72. Section 8(2) of the PBSA remains unchanged since its adoption in 1986. Section 8(1) was changed in 1998 and in 1986. Section 8(1) was changed in 1998 and 2010, albeit not substantially.[53]

73. As in the case of the NL PBA deemed trust, Sections 8(1) and 8(2) of the PBSA have not been amended to incorporate the "Sparrow Electric Amendment" necessary to defeat pre-existing secured creditors with a fixed charge.

74. In the event of wind-up of a pension plan, Section 29(6.5) of the PBSA clearly states that the deemed trust pursuant to Section 8(1) does not cover the wind-up deficit payable pursuant to Section 29(6.4), but extends to any payments that have accrued and that have not been remitted before the date of the wind-up. Sections 29(6), 29(6.4) and 29(6.5) of the PBSA read as follows:

> **Payments by employer to meet solvency requirements**
>
> (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

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[53] Section 8(1) was amended in 1998 and 2010. Section 8(1) originally appeared as "an Employer shall ensure, with respect to its pension plan, that (a) the moneys in the pension fund, (b) an amount equal to the aggregate of (i) the normal actuarial costs and (ii) any prescribed special payments, that have accrued to date; and (c) 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 are kept separate and apart from the Employer's own moneys, and shall be deemed to own the amounts refer to in paragraphs (a) to (c) in trust for members of the pension plan, former members, and any other persons entitled to pension benefits or refunds other the plan. See Debtors' June 19, 2015 Argumentation Outline in support of Priority and Suspension Order, **Schedule C**, at note 6.

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

Winding-up or bankruptcy

(6.4) On the winding-up of the pension plan or the liquidation, assignment or bankruptcy of the employer, the amount required to permit the plan to satisfy any obligations with respect to pension benefits as they are determined on the date of termination is payable immediately.

Application of subsection 8(1)

(6.5) Subsection 8(1) does not apply in respect of the amount that the employer is required to pay into the pension fund under subsection (6.4). However, it applies in respect of any payments that have accrued before the date of the winding-up, liquidation, assignment or bankruptcy and that have not been remitted to the fund in accordance with the regulations made for the purposes of subsection (6.1).

[Our underlining]

75. OSFI does not submit that the wind-up deficit is protected by a deemed trust pursuant to the PBSA.

C. SPPA

76. The SPPA "deemed" trust is created under Section 49 of the SPPA which reads as follows:

> **49.** Until contributions and accrued interest are paid into the pension fund or to the insurer, they are deemed to be held in trust by the employer, whether or not the latter has kept them separate from his property.

77. Section 49 only purports to secure the payment of "contributions", which by definition excludes the wind-up deficit the payment of which merely constitutes a "debt" of the employer pursuant to Section 228 of the SPPA:

> 228. The amount to be funded to ensure full payment of the benefits of the members or beneficiaries affected by the withdrawal of an employer from a multi-employer pension plan or the termination of a pension plan shall constitute a debt of the employer. The amount to be funded shall be established at the date of termination.
>
> If, at the date of termination, the employer has failed to pay contributions into the pension fund or to the insurer, as the case may be, the debt shall be the amount by which the amount to be funded exceeds such contributions.
>
> In the case of a multi-employer plan, this section applies to every employer who is a party to the plan and to whom a group of benefits under subdivision 3 consisting of the benefits of the members or beneficiaries affected by the withdrawal or termination pertains.
>
> [Our underlining]

78. Section 49 also remains unchanged since its adoption and has not been subject to the Sparrow Electric Amendment.

79. The "deeming" provision of Section 49 of the SPPA appears directed at the intent that the contributions and interest accrued thereon be held in trust whether or not same has been kept separate by the employer from his property. It is not a "deeming" provision with respect to the subject matter of the trust that would charge the employer's assets.

80. In *Abitibi*[54], Justice Mayrand held that the CCAA Court had the proper jurisdiction to allow a suspension of special costs or amortization payments and agree to grant such an order in the exercise of her discretion. Justice Mayrand commented as follows concerning Section 49 of the SPPA (at paragraphs 24 to 36):

> [24] Abordant maintenant la question de la juridiction du Tribunal en vertu de la LACC, il convient de bien comprendre la nature et la portée des conclusions recherchées.
>
> [25] Le Tribunal réitère que les prestations et les avantages, qui découlent des régimes de retraite et qui font partie des conventions collectives, ne peuvent être modifiés unilatéralement. Cette question a déjà été résolue par la Cour d'appel du Québec dans trois dossiers différents : *Mine Jeffrey, Uniforêt et TQS*. Le juge Gascon l'a à nouveau affirmé, le 4 mai dernier, dans le présent dossier.
>
> [26] La demande a trait au financement des régimes de retraite. En effet, *Abitibi* demande de suspendre l'exécution de son obligation de financer en partie les régimes de retraite, en suspendant ses cotisations d'équilibre.
>
> [27] La Cour supérieure a juridiction pour décider s'il y a lieu d'ordonner la suspension des cotisations d'équilibre à la caisse d'un régime complémentaire de retraite. La question n'est pas nouvelle et a d'ailleurs fait l'objet de décisions par les tribunaux québécois et canadiens.
>
> [28] Dans l'arrêt Mine Jeffrey, la débitrice avait obtenu la protection de la LACC pour se restructurer. La Cour d'appel du Québec a, d'une part, décidé que l'employeur ne pouvait modifier unilatéralement le contrat collectif de travail, mais a fait droit à la demande de suspension des cotisations d'équilibre, pendant la période de restructuration.
>
> [29] La suspension des cotisations d'équilibre a aussi été ordonnée dans l'affaire de Papiers Gaspésia par le juge Chaput de cette Cour.
>
> [30] Plus récemment, dans Collins c. Eickman Automotive Canada Inc., le juge Spence de la Cour supérieure de l'Ontario fait une revue exhaustive de la jurisprudence canadienne sur la question (dont l'arrêt de la Cour d'appel dans Mine Jeffrey).
>
> [31] Le juge Spence soulève la distinction importante entre les droits qui découlent d'une convention collective, notamment ceux prévus dans le régime de retraite, et l'exécution des obligations pour y donner effet. Du point de vue juridictionnel, il ajoute que, malgré le cadre statutaire provincial qui oblige l'employeur à verser des cotisations d'équilibre ponctuellement, il n'en demeure

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[54] *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 2028 (**Abitibi**). **Tab 11.**

pas moins qu'il s'agit de créances qui peuvent être suspendues et qui seront traitées lorsqu'il sera mis fin à la protection offerte en vertu de la LACC.

[32] Le Tribunal partage cet avis et considère dès lors avoir juridiction pour trancher la question qui lui est soumise.

[33] Avant d'aborder la seconde question en litige, il y a lieu de répondre à l'une des prétentions des syndicats. Ceux-ci invoquent que les participants aux régimes de retraite ont un statut distinct et qu'ils devraient donc être traités différemment des autres créanciers.

[34] Avec égards, que ce soit en vertu de la LACC ou de l'article 49 de la *Loi sur les régimes complémentaires de retraite* (LRCR), les créances en cause sont des créances ordinaires, que le législateur n'a pas choisi de protéger dans le contexte de la présente restructuration. Le libellé de l'article 49 LRCR n'est pas suffisant en soi pour conclure à l'établissement d'une véritable fiducie devant avoir priorité sur les autres créanciers. D'ailleurs, la Cour d'appel de l'Ontario, dans l'affaire *Ivaco*, alors qu'elle décide de la portée de l'article 57(3) du *Pension Benefit Act* (dont les termes sont au même effet que ceux de l'article 49 LRCR), mentionne ce qui suit à l'égard des fiducies présumées (*Deemed Trust*) :

> [...] This Legislative designation by itself does not create a true trust. If the province wants to require an employer to keep its unpaid contributions to a pension plan in a separate account, it must legislate that separation. It has not done so.

[35] S'il est vrai que l'article 81.5 de la *Loi sur la faillite et l'insolvabilité* (LFI) prévoit une super priorité pour les contributions des employés qui sont déduites à la source par l'employeur et les cotisations d'exercice que celui-ci doit faire pour le service courant à la caisse de retraite, la LFI n'est toutefois pas applicable en l'instance.

[36] D'une part, la restructuration se fait en vertu d'une autre loi qui ne prévoit pas une telle priorité et, d'autre part, cette priorité ne vise pas les cotisations d'équilibre, car elle est limitée aux déductions à la source et aux cotisations d'exercice pour le service courant.

[References omitted]

81. Justice Mongeon rendered three important decisions with respect to Section 49 of the SPPA.

82. First, in *White Birch #1*,[55] Justice Mongeon was asked to review its previous orders made as part of the initial order with respect to the suspension of special payments and the priority of the CCAA Charges, including the DIP Charge (2010 QCCS 764). Justice Mongeon declined to review its previous orders on several grounds including on the basis of a paramountcy analysis that was subsequently adopted by the Supreme Court of Canada in *Indalex*. Justice Mongeon (2012 QCCS 1679) also made specific findings with respect to the 49 SPPA deemed trust:

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[55] *White Birch Paper Holding Company (Arrangement relatif à)* 2010 QCCS 764 and 2012 QCCS 1679 (**White Birch #1**). **Tab 12.**

a) only real trusts were protected under the BIA, exception made for certain deemed trusts protected by Section 67(3) of the BIA (at paragraphs 134 to 146);

b) it was not specifically protected or preserved by the CCAA applying *Century Services*[56] (at paragraphs 148 to 158);

c) that it did not constitute a true trust under Article 1260 of the *Civil Code of Québec* as it did not meet the three essential conditions (at paragraphs 160 to 193).

83. Secondly, Justice Mongeon in *Timminco*[57] ruled the Section 49 SPPA deemed trust trumped the rights of conventional secured creditors. In doing so, he suggested that the holding in *White Birch #1* should be limited to his paramountcy analysis in the context of DIP financing.

84. In *Timminco*, Justice Mongeon declared (at paragraph 84):

> [84] Ainsi, même si l'on doit conclure à l'existence d'une fiducie créée par la loi en vertu de l'article 49 LRCR, une telle conclusion, si elle avait été retenue dans White Birch n'aurait pas eu d'impact sur la finalité de ce débat car la question était toute autre.

85. Justice Mongeon suggested in *Timminco* that Section 49 of the SPPA needed to be read in conjunction with Section 264 of the SPPA and that together they created a valid statutory trust as contemplated by Article 1262 of the *Civil Code of Québec*:

> 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.
>
> [Our underlining]

86. The undersigned attorneys respectfully disagree with the *Timminco* ruling on the basis that it ignores for no cogent reason the rulings of the Supreme Court in *Sparrow Electric*[58] and *First Vancouver*[59]. It also runs contrary to *Samson Bélair*[60]. Also and as stated above, the finding of a valid deemed trust charging all the assets of the employer, encumbered or not, is not event supported by any charging provision to be found in Section 49 of the SPPA.

87. Justice Mongeon seems to accept that the simple creation of statutory trust was sufficient to make it established by law, as provided by Article 1262 of the *Civil Code of Québec* and fully effective even if it did not meet any of the essential conditions set out

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56 *Century Services Inc.* v. *Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379 (**Century Services**). N&L Superintendent, BOA, Tab 20.

57 *Timminco ltée (Arrangement relatif à)*, 2014 QCCS 174 (**Timminco**). N&L Superintendent, BOA, Tab 37 and Representative Counsel, BOA, Tab 11.

58 *Royal Bank of Canada* v. *Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (**Sparrow Electric**). **Tab 13.**

59 *First Vancouver Finance* v. *M.N.R.*, [2002] 2 S.C.R. 720 (**First Vancouver**). **Tab 14.**

60 *British Columbia* v. *Samson Bélair Ltd.*, [1989] 2 S.C.R. 24 (**Samson Bélair**). Representative Counsel, BOA, Tab 6.

in Article 1260 of the *Civil Code of Québec*. Justice Kasirer insisted in the *Groupe Sutton-Royal*[61] on the need of a clear evidence of valid transfer of identifiable assets to a distinct patrimony:

> [115] A distinction – a critical one – can be drawn between the law of trusts in the common law and the civil law on this point. Both traditions allow a settlor to establish a trust in respect of which he or she will act as trustee. In the common law, however, the settlor who remains trustee after the establishment of the trust retains legal title to the property. While Quebec civil law, as noted, requires the transfer of property from the patrimony of the settlor to a distinct patrimony by appropriation, the common law requires no such transfer. Unlike article 1260 C.C.Q. which requires a translatory act for the establishment of a trust in these circumstances, the settlor in the common law merely declares that a trust exists because he or she continues to hold the legal title, as trustee, without the need of any transfer of the trust property.
>
> [116] The absence of proof of transfer of property by the Agency out of its patrimony to a patrimony by appropriation is thus fatal to the establishment of a trust under article 1260 C.C.Q. in our case. Because there is no such legal requirement in the common law, it was not a bar to the establishment of a trust in *Midland*.
>
> [117] Moreover, there must be evidence of the establishment, by the settlor, of a patrimony by appropriation in Quebec law. Proof of this is also is lacking in the record.
>
> [118] Absent any other evidence to this end, the opening by the Agency of a designated bank account into which the commissions were deposited falls short of that requirement, at least on the facts of this case. The patrimony created by the settlor must be a true patrimony, that is to say a universality of rights and obligations, and not just a different mass of property, however distinct it might be in appearance. The fact that the account is segregated was, to be sure, an indication that the Agency wished to keep those funds separate from its operating account. But, on its own, this is insufficient in the circumstances to establish that the Agency had divested itself of the property such that the funds no longer belonged to it and transferred it to a new patrimony appropriated to the purpose of benefiting the Brokers.
>
> [References omitted]

88. Absent clear deeming provisions extending the subject matter of the 49 SPPA from the actual contributions and accrued interest to charge all the property of the employer, Section 264 of the SPPA appears of little value as it only also pertains only to unpaid contributions and accrued interest. Section 264 of the SPPA reads as follows:

> **264.** Unless otherwise provided by law, the following amounts or contributions are unassignable and unseizable:
>
> (1) all contributions paid or payable into the pension fund or to the insurer, with accrued interest;

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61 *Groupe Sutton-Royal inc. (Syndic de)*, 2015 QCCA 1069 (**Groupe Sutton-Royal**), **Tab 15.**

(2) all amounts refunded or pension benefits paid under a pension plan or this act;

(3) all amounts awarded to the spouse of a member following partition or any other transfer of benefits effected pursuant to Chapter VIII, with accrued interest, and the benefits deriving from such amounts.

Except as far as they derive from additional voluntary contributions or represent a portion of the surplus assets allocated after termination of the plan, any of the above-mentioned amounts that have been transferred to a pension plan contemplated by section 98, with accrued interest, and any refunds of benefits resulting from such amounts, and any pension or payment having replaced a pension pursuant to section 92, are also unassignable and unseizable.

89. Finally, in *White Birch #2*,[62] Justice Mongeon was asked to revisit his previous ruling in light of this *Timminco* decision and of the fact that White Birch DIP had been repaid in the interim. He refused to do so mainly on the basis of *res judicata*.

90. As stated in the Pension Motion (at paragraphs 66 and 67) the Memorandum of Agreement (R-22) cannot serve as the basis for the application of the NL PBA in relation to property located in Quebec. Also and absent a multi-jurisdictional agreement providing for the application in Quebec of the laws of Newfoundland & Labrador, it is submitted that this Court is bound to apply the laws applicable in the Province of Quebec to adjudicate a dispute with respect to tangible assets located in Québec (or the proceeds standing in their stead).

D. Limited Priority Disputes

91. As previously decided by this Court in the Suspension and Priority Order, none of the remaining CCAA Charges can be trumped by any of the pension deem trusts.

92. Also and for the same reason as stated in *Sparrow Electric*, *Aveos*[63] and in the Suspension and Priority Order, failing specific and clear wording, commonly referred to as the Sparrow Electric Amendment, the different pension deemed trusts, should any be applicable, would now not outrank the validly secured and unpaid municipal taxes. The Monitor respectfully submits that this Court should not follow the *Timminco* precedent as Section 49 of the SPPA clearly does not create a valid true trust (*White Birch* # 1), Justice Mongeon provides no cogent reason in *Timminco* to set aside *Sparrow Electric* and that his ruling runs contrary to the *First Vancouver* analysis, which considers statutory deemed trusts as creating a floating charge, not as transferring absolutely the property of the debtor into a new patrimony, subject to presumably to some reversionary provision upon payment or satisfaction of the unpaid pension contributions.

93. Finally, even should this Court find that Section 32 of the NL PBA was validly triggered and that it extended to the wind-up deficit (thus rejecting the arguments of the Monitor on these two issues), the undersigned attorneys would submit that this Court could not, in

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62 *White Birch Paper Holding Company (Arrangement relatif à)*, 2014 QCCS 4709 (**White Birch #2**). **Tab 12.**

63 *Aveos Fleet Performance Inc./Aveos Performance aéronautique inc. (Arrangement relatif à)*, 2013 QCCS 5762 (**Aveos**). N&L Superintendent, BOA, Tab 15.

any event, extend the application of the Section 32 NL PBA deemed trust to charge assets located in the Province of Québec or to the sale proceeds thereof.

IV. THE "LIQUIDATION" TRIGGER UNDER THE NL PBA AND THE PBSA

94. With respect to the "liquidation" as a triggering event of deemed trusts pursuant to Section 8(2) PBSA, this Court wrote, in the Suspension Order dated June 26, 2015:

> [67] However, Section 8(2) PBSA only applies "[i]n the event of any liquidation, assignment or bankruptcy of an employer". It attaches to any property which lawfully belongs to the employer when the triggering event occurred.
>
> [68] The issue of the triggering event could be determinative in the present case. If the triggering event has not occurred, then there is no deemed trust and no obstacle to the Court granting the priority required by the Interim Lender.
>
> [69] It is clear that there has been no assignment or bankruptcy in the present matter. Further, there is no liquidation under Part XVIII of the *Canada Business Corporations Act* or equivalent provincial legislation. A CCAA proceeding does not appear to trigger the application of Section 8(2) PBSA. However, OSFI argues that these CCAA proceedings are really a liquidation, because it is very likely that the ongoing sale process will result in the sale of all of the assets of the Wabush CCAA Parties].
>
> [70] In interpreting the word "liquidation" in Section 8(2) PBSA, and in particular whether it includes a liquidation under the CCAA, the Court will consider more generally how the deemed trust under Section 8(2) PBSA is dealt with under the CCAA.
>
> [...]
>
> [79] In the alternative, the Court could conclude that a liquidation under the CCAA does not fall within the term "liquidation" in Section 8(2) PBSA such that there has been no triggering event.
>
> [References omitted. Our underlining.]

95. The Monitor submits that this analysis is well-founded and constitutes the proper approach to interpreting the meaning of "liquidation" as a triggering event under both Section 8(2) PBSA and Section 32(2) NL PBA.

96. Specifically, the Monitor submits that it is inappropriate and in effect untenable to maintain, as the Objecting Parties do, that a so-called "liquidating CCAA" proceeding can constitute a liquidation triggering the application of Sections 8(2) PBSA or 32(2) NL PBA, as further demonstrated below.

97. The Monitor further submits that, even should the Court find that certain sales of assets conducted under the auspice of the CCAA can indeed trigger the deemed trusts of Sections 8(2) PBSA or 32(2) NL PBA, the present CCAA Proceedings did not.

A. Position of the Objecting Parties

(i) Representative Counsel

98. Representative Counsel, in their Outline of Arguments, favour a "broad, purposive" interpretation of "liquidation" rather than a "narrow or technical" one (para. 94). They contend that any CCAA debtor that "is not restructuring" but rather selling its assets is without question undergoing a "liquidation" (para. 90).

99. The Representative Counsel's position in this respect appears in large part to be based on the fact that, as they claim, an increasing number of CCAA proceedings would result in a sale of assets rather than a restructuring (paras. 92-94). This phenomenon is described as presenting an increased risk of misconduct on the part of the debtor, as appears from the excerpt from an article by seminal author Janis Sarra on which Representative Counsel heavily rely:

> [...] Courts are confronted with fait accompli applications before them, in effect bypassing many of the checks and balances of the system. Sales under these conditions often do not have the protections built into a CCAA plan that prevent misconduct. [J. Sarra. The Oscillating Pendulum, as quoted in para. 94 of the Outline of Arguments of Representative Counsel]

100. Not only is this description completely at odds with the way the present CCAA Proceedings have unfolded to date, but, more importantly, when looking at pension plan funding, which is what is at stake here, it completely ignores the fact that the legislator has in fact provided for specific checks and balances applicable in the context a sale of assets under the CCAA, by way of Section 36(7) CCAA, as further argued below.

(ii) Union

101. The Union, in its Outline of Arguments, also favours an interpretation of "liquidation" that would include the present CCAA Proceedings (paras. 11-14, 25-26).

102. The Union contends that the fact that the debtors will not be in a position to operate a business further to the sale of their assets under these CCAA Proceedings entails that no plan of arrangement will be presented (paras. 11-12), which in turns warrants that the process be qualified as a "*liquidation ordonnée*" (paras. 13-14). At the very least, it is argued, this is *likely* to be the case ("*vraisemblablement*", para. 26).

(iii) N&L Superintendent

103. The N&L Superintendent, in its Outline of Arguments, is more categorical than the Union: the Wabush CCAA Proceedings, it is said, constitute as a matter of fact liquidation proceedings (paras. 6(a), 16).

104. In support of this conclusion, the N&L Superintendent claims that the Wabush CCAA "never had any intention of restructuring and emerging from the CCAA process as a going concern" (para. 12), that these CCAA Proceedings have been "directed – since their very outset – to the sale of all of the Wabush [CCAA Parties'] assets and inventory" (para. 13), and that the Monitor "solicited 'liquidation proposals'" as part of the sale process (paras. 14, 19).

105. The N&L Superintendent thus concludes: "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." (para. 20).

106. Of note, the N&L Superintendent goes on to situate the occurrence of said liquidation in time as follows: "This liquidation would have occurred as of the time of CCAA filing, if not before" (para. 20).

107. While the N&L Superintendent acknowledges that not all hope of seeing the Wabush Mine sold as a going concern was lost as of the filing of their written submissions (para. 17), it urges the Court to disregard as irrelevant the distinction between the sale of a debtor's assets on a piecemeal basis, on the one hand, and the purchase of the debtor's business on a going concern basis, on the other hand (paras. 21-29).

108. In doing so, the N&L Superintendent appears to convene the Court to conclude that any CCAA proceeding not involving a "genuine restructuring", as a going concern, which must entail the filing of a plan of arrangement, must automatically be considered as a liquidation:

> 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.

109. The Monitor, as further outlined below, strongly urges this Court to reject this false dichotomy, which is unsupported by the broad and remedial language of the CCAA and modern case-law, including with respect to so-called "liquidating CCAAs". The Superintendent's view in this respect runs afoul of the flexibility afforded to insolvent debtors and their stakeholders by the Legislator, including by way of specifically authorizing sales outside the ordinary course of business in the context of the 2005-2009 Reform as described more fully below.

110. The N&L Superintendent argues that the liquidation of an employer occurs whenever all or substantially all of its assets are sold, and the resulting proceedings distributed, irrespective of whether the sale is done on a going concern basis or not (para. 22). This broad interpretation is said to be supported by the protective and remedial purpose of deemed trust provisions of the NL PBA (paras. 23, 34-38). The N&L Superintendent also relies on Section 16 of the *Interpretation Act*, RSNL 1990, c. I-19 (para. 34):

> 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.

111. As for the interpretation of "liquidation" in light of the fact that it forms part of an enumeration including "bankruptcy" and "assignment" in Section 32(2) PBA, the N&L Superintendent simply submits that a "liquidating CCAA fits naturally within this framework" (para. 33), the common feature in its view being "the debtor's property

[being] 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)" (para. 32).

112. Here again, the Monitor strongly disagrees that a sale of property under the CCAA by a debtor-in-possession who retains its management and carriage of its business can be considered akin to a bankruptcy or assignment, the whole as further explained below.

(iv) OSFI

113. While OSFI recognizes that the proper use of CCAA proceedings can entail a sale of the debtor's assets (paras. 21, 24), no submissions as to the proper meaning of "liquidation" within the meaning of Sections 8(2) PBSA are made.

114. That said, OSFI evidently supports the view pur forward by other Objecting Parties to the effect that the Wabush CCAA Parties in these CCAA Proceedings have opted for a liquidation (paras. 14(b), 28).

115. Furthermore, OSFI strongly emphasizes its mandate and supervisory role in terms of protecting the rights and interests of pension plan beneficiaries (paras. 5-7).

(v) Retraite Québec

116. The deemed trust pursuant to Section 49 SPPA not being conditioned upon a triggering event such as a liquidation, contrary to Sections 8(2) PBSA or 32(2) NL PBA, Retraite Québec offers no submission on the issue either.

(vi) Replacement Plan Administrator

117. Morneau Shepell adopts as a whole the submissions made by Representative Counsel, the Union and the N&L Superintendent.

B. Position of the Monitor

(i) Purposive Interpretation and Competing Legislation Objectives

118. The Objecting Parties, in arguing in favour of a broad definition of "liquidation", appear to be conflating the remedial nature of the deemed trust provisions and the overall purpose of pension legislation generally.

119. The Monitor submits that a true purposive interpretation ought to take into consideration a wide array of elements and cannot merely strive to arrive at the most generous interpretation possible:

> In its broadest sense, legislative purpose refers not only to the material goals the legislature hoped to achieve but also to the reasons underlying each feature of the implementing scheme. It asks the question why: why this legislation? Why this arrangement of powers? Why this direction or rule? Why this turn of phrase? In purposive analysis every feature of legislation from the overall conception to the smallest linguistic detail is presumed to be there for a reason. It is presumed

> to address a concern, anticipate a difficulty, or in some way promote the legislature's goals.[64]

120. Furthermore, as noted by Justice Gonthier, dissenting, in *Sparrow Electric*, the purpose underpinning one particular statute may well conflict with another (at paragraphs 21 and 22):

> [21] More recently, provincial legislatures have moved to protect secured creditors generally through the enactment of personal property security legislation [...] These statutory regimes have been implemented to increase certainty and predictability in secured transactions through the creation of a coherent system of priorities [...] The benefits of such certainty in commercial transactions, on basic economic principles, are intended to accrue to the health of the economy in general.
>
> [22] It can be seen from the foregoing, therefore, that the priority competition between statutory trusts and consensual security interests represents, in a broad sense, a clash between conflicting legislative objectives. To this extent, then, a resolution of the priority competition in the present case requires a sensitivity to the differing legislative objectives here at play. In particular, however, to the extent that the aim of personal property security regimes is to effect certainty in commercial transactions, the interpretation by the courts of such legislation and the development of the jurisprudence generally in this area must, to every extent possible, seek to achieve predictable results.
>
> [References omitted. Our underlining.]

