

**SCHEDULE “A”**

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 JV 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. The Wabush Mines JV suspended operations at the Wabush Mine in March 2014. In November 2014, the Wabush Mines JV commenced the process of permanently idling the Wabush Mine. Operations at the Pellet Plant had been previously shut down in June 2013. With the exception of some ongoing maintenance activity, the Wabush Lake Railway and the Arnaud Railway were shut down in September 2014, and December 2014, respectively. As of the date hereof, all of the employees have been terminated.
3. 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 CCAA Entities**”) obtained protection from their creditors under the *Companies’ Creditors*

*Arrangement Act*, R.S.C. 1985, c. C-36 (“**CCAA**”).

4. Pursuant to an Order of the Quebec Superior Court for the judicial district of Montreal (Commercial Division) (the “**CCAA Court**”) granted on June 26, 2015, but effective on a *nunc pro tunc* basis on May 29, 2015, the Wabush CCAA Entities suspended the payment of monthly amortization and yearly catch up amortization payments in respect of the two pension plans described below, as well as other post-retirement employee benefits. The Wabush CCAA Entities have also terminated health benefits, life insurance benefits and supplemental pension benefits for their former employees, with the exception of certain continuing health and welfare benefits for the four employees who were retained to monitor the idled Mine and who were recently terminated as part of the sale of the Wabush Mine.
5. On June 9, 2015, the CCAA Court approved a sale and investor solicitation procedure (“**SISP**”) for the Wabush CCAA Entities. The Wabush CCAA Entities have since implemented the SISP under the supervision of the Monitor, FTI Consulting Inc. This has resulted in seven separate, court-approved transactions which saw the Wabush CCAA Entities sell substantially all of their assets to different purchasers.
6. Wabush Mines JV, Cliffs Mining Company, Managing Agent, Arnaud Railway Company and the Wabush Lake Railway Company (collectively defined as the “**Employer**” in the two pension plans, described below), sponsor two pension plans with defined benefit provisions for their 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 JV, 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 JV, 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 the Employer, 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 (2<sup>nd</sup> Supp.).
10. According to data reproduced in the Monitor’s Amended Motion for Directions, filed on April 13, 2017, the membership breakdown of the two pension plans by jurisdiction is as follows:

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

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 Employer had discontinued or was in the process of discontinuing all of its 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 also 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 CCAA Entities had been made subject to proceedings under the CCAA. In addition, the Wabush Mines had been shut down and substantially all of the 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 Employer was 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 DB 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 the amounts owed to the respective pension funds.
16. Shortly thereafter, in January 2016, the members of the Salaried and Union DB Plans received notice that, since the pension plans were underfunded, approval had been received 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. These monthly pension benefit reductions were put into effect for the Quebec and Newfoundland retirees as of March, 2016. 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 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:

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

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 financial hardship, as the CCAA Court observed in its decision dated June 26, 2015 at paragraphs 126 and 133, annexed

to the present Statement of Facts.

## **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 (2<sup>nd</sup> Supp.). A copy of the Salaried DB Plan has been annexed to the present Statement of Facts.
21. According to the Office of the Superintendent of Financial Institutions, 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 (2<sup>nd</sup> 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 Memorandum. This Memorandum sought to provide a working arrangement for pension regulators exercising statutory responsibilities and powers over multi-jurisdictional pension plans.
25. The preamble to the Memorandum, which has been annexed to the present Statement of Fact, 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 functions and powers, as well as the functions and powers 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, which have been both annexed to the present Statement of Facts, 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.