

File No. 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*, 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

**FACTUM OF THE ATTORNEY GENERAL OF QUEBEC
AND RETRAITE QUÉBEC**

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FACTUM OF THE ATTORNEY GENERAL OF QUEBEC AND RETRAITE QUÉBEC

A. INTRODUCTION AND CONTEXT

1. The Attorney General of Quebec and Retraite Québec (“**AG Quebec and RQ**”) would like to submit to this Honorable Court their arguments with regards to the Reference questions referred by way of Order in council OC 2017-103 (“**Reference questions**”):
 - (a) the consultative role and opinion offered by this Court;
 - (b) the preservation of the parties’ rights by this Court;
 - (c) the scope of the Reference questions;
 - (d) the proposed answers to the Reference questions.
2. The pension plan covered by the Reference questions is registered with the Superintendent of Pensions of Newfoundland and Labrador (“**Superintendent**”) and the relevant regulations are:
 - (a) *Pension Benefit Act*, 1997, SNL, 1996, c. P-4.01 (“**PBA**”);
 - (b) *Pension Benefits Standards Act*, RCS 1985, c. 32 (“**PBSA**”) and;
 - (c) *Supplemental Pension Plan Act*, CQLR, c. 15-1 (“**SPPA**”);
3. The context of the Reference questions arises from the proceedings before the Quebec Superior Court, district of Montreal (“**CCAA Court**”), no. 500-11-048114-157) (“**CCAA Proceedings**”) instituted pursuant to the terms of the *Companies’ Creditors Arrangement Act*, RSC, c. C-36 as amended (the “**CCAA**”);
4. The matter of dispute to be decided by the CCAA Court is to determine if pension claims are considered secured claims under CCAA due to a deemed trust in favor of the pension plan and pursuant to the applicable pension regulations;
5. On September 20, 2016, and amended on April 13, 2017, the Monitor filed a *Motion for Directions with Respect to Pension Claims* (“**Monitor’s Motion for Directions**”) with respect to the priority of pension claims filed by the Pension

Plan Administrator and also the applicability and scope of deemed trust, lien and charge, if any, under the PBA, the PBSA and the SPPA;

6. On June 29, 2017, Justice Stephen W. Hamilton took this matter under advisement. As of now, the judgment is still to be rendered;
7. Following the Monitor's Motion for Directions, the Representative Counsel of the Wabush Salaried Pension Plan Members ("**Representative Counsel**"), the Superintendent and the Pension Plan Administrator submitted to the CCAA Court a preliminary issue to request the aid of the Supreme Court of Newfoundland and Labrador (the "**NL Court**") in order to settle the matter of dispute. They proposed questions to be resolved by the NL Court;
8. This preliminary issue was settled by Justice Stephen W. Hamilton on January 30, 2017¹. The judgment specified that:

"[31] The CCAA Court has jurisdiction to deal with all of the issues that arise in the context of the CCAA Proceedings. The stay of proceedings under the CCAA gives effect to the principle by preventing creditors from bringing proceedings outside the CCAA Proceedings without the authorization of the CCAA Court.

[32] There are clear efficiencies to having a single court deal with all of the issues in a single judgment.

[33] The general rule is therefore that the Court should rule on all issues that arise in the context of these insolvency proceedings.

[90] For all the foregoing reasons, the Court concludes that it is not appropriate in the present circumstances to refer the proposed questions to the NL Court. "

(Emphasis added)

9. As stated in subsection 23 of the judgment, all parties agree that the CCAA Court have jurisdiction to deal with all of the issues;
10. Although the CCAA Court refuses to transfer the matter of dispute to the NL Court, Justice Hamilton reproduces in its judgment the questions submitted to the

¹ *Arrangement relatif à Bloom Lake*, 2015 QCCS 3064, January 30, 2017.