121. That certainly and predictability are overarching goals of the legislator when it comes to credit and commercial transactions is further supported by the legislative choices made in the face of a "proliferation of provisions creating a deemed trust", i.e. to limit their recognition in case of insolvency to those exceptions specifically provided for.[65]

122. In dealing with statutory deemed trusts, Justice McLachlin (as she then was) unequivocally grounded a restrictive approach based on fairness, common sense and clear policy underpinnings of the BIA (*Samson Bélair* at page 33):

> Practical policy considerations also recommend this interpretation of the *Bankruptcy Act*. The difficulties of extending s. 47(*a*) to cases where no specific property impressed with a trust can be identified are formidable and defy fairness and common sense. For example, if the claim for taxes equalled or exceeded the funds in the hands of the trustee in bankruptcy, the trustee would not recover the costs incurred to realize the funds. Indeed, the trustee might be in breach of the Act by expending funds to realize the bankrupt's assets. Other difficulties would arise in the case of more than one claimant to the trust property. The spectre is raised of a person who has a valid trust claim under the general principles of trust law to a specific piece of property, finding himself in competition with the Crown claiming a statutory trust in that and all the other property. Could the Crown's general claim pre-empt the property interest of the claimant under trust law? Or would the

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64 Ruth Sullivan, *Sullivan on the Construction of Statutes*, Sixth Edition, (Markham, Ont.: LexisNexis Canada Inc., 2014), at para. 9.26. **Tab 16.**

65 See Alain Prévost, "Pension Deemed Trust: What's Left?", (2017) 59 CBLJ 30 at pp. 2-3. N&L Superintendent BOA, Tab 9.

> claimant under trust law prevail? To admit of such a possibility would be to run counter to the clear intention of Parliament in enacting the *Bankruptcy Act* of setting up a clear and orderly scheme for the distribution of the bankrupt's assets.
>
> [Our underlining]

123. Recognizing the existence of competing objectives and rights is all the more important when dealing with statutory deemed trusts, especially pension deemed trust which are not limited to third party funds received by the employer to be remitted to a third party or to be held in trust.

124. The protection of pension beneficiaries, while certainly relevant, cannot be the only imperative to factor in when assessing the proper ambit and efficiency of deemed trust provisions in insolvency proceedings.

125. This Court shall resist judicial activism or broadening the scope of Section 32 NL PBA without respect to a proper literal and contextual interpretation simply on the basis of a broad, liberal and generous interpretation of a pension legislation so as to protect as much as possible the rights and interest of employees and pensioners, as legislative discretion belongs to Parliament alone and is not to be exercised by the judiciary.[66]

(ii) Literal and Contextual Construction of Statutes

126. The Supreme Court teaches that, in interpreting a statutory provision, the starting point ought to be as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[67]

127. This principle, often referred to as the "plain meaning rule", also commands that the words chosen by the legislator be read "in their entire context":

> General expressions are particularly sensitive to their legal environment. As sweeping as the terms may be, harmony of the text may dictate an interpretation that limits their scope.[68]

128. In doing so, the immediate internal context of the term to be interpreted is of particular assistance:

> Words used in a legislative provision take the colour of the accompanying terms. Put another way, it is impossible to construed words and expressions in isolation,

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[66] *Century Services*, *supra* note 56 Justice Fish at para. 95 and *Aveos*, *supra* note 63 Justice Schrager at para. 84.

[67] *Sparrow Electric*, *supra* note 58 at para. 30. **Tab 13**; *Re Rizzo & Rizzo Shoes*, [1998] 1 SCR 27 at para. 21. N&L Superintendent, BOA, Tab 31 and Representative Counsel, BOA, Tab 25.

[68] Pierre-André Côté, *The Interpretation of Legislation in Canada*, Fourth Edition, (Toronto: Thomson Reuters Canada, 2011) at p. 329. **Tab 17.**

> in the abstract, in a vacuum, without taking into account other linguistic elements developments to communicate the legal norm. [...]
>
> Two Latin maxims are often invoked by courts to assist in applying the argument of immediate internal context. They are the canons of interpretations known as "*noscitur a sociis*" and "*ejusdem generis*", which are utilized in order to circumscribe general words or expressions found in states. [...] Literally, noscitur a sociis means that a word is known by its associates, while *ejusdem generis* means that a word is limited to things of the same kind, of the same nature.[69]

Noscitur a Sociis

129. The Monitor submits that the proper meaning of "liquidation" within Sections 8(2) PBSA and 32(2) NL PBA needs to take into account the juxtaposition in both provisions of "assignment" and "bankruptcy":

> When two or more words or phrases perform a parallel function within a provision and are linked by "and" or "or", the meaning of each is presumed to be influenced by the others. The interpreter looks for a pattern or a common theme in the words or phrases, which may be relied on to resolve ambiguity or to fix the scope of the provision.[70]

Ejusdem Generis

130. The meaning of "liquidation" also needs to be restricted in light of the reference by the legislator to narrower notions of "bankruptcy" and "assignment" within the same enumeration:

> The rule of *ejusdem generis* is in fact merely the particular application of *noscitur a sociis* to cases where a general term follows a list of specific ones. The *ejusdem generis* rule means that a generic or collective term that completes an enumeration of terms should be restricted to the same genus as those words, even though the generic or collective term may ordinarily have a much broader meaning.[71]
>
> [References omitted]

131. While the classic formulation of the *ejusdem generis* principle often entails that the generic term be found at the end of the enumeration, and not the beginning as here in both Sections 8(2) PBSA and 32(2) NL PBA, the merit of this criterion has been disputed:

> It has also been suggested that the limited class rule does not apply if the general words precede the list of specific items. The basis for this observation is

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69 Stéphane Beaulac, *Handbook on Statutory Interpretation: General Methodology, Canadian Charter and International Law*, (Markham, Ont.: LexisNexis Canada Inc., 2008) at pp. 124-125. **Tab 18.**

70 Ruth Sullivan, *Statutory Interpretation*, Third Edition, (Toronto: Irwin Law, 2016) at p. 138. **Tab 19.**

71 Pierre-André Côté, *supra* note 68 at p. 334. **Tab 17.**

> harder to discern. Arguable the crucial factor is not whether the list precedes or follows the general words but the language used to connect the two.[72]
>
> A second condition for application of the rule, according to some authorities, is that the general term follow rather than precede the specific ones. But these cases do not eliminate the possibility of attenuating the meaning of generic terms with less general terms which follow. Even if, strictly speaking, *ejusdem generic* does not apply, the principle of contextual interpretation set forth by *noscitur a sociis* holds in any case.[73]
>
> [References omitted]

(iii) Common Features of Bankruptcy, Assignment and Liquidation

132. In the provisions at hand, liquidation, bankruptcy and assignment all function as triggers for the application of deemed trusts. The proper meaning of liquidation cannot be assessed in the abstract, without regard to the notions of "bankruptcy" and "assignment". Rather, the "common theme" must be determined.

133. As stated above, the N&L Superintendent contends that the common feature is the sale or transfer of the debtor's property with a view to distributing the proceeds to creditors and, where funds are available, shareholders (para. 32 of the Outline of Arguments). None of the other Objecting Parties appear to have considered the need for a common theme to shed light on the proper meaning of "liquidation" here.

134. The common denominator identified by the N&L Superintendent is inappropriately wide-encompassing. The resulting interpretation of liquidation would include any and all realization of assets followed by a distribution of proceeds to creditors, whether the debtor is involved in a formal insolvency Court supervised sale process or not.

135. Rather, the Monitor submits that the common features of bankruptcy, assignment and liquidation within the meaning of Sections 8(2) PBSA and 32(2) NL PBA ought to include the following aspects: a formal and usually irrevocable process whereby the employer's property as a whole vests with a third-party officer tasked with the realization and distribution of proceeds to creditors and, where sufficient funds exist, shareholders.

136. The BIA defines "Assignment" as follows:

> 2 [...] **assignment** means an assignment filed with the official receiver
>
> 49(1) An insolvent person or, if deceased, the executor or administrator of their estate or the liquidator of the succession, with the leave of the court, may make an assignment of all the insolvent person's property for the general benefit of the insolvent person's creditors. [...]
>
> (3) The assignment made under subsection (1) shall be offered to the official receiver in the locality of the debtor, and it is inoperative until filed with that official receiver, who shall refuse to file the assignment unless it is in the

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72 Ruth Sullivan, *Statutory Interpretation*, *supra* note 70 at p. 145. **Tab 19.**

73 Pierre-André Côté, *supra* note 68 at p. 336. **Tab 17.**

> prescribed form or to the like effect and accompanied by the sworn statement required by subsection (2).
>
> (4) Where the official receiver files the assignment made under subsection (1), he shall appoint as trustee a licensed trustee whom he shall, as far as possible, select by reference to the wishes of the most interested creditors if ascertainable at the time, and the official receiver shall complete the assignment by inserting therein as grantee the name of the trustee. [...]
>
> [Our emphasis]

137. "Bankruptcy" is defined at Section 2 BIA as "*the state of being bankrupt or the fact of becoming bankrupt*". "Bankrupt", in turns, is defined as "a person who has made an assignment or against whom a bankruptcy order has been made or the legal status of that person".

138. Pursuant to Section 43(9) BIA, the bankruptcy order automatically entails the appointment of a trustee:

> **43**(9) On a bankruptcy order being made, the court shall appoint a licensed trustee as trustee of the property of the bankrupt, having regard, as far as the court considers just, to the wishes of the creditors.

139. The trustee in bankruptcy, whether appointed pursuant to a bankruptcy order or further to an assignment, is entrusted with the property of the bankrupt, which forms the estate in bankruptcy, the scope of which is detailed in Section 67 BIA (the French version of which referring to "*le patrimoine attribué à ses créanciers*").

140. As stated above, the Monitor favours an interpretation of "liquidation" for the purposes of Sections 8(2) PBSA and 32(2) NL PBA which would necessarily entail a similar mechanism whereby the totality of the employer's assets vest with a third-party officer tasked with their realization. It is submitted that this is required by the reference, in both subsections (2), to "the estate in liquidation, assignment or bankruptcy".

141. This interpretation is further supported by the French version of Section 8(2) PBSA, which reads as follows:

> **8** (2) En cas de liquidation, de cession des biens ou de faillite de l'employeur, un montant correspondant à celui censé détenu en fiducie, au titre du paragraphe (1), est réputé ne pas faire partie de <u>la masse des biens assujettis à la procédure en cause</u>, que l'employeur ait ou non gardé ce montant séparément de ceux qui lui appartiennent ou des actifs de la masse.
>
> [Our underlining]

142. That both Sections 8(2) PBSA and 32(2) NL PBA refer to the "liquidation [...] of an *employer*" further supports the Monitor's view that the liquidation in question must

encompass the entirety of the debtor's property and signal the end of its existence. See on this point the reasons of Justice Essey, dissenting, in *Dauphin Plains*,[74] p. 1211:

> [...] Where the term [liquidation] is used as in the pension and unemployment statutes with reference to the liquidation "of an employer", it is clear, in my view, that the term carries its broad and general meaning, that is the process of disposing of an undertaking and terminating the existence of the entity.

(iv) Scheme Analysis: Liquidation as Deemed Trust Trigger

143. In *Construction of Statutes*, professor Sullivan writes:

> Inferences about purpose are often drawn from analyzing the structure or scheme embodied in an Act. In carrying out this analyse the court, in effect, retraces the steps of the legislative drafter, examining the relationship among provisions to surmise the overall plan. [...]
>
> When analyzing the scheme of an Act, the court tries to discover how the provisions or parts of the Act work together to give effect to a plausible and coherent plan. It then considers how the provision to be interpreted can be understood in terms of that plan [...] [75]
>
> [References omitted.]

144. In both Sections 8(2) PBSA and 32(2) NL PBA, the notion of liquidation, alongside bankruptcy and assignment, function as a trigger for a deemed trust to arise, whether or not the funds have indeed been kept separate and apart from the estate.

145. Both subsections (2) include the same introductory language: "In the event of..."

146. The broader notion of liquidation that certain of the Objecting Parties would have the Court adopt in the present case is incompatible with the concept of a trigger, which presupposes that the occurrence of the triggering event can be ascertained with certainty and situated in time with precision, especially given the consequences of triggering a deemed trust charging the assets of an insolvent employer.

147. The necessity for such a clear-cut trigger is even more apparent in the case of the PBSA, in light of the provisions of Section 29 PBSA dealing with termination and winding-up of pension plans:

> 29(1) The revocation of registration of a pension plan shall be deemed to constitute termination of the plan. [...]
>
> (3) In a declaration made under subsection (2) or (2.1), the Superintendent shall declare a pension plan or part of a pension plan, as the case may be, to be terminated as of the date that the Superintendent considers appropriate in the circumstances. [...]

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[74] *Dauphin Plains Credit Union Ltd.* v. *Xyloid Industries Ltd.*, [1980] 1 SCR 1182 (**Dauphin Plains**). **Tab 20.**

[75] Ruth Sullivan, *Sullivan on the Construction of Statutes*, *supra* note 64 at paras. 9.57 and 13.12. **Tab 16.**

> (4.3) As of the date of the termination of the whole of a pension plan, there is to be no crediting of benefits to the plan members under that pension plan. [...]
>
> (6) If the whole of a pension plan is terminated, the employer shall, without delay, pay into the pension fund [the amounts listed thereafter] [...]
>
> (6.1) If the whole of a pension plan that is not a negotiated contribution plan is terminated, the employer shall pay into the pension fund, in accordance with the regulations, the amount — calculated periodically in accordance with the regulations — that is required to ensure that any obligation of the plan with respect to pension benefits, as they are determined on the date of the termination, is satisfied.
>
> (6.2) Subsection 8(1) does not apply in respect of the amount that the employer is required to pay into the pension fund under subsection (6.1). However, it applies in respect of any payments that are due and that have not been paid into the pension fund in accordance with the regulations made for the purposes of subsection (6.1). [...]
>
> (6.4) On the winding-up of the pension plan or the liquidation, assignment or bankruptcy of the employer, the amount required to permit the plan to satisfy any obligations with respect to pension benefits as they are determined on the date of termination is payable immediately.
>
> (6.5) Subsection 8(1) does not apply in respect of the amount that the employer is required to pay into the pension fund under subsection (6.4). However, it applies in respect of any payments that have accrued before the date of the winding-up, liquidation, assignment or bankruptcy and that have not been remitted to the fund in accordance with the regulations made for the purposes of subsection (6.1). [...]
>
> [Our underlining]

148. The language used in Sections 6.4 and 6.5 above, in particular the parallelism drawn between the liquidation, assignment or bankruptcy of the employer, on one part, and the winding-up of the pension plan, on the other hand, strongly suggests that the legislator understood "liquidation, assignment and bankruptcy" as events that would automatically and irrevocably entail that the pension plan be wound up.

149. The reference, in Section 6.4, to the "date of termination" further supports the Monitor's view that "liquidation" cannot be construed as something occurring over a period of time.

150. Indeed, adopting the Objecting Parties' definition of liquidation here, would entail that the wind-up deficit of both DB Plans, as protected in subsection (6.4), would have become payable upon the Wabush Initial Order, or any other point said to be mark the beginning of the purported liquidation, before even the official plan termination.

151. Evidently, OSFI had not such intention when it sent its Termination Notice (R-14) and never took the position that the wind-up deficit became payable in full before the termination of the Union DB Plan as a result of said termination notice.

152. Likewise when focussing on the position of the N&L Superintendent (R-13), it is apparent that it purported to declare that the DB Plans were terminated only as of that date and that the wind-up deficit would become owing as a result and payable in accordance with

the rules set-out in Sections 61(2) NL PBA and 25.1 of the Regulation (at page 2, second paragraph). It never took the position that the DB Plans were terminated before or that the full wind-up deficit had become owing and payable based on a qualitative and subjective determination that some form of liquidation had previously occurred.

(v) No Reference to CCAA Proceedings

153. CCAA proceedings can be contrasted with bankruptcy proceedings inasmuch as the former do not entail vesting out or assigning the debtor's property to a trustee. Rather, the debtor remains a debtor in possession authorized to operate its business and conduct its restructuring as it sees fit, under the authority of the Court, and subject only to the supervision of a monitor.

154. The situation is analogous in instances of proposals under Part III of the BIA.

155. Neither Section 8(2) PBSA nor 32(2) NL PBA refers to insolvency or restructuring proceedings generally nor CCAA proceedings specifically as triggers for the deemed trust to arise.

156. This is so despite numerous amendments made to the PBSA since its enactment in 1986:

- L.C. 1998, c. 12, s. 6;
- L.C. 2010, c. 12, s. 1791;
- L.C. 2010, c. 25, s. 183;
- L.C. 2012, c. 16, s. 86.

157. Similarly, the NL PBA has been amended on numerous occasions since its enactment in 1996:

- S.N.L. 2001, c. 22, ss. 19-29;
- S.N.L. 2001, c. 42, s. 31;
- S.N.L. 2004, c. 36, s. 29;
- S.N.L. 2004, c. 47, s. 29;
- S.N.L. 2007, c. 6;
- S.N.L. 2007, c. T-9.1, s. 5;
- S.N.L. 2008, c. 16;
- S.N.L. 2012, c. 41.

158. In fact, Section 8(2) PBSA has not been modified in any way since its first adoption. As for the NL PBA, Section 32 as a whole remained unchanged despite numerous subsequent amendments to the Act, including particularly the enactment of Section 61(2) in 2008:

61. (1) [...]

(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.

[Our underlining]

159. The Monitor notes the foregoing without making any representation to the Court as to the efficiency of such deemed trust in CCAA proceedings, had the legislator (especially the provincial legislature) included specific reference to the CCAA in its enumeration of triggers in Sections 8(2) PBSA or 32(2) NL PBA. To the contrary, case-law makes abundantly clear that the explicit reference to "bankruptcy and assignment" alone in those sections has been far from sufficient to ensure the efficiency of the deemed trusts in bankruptcy proceedings.

160. The point here is that the wording of Sections 8(2) PBSA and 32(2) NL PBA evidences a clear intent on the legislator's part to impose deemed trusts in the event of a bankruptcy – whether or not, and under which conditions, this intent ought to prevail despite the terms of the BIA is a question that needs not be tackled to resolve the issues at hand – which is in stark contrast with the conspicuous absence of any reference to CCAA proceedings.

(vi) Liquidating CCAA and "Genuine Restructuring"

161. As noted above, the N&L Superintendent's reasoning relies on a classification of CCAA proceedings as between two distinct, mutually exclusive categories: instances where a debtor is "genuinely" attempting a restructuring, on the one hand, and liquidations on the other.

162. The Monitor strongly disagrees with this artificial and simplistic subcategorization.

163. Court-authorized sales of assets outside the normal course of a debtor's business, which are specifically permitted – and made subject to a number of criteria – pursuant to Section 36 CCAA, especially when conducted pursuant to a Court-approved process subject to the supervision of the Monitor, do not subvert the nature of the CCAA process to transform it into a liquidation within the meaning of Section 8(2) PBSA or 32(2) NL PBA.

164. Considered as a triggering event, the liquidation of Sections 8(2) PBSA and 32(2) NL PBA simply cannot be construed as a vague or subjective notion, the occurrence of which is only confirmed in light of subsequent events and the passage of time, on an accretive basis (e.g. once a critical number of successive sales, amounting to a disposition of all of substantially all of the debtor's assets, have closed).

165. The broad notion of liquidating CCAA put forth by the Objecting Parties also suggests that the eventual filing of a plan of arrangement would somehow retroactively eliminate the occurrence of the liquidation trigger, and annihilate the deemed trusts thus arisen, because the debtor would then be seen as having completed a "genuine" restructuring.

166. The same concerns had been expressed by Justice Osler in *Royal Trust Co.* v. *Montex Apparel Industries Ltd.*,[76] with respect to sale of assets under receivership, which the Monitor submits are equally applicable here:

> Although no authority on this branch of the case was cited to me, it is trite law that taxing statutes are to be strictly construed and, in my view, a receivership by order of the Court is not a liquidation, assignment or bankruptcy and hence, neither s. 40 of the *Unemployment Insurance Act* nor s. 24 of the *Canada Pension Plan* have application, regardless of the above reasons. On the facts of the present case, it appears that the receiver has in reality been engaged in liquidating the defendant's enterprise. However, as was pointed out by counsel for the trustee, liquidation is not the inevitable result of a receivership and indeed, there have been many successful receiverships which have resulted in the enterprise being handed back to its owner as a going concern. It cannot be known with any degree of certainty at the moment of the appointment of a receiver whether in fact liquidation is inevitable and the effect of the various statutes must be assessed as at that moment. The task of the receiver might well be made an impossible one if the application of these statutes were made to await the outcome of his endeavours rather than being ascertainable upon his appointment. [As cited by Justice Pigeon in *Dauphin Plains*, at p. 1200. Emphasis added. Justice Pigeon disagrees with the above-quoted excerpt for reasons that are further analyzed herein below. The same excerpt of Justice Osler's reasons was also cited with approbation by Justice Estey in the dissenting reasons in *Dauphin Plains*.]
>
> [Our underlining]

167. The Monitor maintains that conflating the notions of "liquidating CCAA" and "liquidation of the employer" for the purposes of determining whether a deemed trust has been triggered under Sections 8(2) PBSA or 32(2) NL PBA clearly runs against the guiding principle that an initial order issued pursuant to the CCAA is meant to preserve the *status quo* amongst creditors *vis à vis* the debtor and its assets.

168. In *Dauphin Plains*,[77] a decision of the Supreme Court of Canada rendered in 1980, a dispute had arisen in the context of the distribution by a court-appointed receiver-manager of the proceeds of sale of the debtor's assets, more particularly in respect of various amounts notionally deducted from employee's wages which, according to the Crown, were protected by deemed trusts.

169. The statutory provisions at stake, all of which are reproduced in full at p. 1207 of the reasons of Justice Estey, all contained triggering events similar to those found in Sections 8(2) PBSA and 32(2) NL PBA: "liquidation, assignment or bankruptcy".

170. The Supreme Court, as part of its analysis, was called upon to determine whether the receivership at hand, which had led to the sale of debtor's property as a whole, could be construed as a liquidation for the purposes of the deemed trusts provisions of the *Income Tax Act*, the *Canada Pension Plan Act*, and the *Unemployment Insurance Act*.

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[76] *Royal Trust Co.* v. *Montex Apparel Industries Ltd.*, 1972 CanLII 437 (ON SC). An appeal from this decision was allowed by the Ontario Court of Appeal: *Royal Trust Co.* v. *Montex Apparel Industries Limited*, 1972 CanLII 705 (ON CA). **Tab 21.**

[77] *Dauphin Plains, supra* note 74. **Tab 20.**

171. Justice Pigeon, for the majority, answered this question in the affirmative. Justice Estey, dissenting, came to the opposite solution.

172. The reasons of Justice Pigeon indicate that his decision is based in large part on the usage, of lack thereof, of the term "liquidation" in legislation across Canada at the time of the enactment of the deeming provisions at stake:

> We are here dealing with a receivership which was completed by the sale and distribution of all the assets of the employer company. In the statutes of Canada as they stood when the two provisions we have to construe were enacted, "liquidation" was not the word used to describe the voluntary or forced distribution of the assets of a company, the word used was "winding-up", see the *Winding-Up Act*, R.S.C. 1970, c. W-10. However, the word "liquidation" was sometimes used to describe this process of dissolution of a company, for instance, in s. 6 subpar. (b) providing for the application of the *Act to Canadian Companies*:
>
> > (b) that are in liquidation or in process of being wound up, and, on petition by any of their shareholders or creditors, assignees or liquidators ask to be brought under this Act.
>
> The word is also found in s. 166 with reference to a British or foreign company that "is in liquidation in the country in which its head office is situated". In the *Canada Cooperative Associations Act*, 1970-71-72 (Can.), c. 6, the word "liquidation" is found in s. 74 making the directors liable for employees' wages when, among other cases, the association has
>
> > (ii) gone into liquidation or been ordered to be wound up under the *Winding-Up Act*, or has made an assignment under the Bankruptcy Act or a receiving order under the *Bankruptcy Act* has been made against it...
>
> It seems to me that it would not make sense to hold that, because the assets of a company were realized by a receiver appointed at the request of a creditor rather than by a liquidator or a trustee in bankruptcy appointed by a court, the claim for wages should fail. It appears to me that there is no reason not to give the word "liquidation" its wide meaning in usual language.
>
> [*Dauphin Plains*, Justice Pigeon, pp. 1200-1201.]

173. Justice Pigeon, in finding so, relies on the reasons of Justice Middleton in a 1930 ruling by the Ontario Court of Appeal, which on the face of the excerpt he quotes, appears readily distinguishable from the present matter, in addition to also having been rendered in a much different legislative environment (at a time when "liquidation" was said to be a "colloquial" expression):

> I would follow the reasoning made by Middleton J.A. in *Davey v. Gibson* (1930), 65 O.L.R. 379, at p. 381:
>
> The argument before us turned rather upon a discussion of the question whether the Act should be strictly or liberally construed. It is not, in my view, necessary to enter upon any such discussion...
>
> The term "gone into liquidation" is not anywhere defined; the language is more or less colloquial, for there is not, at the present time, any legal proceeding known

> as liquidation. At one time there was, but it has long since been obsolete. The technical term used in the Companies Act is "wind-up," although the officer appointed to conduct the winding-up is designated a liquidator.
>
> If one searches dictionaries, it is not hard to find a definition of liquidation wide enough to include bankruptcy. In the Century Dictionary this is given: "Liquidation: the act or operation of winding up the affairs of a firm or company by getting in the assets, settling with its debtors and creditors, and apportioning the amount of each partner's or shareholder's profit or loss, etc." In the Oxford Dictionary is the following: "Liquidate: Law and commerce: To ascertain and set out clearly the liabilities of (a company or firm) and to arrange the apportioning of the assets; to wind up." In Corpus Juris, that mine of information, is this definition: "Liquidation, a word of French origin, is not a technical term, and, therefore, can have no fixed legal meaning; but it has a fairly defined legal meaning, and it is said to be a term of jurisprudence, of finance, and of commerce. It is defined as the act of settling, adjusting debts, or ascertaining their amounts or balance due; settlement or adjustment of an unsettled account [...]. Applied to a partnership or company, the act or operation of winding up the affairs of a firm or company by getting in the assets, settling with its debtors and creditors, and appropriating the amount of profit or loss." [...]
>
> [*Dauphin Plains*, Justice Pigeon, pp. 1201-1202. Our underlining]

174. The Monitor is of the view that *Dauphin Plains* is not determinative of the issue at hand here and can be readily distinguished in light of the numerous subsequent changes made to insolvency legislation generally and the treatment of statutory deemed trusts specifically. It is submitted that, in the present context, the reasoning of the dissenting justices, rather than the majority, ought to be prevail:

> The term as employed in our law generally, whether or not it be qualified by the presence of the words 'assignment' or 'bankruptcy', relates either to the realization of assets to pay debts or to the total disposition of the undertaking of an entity including not only the realization of assets to pay debts but for the distribution of any net surplus to the owners of the entity prior to its termination. Where the term is used as in the pension and unemployment statutes with reference to the liquidation "of an employer", it is clear, in my view, that the term carries its broad and general meaning, that is the process of disposing of an undertaking and terminating the existence of the entity. [...]
>
> [*Dauphin Plains*, Justice Estey, dissenting, at pp. 1210-1211. Our underlining]

175. Justice Estey went on to consider specifically the scenario whereby a debtor sells all or substantially all of its assets, in the context of a receivership for instance, such that only an empty shell survives, but ultimately ruled out that this could be construed as a liquidation within the meaning of the trust-deeming provisions at stake in *Dauphin Plains*:

> It may be argued that the term 'liquidation' would apply to the lesser project, that is to say realization of assets for the purpose of paying a debt, where the debt in question was secured by an all-embracing charge reaching, as is apparently the case here, 100 per cent of the assets. The argument would be that since the process of realization reduces the undertaking to zero, the entity has, in one sense at least, been put in liquidation. As a legal proposition, however, it is not sound because even in that circumstance, the charter still remains in existence, and upon the discharge of the receiver, the entity remains under the control of its owners and although its assets may be nil and although some of its liabilities may

> still survive in law, it cannot be said that the entity has either been liquidated or placed in liquidation.
>
> [*Dauphin Plains*, Justice Estey, dissenting, at pp. 1211-1212.]

