C A N A D A

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

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

No.: 500-11-048114-157

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

WABUSH RESOURCES INC. *ET AL.*

Petitioners

-and-

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

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

MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON

UNITED STEEL WORKERS, LOCALS 6254 AND 6285

RÉGIE DES RENTES DU QUÉBEC

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

Mis-en-cause

-and-

FTI CONSULTING CANADA INC.

Monitor

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

I. PRELIMINARY MATTERS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. SCOPE OF APPLICATION OF PENSION LEGISLATION

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

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

A. Position of the Objecting Parties

(i) Representative Counsel and Replacement Plan Administrator

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

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

(ii) N&L Superintendent

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

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

7 Representative Counsel AO, at para. 82.

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

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

(iii) Retraite Québec

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

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

(iv) Union

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

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

(v) OSFI

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

(vi) Specific Argument of Reverse Paramountcy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Position of the Monitor

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

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

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

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

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

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

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

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14 CAPSA Agreements, Recital II.

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

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

17 Section 1 SPPA.

18 Section 4 PBSA.

19 Section 8.2 NL PBA.

20 Section 249 SPPA.

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

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

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

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

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

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

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

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

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

23 *Ibid*, section 1(c).

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

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

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

27 Union AO, at para. 44.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

38.14. At paragraph 26, the Court added:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) General

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

46. The deeming provision of Section 32(2) according to which an amount equal to the amounts described under Sections 32(1)(a), 32(1)(b) and 32(1)(c) are to be considered held in trust and "considered to be separate from and form no part of the estate [...] whether or not that amount has in fact been kept separate and apart from the employer's own money or from the assets of the estate" is only triggered if certain conditions or trigger events occur.

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

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

(ii) Wind-Up Deficit

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

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

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

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

> 32(3) Where a pension plan is terminated in whole or in part, an employer who is required to pay contributions to the pension fund shall hold in trust for the member or former member or other person with an entitlement under the plan an amount of money equal to employer contributions due under the plan to the date of termination.

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

> **Termination payments**
>
> 61.(1) On termination of a pension plan, the employer shall pay into the pension fund all amounts that would otherwise have been required to be paid to meet the requirements prescribed by the regulations for solvency, including
>
> (a) an amount equal to the aggregate of
>
> (i) the normal actuarial cost, and
>
> (ii) special payments prescribed by the regulations,
>
> that have accrued to the date of termination; and
>
> (b) all
>
> (i) amounts deducted by the employer from members' remuneration, and
>
> (ii) other amounts due to the pension fund from the employer
>
> that have not been remitted to the pension fund at the date of termination.
>
> (2) Where, on the termination, after April 1, 2008, of a pension plan, other than a multi-employer pension plan, the assets in the pension fund are less than the value of the benefits provided under the plan, the employer shall, as prescribed by the regulations, make the payments into the pension fund, in addition to the payments required under subsection (1), that are necessary to fund the benefits provided under the plan.

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

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

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

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

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

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

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

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

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

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

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

47 *Ibid.*

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

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

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

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

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

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

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

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

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

(iii) Plan Administrator's Lien and Charge

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

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

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

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

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

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

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

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

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

> [30] None of these provisions suggest that the contributions owed by GCCL are a debt due to the Administrator. Rather, GCCL's legal obligation was to make the contributions to the pension funds that were required under the pension plans. Nor is there even any indication that the contributions are owed to the Administrator to be held in trust for the pension funds. Rather, the legislation contemplates that those contributions are owed to the pension funds pursuant to the pension plans, and are not the property of the Administrator.
>
> [31] The Administrator's right to commence legal proceedings simply permits it to seek to compel the employer to pay the contributions to the pension funds due under the pension plans.
>
> [32] The consequence of this is that the lien and charge accorded to the Administrator secures the employer's obligation to pay the unpaid contributions required by the pension plans to the pension funds. It does not secure a debt owed to the Administrator. Hence s. 57(5) does not qualify the Administrator as a secured creditor for the purposes of the BIA.
>
> [Our underlining]

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

OPBA	NL PBA
57 (1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.	32. (1) An employer or a participating employer in a multi-employer plan shall ensure, with respect to a pension plan, that (a) the money in the pension fund; (b) an amount equal to the aggregate of (i) the normal actuarial cost, and (ii) any special payments prescribed by the regulations, that have accrued to date; and (c) all (i) amounts deducted by the employer from the member's remuneration, and (ii) other amounts due under the plan from the employer that have not been remitted to the pension fund are kept separate and apart from the employer's own money, and shall be considered to hold the amounts referred to in paragraphs (a) to (c) in trust for members, former members, and other persons with an entitlement under the plan.
(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the	(2) In the event of a liquidation, assignment or bankruptcy of an employer, an amount equal to the

beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund	amount that under subsection (1) is considered to be held in trust shall be considered to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own money or from the assets of the estate.
(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.	(3) Where a pension plan is terminated in whole or in part, an employer who is required to pay contributions to the pension fund shall hold in trust for the member or former member or other person with an entitlement under the plan an amount of money equal to employer contributions due under the plan to the date of termination.
(5) The administrator of the pension plan has a lien and charge on the assets of the employer in an amount equal to the amounts deemed to be held in trust under this section.	(4) An administrator of a pension plan has a lien and charge on the assets of the employer in an amount equal to the amount required to be held in trust under subsections (1) and (3).

[Our underlining]

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

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

B. OSFI

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

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

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) <u>if the prescribed pension plan is regulated by an Act of Parliament</u>,
>
> (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."[106]

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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[106] *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

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