500-09-027082-171

COURT OF APPEAL OF QUEBEC

(Montréal)

Appeal from a judgment of the Superior Court, District of Montréal, rendered on September 11, 2017 by the Honourable Justice Stephen W. Hamilton.

_____

Nº 500-11-048114-157 S.C.M.

In the matter of the Plan of Compromise or Arrangement of Bloom Lake General Partner Limited *et al*:

HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR, as represented by THE SUPERINTENDENT OF PENSIONS

APPELLANT
INCIDENTAL RESPONDENT
(Mise en cause)

v.

FTI CONSULTING CANADA INC.

RESPONDENT
INCIDENTAL APPELLANT
(Monitor – Petitioner)

- and -

VILLE DE SEPT-ÎLES

MISE EN CAUSE
INCIDENTAL APPELLANT
(Mise en cause)

- and -

BLOOM LAKE GENERAL PARTNER LIMITED

QUINTO MINING CORPORATION

(Style of causes continues on following pages)

APPELLANT'S BRIEF

8568391 CANADA LIMITED

CLIFFS QUÉBEC IRON MINING ULC

WABUSH IRON CO. LIMITED

WABUSH RESOURCES INC.

RESPONDENTS
(Debtors)

- and -

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP

BLOOM LAKE RAILWAY COMPANY LIMITED

WABUSH MINES

ARNAUD RAILWAY COMPANY

WABUSH LAKE RAILWAY COMPANY, LIMITED

SYNDICAT DES MÉTALLOS, SECTION LOCALE 6254

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PART I – FACTS

A. *Overview*

1. Pension benefits provide aging Canadians with vital financial support. They help compensate employees for years of loyal service, and are widely relied on by employers as a form of deferred wage which "almost invariably" leads employees to accept lower wages and fewer employment benefits.[1]

2. In light of the importance of adequately funding pension benefits, Parliament has extended protections to certain pension debts in the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36 ("***CCAA***"). Specifically, sections 6(6) and 36(7) provide that a *CCAA* Court may not approve the sale of assets outside the ordinary course of business or approve a plan of arrangement unless the Court is assured that the normal costs and unremitted contributions deducted at source will be paid.

3. These federal protections are supplemented by provincial law. In the event an employer is liquidated, for instance, Newfoundland & Labrador's *Pension Benefits Act*, 1997, SNL 1996, c. P-4.01 ("***NLPBA***") creates both a deemed trust and lien and charge that extends to various additional pension obligations, including the accrued special costs and to the pension plan's full wind-up deficiency.[2]

4. As important as these provincial protections are, the first instance decision maintains that they are necessarily side-lined in a *CCAA* liquidation. Mr. Justice Stephen Hamilton (the "**CCAA Judge**") concluded that section 32 of the *NLPBA* conflicts with

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1 *Buschau v. Rogers Communications Inc.*, [2006] 1 S.C.R. 973, 2006 SCC 28, at paras. 12-13; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, 2004 SCC 54, at para. 1; *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611, at para. 66.

2 *Reference re Section 32 of the Pension Benefits Act, 1997*, 2018 NLCA 1, at paras. 11-27.

sections 6(6) and 36(7) of the *CCAA* – and this despite the fact that these provisions share the common goal of protecting pension benefits. The CCAA Judge also concluded that the deemed trust created by the *NLPBA* could not in any event attach to property formerly located in the Province of Quebec.

5. On October 31, 2017, the Superintendent of Pensions of Newfoundland & Labrador (the "**Superintendent**") received leave to appeal these conclusions.[3]

B. *Facts*

6. The facts of the matter are uncontested and are detailed in the Motion Decision at paragraphs 3-31.

7. Since 1965, the Wabush Mines JV (a joint venture of Wabush Iron Co. Limited and Wabush Resources Inc.) has operated an iron ore mine near the Town of Wabush, Newfoundland & Labrador, as well as a port facility and a pellet production facility in Pointe-Noire, Quebec. The ore was transported from Wabush to Pointe-Noire by the Arnaud Railway Company and the Wabush Lake Railway Company, Limited (collectively, the "**Wabush CCAA Parties**").

8. The Wabush CCAA Parties, in addition to Cliffs Mining Company, Managing Agent, sponsor two pension plans with defined benefit provisions for their salaried and unionized employees and retirees (the "**Union DB Plan**" and the "**Salaried DB Plan**", respectively).[4] Both plans originally included a majority of employees who reported for work in Newfoundland & Labrador, although many members reported for work in Quebec, or on the two federally-regulated railways.[5] The two DB Plans

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3 Minutes of the hearing before Justice Healy J.C.A. on October 31, 2017, **Joint Schedules (hereinafter "J.S."), vol. 1, pp. 106-114.**

4 Unionized Employees Pension Plan, **J.S., vol. 6, pp. 1984-2105**; Salaried Employees Pension Plan, **J.S., vol. 6, pp. 2106-2183.**

5 The two railways have been declared to be works for the general advantage of Canada: see *An Act respecting Wabush Lake Railway Company Limited and Arnaud Railway Company*, 1960, 8-9 Eliz. II, c. 63, s. 3.

include over two thousand members, and their membership breakdown by jurisdiction is detailed at paragraph 6 of the Motion Decision.

