

2017 01H 0029
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

IN THE MATTER OF Section 13
of Part 1 of the *Judicature Act*,
RSNL 1990, c J-4

AND

IN THE MATTER OF Section 32
of the *Pension Benefits Act, 1997*,
SNL 1997, c P-4.01

AND

IN THE MATTER OF a Reference
of the Lieutenant-Governor in Council
to the Court of Appeal for its hearing,
consideration and opinion on the
interpretation and scope of s. 32 of the
Pension Benefits Act, 1997

APPLICATION

The Attorney General of Newfoundland and Labrador applies for directions from this Honourable Court as to what should comprise the Evidentiary Record for the hearing on the Reference Questions.

Subject matter of the application:

1. This Honourable Court set the date of 30 June 2017 for the filing of the Evidentiary Record to be considered by this court for the hearing on the Reference Questions. This honourable Court further directed that if consensus

could not be achieved on the Evidentiary Record by 30 June 2017 then the Attorney General of Newfoundland and Labrador should apply for directions to resolve this issue.

2. On 16 June 2017 counsel for the Attorney General circulated a number of documents to the Parties by email that the Attorney General proposed should form the Evidentiary Record. In the 16 June 2017 email, the Attorney General asked that parties advise by 21 June 2017 if they had issues with the documents proposed.
3. Based on comments received by some of the parties, the Attorney General caused to be drafted a more condensed statement of facts that was circulated to the parties on 27 June 2017.
4. Based on comments received from some of the parties, subsequent to 27 June 2017, the Attorney General revised the statement of facts to the version that is attached hereto at Schedule "A" (the "Statement of Facts"). However, there is still no consensus on the Statement of Facts.
5. The Attorney General submits that the Statement of Facts should be used by this Honourable Court to provide context to answer the Reference Questions. Given that there is no consensus, the Attorney General seeks directions from this Honourable Court as to how to proceed.

The affidavit that is necessary to support or provide the foundation for the application is attached.

DATED at St. John's in the Province of Newfoundland and Labrador this 29th day of June, 2017.



Rolf Pritchard QC / Philip Osborne
**Solicitor for the Attorney General of
Newfoundland and Labrador**
Whose address for service is:
Office of the Attorney General
Department of Justice & Public Safety
4th Floor, East Block,
Confederation Building
P. O. Box 8700, St. Johns, NL A1B 4J6
Phone: (709) 729-0873
Email: rolfpritchard@gov.nl.ca
philiposborne@gov.nl.ca

TO: Registry
Supreme Court of Newfoundland and Labrador
Court of Appeal
Duckworth Street
St. John's, NL

This application is set to be heard on the ____ day of _____,
2017 at 10:00 AM

COURT OFFICER

2017 01H 0029
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

IN THE MATTER OF Section 13
of Part 1 of the *Judicature Act*,
RSNL 1990, c J-4

AND

IN THE MATTER OF Section 32
of the *Pension Benefits Act, 1997*,
SNL 1997, c P-4.01

AND

IN THE MATTER OF a Reference
of the Lieutenant-Governor in Council
to the Court of Appeal for its hearing,
consideration and opinion on the
interpretation and scope of s. 32 of the
Pension Benefits Act, 1997

AFFIDAVIT

I, David Rodgers, Barrister and Solicitor, of the City of St. John's, in the Province of Newfoundland and Labrador, make oath and say that:

1. I am a Solicitor with the Civil Division, Office of the Attorney General, Department of Justice & Public Safety and, as such, I have personal knowledge of the facts herein set forth, unless otherwise stated to be based upon information or belief.

2. That the matters set out in the within Application are true and correct to the best of my knowledge, information and belief.

3. I make this Affidavit in support of the Application of Attorney General of Newfoundland and Labrador for directions from this Honourable Court as to what should comprise the evidentiary record for the hearing on the Reference Questions.

SWORN TO at the City of
St. John's, in the Province of
Newfoundland and Labrador this 29th
day of June, 2017, before me:-

A handwritten signature in blue ink, appearing to be 'R. Blum', written over a horizontal line.A handwritten signature in blue ink, appearing to be 'David Rodgers', written over a horizontal line.
David Rodgers

SCHEDULE "A"

RP DR

File No. 2017 01H 0029

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

IN THE MATTER OF Section 13
of Part I of the *Judicature Act*,
R.S.N.L. 1990, c. J-4, as amended

AND

IN THE MATTER OF Section 32
of the *Pension Benefits Act, 1997*,
S.N.L. 1996, c. P-4.01

AND

IN THE MATTER OF a Reference
of the Lieutenant Governor in
Council to the Court of Appeal, for
its hearing, consideration and
opinion on the interpretation of the
scope of section 32 of the *Pension
Benefits Act, 1997*