176. The conclusion reached by the majority in *Dauphin Plains* with respect to the definition of "liquidation", and its import on the present case, is also to be put into perspective in light of the following distinguishing factors:

- The amounts protected by deemed trusts provisions were payroll deductions, not pension contributions, such that, absent an effective deemed trust in favour of the Crown, the end result would amount to an absurd situation whereby the amounts notionally deducted by the employer ensure to the benefit of the secured creditor, while the employees are detrimentally affected because the income tax and other deductions are not remitted to the Receiver General (with the resulting adverse consequences including, with respect to the tax authorities' right to recoup such amounts against the employees themselves). Justice Estey, dissenting, who came to the conclusion that the deemed trusts were ineffective (in part, but not only, based on his narrower definition of "liquidation"), lamented such a result but was of the view that the problem was one for the legislator to solve.

- It appears that the receiver-manager in *Dauphin Plains* had operated the business of debtor Xyloid, at least in part (see p. 1204: "[...] in the post-appointment period the receiver carried on some operations of Xyloid and engaged in that connection some former employees [...]), which is to be contrasted from the debtor-in-possession approach that prevails in most CCAA, including certainly the present Wabush CCAA Proceedings.

- In *Dauphin Plains*, the property of the debtor Xyloid appears to have been sold in whole at once, or, at the very least, in a relatively short period of time.

177. Also, when reading the analysis proposed by Justice Deschamps in *Century Services*[78], it is clear that she used the term "liquidation" as meaning a liquidation in bankruptcy and not in relation to CCAA proceedings, whether or not said proceedings could otherwise have been characterized as "liquidating CCAA proceedings" (at paragraphs 12, 13, 14, 16, 17, 18, 23, 24, 47, 70, 77, 80, 81 and 86).

(vii) Liquidation and Dissolution of Corporations

178. Upon the enactment of both Sections 8(2) PBSA and 32(2) NL PBA, the notion of "liquidation" had a very clear meaning as an integral part of the corporate law legislative scheme, both in the *Canada Business Corporations Act* (**CBCA**) and similar provincial legislations.

179. As the Court pointed out in the Suspension Order (para. 69), "liquidation" as used in Sections 8(2) PBSA and 32(2) NL PBA would likely encompass such proceedings

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[78] *Century Services*, *supra* note 56.

conducted under Part XVIII of the CBCA, titled Liquidation and Dissolution, or analogous provisions found in provincial statutes governing business corporations.

180. The CBCA does allow for a company to proceed to its own liquidation under certain circumstances:

> 210(3) A corporation that has property or liabilities or both may be dissolved by special resolution of the shareholders or, where it has issued more than one class of shares, by special resolutions of the holders of each class whether or not they are otherwise entitled to vote, if
>
> (a) by the special resolution or resolutions the shareholders authorize the directors to cause the corporation to distribute any property and discharge any liabilities; and
>
> (b) the corporation has distributed any property and discharged any liabilities before it sends articles of dissolution to the Director pursuant to subsection (4).
>
> 211(1) The directors may propose, or a shareholder who is entitled to vote at an annual meeting of shareholders may, in accordance with section 137, make a proposal for, the voluntary liquidation and dissolution of a corporation. [...]
>
> (5) On receipt of a statement of intent to dissolve, the Director shall issue a certificate of intent to dissolve in accordance with section 262.
>
> (6) On issue of a certificate of intent to dissolve, the corporation shall cease to carry on business except to the extent necessary for the liquidation, but its corporate existence continues until the Director issues a certificate of dissolution.
>
> (7) After issue of a certificate of intent to dissolve, the corporation shall
>
> (a) immediately cause notice thereof to be sent to each known creditor of the corporation;
>
> (b) without delay take reasonable steps to give notice of it in each province in Canada where the corporation was carrying on business at the time it sent the statement of intent to dissolve to the Director;
>
> (c) proceed to collect its property, to dispose of properties that are not to be distributed in kind to its shareholders, to discharge all its obligations and to do all other acts required to liquidate its business; and
>
> (d) after giving the notice required under paragraphs (a) and (b) and adequately providing for the payment or discharge of all its obligations, distribute its remaining property, either in money or in kind, among its shareholders according to their respective rights.
>
> [Our underlining]

181. However, it remains possible for the Court, upon request by any interested party, to continue the liquidation under Court supervision and/or to appoint a liquidator:

> 211(8) The Director or any interested person may, at any time during the liquidation of a corporation, apply to a court for an order that the liquidation be

> continued under the supervision of the court as provided in this Part, and on such application the court may so order and make any further order it thinks fit. [...]
>
> 217 In connection with the dissolution or the liquidation and dissolution of a corporation, the court may, if it is satisfied that the corporation is able to pay or adequately provide for the discharge of all its obligations, make any order it thinks fit including, without limiting the generality of the foregoing, [...]
>
> (b) an order appointing a liquidator, with or without security, fixing the liquidator's remuneration and replacing a liquidator; [...]

182. The duties of a court-appointed liquidator under the CBCA include "tak[ing] into custody and control the property of the corporation" (Section 221(c) CBCA). Its powers may include "carry[ing] on the business of the corporation as required for an orderly liquidation" (Section 222(1)(c) CBCA).

183. The liquidation of a corporation under the CBCA entails the realization and/or distribution of the entirety of its assets. Further, the liquidation of a corporation is followed by its dissolution (i.e. the end of its existence – see Section 223(8) CBCA), which, save for narrow exceptions (see Section 209 CBCA), is irrevocable.

184. As such, it is submitted that corporate liquidation and dissolution, much like a bankruptcy or assignment, leave absolutely no prospect of a surviving going concern entity.

185. The fact that liquidations and dissolutions governed by the CBCA are automatically stayed if the corporation is found to be insolvent or bankrupt within the meaning of the BIA, further highlights the parallelism between both procedures (each governing the liquidation of estates, respectively applicable depending on whether the company is solvent):

> 208(1) This Part, other than sections 209 and 212, does not apply to a corporation that is an insolvent person or a bankrupt as those terms are defined in subsection 2(1) of the *Bankruptcy and Insolvency Act*.
>
> (2) Any proceedings taken under this Part to dissolve or to liquidate and dissolve a corporation shall be stayed if the corporation is at any time found, in a proceeding under the *Bankruptcy and Insolvency Act*, to be an insolvent person as defined in subsection 2(1) of that Act.

(viii) No Liquidation in Wabush CCAA Proceedings

186. As a subsidiary argument, if the Court were to rule that liquidation within the meaning of Sections 8(2) PBSA or 32(2) NL PBA can occur under the umbrella of the CCAA, including by way of a so-called "liquidating CCAA" proceeding, the Monitor is of the view that the present Wabush CCAA Proceedings ought not to be considered as such.

187. The following facts support the Monitor's position in this respect:

- The SISP contemplated either the sale of assets or the injection of funds by an investor, such that the end result could well have been that the Wabush CCAA Parties would emerge the CCAA Proceedings as a going concern;

- The sale of the various assets of the Wabush CCAA Parties occurred over a long period of time, and in fact remained ongoing as of the filing of the Objecting Parties' written submission with respect to the Wabush Mine, which is arguably one of the main assets of the "employer";

- The "liquidation proposals" sought by the Monitor and invoked by the N&L Superintendent in support of its position were pursued in parallel with the SISP and precisely with a view to obtain a benchmark to gauge the reasonability of the prices obtained for certain assets within the context of the SISP. They led to transactions approved by the Court only in the absence of alternatives;

- All sales of assets were duly approved by the Court in due course. With the sole exception of the Chromite Sale, all such approved transactions were conducted within the confine of the equally court-approved and court-supervised SISP;

- At all relevant times, the Wabush CCAA Parties remained in possession of their assets, the Monitor's role being limited to the supervision of the ongoing restructuring efforts.

(ix) No Pre-Filing Liquidation

188. As a further, second-tier subsidiary argument, the Monitor submits that, even if the Court were to find that these Wabush CCAA Proceedings consist in a liquidation within the meaning of Sections 8(2) PBSA and 32(2) NL PBA, any such liquidation would have taken place after the issuance of the Wabush Initial Order, which, as a matter of law, means that no enforceable deemed trust could have arisen in light of the prevailing stay of proceedings.

189. For the reasons further outlined above, the Monitor is of the view that the notion that a "liquidation" could have occurred in the present matter as a result of the issuance of either the issuance of the Wabush Initial Order, the contemplation prior thereto of a sale of assets by the parent company, or even the order extending the SISP to the Wabush CCAA Parties on *a nunc pro tunc* basis, are all incompatible with the triggering role that the term plays in Sections 8(2) PBSA and 32(2) NL PBA.

190. Any "liquidation" within the these provisions, the occurrence of which is not admitted but rather contested, would at best have occurred after the Stay of Proceedings was in place in respect of the Wabush CCAA Parties. Similarly, it is only months after the issuance of the Wabush Initial Order that the DB Pension Plans went on to be wound-up at the initiative of the pension regulators.

191. The Monitors submits that allowing deemed trusts to arise post-filing, rather than having been crystallized by the CCAA filing or occurred prior thereto – is radically incompatible with the fundamental status quo principle underpinning all CCAA proceedings.

192. While the ruling of the Supreme Court in *Indalex* sheds light on this question and, in the Monitor's view, certainly support the present submissions, it is not entirely determinative.

193. The N&L Superintendent relies on the following excerpts of Justice Deschamps' reasons 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 (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.

194. In the Monitor's view, these reasons are far from supporting the Objecting Parties' view.

195. It is crucial to understand that the statutory provisions under consideration in *Indalex* pre-date the 2005-2009 Reform, as explained below in a different section of this Argumentation Outline. As such, it may well be the case that the federal legislator has now "ousted" the provincial statutory priorities, as contemplated by Justice Deschamps in the paragraph 51 above. This is indeed the Monitor's view, as further outlined below.

196. A further distinction to be made between *Indalex* and the questions at hand in the present matter is that the Newfoundland and Labrador legislature had not, contrary to Ontario, as appears from the *Indalex* ruling, incorporated the deeming provisions Section 32 NL PBA within its distribution scheme pursuant to its PPSA.

197. The reasons of Justice Deschamps in paragraph 52 *in fine* above merely state that the Section 136 BIA scheme ***may***, in a CCAA liquidation, give way to the provincially-enacted priorities, but also suggest that this could only be the case where the priorities in question are properly incorporated within a scheme determined by the province's PPSA. As stated, this is not the case in Newfoundland & Labrador legislation.

198. It also bears noting that, under the Ontario legislation, the triggering event for the deemed trust to arise is the winding-up of the plan, not the liquidation of the debtor. To apply the Objecting Parties' reading of *Indalex* to the present case, one would need to find that a "liquidation" within the meaning of Sections 8(2) PBSA or 32(2) NL PBA somehow took place prior to the sale of assets, so that the deemed trust exist at the time of the sale, the very proceeds of which it is argued would then be effectively charged by said deemed trusts.

199. This is a circular and absurd result, and further highlights the incongruity that stems from the Objecting Parties' proposed interpretation of "liquidation" as a moving-target triggering event.

200. If the Court deems it fit, in its analysis of the present matter, to settle the issue of whether deemed trusts can arise post-filing in CCAA matters, the Monitor submits that the overarching status quo principle underpinning CCAA proceedings commands a negative response to this question.

201. The same considerations also inform the submissions by the Monitor relating to the paramountcy principle, as further detailed herein below.

202. Even if the CCAA does not incorporate the BIA scheme of distribution, it nevertheless seeks to preserve the *status quo* amongst creditors as against the insolvent debtor and its assets, such that the purported crystallization of statutory deemed trusts post-filing, and the ensuing assertion of "secured creditor" status with respect to claims that undeniably remained unsecured as of the date of the initial order, also raise serious paramouncty issues.

203. The Monitor takes the view that following the 2005-2009 Reform and despite certain comments made by Justice Deschamps in *Indalex*, a pension deemed trust cannot validly operate if crystalized only after the issuance of an initial order under the CCAA, the whole for the reasons set out in the following section of this Argumentation Outline.

V. PARAMOUNTCY AND PROPER INTERPRETATION OF PENSION DEEMED TRUSTS

204. In their respective argumentation outlines, the Objecting Creditors: (a) place much reliance on certain extracts of *Indalex*; and (b) propose to limit certain rules to be found in *Aveos* and *Century Services* in relation only to a deemed trust created in favour of the Crown.

205. The Monitor is of the view that it is important to revisit *Indalex* and also review briefly the evolution of case law in relation to Crown claims.

A. *Indalex* Revisited and *Grant Forest*

206. In *Indalex*, Justice Deschamps stated (at paras. 49, 50 and 52) that:

> [49] The Appellants argue that any provincial deemed trust is subordinate to the DIP charge authorized by the *CCAA* order. They put forward two central arguments to support their contention. First, they submit that the *PBA* deemed trust does not apply in *CCAA* proceedings because the relevant priorities are those of the federal insolvency scheme, which do not include provincial deemed trusts. Second, they argue that by virtue of the doctrine of federal paramountcy the DIP charge supersedes the *PBA* deemed trust.
>
> [50] The Appellants' first argument would expand the holding of *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, so as to apply federal bankruptcy priorities to *CCAA* proceedings, with the effect that claims would be treated similarly under the *CCAA* and the *BIA*. In *Century Services*, the Court noted that there are points at which the two schemes converge:
>
> > Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will

> happen if a *CCAA* reorganization is ultimately unsuccessful. [para. 23]
>
> [...]
>
> [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*.

207. Before importing these comments to the present case, it is critical to emphasize the following distinctions:

207.1. First, in *Indalex* the Salaried Plan had been terminated pre-filing and the applicable wind-up deemed trust under Section 57(4) of the OPBA had been crystallized prior to the initial order;

207.2. Second, the validity and priority of said wind-up deemed trust was specifically provided by Section 30(7) of the Ontario PPSA;

207.3. Thirdly, the CCAA contained at the time no restrictions or specific statutory protections in favour of pension claims, the whole as explained more fully below in Section V.C. of this Argumentation outline;

207.4. It shall be noted that although Justice Deschamps referred to these provisions in her conclusion (at para. 81), these provisions were not described at length or given effect by the Supreme Court in the *Indalex* matter.

208. In their Argumentation Outlines both the N&L Superintendent (AO, at paragraphs 53 to 61) and Representative Counsel (AO, at paragraphs 142 to 144) insist that the key date for the crystallization of the OPBA wind-up deemed trust was not the date of the initial order, but rather the date on which the sale of assets was approved.

209. The Monitor disagrees and submits that based on a proper paramountcy analysis informed by Parliament's clear intent and choices made in relation to pension claims as part of the 2005-2009 Reform, as described more fully below, and based on *Grant Forest*[79] discussed below, that pension deemed trust could not be triggered after May 20, 2015 without disrupting the *status quo* amongst creditors and granting undue preference to unsecured creditors both as of the date of the Wabush Initial Order and in the context of eventual bankruptcy proceedings.

210. In *Grant Forest*, the central question before the Court was whether the debtors were required to make wind-up payments prior to a petition into bankruptcy. The Superintendent argued that the payments should be made because they were in priority to claims of the second lien lenders under the OPBA's deemed trust provisions.

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[79] *Grant Forest Products Inc. (Re)*, 2013 ONSC 5933 (**Grant Forest**). N&L Superintendent, BOA, Tab 24.

211. Justice Campbell rejected this argument. In reaching his conclusion, he relied on the Supreme Court of Canada's decision in *Indalex* and found that a deemed trust cannot arise once a valid initial order is made under the CCAA. In his view, once that occurs, the federal insolvency scheme is paramount and the initial order prevails over a debtor's obligations under provincial legislation.

212. Justice Campbell was, however, uncertain as to when a deemed trust that takes priority would operate and left open the possibility that it could operate from either the date of the Initial Order or the date of the sale of assets within a CCAA proceeding. In an endnote, he said:

> Endnote 6
>
> It is not entirely clear from the various decisions in *Indalex* as to precisely when the deemed trust which can take priority operates. The date of the Initial Order was given as one possibility the other being the date of sale of the assets. In this case it does not really matter which date applies as the Initial Order and primary asset sale pre-date any deemed trust.

213. Although the Court of Appeal[80] distinguished *Indalex* on the basis that the wind-up deemed trust considered in *Indalex* arose before the CCAA proceeding commenced while the plans under consideration in *Grant Forest* had not been declared wound up at the time the Initial Order was made, it did not explain how this distinguishing fact affected its decision.

214. Nevertheless, the Court of Appeal did not disturb Justice Campbell's conclusion that a deemed trust could not arise after the Initial Order was granted.

215. As described above, the termination orders were issued after the Wabush Initial Order and the Priority and Suspension Order which suspended the monthly amortization payments and annual lump sum "catch-up" payments (collectively, **Special Payments**) that were coming due.

216. Accordingly, based on the decisions in *Indalex*, *Ivaco*[81] and *Grant Forest*, any deemed trusts claimed by OSFI and the Superintendent in relation to the suspended Special Payments could not have come into existence until after the Wabush Initial Order and Pension Stay were granted.

217. *Grant Forest* indicates that once a stay of proceedings is in place, a deemed trust cannot arise or operate. In *Grant Forest*, both Justice Campbell and the Court of Appeal concluded that wind-up payments are not payments in the ordinary course of business and, accordingly, were not permitted the Initial Order, which permitted only payments incurred in the ordinary course of business to be made. Justice Campbell's reasoning is very helpful in the present case:

> [94] It does seem to me that a commitment to make wind up deficiency payments is not in the ordinary course of business of an insolvent company subject to a

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80 *Grant Forest Products Inc.* v. *The Toronto-Dominion Bank*, 2015 ONCA 570 (**Grant Forest Appeal**). **Tab 22.**

81 *Re Ivaco Inc. (2006)*, 83 OR (3d) 108 (CA). **Tab 23.**

> CCCA order unless agreed to. Even if the obligation could be said to be in the ordinary course for an insolvent company GFPI was not obliged to make the payments [...].
>
> [95] This is precisely the reason for the granting of a stay of proceeding that is provided for by the CCAA. Anyone seeking to have a payment made that would be regarded as being outside the ordinary course of business must seek to have the stay lifted or if it is to be regarded as an ordinary course of business obligation, persuade the applicant and creditors that it should be made. ***The decision of the Supreme Court of Canada in Indalex appears to stand for the proposition that once a valid Initial Order is made under the CCAA the Federal insolvency regime is paramount, and absent any agreement or other Order where there is conflict, the Initial Order prevails over an applicant's obligation under the provincial statute.***[82]
>
> [Emphasis Added]

218. The Court of Appeal's findings in *Ivaco* also support the view that during a stay of proceedings, a deemed trust cannot operate. In that case, the Court held that there was no requirement in law for a court to order the Monitor to segregate deemed trust amounts during a CCAA proceeding or to order payment of the deemed trust amounts at the end of the CCAA proceeding.[83]

B. Paramountcy and Crown Claims

219. As previously stated by this Court in the Priority and Suspension Order (at para. 72), the different deemed trusts created in the Pension Legislation are not deemed trusts in favour of the Crown, and accordingly the comments of Justice Schrager in *Aveos* and apparent reliance on the specific analysis suggested by Justice Fish in *Century Services* is subject to caution. This does not however mean in any way that provincial legislation and federal legislation are free to create deemed trust in an insolvency context and that same would not raise possible paramountcy or legislative conflicts to be resolved in the context of proceedings under the CCAA.

220. In reviewing the key cases dealing with paramountcy in relation to the BIA scheme of distribution, it is critical to emphasize the introduction by the way of the 1992 amendments[84] of the rule set out in Section 86 of the BIA and the exceptions in relation to certain Crown claims and deemed trusts in favour of the Crown. Up until the 1992 amendments, the only reference to Crown claims was to be found in Section 136(1)(j) providing for a preferred status in favour of Crown claims which excluded, according to the Supreme Court, any provincial effort to either provide secured creditor's status in favour of Crown claims or to create statutory deemed trusts.

221. In the *Samson Bélair* case, the Supreme Court declared inoperative a statutory deemed trust created by Section 18 of the *Social Service Tax Act* (R.S.B.C. 1978, c. 388) on the

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82 *Grant Forest* at paras 94 and 95. See also *Grant Forest Appeal* at paras. 137 and 138. **Tab 22.**

83 *Ivaco* at para. 59. **Tab 23.**

84 See *Deputy Minister of Revenue* v. *Rainville*, [1980] 1 S.C.R. 35 (**Rainville**); *Deloitte Haskins and Sells Ltd.* v. *Workers' Compensation Board*, [1985] 1 S.C.R. 785 (**Deloitte**); *Federal Business Development Bank* v. *Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061; *Samson Bélair, supra* note 60; Husky Oil Operations Ltd. v. *M.N.R.*, [1995] 3 S.C.R. 453 (**Husky Oil**). N&L Superintendent, BOA, Tab 25.

basis that it did not possess the attributes of true trust and that the Crown claims could only be considered as a preferred claim falling under Section 107(1)(j) of the *Bankruptcy Act* (predecessor of Section 136 BIA). Justice McLachlin (as she then was) for the majority stated that (at pages 31 and 33) :

> With these principles in mind, I turn to the construction of ss. 47(*a*) and 107(1)(*j*) of the *Bankruptcy Act*. The question which arises under s. 47(*a*) of the Act concerns the meaning of the phrase "property held by the bankrupt in trust for any other person". Taking the words in their ordinary sense, they connote a situation where there is property which can be identified as being held in trust. That property is to be removed from other assets in the hands of the bankrupt before distribution under the *Bankruptcy Act* because, in equity, it belongs to another person. The intention of Parliament in enacting s. 47(*a*), then, was to permit removal of property which can be specifically identified as not belonging to the bankrupt under general principles of trust law from the distribution scheme established by the *Bankruptcy Act*.
>
> [...]
>
> To interpret s. 47(*a*) as applying not only to trusts as defined by the general law, but to statutory trusts created by the provinces lacking the common law attributes of trusts, would be to permit the provinces to create their own priorities under the *Bankruptcy Act* and to invite a differential scheme of distribution on bankruptcy from province to province.
>
> Practical policy considerations also recommend this interpretation of the *Bankruptcy Act*. The difficulties of extending s. 47(*a*) to cases where no specific property impressed with a trust can be identified are formidable and defy fairness and common sense. For example, if the claim for taxes equalled or exceeded the funds in the hands of the trustee in bankruptcy, the trustee would not recover the costs incurred to realize the funds. Indeed, the trustee might be in breach of the Act by expending funds to realize the bankrupt's assets. Other difficulties would arise in the case of more than one claimant to the trust property. The spectre is raised of a person who has a valid trust claim under the general principles of trust law to a specific piece of property, finding himself in competition with the Crown claiming a statutory trust in that and all the other property. Could the Crown's general claim pre-empt the property interest of the claimant under trust law? Or would the claimant under trust law prevail? To admit of such a possibility would be to run counter to the clear intention of Parliament in enacting the *Bankruptcy Act* of setting up a clear and orderly scheme for the distribution of the bankrupt's assets.
>
> [Our underlining. References omitted.]

222. In *Husky Oil*, the Supreme Court a majority declared Section 133 of *The Workers' Compensation Act*, 1979 inoperative in a bankruptcy as it purported to secure the claims of the Saskatchewan Workers' Compensation Board against the assets of the bankrupt employer by way of offset. *Husky Oil* was decided on the basis of the provisions of the *Bankruptcy Act* (prior to the enactment and coming into force of the BIA).

223. The often cited reasons of Justice Gonthier contains a very useful review of the cases referred at the time as the quartet (at paragraphs 14 to 28) and proposed the following rules (at paragraphs 32 and 39):

> (1) provinces cannot create priorities between creditors or change the scheme of distribution on bankruptcy under s. 136(1) of the Bankruptcy Act;
>
> (2) while provincial legislation may validly affect priorities in a non-bankruptcy situation, once bankruptcy has occurred section 136(1) of the Bankruptcy Act determines the status and priority of the claims specifically dealt with in that section;
>
> (3) if the provinces could create their own priorities or affect priorities under the Bankruptcy Act this would invite a different scheme of distribution on bankruptcy from province to province, an unacceptable situation; and
>
> (4) the definition of terms such as "secured creditor", if defined under the Bankruptcy Act, must be interpreted in bankruptcy cases as defined by the federal Parliament, not the provincial legislatures. Provinces cannot affect how such terms are defined for purposes of the Bankruptcy Act.
>
> [...]
>
> Finally, I would observe that while in agreement with the above four propositions as embodying the reasoning of the quartet, in my view the list would be more complete with the addition of a fifth and sixth, as follows:
>
> (5) in determining the relationship between provincial legislation and the *Bankruptcy Act*, the form of the provincial interest created must not be allowed to triumph over its substance. The provinces are not entitled to do indirectly what they are prohibited from doing directly;
>
> (6) there need not be any provincial intention to intrude into the exclusive federal sphere of bankruptcy and to conflict with the order of priorities of the *Bankruptcy Act* in order to render the provincial law inapplicable. It is sufficient that the effect of provincial legislation is to do so.

224. Even when we fast-forward to *Sparrow Electric*, *First Vancouver*, *Century Services* and *Aveos* to deal with Crown deemed trusts taking into account the clear restrictions imported in 1992 into the BIA at Sections 67 and 86, this Court should remain mindful of the pre-1992 quintet of cases dealing with paramountcy and rendering inoperative any provincial legislative attempt to create a statutory security or lien and charge (not subject to publication and not available generally to other creditors, *Rainville* and *Deloitte*, discussed at paragraphs 11 to 17 of *Husky Oil*) or to create a deemed trust, not allowing a clear identification and segregation of assets transferred out of the estate to be held in trust (*Samson Bélair*, discussed at paragraphs 23 to 28 of *Husky Oil*). The same principles should extend to pension claims in view of the clear legislative choices by Parliament in enacting the 2005-2009 Reform, as more fully outlined below.

C. Protection of Pension Claims under Insolvency Legislation

225. Important changes were made to the BIA and the CCAA in relation to pension claims as part of the latest comprehensive round of amendments to insolvency legislation in 2008 and 2009 (the **2005-2009 Reform**), which contained multiple amendments seeking to afford greater protection in favour of employees including by way of the *Wage Earner Protection Program Act*, S.C. 2005, c. 47 (the **WEPPA**) which came into force on July 7,

2008,[85] the security for unpaid wages in bankruptcy (Section 81.3 BIA) or in receivership (Section 81.4 BIA) and the specific regime protecting collective bargaining agreements (Sections 65.12 BIA and 33 CCAA).