CCAA Court by the Superintendent and the Representative Counsel in order to request the aid of the NL Court. Those exact questions became the Reference Questions;

11. According to authors and jurisprudence, Reference should be used mainly for constitutional questions, including questions related to the Charters of Rights, whereas this Reference entails the interpretation of a private contract, the Salaried DB Plan, with pension regulations of different legislative authorities in a context of a pension plan funding deficiency due to the employer's insolvency; (See: *Broome*², *Same Sex Reference*³ and *Hogg*⁴);
12. AG Quebec and RQ respectfully ask this Court to carefully render a decision in this matter that is within its role and duty;
13. Further, considering this Court's decision might affect the parties' rights if it offers its opinion on the Reference questions, AG Quebec and RQ invite the Court to reconfirm its June 9, 2017 ruling that asserts:

"[2] (...) we subscribe to the view that questions posed on a reference should be treated as raising hypothetical questions and not directed at determining the parties' rights.⁵"
14. By rendering a judgment with the acknowledgement of the exclusive jurisdiction of the CCAA Court, this Court shall reaffirms, for all parties involved, its consultative role in the Reference process;
15. The CCAA Court jurisdiction acknowledgment shall also prevent relitigation in other courts that could lead to more costs and delays for the parties, including its members and retirees;
16. Without the CCAA Court jurisdiction acknowledgement on all matters related to or concerning the CCAA Proceedings, this Court's ruling might result in a

² *Reference Re Broome v. Prince Edward Island*, 2010 SCC 11, [2010] 1 S.C.R. 360 [Tab 3].

³ *Reference Re Same Sex Marriage*, [2004] 3 SCR 698 [Tab 4].

⁴ Peter W. Hogg, *Constitutional Law of Canada*, (5th ed. 2016) [Tab 6].

⁵ Ruling on Application for Directions of this Court, June 9, 2017, subsection 2.

conflicting ruling with the CCAA's and could also lead to other legal disputes when enforcing the CCAA judgment;

B. AG QUEBEC AND RQ POSITION

17. For the reasons set forth in the Superintendent's Factum dated July 26, 2017, we believe that there is no conflict of laws between the PBA and the SPPA, neither between the PBS and the SPPA;
18. We also agree with and share the Superintendent's position and arguments cited in subsections 67 to 96 of Section C of his Factum. We consider that the pension legislation that must be interpreted and applied to members who report for work in a jurisdiction is the law of that jurisdiction;
19. Furthermore, we submit to this Court that the SPPA must be applied to members who report for work in the province of Quebec, except for those members who report for work in federally regulated undertakings;
20. Our position is supported by section 1 (1) of the SPPA⁶ and also by paragraph 2.25 of and Section 14 of the Salaried DB Plan⁷;
21. We also take note of the position of the Representative Counsel that there is no conflict of laws between the PBA and the SPPA, which means that the deemed trust enacted in section 49 of the SPPA applies for the benefit of the plan members who report for work in the province of Quebec;
22. We cannot agree with the view of the Representative Counsel that substantive provisions such as section 32 of the PBA apply to Quebec members even if these provisions may be more generous than those of the SPPA. Such view does not respect the separation of powers between provincial parliaments (Ref. *Leco case*⁸, *Boucher c. Stelco*⁹);

⁶ *Supplemental Pension Plans Act*, RLRQ, c. 15.1, section 1(1) [Tab 7].

⁷ Attorney General of Newfoundland and Labrador Statement of Facts [Tab 2].

⁸ *Régie des rentes du Québec v. Pension Commission of Ontario*, (2000), 189 DLR (4th) 304 (Ont. Div. Ct) [Tab 5].

