had concluded on this issue as follows (at paragraph 72) :[52]

> [72] As I see it, under the current BIA, the Administrator has no enforceable lien under the BIA. I am supported in this view by the decision of Farley J. in *Re Ivaco Inc.* In *Ivaco,* Farley J expressly held that "an administrator's lien pursuant to s. 57(5) of the *Pension Benefits Act* (Ontario) would also be ineffective in a bankruptcy ... Even though provincial legislation may deem something to be a lien, that deeming does not make it a s. 2(1) BIA lien." Campbell J followed this reasoning in his decision in this case to appoint the interim receiver. I, too, accept and follow their reasoning, and must conclude the Administrator has no lien.
>
> (2005), 2005 CanLII 27605 (ON SC), 12 C.B.R. (5th) 213 (S.C.J.), leave to appeal allowed 10 November 2005. For other cases taking a similar view, see *Re Graphicshoppe Limited*, (2005), 2005 CanLII 45183 (ON CA), 78 O.R. (3d) 401 (C.A.); *Re United Air Lines Inc.* (2005), 2005 CanLII 7258 (ON SC), 9 C.B.R. (5th) 159; *Continental Casualty Co. v. MacLeod-Stedman Inc. (1996)*, 1996 CanLII 12432 (MB CA), 141 D.L.R. (4th) 36 (Man.C.A.).

B. OSFI

71. Sections 8(1) and 8(2) of the PBSA are largely similar to Sections 32(1) and 32(2) of the NL PBA.

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[52] *Harbert Distressed Investment Fund, L.P.* v. *General Chemical Canada Ltd.*, 2006 CanLII 25540 (ON SC). **Tab 10.**