226. The byzantine structure of the 2005-2009 Reform is summarized as follows by Patrick Shea:[86]

> The *Insolvency Reform Act 2005*[3] was introduced in the House of Commons on June 3, 2005 and received Royal Assent on November 25, 2005.[4] The Act was intended to: (a) enact the *Wage Earner Protection Program Act* [5] to establish a program — the Wage Earner Protection Program or the WEPP – to provide compensation for remuneration owing to employees in the case of the bankruptcy or receivership of their employer; and (b) make significant amendments to the *BIA* and the *CCAA*. The *Insolvency Reform Act 2005* was pushed through the House of Commons and the Senate without a detailed review being undertaken at the committee stage in either House. It was generally understood that there were issues with the legislation, and, as a condition of passing the *Insolvency Reform Act 2005* without having undertaken a detailed review of the legislation, the Senate required that the government of the day agree that the *Insolvency Reform Act 2005* would not be proclaimed into force before June 30, 2006.[6] The purpose of this delay was to provide an opportunity for the Senate to hold hearings to determine if further amendments ought to be made to address concerns that had been raised by stakeholders with respect to the *Insolvency Reform Act 2005*.
>
> Subsequent to the *Insolvency Reform Act 2005* receiving Royal Assent, Industry Canada undertook a process to determine what amendments to the *Insolvency Reform Act 2005* or the *WEPPA*, or further amendments to the *BIA* and the *CCAA*, ought to be made to address various concerns raised by stakeholders. This process resulted in further legislation being drafted to make amendments to the *Insolvency Reform Act 2005*, the *WEPPA*, the *BIA* and the *CCAA* to address a number of the concerns raised by stakeholders. On June 13, 2007, the *Insolvency Reform Act 2007*[7] was introduced in the House of Commons as Bill C-62. Bill C-62 had only received first reading in the Senate when the first session of the 39th Parliament was prorogued on September 14, 2007, but on October 29, 2007, the Bill was reintroduced as Bill C-12 and received Royal Assent on December 14, 2007.[8] Unfortunately, as was the case with the *Insolvency Reform Act 2005*, no detailed review of the *Insolvency Reforms Act 2007* was undertaken at the committee stage in either the House of Commons or the Senate.
>
> The amendments made by the *Insolvency Reform Act 2005* and the *Insolvency Reform Act 2007* came into force in two stages. On July 7, 2008, the *WEPPA* and certain amendments to the *BIA* came into force[9] and the remainder of the amendments to the *BIA* and the amendments to the *CCAA* came into force on September 18, 2009.[10] To correspond to the corning into force of the *WEPPA* and the amendments to the *BIA* and the *CCAA*, regulations to the *WEPPA*[11] and the *CCAA*[12] were promulgated and the *Bankruptcy and Insolvency Act General Rules 13* were amended.

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85 SI/2008-78 and SOR/2008-222.

86 E. Patrick Shea, *BIA, CCAA & WEPPA: A Guide to the New Bankruptcy & Insolvency Regime*, (Markham, Ont.: LexisNexis, 2009) at pp. 1-2. **Tab 24.**

[3] An *Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47 (the "*Insolvency Reform Act 2005*").

[4] See E. Patrick Shea, *Bankruptcy & Insolvency Act, Companies' Creditors Arrangement Act, Bill C-55 & Commentary* (Markham, Ont. Ont.: LexisNexis Canada, 2006).

[5] S.C. 2005, c. 47, s. 1 (the "*WEPPA*").

[6] *Sixteenth Report of the Standing Senate Committee on Banking, Trade and Commerce*, November 24, 2005. The report can be located on the Parliament of Canada's website at <www.parl.gc.ca>.

[7] S.C. 2007, c. 36 (the "*Insolvency Reform Act 2007*"), The *Insolvency Reform Act 2007* is formally named *An act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program and chapter 47 of the Statutes of Canada, 2005.*

[8] See E. Patrick Shea, "The Insolvency Reform Act 2007 – A Review of the Proposed Commercial Insolvency-Related Amendments to the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act" (2007) 27 C.B.R. (5th) 163, and Susan Grundy, "Proposed Insolvency Law Amendments – Take Two" *OBA Insolvency News* (February 2007) 5.

[9] SI/2008-78. See E. Patrick Shea, "Coming Into Force of the WEPPA and Certain of the Amendments to the *BIA*" *Insolv. L Nws.* (2008) 29; E. Patrick Shea, "Coming into Force of the WEPPA and Certain of the Amendments to the *BIA*" (2008) 25 Nat. Insol. Review 50; E. Patrick Shea, "The Wage Earner Protection Program and the Employee Charge" (2008) 24 Insol. News 1; and E. Patrick Shea, "The Wage Earner Protection Program" (2009) 24 N.C.D. Rev. 21.

[10] SI/2009-68.

[11] SOR/2008-222 (the "*WEPP Regulations*").

[12] SOR/2009-219 and SOR/2009-223 (the "*CCAA Regulations*").

[13] C.R.C. 1978, c. 368 (the "*General Rules*"). The Superintendent of Bankruptcy amended certain of the *BIA* Forms, created new *BIA* Forms, amended existing Directives and issued new Directives in connection with the coming into force of the *Insolvency Reform Act 2005* and the *Insolvency Reform Act 2007*.

227. The comprehensive changes made with respect to pension claims are not limited to Sections 6(6) and 36(7) CCAA, as set out more fully below. These changes included:

227.1. Sections 81.5 and 81.6 of the BIA which provide for a pension charge over all of the debtor's assets to secure (a) any unremitted employee pension contributions; (b) any unpaid employer defined pension contributions; and (c) any unpaid normal costs as required by the pension legislation, excluding prescribed funding deficiencies, in a bankruptcy (Section 81.5 BIA) or in a receivership (Section 81.6 BIA);

227.2. The priority rules with respect to said pension charge are slightly different under a bankruptcy (Section 81.5(2) BIA) and a receivership (Section 81.6(2)BIA);

227.3. The pension charge is also applicable in the event an interim receiver is appointed under Sections 46(1), 47(1) or 47.1(1) BIA, or a 243 BIA receiver is appointed (Section 81.6(4) BIA);

227.4. The preferred claim of employees protected in the distribution bankruptcy scheme of distribution at Section 136(1)(d) BIA has been amended to take into

account the possible "limited" erosion of the secured creditors' collateral on account of the pension charge as provided by Sections 81.5 and 81.6 of the BIA;

227.5. Any further erosion of the collateral of the secured creditor on account of unpaid special costs or wind-up deficit would clearly disrupt the bankruptcy scheme of distribution;

227.6. In the context of a proposal (Section 60(1.5) BIA) or of a plan of arrangement (Section 6(6) CCAA), a court may not approve or sanction same unless the same limited pension claims are paid or will be paid in accordance with an agreement reached by the relevant parties as approved by the relevant pension regulator;

227.7. Also, in the context of sales of assets outside the ordinary course of business, either in the context of a notice of intention/proposal (Section 65.13(8) BIA) or in the context of CCAA proceedings (Section 36(7) CCAA), the Court must also be satisfied that the same limited pension claims have been paid or will be paid as provided above in relation to a proposal or a plan of arrangement.

227.8. In summary, the same limited protection applies to sales outside the ordinary course of business (BIA or CCAA), interim-receivership, 243 BIA receivership, proposal, plan of arrangement or bankruptcy: also, any statutory protection extending to special costs and wind-up deficit would run afoul Sections 60(1.5) BIA, 136 BIA and 6(6) CCAA;

227.9. In making these changes, Parliament extended the same protection and imposed the same limitation to provincial pension legislation;

227.10. Section 6(6) of the CCAA provides that:

> (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).
>
> [Our underlining]

228. It is also important to highlight that these legislatives changes reflect legislative choices made as part of the 2005-2009 Reform when Parliament specifically considered extending these provisions to unpaid special costs and wind-up deficit, but refused to do so, the whole as set out below.

228.1. In *Indalex*, even though these new provisions were not applicable given they came into force after the commencement of that case (and hence are not fully considered and should not necessarily be read into the different statements made by the Court in other parts of its decision), Justice Deschamps in her conclusions comments as follows said legislative choices:

> [81] There are good reasons for giving special protection to members of pension plans in insolvency proceedings. Parliament considered doing so before enacting the most recent amendments to the CCAA , but chose not to (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act*, the *Wage Earner Protection Program Act* and chapter 47 of the *Statutes of Canada*, 2005, S.C. 2007, c. 36, in force September 18, 2009, SI/2009-68; see also Bill C-501, *An Act to amend the Bankruptcy and Insolvency Act and other Acts (pension protection)*, 3rd Sess., 40th Parl., March 24, 2010 (subsequently amended by the Standing Committee on Industry, Science and Technology, March 1, 2011)). A report of the Standing Senate Committee on Banking, Trade and Commerce gave the following reasons for this choice:
>
> > Although the Committee recognizes the vulnerability of current pensioners, we do not believe that changes to the BIA regarding pension claims should be made at this time. Current pensioners can also access retirement benefits from the Canada/Quebec Pension Plan, and the

> Old Age Security and Guaranteed Income Supplement programs, and may have private savings and Registered Retirement Savings Plans that can provide income for them in retirement. The desire expressed by some of our witnesses for greater protection for pensioners and for employees currently participating in an occupational pension plan must be balanced against the interests of others. As we noted earlier, insolvency – at its essence – is characterized by insufficient assets to satisfy everyone, and choices must be made.
>
> The Committee believes that granting the pension protection sought by some of the witnesses would be sufficiently unfair to other stakeholders that we cannot recommend the changes requested. For example, we feel that super priority status could unnecessarily reduce the moneys available for distribution to creditors. In turn, credit availability and the cost of credit could be negatively affected, and all those seeking credit in Canada would be disadvantaged.

(*Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at p. 98; see also p. 88.)

> [82] In an insolvency process, a CCAA court must consider the employer's fiduciary obligations to plan members as their plan administrator. It must grant a remedy where appropriate. However, courts should not use equity to do what they wish Parliament had done through legislation.

228.2. The relevant extracts of the 2003 Senate Report[87] sets-out divergent views of different parties or group of interest on this very question:

> Another compensation issue that arises in situations of employer insolvency is protection for pension plans. While the BIA contains no provisions regarding unpaid contributions to pension plans, federal and provincial/territorial pension standards legislation provide priorities. There is, however, some question about whether priorities established in provincial/territorial legislation would be protected in bankruptcy.
>
> Many believe that pensioners are similar to employees: they are poorly protected by current legislative provisions; they lack bargaining power; and they are relatively unable to assess accurately the risk of bankruptcy by the employer sponsoring their pension plan.
>
> In funding pensions, there are two issues to consider: unfunded pension liabilities and unremitted periodic contributions to the pension plan. To some extent, unfunded pension liabilities should be reduced through the payments that must be made following the identification of an actuarial

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[87] Canada. Senate. Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*. Ottawa: Senate of Canada, November 2003 at pp. 96-98. **Tab 25.**

deficiency arising as a consequence of mandatory periodic actuarial reviews of registered pension plans.

Regarding pension protection, the Canadian Bankers Association advocated monthly employer contributions to pension plans and annual actuarial reviews of pension plans to identify any unfunded liability. In its view, if additional protection is needed for pension contributions, a fund would be the most efficient and effective method.

Organized labour also spoke to the Committee about pension protection for employees. In speaking about reorganizations under the CCAA, the CAW-Canada told us that "the CCAA should make it abundantly clear that a Court has no jurisdiction (inherent or otherwise) to interfere with the promises enshrined in a collective agreement to adequately fund (sic) for pension credits earned while the corporation carries on business under CCAA coverage, and moreover, that no pension benefit may be reduced by unilateral order of a Court. Simply put, an employer operating under CCAA coverage cannot take the continuing benefit of services rendered to it by employees but be excused by the Court from performing any one of its obligations under a collective agreement, including the funding of pensions."

The United Steelworkers of America also commented on pensions, and told the Committee that "the Courts have not been consistent in requiring that companies operating under CCAA protection continue to contribute to the pension plans of their employees. CCAA orders require that employees continue to be paid; there is no reason why the CCAA should not explicitly protect pension funds which are, after all, deferred wages." It advocated a super priority, immediately following federal and provincial/territorial taxes, for unfunded pension liabilities.

Furthermore, the Canadian Labour Congress argued that "current and future pensioners ought to be afforded maximum protection in an insolvency situation [since] of all the parties affected by an insolvency, current and future pensioners are least able to protect themselves. ... [T]hey are not able to take security for future indebtedness ... [and] ... they are not able to impose or even bargain funding terms."

The labour federation recommended two methods of protecting pension accruals: pension insurance or the creation, under the BIA, of a super priority in cases of pension underfunding, either to overdue contributions and payments on account of the underfunding or to the overall value of the solvency deficiency at the time of windup.

For the same reasons that it did not support a super priority for employees' unpaid wages, the Canadian Bar Association also did not favour a super priority for unpaid pension contributions. Instead, it advocated protection as part of a wage earner protection fund in the event that Parliament intends to provide additional protection for these contributions.

228.3. More importantly, when Parliament adopted the limited and comprehensive legislative amendments in relation to pension claims, it refused to adopt the

protection sought by way of Bill C-281.[88] Bill C-281 was submitted in first reading on November 15, 2004 and on second reading on May 5, 2005. It purported to amend the BIA as follows at Section 60(1.3)(a) BIA:

> (*a*) it provides for payment to the workers and former workers, immediately after court approval of the proposal, of amounts equal to the amounts that they would be qualified to receive under subsection 136(0.1) if the employer became bankrupt on the date of the filing of the notice of intention, or proposal if no notice of intention was filed, as well as wages, salaries, payments in the form of severance or termination pay arising under a collective agreement or legislation, commissions, payments required to eliminate any unfunded liabilities of pension plans or compensation for services rendered after that date and before the court approval of the proposal, together with, in the case of travelling salespersons, disbursements properly incurred by those salespersons in and about the bankrupt's business during the same period; and

and at Section 136 BIA:

> **136.** (0.1) Before the settlement of any claims of secured creditors in respect of any security taken or granted and any claims described in subsection (1), the proceeds realized from the property of a bankrupt shall be applied to amounts owed to workers or to other recipients for the benefit of workers, including wages, salaries, payments in the form of severance or termination pay arising under a collective agreement or legislation, commissions, compensation, benefits and other payments, including payments required to eliminate any unfunded liabilities of pension plans that provide benefits to workers. These amounts are deemed to be a first charge on every realizable asset of the bankrupt, despite any security taken or granted to any other person.
>
> (0.2) For the purposes of subsection (0.1),
>
> (*a*) despite any provision of any contract or agreement under which a worker is employed, any amounts referred to in subsection (0.1) owed to the worker or to any other recipient for the benefit of workers are deemed to have accrued as of the date of bankruptcy, and the trustee shall, with the approval of the court, determine the portion of those amounts that had been earned at the time of the bankruptcy; and

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[88] Bill C-281, *An Act to amend the Bankruptcy and Insolvency Act, the Canada Business Corporations Act, the Employment Insurance Act and the Employment Insurance Regulations*, 1st Session, 38th Parliament, 2004. See also Bill C-270, *An Act to amend the Bankruptcy and Insolvency Act, the Canada Business Corporations Act, the Employment Insurance Act and the Employment Insurance Regulations*, 1st Session, 39th Parliament, 2006; Bill C-223, *An Act to amend the Bankruptcy and Insolvency Act (unpaid wages to have first priority in distribution)*, 1st Session, 38th Parliament, 2004; Bill C-474, *An Act to amend the Bankruptcy and Insolvency Act (unpaid wages to rank first in priority in distribution)*, 3rd Session, 37th Parliament, 2004; Bill C-253, *An Act to amend the Bankruptcy and Insolvency Act (unpaid wages to rank first in priority in distribution)*, 2nd Session, 37th Parliament, 2002; Bill C-423, *An Act to amend the Bankruptcy and Insolvency Act (unpaid wages to rank first in priority in distribution)*, 1st Session, 37th Parliament, 2001-2002; Bill C-203, *An Act to amend the Bankruptcy and Insolvency Act (unpaid wages to rank first in priority in distribution)*, 1st Session, 37th Parliament, 2001. **Tab 26.**

(*b*) the trustee shall make any payments owed by a bankrupt to a pension plan that provides benefits to workers so as to eliminate all unfunded liabilities of the pension plan and allow the pension plan to immediately satisfy all of its obligations to every member of the plan in accordance with the terms of the plan.

(0.3) Subsection (0.1) operates despite any other provision of this or any other Act of Parliament or of the legislature of a province, and no secured creditor shall take or disburse the proceeds realized from any property on which the creditor holds security unless the creditor first sets aside, in a manner satisfactory to the trustee and approved by the court,

(*a*) such proportion that the trustee has ordered and the court has approved of the total of all amounts referred to in subsection (0.1) that are proven; or

(*b*) a sum that the trustee has estimated, and the court has approved, as sufficient to pay any claims that are likely to be proven under subsection (0.1).

(2) The portion of subsection 136(1) of the Act before paragraph (a) is replaced by the following:

(1) Subject to subsections (0.1) to (0.3) and the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

(3) Paragraph 136(1)(d) of the Act is repealed.

(4) Paragraph 136(1)(i) of the Act is replaced by the following:

(*i*) claims resulting from injuries to workers of the bankrupt in respect of which the provisions of any Act respecting workers' compensation do not apply, but only to the extent of moneys received from persons guaranteeing the bankrupt against damages resulting from those injuries; and

(5) Subsection 136(2) of the Act is replaced by the following:

(2) Despite section 151, the trustee shall, immediately after the bankruptcy, make payment of the amounts referred to in subsection (0.1) that are owed to workers or to other recipients for the benefit of workers provided that the trustee shall retain sufficient funds to provide for administrative costs.x

228.4. When the limited and comprehensive pension legislative amendments were adopted by Parliament, the federal government issued different official summaries and documents highlighting as part of the 2005-2009 Reform, the legislative choices made which excluded the protection by way of a deemed charge of special costs and wind-up deficit:

Q.5 How does the Bill relate to the Private Member Bill C-281?

- This Bill proposes a comprehensive reform to Canada's insolvency system.

> • Bill C-281 only deals with workers' claims and would provide for an unlimited super priority for all employee-related claims, including pensions. Because of the potentially very large amounts involved, Bill C-281, if adopted, would adversely affect credit availability and competitiveness, and would have negative impact over time on employment and the continuation of defined benefit pension plans.
>
> • The proposed Bill will enhance the protection of employees while minimizing the adverse impact on credit.
>
> [...]
>
> Q.8 Are pension plan and pensioners granted better protection in bankruptcy?
>
> • There is very limited scope to deal with pension issues within an insolvency context, especially the issue of unfunded liabilities, which is more appropriately dealt with under the relevant pension regulatory system.
>
> • The Bill will, however, contain a new explicit provision to ensure that arrears in regular pension contributions that have not been remitted to the pension plan by the employers constitute a priority charge over all assets (ahead of secured creditors).[89]
>
> [Our underlining]

228.5. The detailed comments concerning the relevant provisions of Bill C-55[90] also clearly reflect these legislative choices:

> Rationale
>
> Court sanction is required of any plan of arrangement or compromise that is developed by the debtor company and its creditors. Generally, the court will sanction a plan that has the approval of the majority of creditors unless it has a grievous, negative effect on one or a small group of creditors.
>
> The intention of the reform is to ensure that the treatment of certain claims be similar in both the CCAA and the BIA to prevent forum shopping to defeat these interests, which are protected for public policy reasons. Concurrent reforms to the BIA require that a court's ability to sanction a plan be limited to an extent to ensure that the treatment of certain creditor groups be the same in both the BIA and CCAA.

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89 Canada. Industry Canada. Corporate, Insolvency and Competition Law Policy. *Archived – Questions and Answers on the amendments to the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangements Act*. September 6, 2011 update (online: https://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/cl00782.html). **Tab 27.**

90 Bill C-55, *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, 1st Session, 38th Parliament, 2004.

Subsection (2) requires Crown approval for any plan of arrangement or compromise that would not require payment of all amounts owed to the Crown in respect of source deductions relating to income tax, Canada Pension Plan and Employment Insurance, including in favour of any province, that were outstanding as at the date of the initial application.

Subsection (3) requires Crown approval for any plan of arrangement or compromise that would not require payment of all amounts owed to the Crown in respect of source deductions relating to income tax, Canada Pension Plan and Employment Insurance, including in favour of any province, that came due after the date of the initial application.

The limitations created by subsection (*sic*) (2) and (3) currently exist in the BIA proposal provisions but were not previously included in the CCAA. From a policy position, there is no reason why the amounts deducted from an employees' remuneration for income tax, Canada Pension Plan and Employment Insurance should be kept by the debtor company for its own use rather than remitted to the Canada Revenue Agency for the purpose intended.

Subsection (4) prohibits the court from sanctioning a plan of arrangement or compromise unless the plan requires the payment of all outstanding unpaid wage claims of employees and former employees, subject to monetary limits in the BIA.

A concurrent reform in the BIA to enhance the protection of wage earners' in respect of unpaid wages is reflected in the CCAA to ensure equal treatment of workers under both statutes. By prohibiting a court from sanctioning a plan unless the plan requires the payment of unpaid wages, the reform ensures equal treatment of wage earner's whether the employer becomes bankrupt, files a proposal under the BIA or enters CCAA proceedings.

Subsection (5) prohibits the court from sanctioning a plan of arrangement or compromise unless the plan requires the payment of specific pension obligations, enumerated in the subsection, outstanding at the date of the hearing to sanction the plan.

Subsection (6) provides that, notwithstanding subsection (5), the court may sanction a plan if the parties to the pension plan and the relevant pension regulator agree to alternate financing obligations.

Subsection (*sic*) (5) and (6) mirror the reforms in the BIA. Effectively, pension obligations will need to be accounted for before a court can sanction a plan.

Pension rights may form a significant portion of a wage earner's compensation from its employer, although it is deferred income. When the employer undertakes a restructuring under the CCAA, debts, including those owed to a pension fund, may be compromised. For wage earners, a diminution of pension benefits would have a negative impact on future income levels.

The intention of the reform is to provide a higher priority for unremitted pension contributions. The amounts subject to the provision are

> (1) contributions deducted from employees' salaries but not remitted to the pension fund, (2) contributions owed by an employer for the cost of benefits offered under the pension plan, excluding amounts payable to reduce an unfunded pension liability, and (3) contributions owed by an employer to a defined contribution plan. Obligations relating to unfunded pension liabilities, including special payments or solvency payments ordered to be paid by a regulator but not remitted to the pension fund, are not intended to be captured by the reform and will not be given a higher priority. If an unfunded pension liability exists and a claim is made, it would be treated as an unsecured debt.
>
> Because court approval is required before a compromise or arrangement is finalized, prohibiting a court from approving it if it does not require the payment of unremitted pension contributions described above effectively grants a super-priority to the pension contribution amounts. The super-priority, however, is limited by the operation of subsection (6).
>
> Subsection (6) provides flexibility to allow for a compromise of pension contribution obligations where the parties agree. It is expected that the provision will be used in limited circumstances where the parties agree to reduce pension benefits, which would reduce the employer's obligations. Requiring full payment of pre-filing contributions would not make sense in that circumstance.
>
> The nature of pension regulation in Canada also affects aspects of the section – pensions may be regulated federally or provincially. The section must capture kinds of pensions described in the federal and provincial legislation. Prescribing pension plans that will be subject to this section provides greater flexibility to ensure that the appropriate pension plans are captured.[91]
>
> [Our underlining]

228.6. The Clause by Clause Briefing Book also explains Parliament's decision not to give priority to the provincial deemed trusts:

> Pension rights may form a significant portion of a wage earner's compensation from its employer, although it is deferred income. When the employer undertakes a restructuring under the CCAA, debts, including those owed to a pension fund, may be compromised. For wage earners, a diminution of pension benefits would have a negative impact on future income levels.
>
> The intention of the reform is to provide a higher priority for unremitted pension contributions. The amounts subject to the provision are (1) contributions deducted from employees' salaries but not remitted to the pension fund, (2) contributions owed by an employer for the cost of benefits offered under the pension plan, excluding amounts payable to reduce an unfunded pension liability, and (3) contributions owed by an employer to a defined contribution plan. Obligations relating to unfunded

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[91] Canada. Industry Canada. Corporate, Insolvency and Competition Law Policy. *Bill C-55: clause by clause analysis*. Treatment of tax, wages and pension claims, Bill Clause No. 126 – CCAA Section 6 (online: https://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/cl00908.html#bill126). **Tab 28.**

> pension liabilities, including special payments or solvency payments ordered to be paid by a regulator but not remitted to the pension fund, are not intended to be captured by the reform and will not be given a higher priority. If an unfunded pension liability exists and a claim is made, it would be treated as an unsecured debt.
>
> [Emphasis Added]

D. Paramountcy and Pension Claims: Analysis of the Monitor

(i) Introduction

229. The N&L Superintendent contends that the deemed trusts under the NL PBA and SPPA have not been rendered inoperative by the doctrine of federal paramountcy because provincial law continues to apply in CCAA proceedings.

230. There is no question that provincial law continues to apply in CCAA proceedings. However, as the N&L Superintendent correctly points out, provincial law applies only if the federal doctrine of paramountcy is not triggered.[92]

> [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. [...]

231. Paramountcy is triggered when a conflict arises between a valid federal law and a valid provincial law.[93]

232. A conflict arises in two circumstances:

(a) There is an operational conflict because it is not possible to comply with both the federal and provincial laws;

(b) Although it is possible to comply with both the federal and provincial laws, the operation of the provincial law frustrates the purpose of the federal law.[94]

(ii) Operational Paramountcy

233. The fundamental test for determining whether an operational conflict exists between provincial and federal legislation was succinctly described in *Multiple Access Ltd.* v. *McCutcheon*[95] and most recently approved by the Supreme Court of Canada in *Lemare Lake*[96] and *Alberta (Attorney General)* v. *Moloney* :

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92 *Crystalline Investments Ltd.* v. *Domgroup Ltd.*, [2004] 1 SCR 60 at para. 43. N&L Superintendent, BOA, Tab 22.

93 *Saskatchewan (Attorney General)* v. *Lemare Lake Logging Ltd.*, 2015 SCC 53 (**Lemare Lake**) at paragraph 15. N&L Superintendent, BOA, Tab 33.

94 *Lemare Lake* at para. 17.

95 *Multiple Access Ltd.* v. *McCutcheon*, [1982] 2 SCR 161.

96 *Lemare Lake* at para. 18.

> [19] What is considered to be the first branch of the test was described as follows in *Multiple Access*, the seminal decision of the Court on this issue:
>
> In principle, there would seem to be no good reason to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other. [97] [Court's Emphasis]

234. In *Indalex*, the Supreme Court of Canada recognized (without actually acknowledging that it was doing so) that an operational conflict existed between provincial law and the Initial Order made pursuant to the CCAA (at paragraph 60) :

> [60] In this case, compliance with the provincial law necessarily entails defiance of the order made under federal law. On the one hand, s. 30(7) of the PPSA required a part of the proceeds from the sale related to assets described in the provincial statute to be paid to the plan's administrator before other secured creditors were paid. On the other hand, the Amended Initial Order provided that the DIP charge ranked in priority to "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise" (para. 45). Granting priority to the DIP lenders subordinates the claims of other stakeholders, including the Plan Members. This court-ordered priority based on the CCAA has the same effect as a statutory priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

(iii) Frustration of Purpose

235. Even if there is no operational conflict between the provincial law and the federal law, there may nevertheless be conflict under the second branch of paramountcy if the operation of the provincial law frustrates the purpose of the federal law.[98]

236. To determine whether provincial legislation frustrates the purpose of federal legislation, two questions must be resolved:

a) What is the purpose of the federal legislation?

b) What is the effect of the provincial legislation (i.e., is it incompatible with the federal legislation)?