9. On May 19, 2015, the Wabush CCAA Parties filed a motion for the issuance of an initial order under the *CCAA.*[6] On June 26, 2015, the Superior Court ordered the suspension of payment by the Wabush CCAA Parties of their monthly amortization payments and their annual lump sum "catch-up" payments coming due under the two DB Plans.[7] The Court also ordered the suspension of payment of other post-retirement benefits, including life insurance, health care and a supplemental retirement arrangement plan.[8]

10. On December 16, 2015, the Superintendent terminated both pension plans; the Office of the Superintendent of Financial Institutions terminated the Union DB Plan as of the same date. As of March 2016, the monthly benefits being paid to the non-federal retirees of the Salaried DB Plan were reduced by 25%, and the benefits being paid to the non-federal retirees of the Union DB Plan were reduced by 21%.

11. During the course of the ensuing CCAA proceedings, all or substantially all of the assets were sold, and the proceeds are now held by the Monitor. These assets were located in both the Provinces of Newfoundland & Labrador and Quebec.

12. There are significant amounts still owed to the Salaried and Union DB Plans. $6,671,820 is still owed to the Union DB Plan as special payments and catch-up special payments, while $2,185,756 is still owed in special payments to the Salaried DB Plan. The wind-up deficiencies of the Union and Salaried DB Plan are valued at $27,486,548 and $27,450,000, respectively.[9]

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6 See Motion for the Issuance of an Initial Order, May 19, 2015, **J.S., vol. 2, pp. 647-685.**
7 See Judgment on Pension Priority and Suspension of Certain Payment, June 26, 2015, **J.S., vol. 2, pp. 363-393.**
8 *Ibid.*
9 Amended Motion for Directions with Respect to Pension Claims, April 13, 2017, **J.S., vol. 2, pp. 544-574.**

13. On September 20, 2016, the Monitor filed a Motion for Directions – later amended on April 13, 2017[10] – seeking a determination of various issues relating to potential pension claims. The CCAA Judge ultimately directed as follows. In his view, the law that applies to any given plan member will depend on where that plan member reported for work.[11] Those reporting for work in the Province of Newfoundland and Labrador would be governed by the *NLPBA*, those reporting for work in Quebec would be governed by the Quebec *Supplemental Pension Plans Act*, CQLR c. R-15.1 ("***SPPA***"), while those reporting for work on one of the two federally-regulated railways would be governed by the *Pension Benefits Standards Act*, 1985 RSC 1985, c. 32 ("***PBSA***").

14. In the CCAA Judge's view, there was indeed a "liquidation" of the insolvent debtors, thereby giving rise to the liquidation deemed trusts outlined in the *NLPBA* and the federal *PBSA.*[12] This liquidation, in the CCAA Judge's view, would have begun at the very outset of the insolvency proceedings, on May 19, 2015.[13] The CCAA Judge also assumed that the deemed trust under the *NLPBA* applies to the full wind-up deficits owed to the two DB pension plans. Uncontroversially, the *PBSA*'s deemed trusts do not.

15. As for the Quebec members, the CCAA Judge concluded that the Quebec *SPPA* does not create a valid deemed trust that is enforceable against third parties, since it lacks the "key language" that deems certain amounts "to be separate from and form no part of the estate in liquidation, assignment or bankruptcy".[14]

16. It is the CCAA Judge's conclusions on paramountcy and applicable law that concern the present submission. On this, the CCAA Judge concluded that the *NLPBA*'s deemed trust and lien and charge conflict with the *CCAA*, and are therefore rendered inoperative by virtue of the doctrine of federal paramountcy.[15] The CCAA Judge

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10 *Ibid.*
11 Motion Decision, at paras. 61-81, **J.S., vol. 1, pp. 14-17.**
12 Motion Decision, at paras. 155-175, **J.S., vol. 1, pp. 32-35.**
13 Motion Decision, at para. 173, **J.S., vol. 1, p. 73.**
14 Motion Decision, at paras. 90-91, **J.S., vol. 1, pp. 19-20.**
15 Motion Decision, at paras. 177-210, **J.S., vol. 1, pp. 35-43.**

reasoned that the *NLPBA*'s deemed trust represents a different way of balancing conflicting interests than what is provided for in the *CCAA*, and the two statutes would thereby be in conflict. In the alternative, the CCAA Judge insisted that the entire scheme of distribution set out in the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 ("***BIA***") applies to a *CCAA* liquidation, and the *BIA*'s exhaustive scheme of distribution simply cannot be applied concurrently with the *NLPBA*'s deemed trust.[16] The CCAA Judge also concluded that, even if the *NLPBA*'s deemed trust and lien and charge did remain operative, they could not attach to the proceeds of property formerly located in the Province of Quebec.[17]

