

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.L.S.N. 1990, c.
J-4

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 of its hearing,
consideration and opinion on
interpretation of the scope of s. 32 of the
Pension Benefits Act, 1997

FACTUM OF THE CCAA PARTIES

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1. INTRODUCTION

1. This is the factum of the Intervenors, Bloom Lake General Partner Limited, Quinto Mining Corporation, 8568391 Canada Limited, Cliffs Québec Iron Mining ULC, Wabush Iron Co. Limited, and Wabush Resources Inc. (the “**CCAA Parties**”).
2. The CCAA Parties submit that this Court should decline to answer the questions addressed to it by the Government of Newfoundland and Labrador, on the grounds that the facts and issues referred to this Court involve contentious matters that have already been adjudicated before the Superior Court of Québec in the proceedings commenced by the CCAA Parties (the “**CCAA Proceedings**”).

2. DISCRETION NOT TO ANSWER QUESTIONS REFERRED

2.1 The Issues Have Already Been Debated by the Same Parties in Québec

3. On September 30, 2016, the Monitor notified the Service List of its Motion for Directions with respect to Pensions Claims in the CCAA Proceedings before the Superior Court of Québec (the “**Pension Claims Motion**”).
4. By way of the Pension Claims Motion, the Monitor sought instructions with respect to the adjudication of the pension claims arising out of the two pensions plans of certain of the CCAA Parties which contained defined benefit schemes (the “**Pension Claims**”). More specifically, the Monitor sought to establish the priority rank, if any, to be afforded to said Pension Claims as a result of the application of “deemed trust” provisions of applicable pension legislation.
5. The Superior Court of Québec (the “**CCAA Court**”) was thereby seized with the matter of adjudicating the priority of the Pension Claims. There is no question that the CCAA Court has jurisdiction over the CCAA Parties and the adjudication of the priority of the Pension Claims.¹
6. Adjudication of the Pension Claims Motion required the CCAA Court to consider the scope of any deemed trust under Newfoundland and Labrador’s *Pension Benefit Act* (“**NPBA**”), Québec’s *Supplemental Pension Plans Act*, (“**SPPA**”), and the federal *Pension Benefits Standards Act* (“**PBSA**”), and determine which employees are covered by which of these statutes.
7. In connection with the Pension Claim Motion, a preliminary issue arose as to whether the Court should request the aid of the Supreme Court of Newfoundland and Labrador (the “**Newfoundland Court**”) with respect to the scope and priority of the deemed trust and other security created by the NPBA which regulates in part the pension plans. A hearing was held on December 20, 2016.
8. In a judgment dated January 30, 2017 (the “**January 30 Order**”), the CCAA Court came to the conclusion that it was not appropriate to refer the proposed questions to the Newfoundland Court. It did so for various reasons, namely: 1) by applying the principle

¹ Pursuant to Section 9 of the *Companies’ Creditors Arrangement Act*.

of “single control” over insolvency proceedings, a principle previously adopted by the Supreme Court of Canada in *Sam Levy & Associates v. Azco Mining*; 2) for reasons of simplicity and expediency; and 3) for various other considerations, including the fact that any answer would require consideration of Québec, federal and Newfoundland law, and was therefore not a matter of purely local concern to Newfoundland and Labrador.²

9. The Pension Claims Motion was then debated before Mr. Justice Hamilton of the CCAA Court on June 28 and 29, 2017. Representatives of the Monitor, the CCAA Parties, the Newfoundland Superintendent of Pensions, Retraite Québec, the Salaried Employees, United Steel Workers, and the City of Sept-Iles were all present at the hearing and had the opportunity to make representations as to the questions at issue, namely the scope of any deemed trusts arising from the Pension Claims and their application to various employees.
10. Following the June hearing, Mr. Justice Hamilton took the matter under advisement. To date, no judgment has been issued.
11. Accordingly, the issues that have been referred to this Court are not theoretical matters, but live issues that have already been debated before the CCAA Court, by the exact same parties, with respect to the exact same facts. Given that the issues, parties and facts are identical in both matters, there is a very real risk of contradictory judgments in respect of the same matters.

2.1.1 The Reference Should Not Be a Way to Circumvent the January 30, 2017 Order Issued by the CCAA Court

12. The Government of Newfoundland and Labrador was represented during the hearing that was held on December 20, 2016 before the CCAA Court by its representative, the Superintendent of Pensions.
13. The goal of this hearing was to determine as to whether or not the CCAA Court as the proper forum to debate the various questions raised by the Pension Claims Motion.
14. At that time, the exact same questions as the ones that are now being put forward to this Court were put forward to the CCAA Court and the CCAA Court was asked whether it was appropriate for it to request the aid of the Newfoundland Court in answering these questions.
15. As stated above, the CCAA Court, in its January 30 Order, decided that it was not necessary or appropriate to refer those questions to the Newfoundland Court for consideration.
16. The January 30 Order was not appealed and has consequently become final.