STATEMENT OF FACTS

- A. WIND-UP DEFICIENCY PAYMENTS FOLLOWING PENSION PLAN TERMINATION**
1. Since 1965, Wabush Mines has operated an open-pit iron ore mine in the Town of Wabush, at the western tip of Labrador. Iron ore was mined in Wabush and transported by rail to processing and shipment facilities in Pointe-Noire, Québec.
 2. On May 20, 2015, Wabush Iron Co. Limited, Wabush Resources Inc., Wabush Mines JV, Arnaud Railway Corporation and Wabush Lake Railway Company Limited (collectively, the "**Wabush Parties**") obtained protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("**CCAA**").
 3. Since filing for protection under the *CCAA*, the Wabush Parties have shut down all mining operations, and have terminated all employees, with the exception of four employees who continue to monitor the idle Wabush Mine.
 4. The Wabush Parties have also since terminated their employees' health benefits, life insurance benefits, and supplemental pension benefits.

5. FTI Consulting Inc., the Monitor appointed during the course of these *CCAA* proceedings, has proceeded to the sale of substantially all of the assets of the Wabush Parties.
6. The Wabush Parties sponsor two pension plans with defined benefit provisions for its salaried and unionized employees and retirees:
 - a. One pension plan for salaried employees at the Wabush Mine and the Pointe-Noire Port, known as the Contributory Pension Plan for Salaried Employees of Wabush Mines, Cliffs Mining Company, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company Ltd., which included both defined benefit and defined contribution components ("**Salaried DB Plan**"); and
 - b. Another pension plan for unionized hourly employees at the Wabush Mine and the Pointe-Noire Port, known as the Pension Plan for Bargaining Unit Employees of the Wabush Mines, Cliffs Mining Company, Managing Agent, Arnaud Railway Company, Wabush Lake Railway Company Ltd., which included both defined benefit and defined contribution components ("**Union DB Plan**").
7. The Salaried and Union DB Plans were originally administered by Wabush Mines, and were registered with the Superintendent of Pensions of Newfoundland & Labrador ("NL Superintendent"). In addition, the Union DB Plan was registered with the Office of the Superintendent of Financial Institutions of Canada ("federal Superintendent").
8. The Salaried and Union DB Plans include over two thousand members.
9. These members either reported for work in the Province of Newfoundland & Labrador or in the Province of Québec. Some employees also reported for work on a railway that is a federal Work, and were therefore employed in "included employment" for the purposes of the federal *Pension Benefits Standards Act, 1985*, RSC 1985, c. 32 (2nd Supp.).
10. The membership breakdown of the two pension plans by jurisdiction is as follows:

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

11. In two notices of termination dated December 16, 2015, the NL Superintendent declared that the Salaried DB Plan and the Union DB Plan would be terminated as of that date.
12. In its notices of termination, the NL Superintendent noted that the Wabush Parties had discontinued or were in the process of discontinuing all of their business operations within the meaning of section 59(1)(b) of the *Pension Benefits Act, 1997* and that the NL Superintendent was of the view that the Salaried and Union DB Plans had failed to meet the solvency requirements prescribed by the applicable regulations referred to in section 59(1)(d) of the *Pension Benefits Act, 1997*.
13. On December 16, 2015, the federal Superintendent declared that the Union DB Plan would be terminated as of that date. In its notice of termination, the federal Superintendent noted that the Wabush Parties were made subject to proceedings under the *CCAA*. In addition, the mines had been shut down and substantially all of its employees have been terminated. The federal Superintendent was of the view that the Union DB Plan had failed to meet the prescribed tests and standards for solvency as required by subsection 9(1) of the *Pension Benefits Standards Act, 1985* and section 8 and 9 of the *Pension Benefits Standards Regulations*,
14. In these notices of termination, the federal Superintendent and the NL Superintendent indicated that the Wabush Parties were required to pay into the pension funds certain amounts so as to meet the prescribed solvency requirements, as well as other amounts necessary to fund the benefits provided for in the Union plan (for the federal Superintendent) and for both Salaried and Union DB Plans (for the NL Superintendent).
15. Both the federal Superintendent and the NL Superintendent also took the position in the notices of termination that a deemed trust had arisen in respect of such amounts.
16. Shortly thereafter, in January 2016, the members of the Salaried and Union DB Plans received notice that, since the pension plans were underfunded, the Wabush Parties received approval from the NL Superintendent to reduce the amount of monthly benefits being paid by 25% for the retirees of the Salaried DB Plan, and by 21% for the retirees of the Union DB Plan. To date, no such approval to reduce the amounts paid to federal retirees has been given by the federal Superintendent.