17. Finally, it is worth noting that the Government of Newfoundland & Labrador has requested an advisory opinion from the Newfoundland & Labrador Court of Appeal on two issues raised in the Monitor's Amended Motion for Directions that are of specific concern to that province, namely (1) the scope and nature of the deemed trust and the lien and charge outlined in section 32 of the *NLPBA*; and (2) how to determine what law applies in the context of a multi-jurisdictional pension plan which includes some members governed by the *NLPBA*.[18] The Court of Appeal's reference opinion was rendered on January 15, 2018, confirming, *inter alia,* that the NLPBA's deemed trust does indeed extend to the pension plan's full wind-up deficiency.[19]

PART II – ISSUES IN DISPUTE

A. Did the CCAA Judge err in holding that the deemed trusts in the Newfoundland and Labrador *Pension Benefits Act*, 1997, S.N.L. 1996, c. P-4.01 and the Quebec *Supplemental Pension Plans Act*, chapter R-15.1 are inoperative in the Wabush Mines *CCAA* proceedings based on the doctrine of paramountcy?

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16 Motion Decision, at para. 208, **J.S., vol. 1, p. 43.**
17 Motion Decision, at paras. 144-154, **J.S., vol. 1, pp. 30-32.**
18 Order in Council 2017-103, March 27, 2017, **J.S., vol. 3, pp. 743-744**; see also Ruling on Application for Directions, June 9, 2017, **J.S., vol. 2, pp. 687-688.**
19 *Reference re Section 32 of the Pension Benefits Act, 1997*, 2018 NLCA 1, at paras. 11-27.

B. Did the CCAA Judge err in holding that the deemed trusts in section 32 of the NLPBA do not apply to the Wabush Mines' assets located in the Province of Quebec and the sales proceeds therefrom?

C. Did the CCAA Judge err in holding that the scheme of distribution to creditors of the *Bankruptcy and Insolvency Act* applies in the Wabush Mines CCAA proceedings?

18. The Superintendent's submissions in the present factum are limited to those issues raised in its Notice of Appeal and Motion for Leave to Appeal, dated October 2, 2017.[20] These issues are worded and ordered according to the Appellants' and Incidental Appellants' joint document entitled Chart of Additional Issues. The Superintendent nevertheless reserves its right to support portions of the submissions of the other Appellants or of the Incidental Appellants.[21]

PART III – SUBMISSIONS

A. Both provincial and federal law can co-exist on this issue of overlapping federal and provincial jurisdiction, since Parliament has not "covered the field"

i. The CCAA Judge concluded that Parliament has covered the field in introducing sections 6(6), 6(7) and 36(7) of the *CCAA*

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20 See Newfoundland and Labrador Superintendent of Pension's Notice of Appeal and Motion for Leave to Appeal, **J.S., vol. 1, pp. 229-264.**

21 See the Appellants' and Incidental Appellants' joint document entitled Chart of Additional Issues for a complete description of the issues in appeal and the Superintendent's position on each one, **J.S., vol. 1, pp. 49-63.**

19. It is well-settled that provincial legislation "defines the priorities to which creditors are entitled until that legislation is ousted by Parliament".[22] Federal paramountcy is only triggered where there is an "operational conflict", such that it is impossible to comply with both federal and provincial law simultaneously, or where the operation of provincial law "frustrates the purpose" of the federal legislation.[23]

20. Unlike the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, the *CCAA* does not set out a fulsome scheme for the order of collocation or preference of claims. Indeed, the *CCAA* has very little to say about how the proceeds of a liquidation must be distributed. As such, according to *Indalex,* since Parliament "did not expressly apply all bankruptcy priorities […] to CCAA proceedings", then, at the end of a "CCAA liquidation proceeding, priorities may be determined by the *PPSA*'s [or provincial law's] scheme rather than the federal scheme set out in the *BIA*".[24] Alain Prévost finds that this passage represents *Indalex*'s most important contribution:

> […] the interest of the *Indalex* decision lies primarily in the fact that the Supreme Court confirmed therein that deemed trusts created by provincial legislation continue to apply in respect of companies having obtained court protection under the CCAA, which in principle is not the case for those companies that are liquidated under the BIA. [25]

21. After the *Indalex* proceedings began, Parliament amended the *CCAA* and introduced what are now sections 6(6), 6(7) and 36(7). These sections enshrine minimum protections for pension liabilities. Together, they require that the *CCAA* Court must be assured that the normal costs and unremitted employee contributions

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22 *Sun Indalex Finance LLC v. United Steelworkers*, [2013] 1 S.C.R. 271, 2013 SCC 6, at para. 51; see also *Crystalline Investments Ltd. v. Domgroup Ltd.*, [2004] 1 S.C.R. 60, 2004 SCC 3, at para. 43.