237. The Supreme Court of Canada explained the test in *Quebec (Attorney General)* v. *Canadian Owners & Pilots Association* :[99]

> [66] The question, therefore, is whether the provincial legislation is incompatible with the *purpose* of the federal legislation. [...] The party seeking to invoke the doctrine of federal paramountcy bears the burden of proof: [...] That party must prove that the impugned legislation frustrates the purpose of a federal enactment. To do so, it must first establish the purpose of the relevant federal

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97 *Alberta (Attorney General)* v. *Moloney*, 2015 SCC 51 at para. 19. N&L Superintendent, BOA, Tab 14.

98 *Lemare Lake* at para. 19.

99 *Quebec (Attorney General)* v. *Canadian Owners & Pilots Association*, [2010] 2 S.C.R. 536 at para 66. N&L Superintendent, BOA, Tab 30.

> statute, and then prove that the provincial legislation is incompatible with this purpose. [...]
>
> [Our underlining]

238. If the relevant provincial law is incompatible with the purpose of the relevant federal law, a court can conclude that the provincial law frustrates the purpose of the federal law "even though it does 'not entail a direct violation of the federal law's provisions: [...] ".[100]

239. With respect to the deemed trusts created under the NL PBA and SPPA, there is no operational conflict between the provincial legislation and the federal CCAA. It is possible for a deemed trust to exist under the NL PBA or the SPPA without an operational conflict arising. In other words, compliance with the provincial NL PBA or the SPPA does not necessarily entail defiance of the federal CCAA.

240. The Monitor believes that although there is no operational conflict between the NL PBA and the CCAA and the SPPA and the CCAA, the doctrine of paramountcy applies because the NL PBA and the SPPA frustrate the purpose of the CCAA.

(iv) Purpose of the CCAA

241. Justice Deschamps described the purpose of the CCAA as follows in *Century Services* (at paragraphs 14-15 and 22-23) :

> [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.
>
> [15] As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.
>
> [...]

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[100] *Alberta (Attorney General)* v. *Moloney*, *supra* note 97 at para. 25.

> [22] While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law* :
>
> > They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]
>
> The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.
>
> [23] Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, s. 25; see also *Quebec (Revenue)* v. *Caisse populaire Desjardins de Montmagny*, 2009 SCC 49 (CanLII), [2009] 3 S.C.R. 286; *Deputy Minister of Revenue* v. *Rainville*, 1979 CanLII 2 (SCC), [1980] 1 S.C.R. 35; *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*).
>
> [Our underlining]

242. In *Re Métaux Kitco inc.*,[101] Paquette J.C.S. provided a useful description of the purposes of Canadian insolvency legislation:

> [46] Within the exercise of its powers over matters of bankruptcy and insolvency, Parliament has adopted two main laws: the CCAA and the BIA.
>
> [47] The CCAA distinguishes itself from the BIA by its remedial objective. It seeks to avoid the devastating effects of bankruptcy or the termination of business operations. Nonetheless, it shares the same philosophy as the BIA. The CCAA and the BIA form part of an integrated body of insolvency law.
>
> [48] Two objectives are at the heart of both these laws:

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[101] *Métaux Kitco inc. (Arrangement relatif à)*, 2016 QCCS 444 at paras. 46-50. **Tab 29.** Upheld in *Arrangement relatif à Métaux Kitco inc.*, 2017 QCCA 268. **Tab 29.**

> (1) the financial rehabilitation of the debtor, who is discharged of past debts;
>
> (2) the equitable distribution of the debtor's assets among his or her creditors in accordance with the order of priority established in the CCAA and in the BIA.
>
> [49] The first objective is achieved through the mechanism of discharge at the end of the process, provided for in the CCAA and the BIA. A stay of proceedings also constitutes a rehabilitation tool in that, among other things, it provides the debtor with the minimum needed for subsistence.
>
> [50] The principle of equality of creditors, a cornerstone of the CCAA and the BIA, stems from the second objective mentioned previously.

243. The purposes of the CCAA are achieved through a stay of proceedings which is designed to maintain the status quo so to allow proceeding to be taken under the CCAA for the benefit of the debtor company and its creditors.[102] The stay of proceedings applies not only to pre-filing creditors, but also to post-filing creditors who assert claims against the debtor company.[103]

(v) Effect of the NL PBA and the SPPA

244. The NL PBA and the SPPA do not purport to create a true trust. As the Supreme Court of Canada found in *Sparrow Electric*, a statutorily created deemed trust is not a true trust as the subject matter of the trust cannot be identified from the date of the creation of the trust. A statutorily created deemed trust does not segregate and protect the funds in the manner of a true trust (i.e., the assets of a true trust do not form part of the bankrupt's estate.[104] Accordingly, the deemed trusts would be subject to CCAA priorities.

245. The principle that creditors of a class must be treated equally in an insolvency dictates that one creditor or group of creditors cannot obtain an undue advantage over other creditors unless the CCAA or the BIA expressly authorizes it.[105] According to Justice Paquette (at paragraph 56), J.C.S., "a change in the order of priority established by the BIA or CCAA, not expressly provided for by law, is deemed contrary to that principle."

246. As this Court found in the Priority and Suspension Order, while Sections 6(6) and 36(7) of the CCAA create a priority in the CCAA context for normal payments, special payments are unsecured claims under the CCAA. As stated by this Court (at paragraph 74):

> [74] It is difficult to reconcile Sections 6(6) and 36(7) CCAA with a broad interpretation of Section 8(2) PBSA. Why would the legislator give specific

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[102] *Northland Properties Ltd., Re,* 73 CBR (NS) 141 (BCSC), 1988 CanLII 3247 (BC SC). **Tab 30.** See also *Newfoundland and Labrador* v. *AbitibiBowater Inc.*, [2012] 3 SCR 443 at para 21. **Tab 31.**

[103] *ICR Commercial Real Estate (Regina) Ltd.* v. *Bricore Land Group Ltd.*, 2007 SKCA 72 at paras 36-47. **Tab 32.**

[104] *Sparrow Electric* at para 31. See also *Aveos* at paras. 57-58.

[105] *Métaux Kitco inc. (Arrangement relatif à)*, 2016 QCCS 444 at para 54. **Tab 29.**

> protection to the normal payments by amending the CCAA in 2009 if the deemed trust protecting not only the normal payments but also the special payments was effective in the CCAA context? Why would the legislator not protect the special payments under Sections 6(6) and 36(7) CCAA if they were already protected under a deemed trust? What happens to the deemed trust for the special payments if there is an arrangement or an asset sale? Because both statutes were adopted by the same legislator, we must try to determine the legislator's intent.

247. Any attempt by a province to legislate priorities for unpaid special payments and wind-up deficiencies is an attempt by the province to do indirectly what it cannot do directly. As Justice Mesbur of the Ontario Superior Court of Justice pointed out, "This is a matter solely within the sphere of federal legislation."[105]

248. The provincial deemed trust purports to create a security interest that is not currently recognized in the CCAA.[107] As such, permitting the payment of the special payments out of the amounts deemed to be held in trust would result in giving a preference to unsecured pension creditors that is not contemplated by the CCAA.

249. Based on the foregoing, the conclusion that Parliament did not intend to protect unfunded pension liabilities in a CCAA insolvency is unavoidable. In the circumstances, the granting of priority to the provincial deemed trusts as the N&L Superintendent has requested would allow the provincial legislation to frustrate the purposes of the CCAA and, in particular, the provisions of the CCAA that protect only certain types of pension payments.

VI. QUESTIONS AND POSITION OF THE MONITOR

250. Based on the foregoing, the Monitor hereby submits that this Court should answer as follows to the questions raised by the Pension Motion:

Liquidation giving rise to a liquidation deemed trust

1. What is the proper meaning of "liquidation" pursuant to subsections 8(2) PBSA and 32(2) NL PBA?
2. Did a "liquidation" within the meaning of subsections 8(2) PBSA and 32(2) NL PBA occur prior or since the Wabush Initial Order?

Answer: Liquidation as a trigger must be given a strict meaning and must relate to certain event objectively ascertainable. CCAA proceedings is not a "trigger event" and in itself does not constitute a "liquidation".

3. Would such a liquidation deemed trust (...) be effective if triggered by a "liquidation" occurring after the Wabush Initial Order?

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[105] *Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd., supra* note 52 at para. 70. **Tab 10.**

[107] *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCS 3064 at para 107. Representative Counsel, BOA, Tab 1.

Answer: No, as decided in *Grant Forest* and *Ivaco, Indalex* must now be applied on the basis of paramountcy analysis that reflect the clear legislative choices in relation to pension claims that result from the 2005-2009 Reform. These legislative choices must also inform the interpretation of the PBSA.

Deficit upon termination

4. Absent CCAA or BIA proceedings with respect to an employer, could the full amount of the deficit upon termination of a defined benefit pension plan be subject to a deemed trust pursuant to either of the PBSA or the NL PBA?

Answer: The wind-up deficit is not cover by Section 29(6.5) of the PBSA or Section 49 of the SPPA. This is not controversial and accepted by OSFI and Retraite Québec. With respect to Section 32 of the NL PBA, the Monitor is also of the view that it does not cover the wind-up deficit, based on a proper and contextual interpretation of Sections 32 and 61 of the NL PBA.

5. Would such a wind-up deficit deemed trust be effective if triggered by a termination occurring after the Wabush Initial Order?

Answer: No, as decided in *Grant Forest* and *Ivaco. Indalex* must now be applied on the basis of paramountcy analysis that reflect the clear legislative choices made in relation to pension claims that result from the 2005-2009 Reform. These legislative choices must also inform the interpretation of the PBSA.

Enforcement or recognition of a NL PBA deemed trust charging assets located in Québec

6. Is the deemed trust arising under the NL PBA specifically or implicitly limited to assets of the employer located in Newfoundland & Labrador?

Answer: No. No restrictions to that effect in the NL PBA.

7. Could this Court nonetheless recognize and enforce a PBA deemed trust against assets located in this Province (or the sale proceeds standing in their stead)?

Answer: No basis for a Quebec court to apply Newfoundland and Labrador legislation on a matter of property and priority over tangible property located in Quebec and specifically with respect to real property subject to unpaid municipal taxes. Moreover, none of the pension deemed trusts (NL PBA, PBSA or SPPA) incorporate Sparrow Electric Amendment.

251. The Monitor submits that this Court will also need to consider the scope, validity and effectiveness of the lien and charge of the Replacement Plan Administrator (Section 32(4) of the NL PBA).

Position of the Monitor: Section 32(4) merely mirrors 32(1) to 32(3) of the NL PBA. As such, the same analysis apply to the scope and possible triggering of the lien and charge, as to the deemed trust. In addition, the Ontario Court of Appeal has ruled in *Harbert Distressed Investment* that similarly worded lien and charge did not make the Administrator a "secured creditor".

252. In answering these questions, the Court will also need to consider the proper scope of application of Pension Legislation.

Position of the Monitor: The applicable statutory provisions, the DB Plans, the applicable Memorandum of Agreement (R-22) and the relevant case-law dictate that: the NL PBA deemed trust should apply only to "Newfoundland" employees to the exclusion of "federal" employees; the SPPA deemed trust should apply only to "Quebec employees" to the exclusion of "federal employees"; and, the PBSA deemed trust should apply in favour of "federal" employees. The Monitor is of the view that the "reverse paramountcy" argument has no merits, as it based on unwarranted extension of the proper scope of Section 94A of *The Constitutional Act* and it is ousted by Section 5 of the NL PBA: the position of the Monitor is comforted by the pension multi-jurisdictional agreements.

THE WHOLE RESPECTFULLY SUBMITTED.

Montréal, June 14, 2017

Norton Rose Fulbright Canada LLP

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CANADA

PROVINCE OF QUÉBEC
DISTRICT OF **MONTREAL**

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

N°: **500-11-048114-157**

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

BLOOM LAKE GENERAL PARTNER LIMITED
QUINTO MINING CORPORATION
8568391 CANADA LIMITED
CLIFFS QUÉBEC 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

(Collectively the "**CCAA Parties**"

-and-

FTI CONSULTING CANADA INC.

Monitor

-and-

MOELIS & COMPANY LLC

Mise-en-cause

CCAA PARTIES' OUTLINE OF ARGUMENTS
(In support of the Motion by the Monitor for directions (docket #385))

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1. INTRODUCTION[1]

1. The Monitor's Motion for Directions with respect to Pensions Claims (the "**Motion**") was notified to the Service List on September 20, 2016;

2. By way of its Motion, the Monitor seeks instructions with respect to the adjudication of pension claims arising out of the CCAA Parties' two defined benefit pensions plans (the "**Pension Claims**"). More specifically, the Monitor seeks to establish the priority rank, if any, to be afforded to said Pension Claims as a result of the application of deemed trust provisions of applicable pension legislation.

3. In an Order rendered on June 9, 2015 (the "**Comeback Order**"), the Honourable Justice Hamilton, J.S.C., granted priority to CCAA Charges ahead of all Encumbrances, including, *inter alia*, trusts and deemed trusts, as appears from paragraph 5 of said Comeback Order:

> [5] **ORDERS** that paragraph 47 of the Wabush Initial Order shall be amended as follows:
>
> 47. **DECLARES** that each of the CCAA Charges shall rank ahead of all hypothecs, mortgages, liens, security interests, priorities, trusts, deemed trusts (statutory or otherwise), charges, encumbrances or security of whatever nature or kind (collectively, the "**Encumbrances**") [...] affecting the Property of the Wabush CCAA Parties whether or not charged by such Encumbrances [...], with the exception of the Crown deemed trusts for sources deductions described in Section 37(2) CCAA and the sums that could be subject to a claim under Section 38(3) CCAA. For greater certainty, the CCAA Charges only extend to assets or rights against assets over which the Wabush CCAA Parties hold or acquire title, and the Interim Lender's Charge is subject to the Permitted Priority Liens (as defined in the Interim Financing Term Sheet).

4. In so doing, Justice Hamilton reserved the rights of the Government of Newfoundland and Labrador and the Government of Canada to contest the priority of the Interim Lender Charge over statutory deemed trusts, if any, as described at paragraph 6 of the Comeback Order:

> [6] **RESERVES** the rights of Her Majesty in right of Newfoundland and Labrador, as represented by the Superintendant of Pensions, the Syndicat des Métallos, Section Locale 6254, the Syndicat des Métallos, Section 6285 and the Attorney General of Canada to contest the priority of the Interim Lender Charge over the deemed trust(s) as set out in the Notices of Objection filed by each of those parties in response to the Motion, which shall be heard and determined at the hearing scheduled on June 22, 2015.

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[1] All capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Motion.

5. On November 5, 2015, Justice Hamilton issued the Claim Procedures Order (as amended on November 16, 2015), which approved and established a procedure for the filing of creditors' claims against the CCAA Parties and their directors and officers, as appears from the Claims Procedure Order, a copy of which has been filed by the Monitor as Exhibit R-2.

2. THE FACTS

6. According to the affidavit of Mr. Terence Watt,[2] one of the Salaried Representatives, the membership breakdown of the employees (former active members) and retirees per jurisdiction is the following:

	Salaried Plan	Union Plan	Total
Newfoundland and Labrador	313	1,005	1,318
Québec	329	661	990
Other	14	66	80
Total	656	1,732	2,388

7. According to the Towers Watson report, "Plan Termination as at December 16, 2015," filed by the Petitioner as Exhibit R-26, which is currently under review by the regulators, and as summarized in paragraph 43 of the Monitor's 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

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[2] Affidavit of Mr. Terence Watt, dated December 14, 2016 and filed in support of the Salaried Employees Representatives' Response to the Motion by the Monitor for directions with respect to Pension claims and the transfer of certain questions to the Supreme Court of Newfoundland and Labrador regarding the interpretation of the deemed trust priority provisions in the NPBA **(Tab 1)**.

Total	$0	$3,525,120
Estimated Wind-up Deficiency	$27,450,000	$27,486,548

3. WHICH LAW APPLIES TO THE PENSION PLANS?

8. The two plans (collectively "the **Plans**") are subject to the laws of several distinct jurisdictions. The position of the CCAA parties on this issue is outlined below.

9. As a starting point, each of the following three statutes includes provisions which define the pension plans and persons to which they apply:

Newfoundland and Labrador PBA[3]

> 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.

Québec SPPA[4]

> 1. This Act applies to pension plans provided
>
> (1) for employees who report for work at an establishment of their employer located in Québec or, if not, who receive their remuneration from such an establishment, provided, in the latter case, they do not report for work at any other establishment of their employer;
>
> (2) for employees not referred to in paragraph 1 who, while residing in Québec and being employed by an employer whose main establishment is located in Québec, work outside Québec, provided the plans are not governed by an Act of a legislative body other than the Parliament of Québec which provides for a deferred pension.

Federal PBSA[5]

> 4 (1) This Act applies in respect of pension plans.
>
> (...)
>
> (4) In this Act, included employment means employment, other than excepted employment, on or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada, including, without restricting the generality of the foregoing.
>
> (...)
>
> (b) any railway, canal, telegraph or other work or undertaking connecting a province with another province or extending beyond the limits of a province.

10. From the last sentence of Section 5 NPBA, one can infer that the NPBA shall not apply to the members of the Plans who formerly worked at Arnaud Railway. Section 4(4)(b) of the federal PBSA clearly indicates that it shall apply to the members who were employed by Arnaud Railway.

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3 Newfoundland *Pension Benefits Act*, 1997, SNL1996 Chapter P-4.01 ("**NPBA**").

4 Québec *Supplemental Pension Plans Act*, CQLR, c. R-15.1 ("**SPPA**").

5 *Pension Benefits Standards Act*, RSC 1985, c-32 ("**PBSA**").

11. Section 1 of the SPPA clearly provides that the Act shall apply to the members of the Plans who were formerly employed in Québec (except for those who were employed by Arnaud Railway).

12. Finally, and as further detailed below in section 9.2 of this Outline, the attempt by the Salaried Representatives to extend the application of the NPBA to all the members and beneficiaries of the Salaried DB Plan by referring to the 2016 Agreement respecting Multi-Jurisdictional Pension Plans is a patently ill-founded argument for two reasons. First, the plurality of members of the Salaried DB Plan is found in Québec (as there were more members in Québec than in Newfoundland for that plan). Second, the 2016 Agreement was never ratified by Newfoundland.

4. HAS A DEEMED TRUST BEEN VALIDLY CREATED PURSUANT TO PROVINCIAL LEGISLATION (NPBA OR SPPA) OR FEDERAL LEGISLATION (PBSA)?

13. The existence of a deemed trust protecting the Plans is a question that has been referred by way of reference to the Newfoundland Court of Appeal, despite the fact that, as stated in the January 30, 2017 judgment issued by this Court, the Superior Court of Québec has jurisdiction to adjudicate this issue. However, the real question at issue is not whether a deemed trust exists, but rather what, if anything, is protected by this or these deemed trust(s) and whether such trust(s) is (or are) effective in the present CCAA context.

14. Even if the CCAA Parties were to admit that the rules with respect to deemed trusts pursuant to the PBSA, the SPPA and the NPBA could apply to the Plan members located in the relevant jurisdiction or otherwise protected by each relevant law, they dispute that such rules are effective in an insolvency context. The CCAA parties also dispute that a deemed trust created by Newfoundland legislation, such as the one created by section 32 PBSA, if it were established in the context of CCAA proceedings, can validly charge property located in Québec.

5. IF A DEEMED TRUST EXISTS, WHAT TYPE OF PAYMENTS DOES IT PROTECT?

15. Section 49 SPPA provides for a deemed trust that extends to normal, special and catch-up payments in connection with the members who formerly worked in Québec.

16. Section 8(1) and (2) of the PBSA provides for deemed trusts that extend to normal, special and catch-up payments in connection with the members who formerly worked at Arnaud Railway.

17. Section 32 NPBA provides for various deemed trusts to secure the payment of certain amounts for the members formerly employed in Newfoundland. These amounts may include normal costs, special payments and catch-up special payments.

18. The Salaried Representatives and the USW argue that the deemed trust created pursuant to section 32(1) (c) (ii) and the obligation to hold amounts in trust created by section 32(3) extend to wind-up deficiencies. It is to be noted that the Newfoundland Superintendent of Pensions has not adopted this position in its Outline of arguments.

19. On that point, it is the position of the CCAA Parties that, in this case, the wind up deficiency is not covered for two reasons.

20. First, both sections 32(1) (c) (ii) and section 32(3) protect amounts "due." Section 61(2) states that on termination of a plan the employer shall make the payments set out in the Regulations. Section 25.1 (1) of the Regulations provides that the amount that may become payable pursuant to section 61(2) to cover the wind up deficiency shall be divided in five equal payments, while section 25.1 (3) provides that the first of these payments is due no later than 2 weeks after the filing of the report in which the deficiency will have been calculated. Thus, upon termination of a plan, the amounts related to the wind up deficiency are not due.

21. On this question, section 32(3) NPBA has to be distinguished from section 57(4) of Ontario's PBA. Section 57(4) extends to "contributions accrued to the date of the wind up but not yet due," while 32(1) (c) (ii) and section 32 protect amounts "due."

22. Second, section 32(3) NPBA shall not be applied in this matter since the two plans were not wound up prior to the filing. On that issue, the following statements made by the Court in *Indalex* are relevant:

> [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.
>
> [58] In the instant case, the CCAA judge, in authorizing the DIP charge, did not consider the fact that the Salaried Plan's members had a claim that was protected by a deemed trust, nor did he explicitly note that ordinary creditors, such as the Executive Plan's members, had not received notice of the DIP loan motion.[6]

6. IF A DEEMED TRUST EXISTS, IS IT EFFECTIVE IN A CCAA CONTEXT?

23. Even though the legal context applicable to deemed trusts created to protect pension claims is different from the one in respect of deemed trusts created to protect Crown claims, we submit that one must firstly review the general rules applicable to deemed trusts in an insolvency context before focusing back on the treatment of deemed trusts created to protect pension claims.

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[6] *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 S.C.R. 271, 2013 SCC 6 **(Tab 2)** [***Sun Indalex Finance***].

6.1 Treatment of deemed trusts created to protect Crown claims in a CCAA context

6.1.1 The evolution of the legislation and of case law since *Sparrow Electric*

24. The Supreme Court has previously considered a legislative provision in the *Income Tax Act*[7] (the "**ITA**"), which was substantially similar to section 8(2) PBSA. The Court did so in the *Sparrow Electric* decision[8], where it ultimately rejected the argument that the ITA provision created a valid deemed trust.

25. In *Sparrow Electric*, the Supreme Court was asked to determine a priority dispute between the federal Crown and a secured lender in respect of unpaid source deductions that had not been remitted by the debtor to the federal government. The Crown asserted and relied on the deemed trust provisions then found in sections 227(4) and (5) of the ITA in arguing that it had priority over the proceeds of assets of the debtor that had been liquidated in a receivership.

26. The secured lender in that case, Royal Bank of Canada, had been granted security by the debtor pursuant to a general security agreement governed by and perfected pursuant to the *Personal Property Security Act* of Alberta, and had also been granted *Bank Act* security.

27. The provisions of sections 227(4) and (5) of the ITA in effect in 1997 were substantially similar to the current deemed trust provisions of the PBSA. Sections 227(4) and (5) of the ITA then read as follows:

> (4) Every person who deducts or withholds any amount under this Act shall be deemed to hold the amount so deducted or withheld in trust for Her Majesty.
>
> (5) Notwithstanding any provision of the Bankruptcy Act, in the event of any liquidation, assignment, receivership or bankruptcy of or by a person, an amount equal to any amount
>
> (a) deemed by subsection 9(4) to be held in trust for Her Majesty, ...
>
> Shall be deemed to be separate from and form no part of the estate in liquidation, assignment, receivership or bankruptcy, whether or not that amount has in fact been kept separate and apart from the person's own moneys or from the assets of the estate.

28. Section 8 of the PBSA came into force in 1986. Since that time, the language of section 8(1) has not changed substantively, and section 8(2) has remained unchanged.[9] The

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7 *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp).

8 [1997] 1 S.C.R. 411 **(Tab 3)**.

9 Section 8(1) was amended in 1998 and 2010. Section 8(1) originally appeared as "An employer shall ensure, with respect to its pension plan, that (a) the moneys in the pension fund, (b) an amount equal to the aggregate of (i) the normal actuarial cost, and (ii) any prescribed special payments, that have accrued to date; and (c) 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 are kept separate and apart from the employer's own moneys, and shall be deemed to hold the amounts referred to in paragraphs (a) to (c) in trust for members of the pension plan, former members, and any other persons entitled to pension benefits or refunds under the plan."

following is a side by side comparison of the 1997 ITA provisions considered in *Sparrow Electric* and the current PBSA provisions:

PBSA: **8**(1) An employer shall ensure, with respect to its pension plan, that the following amounts are kept separate and apart from the employer's own moneys, and the employer is deemed to hold the amounts referred to in paragraphs (*a*) to (*c*) in trust for members of the pension plan, former members, and any other persons entitled to pension benefits under the plan: (*a*) the moneys in the pension fund, (*b*) an amount equal to the aggregate of the following payments that have accrued to date: i) the prescribed payments, and (ii) the payments that are required to be made under a workout agreement; and (*c*) all of the following amounts that have not been remitted to the pension fund: i) amounts deducted by the employer from members' remuneration, and (ii) other amounts due to the pension fund from the employer, including any amounts that are required to be paid under subsection 9.14(2) or 29(6). (2) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (1) is deemed to be held in trust shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate."	***ITA:*** **227**(4) Every person who deducts or withholds any amount under this Act shall be deemed to hold the amount so deducted or withheld in trust for Her Majesty. (5) Notwithstanding any provision of the *Bankruptcy Act*, in the event of any liquidation, assignment, receivership or bankruptcy of or by a person, an amount equal to any amount (a) deemed by subsection (4) to be held in trust for Her Majesty, ... Shall be deemed to be separate from and form no part of the estate in liquidation, assignment, receivership or bankruptcy, whether or not that amount has in fact been kept separate and apart from the person's own moneys or from the assets of the estate."

[Emphasis added]

29. In *Sparrow Electric*, the Supreme Court held that the deemed trust provisions at section 227(5) of the ITA were an attempt to overcome the loss of a true trust. In the event of a liquidation, assignment, or bankruptcy, these provisions purported to grant a deemed trust over amounts equivalent to the amounts that were not set aside in trust by the debtor:

> [38] ... s. 227(5) is a provision designed to minimize the adverse effect upon Her Majesty from the misappropriation of trust funds held by tax debtors on account of their employees' tax payable. The provision contemplates an intermingling of Her Majesty's property with that of a tax debtor's, such that the subject matter of

> the trust cannot be (or indeed never was) identifiable. To address this conceptual problem, s. 227(5) allows Her Majesty to attach its interest to any property which lawfully belongs to the debtor at the time of liquidation, assignment, receivership or bankruptcy; this property is then deemed to exist "separate" and apart from the tax debtor's estate.