23. It is our opinion that the Superintendent has no legal ground to apply the PBA substantive provisions, including section 32, to Quebec members since there is no legal agreement between Quebec and Newfoundland and Labrador with a provision to this effect;
24. We do not have a position to submit with regards to the scope of section 32 of the PBA concerning any amount claimed based on a deemed trust or a lien and charge in favor of the Pension Plan Administrator;

However, we do not disagree with the Superintendent's view as to the scope of the deemed trust of section 32 of the PBA, since there is no operational conflict between the latter and section 49 of the SPPA's deemed trust;

C. REFERENCE QUESTIONS AND PROPOSED ANSWERS

25. AG Quebec and RQ submit that, considering its consultative role, this Court possesses the discretion not to answer the Reference Questions. However, should this Court exercise its discretion to answer the Reference questions, the opinion to be rendered must reaffirm the jurisdiction of the CCAA Court;
26. For all the reasons mentioned above, AG Quebec and RQ respectfully submit that the opinion of this Court should be as follows;
27. **Question #1**

The Supreme Court of Canada has confirmed in *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, that, subject only to the doctrine of paramountcy, provincial laws apply in Proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36. What is the scope of section 32 of the *Pension Benefits Act*, 1997, SNL 1996 c. P-4.01 deemed trusts in respect of:

- a) unpaid current service costs;
- b) unpaid special payments; and,

⁹ *Boucher v. Stelco Inc.*, 2005 SCC 64 (CanLII), [2005] 3 S.C.R. 279 [Tab 2].

c) unpaid wind-up deficits?

Proposed answer:

The Court should decline to answer this question.

If this Court exercises its discretion to answer this question and provide its opinion, the decision shall acknowledge the parties' rights to be determined by the CCAA Court.

28. **Question #2**

The Salaried Plan is registered in Newfoundland and Labrador and regulated by the *Pension Benefits Act, 1997*.

a) (i) Does the federal *Pension Benefits Standards Act, R.S.C. 1985, c-32* deemed trust also apply to those members of the Salaried Plan who worked on the railway (i.e., a federal undertaking)?

Proposed answer:

The substantive provisions of the PBSA apply to the portion of the Salaried DB Plan for those plan members who reported for work in a federal undertaking.

(ii) If yes, is there a conflict with the *Pension Benefits Act, 1997* and the Quebec *Supplemental Pension Plans Act*. If so, how is the conflict resolved?

Proposed answer:

There is no conflict, since the Newfoundland & Labrador PBA's substantive provisions only apply to the benefit of those plan members who report for work in Newfoundland and Labrador, except for those plan members who report for work in federally regulated undertakings.

b) (i) Does the Quebec *Supplemental Pension Plans Act, CQLR, c. R- 15.1* also apply to those members of the Salaried Plan who reported for work in Quebec?

Proposed answer:

The substantive provisions of Quebec's SPPA apply to the portion of the Salaried DB Plan for those plan members who report for work in Quebec, except for those plan members who report for work in federally regulated undertakings.

(ii) If yes, is there a conflict with the *Pension Benefits Act, 1997* and the Quebec *Supplemental Pension Plans Act*. If so, how is the conflict resolved?

Proposed answer:

There is no conflict of law because the Newfoundland and Labrador PBA's substantive provisions only apply to the benefit of those plan members who report for work in Newfoundland and Labrador, except for those plan members who report for work in federally regulated undertakings in Newfoundland and Labrador.

(iii) Do the Quebec *Supplemental Pension Plans Act* deemed trusts also apply to Quebec Salaried Plan Members?

Proposed answer:

The Quebec SPPA deemed trusts are the only deemed trusts that apply to the benefit of the Salaried DB Plan members who report for work in Québec, except for those plan members who report for work in federally regulated undertakings in Quebec.

29. **Question #3**

Is the *Pension Benefits Act, 1997* lien and charge in favor of the pension plan administrator in section 32(4) of the *Pension Benefits Act, 1997* a valid secured claim in favor of the plan administrator? If yes, what amounts does this secured claim encompass?

Proposed answer:

The Court should decline to answer this question.

If this Court exercises its discretion to answer this question and provide its opinion, the decision shall acknowledge the parties' rights to be determined by the CCAA Court.


THE WHOLE RESPECTFULLY SUBMITTED,

Quebec City, Quebec, this 18th day of August, 2017

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and Retraite Québec



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APPENDIX A – INDEX OF AUTHORITIES

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