17. The Salaried and Union DB Plans are now in the process of being wound up by Morneau Shepell, an actuarial consulting firm appointed by the federal Superintendent and the NL Superintendent on March 30, 2016 as the replacement plan administrator.
18. Solely for the purposes of the present case, the parties assume (without admission) that the following amounts are still owed to the Salaried and Union DB Plans:

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

19. The reduction of monthly pension benefits for most retirees, coupled with the loss of health and life insurance benefits and supplemental pensions, has evidently caused retirees significant financial hardship.

B. MULTI-JURISDICTIONAL PENSION PLANS

20. Both the Salaried and Union DB Plans are multi-jurisdictional pension plans, since they include employees who report for work in more than one province, and employees employed in “included employment” as defined in the federal *Pension Benefits Standards Act, 1985*, RSC 1985, c.32 (2nd Supp.).
21. There are currently over 2,000 registered pension plans in Canada that are multi-jurisdictional.

22. Many of these multijurisdictional plans provide pension benefits to both employees employed in “included employment” (as defined in the *Pension Benefits Standards Act*, RSC 1985, c. 32 (2nd Supp.) and employees employed in other types of employment.
23. The Newfoundland & Labrador’s *Pension Benefits Act, 1997*, recognizes that a duly authorized representative of the Government may enter into an agreement with the Government of another Province or of Canada. Other pension legislation in Canada contains similar provisions.
24. However, the only agreement the Government of Newfoundland & Labrador has entered into is known as the Memorandum of Reciprocal Agreement, signed *inter alia* by Quebec in 1968 and by the NL Superintendent in 1986. Canada is not a signatory to this Agreement. This Memorandum sought to provide a working arrangement for pension regulators exercising statutory responsibilities over multi-jurisdictional pension plans.
25. The preamble to the Memorandum reads as follows:

WHEREAS each signatory hereto has statutory functions and powers with respect to pension plans covering employees in the jurisdiction represented by such signatory;

AND WHEREAS, by reason of some pension plans covering employees in more than one jurisdiction, more than one signatory may have statutory functions and powers in respect of the same pension plan;

AND WHEREAS the said signatories have deemed it desirable that statutory functions and powers in respect of any one pension plan be exercised by one signatory only, acting both on its own behalf and on behalf of any other signatory having statutory functions and powers in respect of such plan;

AND WHEREAS each signatory has accordingly agreed with each other signatory to the effect hereinafter set forth.

26. The Memorandum provides that the “major authority” for each multi- jurisdictional pension plan will exercise both its own statutory responsibilities, as well as the statutory responsibilities of each minor authority of the pension plan:

2. 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.

27. Sections 1 and 2 of the Memorandum define the terms “authority” and “major authority” as follows:

"authority" means a person or body having statutory functions and powers with respect to registration, funding, vesting, solvency, audit, obtaining information, inspection, winding up, and other aspects, of plans;

[...]

"major authority" means, with respect to a plan, the participating authority of the province where the plurality of the plan members are employed [...].

28. In 2011, the Canadian Association of Pension Supervisory Authorities ("CAPSA") developed an Agreement Respecting Multi-Jurisdictional Pension Plans (the "2011 CAPSA Agreement") which would allow the pension legislation of the major authority's jurisdiction to apply to certain matters in respect of the pension plan instead of the corresponding provisions of the pension legislation of any minor authority.
29. The 2011 CAPSA Agreement was signed by the Provinces of Ontario and Québec. CAPSA developed a revised version of this Agreement in 2016, and this later version was adopted by the Provinces of British Columbia, Nova Scotia, Ontario, Québec and Saskatchewan ("2016 CAPSA Agreement").
30. The 2011 and 2016 CAPSA Agreements provide that:

6(1) While a pension supervisory authority is the major authority for a pension plan in accordance with this Agreement:

(1) the provisions of the pension legislation of the major authority's jurisdiction in respect of matters referred to in Schedule B apply to the plan instead of those of the corresponding provisions of the pension legislation of any minor authority's jurisdiction that would apply to the plan if this Agreement did not exist; and

(2) subject to the provisions of this Agreement, the provisions of the pension legislation of each jurisdiction that are applicable to the plan under the terms of such legislation apply to the plan in respect of matters not referred to in Schedule B.

Schedule B:

8. Legislative provisions respecting: [...] 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 of other pensions; (d) an administrator's lien and charge on the employer's assets equal to the amounts deemed held in trust [...].

31. The Province of Newfoundland & Labrador, however, has not signed either the 2011 or the 2016 CAPSA Agreements.
32. Canada is not a signatory to either the 2011 or the 2016 CAPSA Agreements.
33. Newfoundland and Labrador and Canada have not entered into any agreement concerning multijurisdictional pension plans.