6.1.2 Response to Sparrow Electric

30. In 1998, as a legislative response to the *Sparrow Electric* decision, the Federal Government replaced sections 227(4) and (5) of the ITA with new sections 227(4) and (4.1). The history of the amendment was summarized by Justice Deschamps in *Century Services*:

> [33] In *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, this Court addressed a priority dispute between a deemed trust for sources deductions under the ITA and security interests taken under both the *Bank Act*, S.C. 1991 c. 46, and the *Alberta Personal Property Security Act*, S.A. 1988, c. P-4005 ("PPSA"). As then worded, an ITA deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the ITA deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the ITA deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the ITA by deeming it to operate from the moment the deductions were not paid to the Crown as required by the ITA, and by granting the Crown priority over all security interests (para. 27-29) (the "Sparrow Electric amendment").[10]

31. The new sections 227(4) and 227(4.1) of the ITA provide as follows:

> 227(4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided for under this Act.
>
> (4.1) Notwithstanding any other provision of this Act, the Bankruptcy and Insolvency Act (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed
>
> > (a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for

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[10] *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379, 2010 SCC 60 **(Tab 4)** [***Century Services***].

> Her Majesty whether or not the property is subject to such a security interest, and
>
> (b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest
>
> and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests. [Emphasis added]

32. The amendments to the ITA deemed trust provisions made it clear that the Crown intended to take priority over security interests in respect of source deductions, no matter when such security interests arose. As noted in *Century Services*, this was confirmed by the Supreme Court in *First Vancouver Finance* v. *M.N.R.*:

> [28] It is apparent from these changes that the intent of Parliament when drafting s. 227(4) and 227(4.1) was to grant priority to the deemed trust in respect of property that is also subject to a security interest regardless of when the security interest arose in relation to the time the source deductions were made or when the deemed trust takes effect.[11]

33. While steps were taken by Parliament to amend the ITA in 1998, as well as similar changes at the same time to section 23 of the Canada Pension Plan (the "**CPP**") and s. 86 of the *Employment Insurance Act* (the "**EIA**"), and subsequently in 2000 to the *Excise Tax Act* (the "**ETA**"),[12] Parliament did not take similar steps to amend the language of the PBSA to provide for priority over pre-existing security interests, notwithstanding that Parliament chose to make numerous other amendments to other provisions of the PBSA, including to section 8 in 1998, 2010, and 2012.[13] However, the provisions of section 8(2) have not been altered since the PBSA came into force in 1986. It is submitted that Parliament has had numerous occasions to make amendments similar to those made to the ITA, the CPP, the EIA, and the ETA, but has chosen not to do so. As a result, the reasoning of the Supreme Court in *Sparrow Electric* applies in the case at hand.

6.2 The deemed trusts created to protect amounts owed to a pension plan are ineffective in a CCAA context

6.2.1 Is the deemed trust created by the PBSA effective in a CCAA context?

34. The general rule with respect to the treatment of creditors is that they shall be paid on a *pari passu* basis except where specific exceptions are provided by law. The following statements are found in *Re White Birch*:

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11 *First Vancouver Finance* v. *M.N.R.*, 2002 SCC 49 **(Tab 5)** [***First Vancouver***].

12 *Income Tax Amendments Act, 1997, Statutes of Canada*, 1998 c. 19; *Sales Tax and Excise Tax Amendment Act, 1999, Statutes of Canada*, 2000, c. 30.

13 *Statutes of Canada*, 1998, c. 12, s. 6; 2010, c. 12, s. 1791; c. 25, s. 183; 2012, c. 16, s. 86.

> *[141] En droit québécois comme en droit canadien, les biens d'une société sont le gage commun de ses créanciers. Ils doivent donc être utilisés à l'avantage commun à moins que, par exception, ces biens ne soient dévolus à des créanciers spécifiques.*
>
> *[142] Les créanciers de ces créances spécifiques seront toujours traités dans un contexte d'exception.*[14]

35. There is consistent case law to the effect that, for a deemed trust to remain effective in an insolvency context, a specific legislative provision must exist to that effect.

36. In considering a deemed trust created to facilitate the collection of the goods and services tax, the Supreme Court made the following statements in *Century Services*, statements which were cited with approval in *Re White Birch*:

> *[155] Arborant la question de la fiducie réputée touchant la TPS, par rapport à la LACC, la juge Deschamps écrira:*
>
> > *[44] En examinant la question dans tout son contexte, je suis amenée à conclure, pour plusieurs raisons, que ni le raisonnement ni le résultat de l'arrêt Ottawa Senators ne peuvent être adoptés. Bien qu'il puisse exister un conflit entre le libellé des textes de loi, une analyse téléologique et contextuelle visant à déterminer la véritable intention du législateur conduit à la conclusion que ce dernier ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a apporté à la LTA, en 2000, la modification découlant de l'arrêt Sparrow Electric.*
> >
> > *[45] Je rappelle d'abord que le législateur a manifesté sa volonté de mettre un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité. Selon le par. 18.3(1) de la LACC (sous réserve des exceptions prévues au par. 18.3(2)), les fiducies réputées de la Couronne n'ont aucun effet sous le régime de cette loi. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. Par exemple, le par. 18.3(2) de la LACC et le par. 67(3) de la LFI énoncent expressément que les fiducies réputées visant les retenues à la source continuent de produire leurs effets en cas d'insolvabilité. Le législateur a donc clairement établi des exceptions à la règle générale selon laquelle les fiducies réputées n'ont plus d'effet dans un contexte d'insolvabilité. La LACC et la LFI sont en harmonie : elles préservent les fiducies réputées et établissent la priorité de la Couronne seulement à l'égard des retenues à la source. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la TPS bénéficient d'un traitement préférentiel sous le régime de la LACC ou de la LFI. Alors que les retenues à la source font l'objet de dispositions explicites dans ces deux lois concernant*

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[14] *White Birch Paper Holding Company (Arrangement relatif à)*, 2012 QCCS 1679 **(Tab 6)** [***White Birch***].

> *l'insolvabilité, celles-ci ne comportent pas de dispositions claires et expresses analogues établissant une exception pour les créances relatives à la TPS.*
>
> *[46] La logique interne de la LACC va également à l'encontre du maintien de la fiducie réputée établie dans la LTA à l'égard de la TPS. En effet, la LACC impose certaines limites à la suspension par les tribunaux des droits de la Couronne à l'égard des retenues à la source, mais elle ne fait pas mention de la LTA (art. 11.4). Comme les fiducies réputées visant les retenues à la source sont explicitement protégées par la LACC, il serait incohérent d'accorder une meilleure protection à la fiducie réputée établie par la LTA en l'absence de dispositions explicites en ce sens dans la LACC. Par conséquent, il semble découler de la logique de la LACC que la fiducie réputée établie par la LTA est visée par la renonciation du législateur à sa priorité (art. 18.4).*
>
> *[156] De son côté, le juge Fish sera encore plus clair sur la survie des fiducies présumées par rapport à la LACC. Il écrit:*
>
> > *[95] Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité. Il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il ne nous appartient pas de nous interroger sur les raisons de ce choix. Nous devons plutôt considérer la décision du législateur de maintenir en vigueur les dispositions en question comme un exercice délibéré du pouvoir discrétionnaire de légiférer, pouvoir qui est exclusivement le sien. Avec égards, je rejette le point de vue suivant lequel nous devrions plutôt qualifier l'apparente contradiction entre le par. 18.3(1) (maintenant le par. 37(1)) de la LACC et l'art. 222 de la LTA) d'anomalie rédactionnelle ou de lacune législative susceptible d'être corrigée par un tribunal.*
> >
> > *[96] Dans le contexte du régime canadien d'insolvabilité, on conclut à l'existence d'une fiducie réputée uniquement lorsque deux éléments complémentaires sont réunis : en premier lieu, une disposition législative qui crée la fiducie et, en second lieu, une disposition de la LACC ou de la Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3 (« LFI ») qui confirme l'existence de la fiducie ou la maintient explicitement en vigueur.*
> >
> > [Emphasis added]

37. The statements, made by Justice Schrager in the matter of *Aveos,*[15] also highlight the need to find specific legislative provisions to maintain the effectiveness of a deemed trust in an insolvency context:

> [71] After examining the legislative history, Deschamps, J. writing for the majority, held that Parliament did not intend for the C.C.A.A. to protect the Crown's deemed trust priority for GST claims payable under the *Excise Tax Act*. Deschamps, J. stated that where Parliament's intent is to protect deemed trust

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[15] *Aveos Fleet Performance Inc./Aveos Performance aéronautique inc. (Arrangement relatif à)*, 2013 QCCS 5762 **(Tab 7)** [***Aveos***].

> claims in insolvency matters, Parliament clearly states so. Absent an express statutory basis for concluding that GST claims enjoy preferred treatment under the C.C.A.A. (or the B.I.A.), no such protection exists. Fish, J. writing minority reasons was even more explicit that the protection of a deemed trust claim in an insolvency requires a statutory provision creating the trust and a provision in the B.I.A. or C.C.A.A. explicitly preserving the effective operation of the deemed trust.
>
> [72] In the present case, while Section 8(2) P.B.S.A. creates the deemed trust, there is no provision of the C.C.A.A. that confirms or preserves it.
>
> [73] Parliament has enacted such "preserving" provisions for deductions at source in Section 37(2) C.C.A.A. (see also Section 86(2) B.I.A.). This is a *Sparrow* legacy amendment. There is no such preservation for the Section 8(2) P.B.S.A. deemed trust.
>
> [75] Whatever allure this logic may contain, the reasoning of Deschamps, J. and Fish, J. in *Century* does not appear restricted to considerations of Crown deemed trust though that is the factual background of the case. Deschamps, J. is explicit in referring to the "general rule that deemed trusts are ineffective in insolvency"
>
> [...]
>
> [84] The beneficiaries of the pension plan may be vulnerable as the Superintendent and Aon submit and as such merit protection for their pension entitlements as a matter of public policy. However, the balance of competing policies is a matter for Parliament whose task is to define policy priorities and to reflect such choices in statutes. As Fish, J. stated in *Century*, legislative discretion belongs to Parliament alone and is not to be exercised by the judiciary.

38. It is clear that the CCAA does not contain any provision that would confirm the validity of a deemed trust created by the PBSA or any other provincial law to the same effect.

39. As was the case in *Century Services*, when seeking to determine what could be the priority applicable to a deemed trust created by the PBSA in a CCAA context, the Court is called to interpret two federal statutes. The goal is to seek out the overall intent of Parliament. *Century Services* reiterates the principle of statutory interpretation that a contextual and purposive analysis ought to be applied in order to determine Parliament's true intent.[16]

40. As held in *Century Services*, "where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately."[17] No such protection has been enacted in the CCAA with respect to the PBSA deemed trust. A contextual analysis leads to the conclusion that Parliament did not intend for the PBSA deemed trust to have any effect in a CCAA proceeding.

41. It is submitted that the 2009 amendments to the *Companies' Creditors Arrangement Act* confirm this position. The amendments provide for specific protection to pension

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16 *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379, 2010 SCC 60, at para. 44 (**Tab 4**).

17 *Ibid*, at para. 45.

obligations at sections 6(6) and 36(7).[18] These provisions provide, respectively, that a compromise or arrangement may only be sanctioned by a Court, and a sale of assets out of the ordinary course of business may only be approved by the Court, if provision is made to ensure payment of certain enumerated pension obligations. The obligations enumerated for such protection consist only of employee deductions and normal cost contributions. They do not include special payments or wind-up deficiencies.

42. It is submitted that these specific additions to (and corresponding omissions from) the 2009 amendments to the CCAA, make it clear that Parliament did not intend for special payments under the PBSA, or any other provincial deemed trust legislation, to have any priority in a CCAA proceeding.[19]

43. In discussing pension plan deficiencies in the context of the amendments to the CCAA and *Bankruptcy and Insolvency Act* (the "**BIA**"), Justice Deschamps, in *Sun Indalex Finance*, underscored that Parliament made a deliberate choice not to extend greater protections to pension claims:

> [81] There are good reasons for giving special protection to members of pension plans in insolvency proceedings. Parliament considered doing so before enacting the most recent amendments to the CCAA, but chose not to (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada*, 2005, S.C. 2007, c. 36, in force September 18, 2009, SI/2009-68; see also Bill C-501, An Act to amend the Bankruptcy and Insolvency Act and other Acts (pension protection), 3rd Sess., 40th Parl., March 24, 2010 (subsequently amended by the Standing Committee on Industry, Science and Technology, March 1, 2011). A report of the Standing Senate Committee on Banking, Trade and Commerce gave the following reasons for this choice:
>
> > Although the Committee recognizes the vulnerability of current pensioners, we do not believe that changes to the BIA regarding pension claims should be made at this time. Current pensioners can also access retirement benefits from the Canada/Quebec Pension Plan, and the Old Age Security and Guaranteed Income Supplement programs, and may have private savings and Registered Retirement Savings Plans that can provide income for them in retirement. The desire expressed by some of our witnesses for greater protection for pensioners and for employees currently participating in an occupational pension plan must be balanced against the interests of others. As we noted earlier, insolvency — at its essence — is characterized by insufficient assets to satisfy everyone, and choices must be made.
> >
> > The Committee believes that granting the pension protection sought by some of the witnesses would be sufficiently unfair to other stakeholders that we cannot recommend the changes requested. For example, we feel that super priority status could unnecessarily reduce the moneys available for distribution to creditors. In turn, credit availability and the cost of credit could be negatively affected, and all those seeking credit in

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[18] *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36.

[19] See also recent article in the National Creditor Debtor Review: "*What about Federal Pension Claims? The Status of Pension Benefits Standards Act, 1985 and Pooled Registered Pension Plans Act Deemed Trust Claims in Insolvency*", 28 National Creditor Debtor Review, p. 25 **(Tab 8)**.

> Canada would be disadvantaged. (Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act (2003), at p. 98; see also p. 88.)
>
> [82] In an insolvency process, a CCAA court must consider the employer's fiduciary obligations to plan members as their plan administrator. It must grant a remedy where appropriate. However, courts should not use equity to do what they wish Parliament had done through legislation.[20] [Emphasis added]

44. In a recent article, *What about Federal Pension Claims? The Status of Pension Benefits Standards Act, 1985 and Pooled Registered Pension Plans Act Deemed Trust Claims in Insolvency*, the authors conclude that the only proper interpretation of the CCAA and the PBSA is that the deemed trust is not intended to have any priority in a CCAA proceeding. The CCAA Parties submit that this conclusion is correct:

> The above application of the Sparrow Electric reasoning to the PBSA deemed trust yields the same results as application of common rules of statutory interpretation. Given that the pension provisions of the BIA and CCAA came into force much later than s. 8 of the PBSA, normal interpretation would require that the later legislation to be deemed remedial in nature. Likewise, since these provisions of the BIA and CCAA are the more specific provisions, normal interpretation would take them to have precedence over the general. Finally, the limited scope of the protection given to pension claims in the BIA and CCAA would, by application of the doctrine of implied exclusion, suggest that Parliament did not intend there to be any additional protection. In enacting BIA subs. 60(1.5) and 65.13(8) and ss. 81.5 and 81.6 and CCAA subs. 6(6) and 36(7), while not amending subs. 8(2) of the PBSA by adding explicit priority language or by removing the insolvency trigger), Parliament demonstrated the intent that pension claims would have protection in insolvencies and restructurings only to the extent set out in the BIA and CCAA. [21]

45. Had Parliament wanted to give priority to the PBSA deemed trust, or any other similar provincially created deemed trust, it has had numerous opportunities since 1997 to amend the CCAA and/or the PBSA. It has made a deliberate decision not to do so.

46. The parallel evolution of the relevant legislation and case law can be summarized as follows:

> 1986: Adoption of Section 8(2) of the PBSA;
>
> 1997: *Sparrow Electric*: The Supreme Court holds that the ITA deemed trust cannot prevail over security interests because no express priority is provided for over pre-existing security interests;
>
> Amendment to CCAA: section 18.3 of the CCAA (now section 37) is added – Deemed trusts in favour of the Crown are nullified subject to certain exemptions for source deductions claims;
>
> 1998: The "Sparrow Electric Amendment": Parliament enacts section 227(4.1) of the ITA which expressly provides for priority over security interests, retroactive to 1994. As well, similar amendments made to EIA and CPP at same time (and similar amendments to the ETA in 2000);

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[20] *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 S.C.R. 271, 2013 SCC 6 **(Tab 2).**

[21] *Ibid*, at p. 30.

2002: *First Vancouver*: The Supreme Court holds, based on the Sparrow Electric Amendment, that a deemed trust is similar to a floating charge. The Supreme Court concludes that by the Sparrow Electric Amendment, Parliament has granted priority to the deemed trust for source deductions over security interests.

2010: *Century Services*: The GST deemed trust has no effect in a CCAA context due to the wording of section 18.3 of the CCAA, which does not expressly recognize the GST deemed trust. This is so notwithstanding that s. 222(3) of the ETA states that the deemed trust created by 222(1) of the ETA applies despite any other federal act (other than the BIA).

47. This issue was discussed at length in the matter of *Aveos*[22] and the Court adopted the argument to the effect that the PBSA deemed trust is not effective in a CCAA proceeding.

48. This is the position that was adopted by this Court on June 26, 2015:

> [74] It is difficult to reconcile sections 6(6) and 36(7) CCAA with a broad interpretation of section 8(2) PBSA. Why would the legislator give specific protection to the normal payments by amending the CCAA in 2009 if the deemed trust protecting not only the normal payments but also the special payments was effective in the CCAA context? Why would the legislator not protect the payment under sections 6(6) and 36(7) CCAA if they were already protected under a deemed trust? What happens to the deemed trust if there is an arrangement or an asset sale? Because both statutes were adopted by the same legislator, we must try to determine the legislator intent. […]
>
> [78] For all these reasons, the Court concludes that the Parliament's intent is that federal pension claims are protected only to the limited extent set ought in the BIA and the CCAA, notwithstanding the potentially broader language in the PBSA.[23]

6.2.2 Paramountcy of Federal legislation over Provincial legislation

6.2.2.1 General principles regarding the application of the principle of Federal paramountcy in an insolvency context

49. In the matter of *Sun Indalex Finance*,[24] the Supreme Court of Canada unanimously held (in three concurrent judgments on this point) that an interim lender charge created by the Court pursuant to the CCAA may rank ahead of a deemed trust for pension priorities created by provincial statute by operation of the constitutional doctrine of federal paramountcy, as the Court's ability to create super-priority for interim lender charges is crucial to achieving the purposes of the CCAA, even in the context of a liquidating CCAA.

50. The reasons of Justice Deschamps are most explicit on this point:

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22 *Aveos Fleet Performance Inc./Aveos Performance aéronautique inc. (Arrangement relatif à)*, 2013 QCCS 5762 **(Tab 7)**.

23 *Bloom Lake, g.p.l. (Arrangement relatif à)*, (C.S. June 26, 2015), Montréal 500-11-048114-157, Hamilton J. **(Tab 9)**.

24 *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 S.C.R. 271, 2013 SCC 6 **(Tab 2)**.

B. *Does the Deemed Trust Supersede the DIP Charge?*

[48] The finding that the interests of the Salaried Plan's members in all the employer's wind-up contributions to the Salaried Plan are protected by a deemed trust does not mean that part of the money reserved by the Monitor from the sale proceeds must be remitted to the Salaried Plan's fund. This will be the case only if the provincial priorities provided for in s. 30(7) of the PPSA ensure that the claim of the Salaried Plan's members has priority over the DIP charge. [...]

[...]

[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 (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.

[...]

[56] A party relying on paramountcy must "demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law" (*Canadian Western Bank*, at para. 75). This Court has in fact applied the doctrine of paramountcy in the area of bankruptcy and insolvency to come to the conclusion that a provincial legislature cannot, through measures such as a deemed trust, affect priorities granted under federal legislation (*Husky Oil*).

[...]

[58] In the instant case, the CCAA judge, in authorizing the DIP charge, did not consider the fact that the Salaried Plan's members had a claim that was protected by a deemed trust, nor did he explicitly note that ordinary creditors, such as the Executive Plan's members, had not received notice of the DIP loan motion. However, he did consider factors that were relevant to the remedial objective of the CCAA and found that Indalex had in fact demonstrated that the CCAA's purpose would be frustrated without the DIP charge. It will be helpful to quote the reasons he gave on April 17, 2009 in authorizing the DIP charge ((2009), 52 C.B.R. (5th) 61):

(a) the Applicants are in need of the additional financing in order to support operations during the period of a going concern restructuring;

(b) there is a benefit to the breathing space that would be afforded by the DIP Financing that will permit the Applicants to identify a going concern solution;

(c) there is no other alternative available to the Applicants for a going concern solution;

(d) a stand-alone solution is impractical given the integrated nature of the business of Indalex Canada and Indalex U.S.;

(e) given the collateral base of Indalex U.S., the Monitor is satisfied that it is unlikely that the Post-Filing Guarantee with respect to the U.S. Additional Advances will ever be called and the Monitor is also satisfied that the benefits to stakeholders far outweighs the risk associated with this aspect of the Post-Filing Guarantee;

(f) the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing against the assets of the Applicants;

(g) the Pre-Filing Security has been reviewed by counsel to the Monitor and it appears that the unsecured creditors of the Canadian debtors will be in no worse position as a result of the Post-Filing Guarantee than they were otherwise, prior to the CCAA filing, as a result of the limitation of the Canadian guarantee set forth in the draft Amended and Restated Initial Order . . . ; and

(h) the balancing of the prejudice weighs in favour of the approval of the DIP Financing. [para. 9]

[59] Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the CCAA judge's findings of fact, but case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve their rights on June 12, 2009 are instructive. He indicated that any uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate" (2009 CanLII 37906 (ON SC), 2009 CanLII 37906, at paras. 7-8).

[60] In this case, compliance with the provincial law necessarily entails defiance of the order made under federal law. On the one hand, s. 30(7) of the PPSA required a part of the proceeds from the sale related to assets described in the provincial statute to be paid to the plan's administrator before other secured creditors were paid. On the other hand, the Amended Initial Order provided that the DIP charge ranked in priority to "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise" (para. 45). Granting priority to the DIP lenders subordinates the claims of other stakeholders, including the Plan Members. This court-ordered priority based on the CCAA has the same

> effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.
>
> [Emphasis added]

51. The decisions rendered by Justices Cromwell and LeBel, respectively, concur with Justice Deschamps on this issue.[25]

52. The Supreme Court recently discussed the application of the paramountcy doctrine in *Alberta (Attorney General) v. Moloney*:

> [18] A conflict is said to arise in one of two situations, which form the two branches of the paramountcy test: (1) there is an operational conflict because it is impossible to comply with both laws, or (2) although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment.
>
> [19] What is considered to be the first branch of the test was described as follows in *Multiple Access*, the seminal decision of the Court on this issue:
>
> > In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other.
> >
> > In *Western Bank*, Binnie and LeBel JJ. referred to this passage as "the fundamental test for determining whether there is sufficient incompatibility to trigger the application of the doctrine of federal paramountcy" (para. 71). Under that test, the question is whether there is an actual conflict in operation, that is, whether both laws "can operate side by side without conflict" (*Marine Services*, at para. 76) or whether both "laws can apply concurrently, and citizens can comply with either of them without violating the other": *Western Bank*, at para. 72; see also *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 60; *Marine Services*, at para. 68; *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86, at paras. 77 and 81-82; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 53; *Smith v. The Queen*, [1960] S.C.R. 776, at p. 800, per Martland J.[26]

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25 *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 S.C.R. 271, 2013 SCC 6 paras. 242 and 265 **(Tab 2)**.

26 *Alberta (Attorney General) v. Moloney*, 2015 SCC 51 **(Tab 10)**.

53. It is respectfully submitted that, in the present case, the application of Section 32 NPBA or 49 SPPA would create a situation where it would be impossible to comply with both laws.

6.2.2.2 Application of the principle of federal paramountcy

54. As a starting point for this section, it is to be noted that section 32(2) NPBA creates a deemed trust while section 32(4) states that the administrator of a plan has a lien and charge on the assets of the employees in an amount equal to the amount required to be held in trust.

6.2.2.2.1 Relevant provisions of the BIA and CCAA

55. The definition given to the term "secured creditor" in the CCAA is the following:

> *secured creditor* means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds;
>
> [Emphasis added]

56. Although the provisions of the BIA are not directly relevant to the present matter, some considerations must be given to the latter since it is expected that the federal legislator would have attempted to adopt a coherent interpretation between the same terms used in different acts dealing with a situation of insolvency.

57. On this point, it is to be noted that the definition of "secured creditor" given in the BIA is the following:

> *secured creditor* means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable, and includes
>
> (a) a person who has a right of retention or a prior claim constituting a real right, within the meaning of the *Civil Code of Québec* or any other statute of the Province of Quebec, on or against the property of the debtor or any part of that property, or
>
> (b) any of
>
> (i) the vendor of any property sold to the debtor under a conditional or instalment sale,

> (ii) the purchaser of any property from the debtor subject to a right of redemption, or
>
> (iii) the trustee of a trust constituted by the debtor to secure the performance of an obligation,
>
> if the exercise of the person's rights is subject to the provisions of Book Six of the *Civil Code of Québec* entitled *Prior Claims and Hypothecs* that deal with the exercise of hypothecary rights [Emphasis added]

58. While one of the fundamental distinctions between the BIA and the CCAA is that there is no transfer of the ownership of the debtor's assets to a trustee in a CCAA context, Section 67(1)(a) of the BIA is relevant for our purpose. Said section reads as follows:

> 67 (1) The property of a bankrupt divisible among his creditors shall not comprise
>
> (a) property held by the bankrupt in trust for any other person.
>
> [Emphasis added]

59. In short, a party who benefits from a trust is entitled to be treated as a secured creditor only if it is the beneficiary of a conventional trust created to act as a security.

6.2.2.2.2 Application of the principles set out by the Supreme Court of Canada in *British Columbia v. Henfrey Samson Belair Ltd.* and in *Husky Oil Operation* v. *M.R.N.*

Even if *Indalex* shall surely be considered as providing some indices on how the issues raised in the present matter can be resolved, some other decisions issued by the Supreme Court previously shall also be considered. In an article by Sellers et al[27], the authors point to the fact that a certain ambiguity has been created by the Supreme Court's failure to reconcile Indalex with its prior case law:

> Beyond the priority ruling discussed above, the Supreme Court (by a majority of 4-3 in split decisions) affirmed the expansion of the scope of the statutory deemed trust contained in the *OPBA* in respect of a pension plan being wound-up to include the entire wind-up deficiency of the pension plan--not just unpaid amortized special payments due to be paid at the time of winding-up. In Justice Deschamps' reasons, this finding was based upon statutory interpretation, the broadening scope of the deemed trust protection in the legislative history of the *OPBA* and the remedial purpose of the *OPBA* deemed trust provisions--to protect the interests of plan beneficiaries. However, the Supreme Court did not comment on its prior decisions requiring that there be a "trust in fact" to support the enforceability of such provincial statutory deemed trusts (see, for example: *British Columbia v. Henfrey Samson Belair Ltd.*). It therefore remains to be seen how the courts will reconcile such prior decisions with the decision in *Indalex*.
>
> [...]

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[27] "Aftermath-in the Wake of the Indalex Decision", Banking & Finance Law Review, November, 2013 **(Tab 11)**

> While the decision of the Supreme Court in *Indalex* provided important clarification on the priority of DIP loans and the scope and timing of a specific provincial statutory deemed trust, some uncertainty and ambiguity remains in reconciling the Supreme Court's decision in *Indalex* with prior case law, the 2009 Amendments and the dual roles of plan sponsor and plan administrator held by many employers.

60. In the matter of *British Columbia v. Henfrey Samson Belair Ltd.*,[28] the Supreme Court of Canada had to decide if the deemed trust created by Section 18 of *the Social Service Tax Act* applied in a bankruptcy context.