² *Arrangement relatif à Bloom Lake*, 2017 QCCS 284. [*Bloom Lake*] (Tab 1)

2.1.2 The Newfoundland Court of Appeal Does Not Need to Answer all the Questions Raised

17. In order to avoid the very real possibility of contradictory judgments, it is respectfully submitted that this Court should use its discretion and choose not to answer some of the questions addressed to it by the Government of Newfoundland and Labrador.
18. Although the wording of Section 13 of the *Judicature Act*³ seems imperative, it has happened on numerous occasions in the past that Courts have elected not to answer some of the questions addressed to it by way of reference:

The Supreme Court Act and the provincial reference statutes impose on the Court a duty to answer reference questions. However, the Court has often asserted and occasionally exercised discretion not to answer a question posed on a reference. It may exercise that discretion where the question is not yet ripe, or has become moot, or is not a legal question, or is too vague to admit of a satisfactory answer, or is not accompanied by enough information to provide a complete answer.⁴

19. The CCAA Parties would submit that, in the event that the questions referred arise from a genuine controversy being litigated in another jurisdiction, the Court should also exercise its discretion not to answer all or certain of the questions.
20. On this point, it is to be noted that this Court has already exercised its discretion not to answer certain questions in other matters.
21. In the matter of *Churchill Falls (Labrador) Corp. v. Newfoundland (Attorney General)*⁵ this Court, pursuant to Section 6 of Part I of the *Judicature Act*, elected not to answer four of the nine questions that were addressed to it by the Government of Newfoundland and Labrador:

56. By questions 2, 4, 6, and 8 we are asked to interpret the legal effect of sections 4, 5, 7 and 8 in so far as they are found to be *intra vires*.

57. The subject matter of this reference is the constitutional validity of the Act in whole or in part and in determining that issue each of the substantive sections must of necessity be considered. The consequential effect of these sections however are not to be confused with legislative subject matter and, in our view, we should not enter more largely upon an interpretation of the statute that is necessary for the decision of the particular question before us. (See *Citizens Insurance Compagny of Canada v. Parsons*, [1881] 7 App. Cas. 96). It is undesirable for the Court to answer in the abstract questions that may involve consideration of debatable fact and which may affect the rights of persons not represented before it.

58. In *Attorney-General of British Columbia v. Attorney General of Canada*, [1914] A.C. 153 Viscount Haldane L.C., speaking for the Privy Council, after

³ *Judicature Act*, RSNL 1990, c J-4.

⁴ Peter W. Hogg, *Constitutional Law of Canada*, 5th Edition Supplemented, Volume 1, 2007, Thomson Carswell, Scarborough, Ontario, p. 8-20 [**Hogg**]. (**Tab 2**)

⁵ *Churchill Falls (Labrador) Corp. v. Newfoundland (Attorney General)*, 1981 CarswellNfld 45. (**Tab 3**)

referring to the statutory authority given the Supreme Court by the Dominion Parliament to pronounce on questions of general and abstract character referred to the Court, stated at p. 162:

Nevertheless, under this procedure questions may be put of a kind which it is impossible to answer satisfactorily. Not only may the question of future litigants be prejudiced by the Court laying down principles in an abstract form without any reference or relation to actual facts, but it may turn out to be practically impossible to define a principle adequately and safely without previous ascertainment of the exact facts to which it is to be applied. It has therefore happened that in cases of the present class their Lordships have occasionally found themselves unable to answer all the questions put to them, and have found it advisable to limit and guard their replies.

2.2 The Existence of a Genuine Controversy Makes the Present Matter Unsuitable for A Reference

22. A reference is the rendering of an advisory opinion, in the absence of a genuine controversy.⁶ Respectfully, the situation at hand is not an appropriate one for a reference, as there exists a genuine controversy between the parties, and the CCAA Court is already validly seized with the adjudication of the controversy. Here, there is no doubt that the present reference seeks to re-litigate the questions already pleaded before the CCAA Court: all of the facts and evidence relate to matters before the CCAA Court, and the questions referred are the exact same raised by the Superintendent of Pensions at the December 20, 2016 hearing before the CCAA Court on whether to refer the matter to the Supreme Court of Newfoundland and Labrador.
23. If two separate Courts become seized with and consider the same issues and questions then this can create a risk of contradictory judgments. This risk is all the more acute given that the precedential value of this Court's decision is unclear. In the *Reference Appeal (1912)*,⁷ the Privy Council held that the Court's answer to a question posed on reference is "advisory" and of "no more effect than the opinions of law officers." For Professor Hogg, the effect of the Privy Council's holding is that the Court's answer on reference is not binding, even on the parties to the reference.⁸ The precedential value of this Court's reference judgment is therefore uncertain, specifically as the issue has already been heard (if not decided) in another jurisdiction.
24. The reference is unsuited for resolving a genuine controversy, and therefore unlikely to yield a completely satisfactory outcome. The presentation of facts is limited, and there is no truly adversarial process.⁹ The reference procedure does not include all of the procedural safeguards that exist in circumstances where the court is adjudicating a

⁶ Hogg, p. 8-19. (Tab 2)

⁷ *Reference by the Governor in Council (Re)*, [1912] JCJ no. 2; [1912] AC 571; 3 DLR 509. (Tab 4)

⁸ Hogg, p. 8-20. (Tab 2)

⁹ Hogg, p. 8-23. (Tab 2)

genuine dispute where the rights of the parties are at stake. While such a procedure may be appropriate for advising the government on theoretical issues of constitutional law, the CCAA Parties submit that it is not the appropriate forum for a contentious matter.

25. The CCAA Parties submit that this Court should decline to answer the questions addressed to it by the Government of Newfoundland and Labrador. To the extent that the Court chooses to answer any of the questions referred, the CCAA Parties refer to the submissions of the Monitor.

THE WHOLE RESPECTFULLY SUBMITTED.

Montréal, August 23, 2017

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