61. The following excerpts of this decision are relevant for our purposes:

> The issue may be characterized as follows. Section 47(a) of the *Bankruptcy Act* exempts trust property in the hands of the bankrupt from distribution to creditors, giving trust claimants absolute priority. Section 107(1) establishes priorities between creditors on distribution; s. 107(1)(j) ranks Crown claims last. Section 18 of the *Social Service Tax Act* creates a statutory trust which lacks the essential characteristics of a trust, namely, that the property impressed with the trust be identifiable or traceable. The question is whether the statutory trust created by the provincial legislation is a trust within s. 47(a) of the *Bankruptcy Act* or a mere Crown claim under s. 107(1)(j).
>
> (...)
>
> With these principles in mind, I turn to the construction of ss. 47(*a*) and 107(1)(*j*) of the *Bankruptcy Act*. The question which arises under s. 47(*a*) of the Act concerns the meaning of the phrase "property held by the bankrupt in trust for any other person". Taking the words in their ordinary sense, they connote a situation where there is property which can be identified as being held in trust. That property is to be removed from other assets in the hands of the bankrupt before distribution under the *Bankruptcy Act* because, in equity, it belongs to another person. The intention of Parliament in enacting s. 47(*a*), then, was to permit removal of property which can be specifically identified as not belonging to the bankrupt under general principles of trust law from the distribution scheme established by the *Bankruptcy Act*.
>
> (...)
>
> This construction of ss. 47(*a*) and 107(1)(*j*) of the *Bankruptcy Act* conforms with the principle that provinces cannot create priorities under the *Bankruptcy Act* by their own legislation, a principle affirmed by this Court in *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, [1985] 1 S.C.R. 785.
>
> To interpret s. 47(*a*) as applying not only to trusts as defined by the general law, but to statutory trusts created by the provinces lacking the common law attributes of trusts, would be to permit the provinces to create their own priorities under the *Bankruptcy Act* and to invite a differential scheme of distribution on bankruptcy from province to province.
>
> Practical policy considerations also recommend this interpretation of the *Bankruptcy Act*. The difficulties of extending s. 47(*a*) to cases where no specific

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[28] *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 **(Tab 12)**

> property impressed with a trust can be identified are formidable and defy fairness and common sense.
>
> (...)
>
> The Province, however, argues that it is open to it to define "trust" however it pleases, property and civil rights being matters within provincial competence. The short answer to this submission is that the definition of "trust" which is operative for purposes of exemption under the *Bankruptcy Act* must be that of the federal Parliament, not the provincial legislatures. The provinces may define "trust" as they choose for matters within their own legislative competence, but they cannot dictate to Parliament how it should be defined for purposes of the *Bankruptcy Act*: *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*.

62. On the basis of the doctrine of federal paramountcy, we respectfully submit that neither the Province of Newfoundland nor the Province of Québec can, by the creation of a deemed trust pursuant to sections 32 NPBA or 49 SPPA, create a right that would allow provincially created trusts to rank above the claims of secured creditors, as they are defined in the federal CCAA.

63. It is to be noted that the findings made by the Supreme Court in *British Columbia v. Henfrey Samson Belair Ltd.* were also followed with approbation by the Supreme Court of Canada in the matter of *Husky Oil Operations Ltd. v. M.R.N.*[29] This decision stands for the principle that a province cannot attempt to "jump the queue" by defining at its will in its laws terms such as "secured creditor" or "trust."

64. More specifically, the Court expressed the following views in *Husky Oil*:

> 10. In recent years, the constitutional relationship between the scheme of distribution under the *Bankruptcy Act* and various branches of provincial law governing property has received heightened scrutiny in the so-called "quartet" of decisions of this Court. Since my interpretation of the quartet differs from Iacobucci J.'s, I hope that I will be forgiven for re-canvassing that familiar terrain in order to explain the basis of my position.
>
> 23. Finally, in *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, at issue was whether the deemed statutory trust created by s. 18 of the British Columbia *Social Service Tax Act*, R.S.B.C. 1979, c. 388, in favour of the province for provincial sales tax collected was a valid trust within the meaning of s. 47(*a*) (now s. 67(*a*)) of the *Bankruptcy Act*. Section 47(*a*) exempted "property held by the bankrupt in trust for any other person" from "[t]he property of a bankrupt divisible among his creditors". A majority of the Court ruled that this deemed statutory trust was not a valid trust. Instead, the province's claim for the monies collected under the purported trust was really a Crown preferred claim under s. 107(1)(*j*) of the *Bankruptcy Act*, which covered "claims of the Crown ... in right of Canada or of any province".
>
> 24. Speaking for the majority, McLachlin J. noted at p. 30 that the impugned deemed statutory trust lacked the essential attributes of a trust under general principles of trust law, namely the possibility of being identified and traced. She stated at p. 33:

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[29] *Husky Oil Operations Ltd. v. M.R.N.*, [1995] 3 R.C.S. 453 **(Tab 13)**.

To interpret s. 47(*a*) as applying not only to trusts as defined by the general law, but to statutory trusts created by the provinces lacking the common law attributes of trusts, would be to permit the provinces to create their own priorities under the *Bankruptcy Act* and to invite a differential scheme of distribution on bankruptcy from province to province.

27. McLachlin J. also addressed the province's contention that it remained sovereign over the definition of what constitutes a trust. She made the following important observations at p. 35:

> The province ... argues that it is open to it to define "trust" however it pleases, property and civil rights being matters within provincial competence. The short answer to this submission is that the definition of "trust" which is operative for purposes of exemption under the Bankruptcy Act must be that of the federal Parliament, not the provincial legislatures. The provinces may define "trust" as they choose for matters within their own legislative competence, but they cannot dictate to Parliament how it should be defined for purposes of the Bankruptcy Act: Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board.

32. The quartet is better stated, in my view, as standing for a number of related propositions which are themselves part of a consistent philosophy. In their lucid and thorough study of the quartet, "The Conflict Between Canadian Provincial Personal Property Security Acts and the Federal Bankruptcy Act: The War is Over" (1992), 71 Can. Bar Rev. 77, at pp. 78-79, Andrew J. Roman and M. Jasmine Sweatman state that the quartet stands for the following four propositions:

> (1) provinces cannot create priorities between creditors or change the scheme of distribution on bankruptcy under s. 136(1) of the Bankruptcy Act;
>
> (2) while provincial legislation may validly affect priorities in a non-bankruptcy situation, once bankruptcy has occurred section 136(1) of the Bankruptcy Act determines the status and priority of the claims specifically dealt with in that section;
>
> (3) if the provinces could create their own priorities or affect priorities under the Bankruptcy Act this would invite a different scheme of distribution on bankruptcy from province to province, an unacceptable situation; and
>
> (4) the definition of terms such as "secured creditor", if defined under the Bankruptcy Act, must be interpreted in bankruptcy cases as defined by the federal Parliament, not the provincial legislatures. Provinces cannot affect how such terms are defined for purposes of the Bankruptcy Act.

35. As a result, the "jump the queue" or "directly improve bankruptcy priorities" approach captures only part of the reasoning of the quartet. As Roman and Sweatman noted, in the *Deloitte Haskins* and *Henfrey Samson* cases, for example, the provinces were not directly or intentionally attempting to influence bankruptcy priorities. Rather, the provinces enacted laws of general application which sought to create a general priority not necessarily targeted to bankruptcy, but which had the effect of altering bankruptcy priorities. This Court nevertheless ruled that such provincial laws were inapplicable in the event of bankruptcy.

38. In this regard, I agree with Iacobucci J., at para. 147, that a bankruptcy priority is a category, and also that provincial law may result in the content of such categories being different from province to province. However, provincial law does not and cannot define the content of bankruptcy priorities or categories without limitation. Indeed, crucial limitation is imposed by the order of priorities in the *Bankruptcy Act* itself. Thus, while individual provinces can define and rank

categories such as "secured creditor" and "trust" as they each have their own purposes, those provincial laws which enter into conflict with the provisions of the *Bankruptcy Act* are simply without application in bankruptcy. Such, indeed, was this Court's unequivocal holding in *Re Bourgault*, *Deloitte Haskins*, and *FBDB* with respect to "secured creditors" and in *Henfrey Samson* with respect to "trusts".

39. Finally, I would observe that while in agreement with the above four propositions as embodying the reasoning of the quartet, in my view the list would be more complete with the addition of a fifth and sixth, as follows:

(5) in determining the relationship between provincial legislation and the Bankruptcy Act, the form of the provincial interest created must not be allowed to triumph over its substance. The provinces are not entitled to do indirectly what they are prohibited from doing directly;

(6)there need not be any provincial intention to intrude into the exclusive federal sphere of bankruptcy and to conflict with the order of priorities of the *Bankruptcy Act* in order to render the provincial law inapplicable. It is sufficient that the effect of provincial legislation is to do so.

44. This last observation is also an important additional reason why I respectfully believe that it is inaccurate to interpret the quartet as only prohibiting legislation which "directly improves the priority of a claim". Such a characterization suggests that the quartet was concerned with the validity of the impugned laws. However, if the provinces had been attempting to improve the priority of their claims in bankruptcy directly, presumably this Court would simply have declared their laws to be ultra vires and invalid for being in relation to an exclusive federal matter, and no question of applicability or operability would ever have arisen.

[Emphasis added]

65. The Court of Appeal of Québec has adopted the same reasoning on numerous occasions. First, in *9083-4185 Québec Inc. (Syndic de)*[30]:

"***2. La fongibilité ou les conditions de revendication d'une somme identifiée.***

"[57] L'argument du sous-ministre selon lequel la Couronne serait en tout temps demeurée propriétaire des taxes à percevoir par le failli n'est pas nouveau lui non plus et a déjà été rejeté par la Cour suprême du Canada.

[58] Dans l'affaire Colombie-Britannique c. Henfrey Samson Belair, en effet, le ministère du Revenu provincial plaidait que le failli détenait en fiducie, pour le compte de la Couronne, la taxe qu'il devait percevoir et donc, que les montants concernés étaient exclus des biens de la faillite. La Cour suprême a rejeté cette prétention en ces termes :

> *Au moment de la perception de la taxe, il y a fiducie légale réputée. À ce moment-là, le bien en fiducie est identifiable et la fiducie répond aux exigences d'une fiducie établie en vertu des principes généraux du droit. La difficulté que présente l'espèce, qui est la même que dans la plupart des autres cas, vient de ce que le bien en fiducie cesse bientôt d'être identifiable. Le*

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30 *9083-4185 Québec Inc. (Syndic de)*, 2007 QCCA 1837 **(Tab 14)**.

> *montant de la taxe est confondu avec d'autres sommes que détient le marchand et immédiatement affecté à l'acquisition d'autres biens de sorte qu'il est impossible de le retracer. Dès lors, il n'existe plus de fiducie de common law. Pour obvier à ce problème, l'al. 18 (1) b) prévoit que la taxe perçue sera réputée être détenue de manière séparée et distincte des deniers, de l'actif ou du patrimoine de celui qui l'a perçue. Mais,…en réalité, après l'affectation de la somme, la fiducie légale ressemble peu à une fiducie véritable. Il n'y a pas de bien qu'on puisse considérer comme sujet à la fiducie.*
>
> *[. . .]*
>
> *L'argument voulant que le montant de taxe perçu demeure la propriété de Sa Majesté en tout temps ne résiste pas non plus à l'analyse…La province a un droit de fiducie et donc de propriété sur les montants de taxe perçus dans la mesure où ils peuvent être identifiés ou retracés. Dès que ces sommes perdent ce caractère, tout droit de propriété découlant de la common law ou de l'equity disparaît.*

Comme le démontre l'extrait suivant, la solution n'est pas différente en droit civil :

> *Comme chacun sait l'argent est un bien fongible. Pour en revendiquer la propriété, il faut qu'il soit clairement identifiable. Il ne suffit pas qu'il soit simplement quantifiable. Notre Cour l'a déjà dit à plus d'une reprise.*

[59] Il faut conclure dès lors qu'« à compter du moment où les fonds sont entremêlés avec tous les autres fonds dans un compte, ils ne sont plus identifiables et le mandant ne peut plus faire valoir son droit de propriété».

[60] L'on sait de plus que la TPS et la TVQ n'ont pas à être indiquées séparément sur les factures du fournisseur. Ce dernier a le droit de vendre un bien à un prix global qui inclut la TPS et la TVQ, ce qui rend difficile la conceptualisation du droit de propriété réel dans une somme d'argent spécifique dont se réclame le ministre du Revenu, la TPS et la TVQ étant au départ confondues dans la créance du détaillant.

[61] Il peut également arriver que les montants de taxe que le détaillant aura déjà remis au ministre comme la loi l'y oblige ne soient jamais perçus par lui. Il devient impossible de concevoir un droit de propriété du ministre dans une somme d'argent qui, non seulement lui a déjà été remise par le détaillant percepteur, mais ne se matérialisera jamais dans les mains de ce dernier.

[62] Les présents dossiers présentent plusieurs similitudes avec l'affaire British Columbia c. National Bank, communément appelée Red Carpet.

[63] La loi provinciale concernée, intitulée le Tobacco Tax Act, faisait de chaque détaillant un agent percepteur du ministre. En première instance, le juge, citant lui-même le juge Barr dans 423092 Ontario Ltd. v. Minister of National Revenue, avait qualifié la taxe en question de «direct tax…collected indirectly».

[64] Le juge Hollinrake, écrivant pour la Cour d'appel de Colombie-Britannique, s'exprime ainsi sur l'aspect de la fongibilité :

> *I think the trial judge was right in saying the sum of $31,017.57 the Crown seeks to recover is not the tax paid and collected from the consumer upon the tobacco products included in the four*

> *invoices, but funds which are a substitute for that tax. (soulignements ajoutés)*

[65] Plus loin, il ajoute :

> *In the case before us, in my opinion, the tracing exercise must logically commence from the time the moneys could arguably be said to be the Crown's moneys. This must be at the time the tobacco tax is collected […]. The Crown argues that when Red Carpet is paid for its invoices by SDM the amount of those invoices which can be calculated to be attributable to tobacco tax is the starting point for the tracing exercise. This calculated amount is still "tax" as defined by the Act but can it be said to be identifiable as the actual tax paid over by the consumer at the time of purchase of the tobacco product from SDM? There is a difference between calculating what one is owed over a set period of time as opposed to tracing the funds that initially represented that debt in the form of money in the hands of the debtor. (Soulignements ajoutés)*

[66] Le juge Hollingrake ajoute encore :

> *With SDM and Red Carpet having intermingled the "tax money" with all their other funds, and the time frame being as it is, I cannot see how this "tax money" could possibly be identified to permit successful tracing.*

[67] Le même raisonnement s'applique en l'instance.

[68] Le schème législatif de perception de la TPS et de la TVQ ne permet donc pas d'envisager la Couronne comme la propriétaire d'un droit réel dans les montants d'argent perçus ou percevables à ce titre.

3. L'effet de la compétence fédérale exclusive en matière de faillite.

[69] La troisième et dernière sous-question à trancher est celle du droit de la province de se conférer, en cas de faillite, une priorité qui soit différente de l'ordre de collocation prévu par la LFI.

[70] Tel que vu précédemment au cours de l'analyse de la première sous-question, l'intention claire et nette du législateur fédéral était de faire de la TPS et de la TVQ, en cas de faillite, des créances ordinaires.

[71] Lors de la faillite, la LFI a priorité sur toute autre loi incompatible. Ce sont les règles de distribution de son article 136 qui prévalent. Il est bien établi que les provinces ne peuvent «établir leur propre ordre de priorité applicable à la Loi sur la faillite», ce qui ouvrirait «la porte à l'établissement de régimes de répartition en cas de faillite différents d'une province à l'autre».

[72] Dans l'affaire Deloitte Haskins & Sells c. Workers' Compensation Board, la Cour suprême confirme qu'une loi provinciale ne peut écarter le plan de répartition prévu à la loi fédérale :

> *Avec égards, dans les arrêts Re Bourgault et Re Black Forest Restaurant Ltd., le litige n'était pas de savoir s'il y avait eu création d'un droit de propriété en vertu des lois provinciales applicables. Il s'agissait de savoir si, même si elle créait un droit de propriété, la loi provinciale pouvait aller à l'encontre du plan de distribution prévu [dans] la Loi sur la faillite. Ces arrêts ont décidé qu'elle ne le pouvait pas et que, même si la loi provinciale*

> *pouvait validement créer une sûreté pour des dettes sur les biens du débiteur en dehors de la faillite, dès qu'il y avait faillite, [la Loi sur la faillite] déterminait le statut et la priorité des réclamations…*
>
> *[73] Le principe a été réaffirmé dans Banque fédérale de développement c. Québec (CSST) et dans l'affaire Colombie-Britannique c. Henfrey Samson Belair Ltd., précitée, où la Cour suprême ajoutait ceci:*
>
> > *La province soutient cependant qu'il lui est loisible de définir le mot «fiducie» comme elle l'entend puisque la propriété et les droits civils relèvent de sa compétence. À cette affirmation, il suffit de répondre que la définition applicable du mot «fiducie» pour les fins des exceptions prévues à la Loi sur la faillite est celle du législateur fédéral et non celle des législateurs provinciaux. Les provinces peuvent définir à leur gré le mot «fiducie» pour les matières relevant de leur compétence, mais elles ne peuvent imposer au Parlement la définition que la fiducie doit recevoir pour les fins de la Loi sur la faillite…(soulignements ajoutés)*
>
> *[74] La préoccupation de la Cour suprême, maintes fois réitérée, est d'éviter la balkanisation du régime de la faillite et de l'insolvabilité à travers les provinces et territoires du Canada :*
>
> > *…notre Cour s'est, avec raison, constamment intéressée à l'objectif du maintien d'un ordre de priorité homogène à l'échelle nationale en matière de faillite. Si ce n'était pas le cas, «le Canada [aurait] un régime de faillite balkanisé qui diminue[rait] l'importance de la compétence fédérale exclusive en matière de faillite et d'insolvabilité [. . .] Il pourrait exister un régime différent dans chaque province; l'existence de dix régimes différents en matière de faillite rendrait les activités commerciales courantes extrêmement complexes, lourdes et coûteuses, non seulement pour les Canadiens mais aussi pour nos partenaires commerciaux internationaux». (Soulignements ajoutés)*
>
> *[75] Il en résulte que les législatures provinciales peuvent conférer une priorité à leurs taxes dans un contexte **hors faillite**, mais qu'en cas de faillite, il leur est constitutionnellement interdit de contrecarrer les dispositions de la LFI.*
>
> > *Les lois provinciales qui entrent en conflit avec les dispositions de la Loi sur la faillite sont tout simplement inapplicables en matière de faillite."*

66. The Court of Appeal, made comments to a similar effect in *Québec (Sous-ministre du Revenu c. De Courval*[31]:

> *[30] Dans l'arrêt Colombie-Britannique c. Henfrey, Samson, Belair Ltd. [Colombie-Britannique], la Cour suprême explique que dès que le montant de la taxe est confondu avec d'autres sommes, il n'existe plus de fiducie de common law :*

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[31] *Québec (Sous-ministre du Revenu c. De Courval*, 2009 QCCA 409 **(Tab 15)**.

> *[…] Au moment de la perception de la taxe, il y a fiducie légale réputée. À ce moment-là, le bien en fiducie est identifiable et la fiducie répond aux exigences d'une fiducie établie en vertu des principes généraux du droit. La difficulté que présente l'espèce, qui est la même que dans la plupart des cas, vient de ce que le bien en fiducie cesse bientôt d'être identifiable. Le montant de la taxe est confondu avec d'autres sommes que détient le marchand et immédiatement affecté à l'acquisition d'autres biens de sorte qu'il est impossible de le retracer. Dès lors, il n'existe plus de fiducie de common law. Pour obvier à ce problème, l'al. 18(1)b) prévoit que la taxe perçue sera réputée être détenue de manière séparée et distincte des deniers, de l'actif ou du patrimoine de celui qui l'a perçue. Mais, comme l'existence de la disposition déterminative le reconnaît tacitement, en réalité, après l'affectation de la somme, la fiducie légale ressemble peu à une fiducie véritable. […]*
>
> *[31] Je conclus donc que l'avis expédié en vertu de l'article 15 LMR n'a pas transformé cette fiducie présumée en fiducie réelle, ce qui aurait pu, effectivement, faire en sorte que ces biens ne soient pas compris dans le patrimoine de la débitrice faillie en vertu de l'alinéa 67(1)a) LFI.*
>
> *[32] En effet, le paragraphe 67(2) LFI édicte que, sous réserve de certaines exceptions (dont entre autres les retenues à la source), un bien n'est pas considéré être détenu en fiducie aux fins de la LFI si, en l'absence d'une disposition législative, il ne le serait pas. Or, c'est exactement le cas dans la présente affaire : les montants étaient réputés être détenus en fiducie en vertu de l'article 20 LMR, mais il n'existait aucune fiducie réelle.*

67. Finally, in 2010, the Court of Appeal of Québec made the following comments in *Corporation Jetsgo (Syndic de)*[32]:

> *[54] La juge de première instance cite avec approbation la décision du juge Clément Gascon dans l'affaire Les Boutiques San Francisco Inc. c. Claudel Lingerie Inc. :*
>
> > *[…] Comme chacun sait, l'argent est un bien fongible. Pour en revendiquer la propriété, il faut qu'il soit clairement identifiable. Il ne suffit pas qu'il soit simplement quantifiable. Notre Cour l'a déjà dit à plus d'une reprise.*
>
> *[55] La Cour suprême a énoncé ce principe dès 1989 dans l'arrêt British Columbia c. Henfrey Samson Bélair Ltd. Dans cette affaire, le vendeur avait perçu la taxe provinciale de vente et avait confondu ces sommes avec ses autres revenus. Bien qu'il paraisse incontestable que ces sommes n'appartenaient pas à la faillie, la Cour suprême conclut que, les sommes ayant été confondues avec les autres avoirs de la faillie, le fisc ne pouvait en réclamer la propriété en vertu d'une fiducie de common law. La juge McLachlin, alors juge puînée, écrit :*
>
> > *[…] Par contre, si la somme a servi à acquérir d'autres biens et ne peut être retracée, il n'y a pas de «biens détenus […] en fiducie» au sens de l'al. 47a). La province a une créance garantie seulement par un privilège et l'al. 107(1)j) s'applique.*

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32 *Corporation Jetsgo (Syndic de)*, 2010 QCCA 1286. **(Tab 16)**.

> *[…]*
>
> *[…] La province a un droit de fiducie et donc de propriété sur les montants de taxe perçus dans la mesure où ils peuvent être identifiés ou retracés. Dès que ces sommes perdent ce caractère, tout droit de propriété découlant de la common law ou de l'equity disparaît. […]*

[56] Récemment, cette Cour, dans l'affaire 9083-4185 Québec inc. (Syndic de), a réitéré ce principe. La juge Duval Hesler, reprenant les propos de la professeure Louise Lalonde, écrit :

> *[59] Il faut conclure dès lors qu'«à compter du moment où les fonds sont entremêlés avec tous les autres fonds dans un compte, ils ne sont plus identifiables et le mandant ne peut plus faire valoir son droit de propriété».*

[57] Toujours dans cet arrêt, la juge Duval Hesler cite l'affaire British Columbia c. National Bank, communément appelée Red Carpet. Dans cet arrêt, le juge Hollingrake de la Cour d'appel de Colombie-Britannique écrit :

> *[52] […] There is a difference between calculating what one is owed over a set period of time as opposed to tracing the funds that initially represented that debt in the form of money in the hands of the debtor.*
>
> *[…]*
>
> *[56] With SDM and Red Carpet having intermingled the "tax money" with all their other funds, and the time frame being as it is, I cannot see how this "tax money" could possibly be identified to permit successful tracing.*

[58] De nouveau, il s'agissait de la perception de taxes et on ne pouvait prétendre que la faillie était propriétaire des sommes ainsi perçues au nom du gouvernement.

[59] Dans le même sens, on peut citer la décision de la Cour d'appel d'Ontario dans l'affaire Graphicshoppe Ltd. dans laquelle les employés tentaient de recouvrer leurs contributions à leur pension que Graphicshoppe avait confondue avec ses fonds dans un seul compte de banque avant sa faillite. Comme en l'espèce, ces contributions au régime de pension étaient déduites du salaire des employés. Pour la majorité, le juge Moldaver écrit :

> *[120] Shortly thereafter however, the trust ceased to be identifiable. The employee contributions were co-mingled with Graphicshoppe's funds and prior to the date of bankruptcy, they were converted into other property and were no longer traceable. On this point, it is clear from the record that as of the date of bankruptcy, none of the employee contributions that had been deposited into Graphicshoppe's bank account remained intact. We know that with certainty because prior to the date of bankruptcy, the account went into a negative balance. We likewise know that the funds in the account on the date of bankruptcy came from Textron, the company that was factoring Graphicshoppe's receivables. Replenishment is a non-issue on the facts before us.*
>
> *[121] Against that backdrop, the central issue on appeal is whether the trustee in bankruptcy was correct in concluding that*

> *the employee contributions, did not constitute trust funds at the date of bankruptcy within the meaning of s. 67(1)(a) of the BIA. With respect, I believe that he has.*
>
> *[122] On the facts of this case, I am of the view that McLachlin J.'s majority decision in British Colombia v. Henfrey Samson Belair Ltd., 1989 CanLII 43 (CSC), [1989] 2 S.C.R. 24 (S.C.C.) ("Henfrey Samson"), vindicates the position taken by the trustee in bankruptcy. My colleague has reviewed the salient facts of the case and they need not be repeated. The passages that I consider to be apposite are found at pp. 741 and 742. They are reproduced below:*
>
> *[...]*
>
> *[123] For present purposes, I am prepared to accept that Henfrey Samson falls short of holding that co-mingling of trust and other funds is, by itself, fatal to the application of s. 67(1)(a) of the BIA. Once however, the trust funds have been converted into property that cannot be traced, that is fatal. And that is what occurred here.*
>
> *[60] L'avocat de SSQ plaide que contrairement à l'affaire Graphicshoppe Ltd, le compte de banque n'a jamais affiché un solde négatif durant la période pertinente. Cela est exact, mais ne règle pas la question de confusion des sommes déposées dans le compte de revenus."*

68. The following findings of the British Columbia Court of Appeal,[33] in what is often referred as the "Red Carpet" decision, are also relevant:

> 29 The position of the Crown generally is that its right to what it asserts are tobacco tax moneys arises from:
>
> > 1. Trust. The Crown says the three requirements of certainty of intention, subject matter and object are met. As to intention, the Crown says this comes expressly from s. 15 of the Act or alternatively it can be implied. As to subject matter the Crown says this has been established in the calculation of the figure of $31,017.57. The object of the trust is clear on its face.
> >
> > 2. The relationship between the Crown and Red Carpet under the *Tobacco Tax Act* was one of principal and agent. An agent owes fiduciary duties in equity to his principal. Equity thus being invoked, it is open to the Crown to trace the sum of $31,017.57 into the hands of the Bay and thus assert a constructive trust or equitable lien over these funds. See: P.D. Maddaugh and J.D. McCamus, *The Law of Restitution*, Canada Law Book Inc., 1990, p. 127.
> >
> > 3. The Bay has been unjustly enriched in the sum of $31,017.57 and that being so the Court should impose a constructive trust over that fund now being held in trust.

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[33] *British Columbia v. National Bank of Canada*, 1994 CarswellBC 639 **(Tab 17)**.

> 31 The starting point here is *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24. The chambers judge referred to this case at the outset of her reasons and went on to say at p. 38 (B.C.L.R.):
>
> > There, the Supreme Court of Canada held that a "deemed" trust created by statute in favour of the provincial Crown was not a "trust" for purposes of s. 67 of the *Bankruptcy Act*, R.S.C. 1985, c. B-3, and therefore did not exempt the subject-matter of the trust from the normal scheme of distribution established under the Act. Here, the question is whether, under the "administrative scheme" established by the Province of British Columbia for the collection of tax under the *Tobacco Tax Act*, a non-statutory or "ordinary" trust existed for the benefit of the Provincial Crown in respect of funds paid by tobacco retailers to the receiver of accounts of a wholesaler of tobacco products. The wholesaler is now bankrupt. If such a trust existed, or if a constructive trust is created, the funds so paid will fall outside the estate of the bankrupt in accordance with s. 67 of the *Bankruptcy Act* and may be traced or followed into the defendants' hands. If no such trust existed, and if none is constructed as a remedy for unjust enrichment, the Crown's claim against the defendants must fail and the Crown may be limited to its recourse against the bankrupt estate. I suspect that this recourse is likely to be fruitless.
>
> 33 As I read the judgment of McLachlin J. the underlying principle leading to her conclusions is that the provinces cannot legislate within their own spheres of activity such as "to create their own priorities under the *Bankruptcy Act* and to write a differential scheme of distribution on bankruptcy from province to province."
>
> 36 With respect, I do not think the Crown can rely on the statute to create the facts necessary to establish a trust under general principles of trust law. I think this would be contrary to the underlying principle in *Henfrey Samson*. That principle being that the province cannot legislate to, in effect, create its own priorities contrary to those in the *Bankruptcy Act*. If the province cannot deem a trust in order to accomplish this I cannot see how it can by legislation create facts through that legislation to accomplish the same end.

69. The qualification of the beneficiary of a trust as a secured creditor would entail a more favorable treatment in a CCAA context and bring with it several favorable consequences. Thus, it is obvious that allowing each of the provinces or territories to create its own definition of a secured creditor could only create chaos. The following provisions of the CCAA are indicative of the distinct and more favorable treatment granted to secured creditors in a CCAA context:

> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> 5. Where a compromise or an arrangement is <u>proposed between a debtor company and its secured creditors</u> or any class of them, the court may, on the

> application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> 22(1) A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.
>
> (2) For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account
>
> (a) the nature of the debts, liabilities or obligations giving rise to their claims;
>
> (b) the nature and rank of any security in respect of their claims;
>
> (c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and
>
> (d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.[34]
>
> [Emphasis added]

70. The significance of the qualification of the pension claims as secured or unsecured in the present matter is obvious. Either the pension claims shall be treated as unsecured creditors and they will then have to vote on a future plan with all other unsecured creditors or they shall be treated as secured creditors and they shall then, pursuant to section 5 and 22(2)b, vote in a distinct class. If the latter option was to prevail, the pension claimants would then benefit from a form of veto right on any plan. The same reasoning would apply if one was to argue that, as beneficiary of a deemed trust, an amount equal to the amount of its claim should be carved out from the monies otherwise available to fund a plan for all the other creditors.

71. In light of the above, it is clear that giving effect to section 32 NPBA and 49 SPPA would create a direct conflict with the CCAA.

72. On that point, the CCAA Parties respectfully submit that the statement made in *Timminco*[35] to the effect that the issue of federal paramountcy is not triggered by the application of the deemed trust created by section 49 SPPA does not take into account the principles set out by the Supreme Court in *Husky Oil*.

73. The sole exceptions to the non-applicability of deemed trusts in an insolvency context are the exceptions set out in sections 67(3) BIA and 37 CCAA. Section 32 NPBA and section 49 SPPA do not fall within these exceptions.

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[34] *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36.

[35] *Timminco (In the matter of the Plan of Arrangement)*, 2014 QCCS 174, at paras. 163 and 171 **(Tab 18)**.

74. Although the CCAA does not include a scheme of distribution that is as elaborated as the one that can be found in the BIA, the CCAA nevertheless distinguishes between unsecured creditors, secured creditors and the beneficiaries of a trust.

75. Even if no conflict existed, and it were possible to comply with both laws at the same time, the provincial laws nevertheless frustrate the federal purpose. To allow such pension claims to outrank secured creditors would frustrate the purpose of the CCAA. As appears from the reasons of Justice Deschamps in *Sun Indalex Finance*, Parliament explicitly chose not extend greater protections to pension claims, as such protections would necessarily reduce the moneys available for distribution to creditors, which would frustrate credit availability and the cost of credit.[36] Parliament, in exercising its jurisdiction in matters of bankruptcy and insolvency, deliberately chose to favour the availability of credit. Such a decision is consistent with one of the fundamental purposes of the CCAA, that is, to allow distressed companies the opportunity to refinance and restructure. To allow provincial legislation to expand the definition of secured creditor, in a sense that Parliament explicitly chose not to, would frustrate Parliament's purpose of ensuring that there is credit available to allow for effective restructuring.

7. FOR A DEEMED TRUST TO APPLY IN A CCAA CONTEXT, MUST A LIQUIDATION HAVE OCCURRED?

76. Both sections 32(2) NPBA and 8(2) PBSA begin by the same words: "In the event of any liquidation, assignment or bankruptcy of an insolvent corporation…"

77. In its judgment of June 26, 2015, this Court issued the following statements with respect to the interpretation of the term "liquidation" as it is used in these two provisions.

> [68] The issue of the triggering event could be determinative in the present case. If the triggering event has not occurred, then there is no deemed trust and no obstacle to the Court granting the priority required by the Interim Lender.
>
> [69] It is clear that there has been no assignment or bankruptcy in the present matter. Further, there is no liquidation under Part XVIII of the Canada Business Corporations Act or equivalent provincial legislation. A CCAA proceeding does not appear to trigger the application of Section 8(2) PBSA. However, OSFI argues that these CCAA proceedings are really a liquidation, because it is very likely that the ongoing sale process will result in the sale of all of the assets of the Wabush CCAA Parties.
>
> [70] In interpreting the word "liquidation" in Section 8(2) PBSA, and in particular whether it includes a liquidation under the CCAA, the Court will consider more generally how the deemed trust under Section 8(2) PBSA is dealt with under the CCAA.
>
> [79] In the alternative, the Court could conclude that a liquidation under the CCAA does not fall within the term "liquidation" in Section 8(2) PBSA such that there has been no triggering event.

78. Two approaches can be taken to interpreting the term "liquidation." On one side, it can be interpreted by referring to its plain meaning. On the other, it could be interpreted as

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[36] *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R, para. 81 **(Tab 2)**.

having the same meaning as in other acts enacted by the same legislator. The CCAA Parties suggest that it is the second option that should prevail.

79. Laws enacted by the same legislator shall be interpreted coherently, as a whole:

> *1269. On suppose qu'il règne, entre les divers textes législatifs adoptés par une même harmonie, la même harmonie que celle que l'on trouve entre les divers éléments d'une loi : l'ensemble des lois est censé former un tout cohérent.*[37] *L'interprète doit donc favoriser l'harmonisation des lois entre elles plutôt que leur contradiction, car le sens de la loi qui produit l'harmonie avec les autres lois est réputé représenter plus fidèlement la pensée de son auteur que celui qui produit des antinomies.*
>
> *1276. En résumé donc, la présomption de cohérence entre lois connexes vaut surtout pour les lois émanant d'un même législateur. Elle s'appliquerait néanmoins entre lois issues de deux législateurs différents dans la mesure où il serait possible d'inférer des circonstances une volonté d'un des auteurs d'imiter la forme ou de tenir compte de la substance de l'autre législation.*[38]
>
> ---
>
> 8.32 It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings. Another way of understanding this presumption is to say that the legislature is presumed to avoid stylistic variation. Once a particular way of expressing a meaning has been adopted, it is used each time that meaning is intended. Given this practice, it follows that where a different form of expression is used, a different meaning is intended.
>
> 8.33 The presumption of consistent expression applies not only within statutes but across statutes as well, especially statutes or provisions dealing with the same subject matter.[39]

80. With respect to the meaning of the word "liquidation" in section 8(2) PBSA, we submit that it refers to the meaning of this term given in section XVIII of the *Canada Business Corporation Act* ("**CBCA**") while the same term used in Section 32(2) NPBA, refers to a liquidation conducted pursuant to Part XVI of the *Newfoundland Corporation Act*.[40]

81. It is to be noted that, pursuant to Section 208 CBCA, a liquidation cannot be conducted for a corporation that is insolvent or bankrupt. The same exclusion applies in Newfoundland for liquidation to be conducted pursuant to the *Newfoundland Corporation Act*.[41]

82. The existence of Section 208 CBCA and 330 *Newfoundland Corporation Act* has, in our view, inspired the drafting of sections 8(2) PBSA and 32(2) NPBA in order to cover two

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37 See Mr. Justice Bastarache's statement in *65302 British Columbia Ltd. c. Canada* [1999] 3 S.R.C. 804, para. 7 **(Tab 19)**.

38 Pierre-André Côté, *Interprétation des lois*, 4e édition, Les Éditions Thémis, 2009 **(Tab 20)**.

39 Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th edition, LexisNexis, 2014 **(Tab 21)**.

40 *Newfoundland Corporation Act*, RSNL 1990, chap. C-36.

41 Section 330, *Newfoundland Corporation Act*, RSNL 1990, chap. C-36.

mutually exclusive situations, i.e. on one side, a situation where a company would be liquidated pursuant to either the federal or the provincial Corporation Act and, on the other, a situation where a company has become the object of bankruptcy proceedings, either voluntarily or at its creditors' initiative.

8. IF A DEEMED TRUST HAS BEEN VALIDLY CREATED PURSUANT TO THE NPBA AND APPLIES IN A CCAA CONTEXT, CAN IT EXTEND TO ASSETS LOCATED IN QUEBEC?

83. The funds that are currently being held in trust by the Monitor in this matter have been generated by the sale of two main types of assets, movable and immovable.

84. The immovable property included the Bloom Lake Iron Ore Mine, the Arnaud Railway Company and the Pointe-Noire facilities.

85. With respect to movable assets, numerous pieces of equipment have been sold to third parties.

86. Both the movable equipment and immovable property were located in the province of Québec.

87. Article 3097 of the *Civil Code of Québec* sets out the conflict of law rules applicable to real rights. It reads as follows:

> 3097. Real rights and their publication are governed by the law of the place where the property concerned is situated.
>
> However, real rights on property in transit are governed by the law of the State of their place of destination.

88. Article 3102 provides the conflict of law rule with respect to movable securities:

> 3102. The validity of a movable security is governed by the law of the State in which the property charged with it is situated at the time of creation of the security.
>
> Publication and its effects are governed by the law of the State in which the property charged with the security is currently situated.

89. In the present case, both the validity and applicability of movable and immovable securities shall be governed by the law of the province of Québec, in light of the location of the assets at the moment where the security of the DB Plan's beneficiaries would have been created.

90. Article 2970 of the *Civil Code of Québec* creates the obligation to proceed to the publication of securities with respect to both movable and immovable property:

> 2970. Publication of rights concerning an immovable is made in the land register, in the land book for the registration division in which the immovable is situated.
>
> Rights concerning a movable and any other rights are published by registration in the register of personal and movable real rights; if the movable real right also pertains to an immovable, registration shall also be made in the land register in

> accordance with the standards applicable to that register and determined by this Book or by the regulations under this Book.

91. Thus, in the absence of another Québec law provision that would contradict article 2970, we believe that the deemed trusts created by Section 32(2) NPBA, which were never published, shall be considered to have no effect in Québec.

9. SPECIFIC REPLIES TO THE ARGUMENTS RAISED IN THE OUTLINE OF ARGUMENTS OF THE OTHER PARTIES

9.1 Superintendent of Financial Institution

92. At paragraph 17 of its Outline of Arguments, OSFI has summarized the amount that would be payable in respect of the Plans.

93. In its conclusion, OSFI seeks a declaration to the effect that an amount of $8,857,576 shall be subject to a deemed trust created by section 8 of the PBSA. This argument is manifestly ill-founded in fact.

94. As stated above, only 80 of the 2,388 Plan members would be subject to federal jurisdiction (i.e. 3.33% of the Plans' members).

95. This being the case, and inasmuch as the deemed trust created by section 8(2) PBSA could apply in the present circumstances, that could be secured by the federal deemed trust can only be calculated on a *pro rata* basis. We estimated the amount of the federal deemed trust to be of $294,957 which would represent 3.33% of $8,857,576.[42]

96. At paragraph 25 of its Outline of Arguments, OSFI states that since the CCAA does not contain a scheme of distribution, unlike the BIA, the CCAA does not contain a priority plan.

97. On this basis, OSFI affirms that there could not be conflict between the application of a deemed trust created pursuant to the PBSA and the CCAA.

98. We believe that this argument is manifestly ill-founded in law. Although the CCAA does not include a scheme of distribution that is as elaborated as the one that can be found in the BIA, the CCAA nevertheless distinguishes between unsecured creditors, secured creditors and the beneficiaries of a trust.

99. This being the case, it is not possible for a province to circumvent the order of collocation elaborated in the CCAA through the creation of a trust.

100. Indeed, the federal government could not do so either with respect to its own claim, in light of the wording of section 37 CCAA, which states the following:

> 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

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[42] Please note that a precise calculation to be performed by an actuary would be required to confirm the amount that could potentially be secured by a deemed trust.

> 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.
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the Income Tax Act, subsection 23(3) or (4) of the Canada Pension Plan or subsection 86(2) or (2.1) of the Employment Insurance Act (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if
>
> > (a) that law of the province imposes a tax similar in nature to the tax imposed under the Income Tax Act and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the Income Tax Act, or
> >
> > b) the province is a province providing a comprehensive pension plan as defined in subsection 3(1) of the Canada Pension Plan, that law of the province establishes a provincial pension plan as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the Canada Pension Plan,
>
> and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

101. Even if one was to argue that, in this case, the deemed trust created by 8(2) PBSA is not in favour of the Crown, the statement made by Justice Fish in *Century Services*[43] is nevertheless instructive and applicable in this respect:

> [95] Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.
>
> [96] In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision creating the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* — or explicitly preserving — its effective operation.

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[43] *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379, 2010 SCC 60 (**Tab 4**).

9.2 Representatives of the Salaried/Non-Union Employees and Retirees

102. In paragraphs 64 to 79 of their Outline, the Representatives attempt to extend the application of the NPBA to all the members of the Salaried DB Plan by stating that, despite the fact that the Newfoundland government has not become a party to the 2011 Agreement Respecting Multi-Jurisdictional Pension Plans or to the 2016 Agreement Respecting Multi-Jurisdictional Pension Plans, these two agreements would be an indication of the Province of Québec's intent to accept that the jurisdiction of a Majority Authority shall extend to all the rules applicable to the funding of a terminated pension plan, including in respect of the personal rights of members located in Québec.

103. It is to be noted that this argument is contradicted by the position adopted by Retraite Québec. Moreover, it is also ill-founded in fact.

104. First, according to the affidavit filed by Mr. Terence Watt,[44] one of the Salaried Representatives, there are 329 employees who worked in Québec in the Salaried DB Plan, while 313 employees worked in Newfoundland. Thus, given that the majority of employees were located in Québec, the Majority Authority for this pension plan is Québec.

105. Also, it must be noted that deemed trusts provisions arguably confer a personal right to plan members, in that such trusts allow for an additional part of a member's benefits to be paid further to a plan wind-up.

106. On that issue, it is also relevant to refer to *Régie des Rentes du Québec v. Commission des régimes de retraite de l'Ontario*.[45] In this matter, the Régie des rentes du Québec sought judicial review of a decision by the Pension Commission of Ontario with respect to the procedure to follow in respect of the allocation of surplus amounts in a multijurisdictional pension plan. The Régie argued that, while Québec was only a "minor authority" because the majority of members were in Ontario, the termination process to be followed and allocation of surplus assets nevertheless had to be performed in accordance with the provisions of the SPPA (Québec), at least with respect to Québec members and beneficiaries. The Divisional Court granted judicial review on the grounds that the decision not to apply the SPPA to the Québec members was neither correct, nor reasonable.

107. In paragraph 80 of their Outline, the Salaried Representatives argue that the NPBA should also apply to the members that were employed at Arnaud Railway.

108. In support of their argument, the Salaried Representatives refer to the so-called theory of "reverse paramountcy." This argument is manifestly ill-founded in law as it is specifically contradicted by section 5 of the NPBA:

> 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.

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[44] Affidavit of Terence Watt, sworn on December 14, 2016, at para 16 **(Tab 1)**.

[45] *Régie des Rentes du Québec v. Commission des régimes de retraite de l'Ontario*, 2000 CanLII 30139, para. 61 **(Tab 22)**.

[Emphasis added]

109. In paragraphs 87 to 95 of their Outline, the Salaried Representatives argue that the word "liquidation" used in 32(2) NPBA and 8(2) PBSA should be interpreted by reference to its "plain meaning." As stated above, we do not believe that this is the proper way to interpret this word. On the contrary, we believe that the interpretation of this term shall be made by referring to similar provisions in other acts enacted by legislature of the same jurisdiction.

110. In paragraphs 151 to 159 of their Outline, the Salaried Representatives argue that the deemed trust created by section 32(2) NPBA should be applicable in Québec in light of the wording of article 1262 of the *Civil Code of Québec*.

111. While article 1262 CCQ states that it is possible to create a trust by law, it does not automatically mean that any trust created by law anywhere in the world can automatically be declared effective in the province of Québec. Section 61 of the *Interpretation Act* makes it clear that any reference to the term "law", in the *Civil Code of Québec*, refers solely to the laws in force in Québec:

> 61. In any statute, unless otherwise specially provided,
>
> [...]
>
> (8) the words "Federal Parliament" mean the Parliament of Canada; the word "Legislature" or "Parliament" means the Parliament of Québec;
>
> [...]
>
> (10) the words "Federal Acts" or "Federal statutes" mean the laws passed by the Parliament of Canada; the words "Act" , "statute" and "law", whenever used without qualification, mean the Acts, statutes or laws of Parliament.[46]

112. On this point, the effectiveness of a deemed trust created in another jurisdiction should then be assessed by referring to the provisions governing private international law that can be found in the *Civil Code of Québec*.

113. With respect to the application of section 3079 CCQ, a review of the case law does not permit to conclude to the applicability of this provision in the present matter.

114. Our research has not uncovered a single positive application of article 3079 CCQ. In fact, among the few reported cases on article 3079 CCQ, the Court of Appeal has refused to apply it twice.

115. In *Globe-X Management Limited (Re)*[47], Justice Clément Gascon, then of the Superior Court, applied Bahaman law to a matter of evidence. Under Bahaman law, evidence obtained by a liquidator must remain confidential. Justice Gascon applied article 3079 in finding that the examinations carried out by a liquidator could not be entered into evidence. Justice Gascon's decision was overturned by the Court of Appeal,[48] on the

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[46] *Interpretation Act*, CQLR c I-16.

[47] *Globe-X Management Limited (Re)*, 2005 CanLII 56268 (QC CS), para. 120 and *ff.* **(Tab 23)**.

[48] *Globe-X Management Ltd. (Proposition de)*, 2006 QCCA 290 **(Tab 23)**.

grounds that the publicity of the court system is a matter of public concern that cannot be supplanted by Bahaman evidence law. The Court also held that:

> [44] Respondent has failed to show that there is any legitimate and manifestly preponderant interest in giving preference to the law of the Bahamas. In fact it is difficult to identify any interest based on principle. With respect, a reference to the rule of international comity, in and of itself, does not satisfy the required criteria in this case.

116. In *Banque Paribas (suisse) S.A. c. Wightman,*[49] the Court of Appeal upheld a lower court decision not to apply article 3079 CCQ in order to allow evidentiary objections based on "banking privilege" that are otherwise available under German and Swiss law.

117. In *Jovalco Group Corporation c. International Association of Bridge Structural,*[50] the question at issue was whether the Superior Court of Quebec or the Ontario Labour Relations Board had jurisdiction with respect to a grievance involving certain employees in Ontario. Again, the Court refused to apply article 3079 CCQ:

> *[67] Quant à l'article 3079 C.c.Q., il ne permet qu'exceptionnellement de donner effet à une disposition impérative de la loi d'un autre État. […]*
>
> *[68] Le Tribunal est d'avis que cette disposition ne peut trouver application en l'espèce. Selon les auteurs, il s'agit d'une disposition reconnaissant, par mesure de réciprocité en lien avec l'article 3076 C.c.Q., les dispositions des lois étrangères d'application immédiate ou nécessaire. L'article 3076 C.c.Q. prévoit en effet que les règles relatives au droit international privé s'appliquent sous réserve des règles de droit en vigueur au Québec dont l'application s'impose en raison de leur but particulier.*
>
> *[69] La notion de lois d'application nécessaire est de portée très restreinte, tel que la Cour d'appel en a fait état dans G.B. c. C.C., en la limitant aux règles qui mettent en cause l'intérêt vital de l'État ou mettent en péril l'existence même de la société et en refusant de considérer les dispositions du Code civil du Québec relatives au patrimoine familial comme étant des règles d'application nécessaire malgré qu'elles soient d'ordre public.*
>
> *[70] Les dispositions législatives ontariennes conférant une juridiction exclusive à la CRTO ne peuvent se qualifier comme dispositions d'application nécessaire compte tenu de l'interprétation donnée à cette notion et, en conséquence, l'article 3079 C.c.Q. ne permet pas de leur donner effet au Québec. Celles-ci ne peuvent donc être considérées comme excluant la compétence internationale de la Cour supérieure du Québec en l'instance.*
>
> *[71] Vu ce qui précède, si le Tribunal avait bien compétence, il lui faudrait s'en remettre aux mécanismes prévus aux articles 3135 et 3137 C.c.Q. plutôt que de retenir le moyen relatif à la juridiction exclusive de la CRTO soumis par le Syndicat.*

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[49] *Banque Paribas (suisse) S.A. c. Wightman*, 1997 CanLII 10291 (QC CA) **(Tab 24)**.

[50] *Jovalco Group Corporation c. International Association of Bridge Structural*, 2014 QCCS 3647 **(Tab 25)**.

118. Finally, it should be noted that Gerald Goldstein and Éthel Groffier, in *Traité de droit civil: droit international privé*,[51] expressed concern with respect to article 3079's addition to the *Civil Code*:

> *Cette innovation assez révolutionnaire est loin de faire l'unanimité. En effet, comme le souligne un auteur :*
>
> > *Un ordre juridique se montrera normalement réticent à prendre en considération une loi de police étrangère qui prétend forcer sa compétence au détriment de la loi désignée comme compétente.*
>
> *[...] Au Québec cette disposition a provoqué l'opposition du Barreau et les doutes de la Chambre des notaires, qui estimaient le recours aux conceptions étrangères de l'ordre public inutile et dangereux.*

119. In the case at hand, there exists no legitimate and manifestly preponderant interest that would justify allowing foreign law to supersede the law applicable in Québec.

120. As stated above, articles 3097 and 3102 CCQ are applicable in this situation.

9.3 Superintendent of Pensions of Newfoundland & Labrador

121. In Part I of its Outline of Arguments (paras. 8 to 41), the Superintendent of Pensions argues that the word "liquidation" should be given its "plain meaning."

122. For the reasons stated above, the CCAA Parties do not share this position.

123. In section II(iii), the Superintendent of Pensions then attempts to demonstrate that sections 36(6) and 36(7) CCAA would not "cover the field, but would rather establish minimum standards."

124. This proposed interpretation is in direct contradiction of the statement made by Justice Deschamps of the Supreme Court of Canada in *Sun Indalex Finance*:

> [81] There are good reasons for giving special protection to members of pension plans in insolvency proceedings. Parliament considered doing so before enacting the most recent amendments to the CCAA, but chose not to (An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005, S.C. 2007, c. 36, in force September 18, 2009, SI/2009-68; see also Bill C-501, An Act to amend the Bankruptcy and Insolvency Act and other Acts (pension protection), 3rd Sess., 40th Parl., March 24, 2010 (subsequently amended by the Standing Committee on Industry, Science and Technology, March 1, 2011). A report of the Standing Senate Committee on Banking, Trade and Commerce gave the following reasons for this choice:
>
> Although the Committee recognizes the vulnerability of current pensioners, we do not believe that changes to the BIA regarding pension claims should be made at this time. Current pensioners can also access retirement benefits from the

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[51] Goldstein, Gerald et Groffier, Éthel, *Traité de droit civil: droit international privé*, *Tome I, Théorie générale*, Cowansville, Les Éditions Yvon Blais Inc., 1998, p. 101-102. **(Tab 26)**.

> Canada/Quebec Pension Plan, and the Old Age Security and Guaranteed Income Supplement programs, and may have private savings and Registered Retirement Savings Plans that can provide income for them in retirement. The desire expressed by some of our witnesses for greater protection for pensioners and for employees currently participating in an occupational pension plan must be balanced against the interests of others. As we noted earlier, insolvency — at its essence — is characterized by insufficient assets to satisfy everyone, and choices must be made.
>
> The Committee believes that granting the pension protection sought by some of the witnesses would be sufficiently unfair to other stakeholders that we cannot recommend the changes requested. For example, we feel that super priority status could unnecessarily reduce the moneys available for distribution to creditors. In turn, credit availability and the cost of credit could be negatively affected, and all those seeking credit in Canada would be disadvantaged." (*Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at p. 98; see also p. 88.)
>
> [82] In an insolvency process, a CCAA court must consider the employer's fiduciary obligations to plan members as their plan administrator. It must grant a remedy where appropriate. However, courts should not use equity to do what they wish Parliament had done through legislation.

125. With respect to the statements made in section IV of the Outline of Arguments of the Superintendent of Pensions regarding the application of articles 1262 and 3079 CCQ to the present matter, the position of the CCAA Parties in connection with the position adopted by the Superintendent of Pensions is the same as the one stated in connection with the Salaried Representatives' position.

9.4 United Steel Workers ("USW")

126. In section D of its Outline of Arguments, the USW deals with the interaction between the various deemed trusts.

127. At paragraph 44 of its Outline, USW states that three pension-related laws are applicable to the Plans, the NPBA, the SPPA and the PBSA. It then concludes that it is the deemed trust most favorable to employees that should be applied in the case at hand.

128. This position is not shared by the CCAA Parties. According to the latter, if several acts are applicable to the two Plans, the proper application of the legislation would be to determine in relation to which group(s) of members each relevant statute applies, determine the scope of the deemed trust created by such legislation (if it applies in a CCAA context) and calculate the portion of the unfunded liabilities covered by each deemed trust.

129. Adopting the position put forward by the USW and extending for example the PBSA to members who are governed by two different provincial pension acts would clearly be inappropriate.

130. With respect to the arguments raised in section E of the USW's Outline of Arguments, the CCAA Parties reiterate that the application of the deemed trust will create a conflict with the CCAA provisions.

9.5 Retraite Québec

131. In paragraphs 19 to 22 of its Outline of arguments, Retraite Québec states that the SPPA shall apply to the members which were formerly employed in Québec. The CCAA Parties share this point of view.

THE WHOLE RESPECTFULLY SUBMITTED.

Montréal, June 14, 2017

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