23 *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 18.

24 *Sun Indalex Finance LLC v. United Steelworkers*, [2013] 1 S.C.R. 271, 2013 SCC 6, at paras. 51-52, with the concurrence of McLachlin C.J. and Cromwell and Rothstein JJ. at para. 242, and the concurrence of LeBel and Abella JJ. at para. 265.

25 Alain Prévost, "Pension deemed trust: what's left?", (2017) 59: *Canadian Business Law Journal* 30, at p. 4.

deducted at source will be paid to the pension plans before the *CCAA* Court may approve a plan of arrangement or a sale outside the ordinary course of business.

22. On their face, these provisions merely set out minimum requirements that must be respected before court approval can be given. These sections are clearly not in "operational conflict" with section 32 of the *NLPBA*, which provides as follows:

> Amounts to be held in trust
>
> 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.
>
> (2) In the event of a liquidation, assignment or bankruptcy of an employer, an amount equal to the 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.
>
> (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.
>
> (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).

23. Both the *CCAA* and the *NLPBA* can be complied with simultaneously by guaranteeing the payment of the amounts described in section 6(6) of the *CCAA*, and by deeming the balance of the amounts described in section 32 *NLPBA* to be held in trust for pension plan members. Clearer still, the *NLPBA* does not frustrate the "federal purpose" underlying sections 6(6) and 36(7) *CCAA*, which is to guarantee payment of a limited class of pension claims. The *NLPBA* simply supplements these protections.

24. The CCAA Judge nevertheless concluded that the *CCAA* and the *NLPBA* were in conflict. This issue being a pure question of law, it is reviewable on the standard of correctness.

25. The CCAA Judge's reasoning relies on the assumption that, in enacting sections 6(6) and 36(7) *CCAA*, Parliament "covered the field" on the question of what pensioners are entitled to in a *CCAA* proceeding. In his view, Parliament "left no room for the provinces".[26] For proof, the CCAA Judge notes that Parliament had "weighed the competing interests" when enacting these provisions and decided that this level of protection was preferred. However, as will be outlined more fully below, such everyday legislative decision-making has *never before* resulted in Parliament "covering the field" on a given question, and simply cannot meet the "high standard" for invoking paramountcy on the basis of a frustration of federal purpose.[27]

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[26] Motion Decision, at para. 192, **J.S., vol. 1, p. 40.**

[27] *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 52, at para. 84.

26. If these everyday legislative choices implied that Parliament had "covered the field" and definitively decided a given question, the provinces would be significantly handicapped from pursuing their own vision of the public good within their constitutionally-recognized areas of competence. Indeed, for the reasons set out below, the CCAA Judge's conclusion is incompatible with the guiding principle of cooperative federalism and the restraint that must be exercised when applying the doctrine of federal paramountcy.

ii. In light of the importance of cooperative federalism, Parliament should only ever be interpreted as "covering the field" where it has employed clear statutory language to that effect

27. In areas of constitutionally overlapping jurisdiction, Canadian jurisprudence has come down decidedly in favour of cooperative federalism – the notion that both federal and provincial legislatures should be allowed to pursue their own visions of the public good within their respective spheres of competence.[28] This has been variously described as the "dominant tide" of federalism jurisprudence[29], a "guiding principle"[30], and even a "fundamental rule of constitutional interpretation".[31] It means that courts "should favour, where possible, the ordinary operation of statutes enacted by *both levels of government*. In the absence of conflicting enactments of the other level of government, the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest".[32]

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28 For a couple of recent decisions, see *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at para. 21, see also *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22, at paras. 22 and 37; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 15.

29 *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22, at para. 37.

30 *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at para. 21.

31 *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at para. 20.

32 *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22, at para. 37.

28. Fundamentally, cooperative federalism recognizes that Parliament is respectful of the provinces' legislative authority, and generally does not desire to bar the provinces from exercising the legislative powers bestowed upon them.[33] Courts must accordingly adopt a "restrained approach" to the doctrine of federal paramountcy[34], and must exercise a special restraint when considering whether provincial law "frustrates the purpose" of federal law.[35] In a word, "care must be taken not to give too broad a scope to paramountcy on the basis of frustration of federal purpose".[36] Courts must also prefer a plausible interpretation of federal law that can live alongside and co-exist with provincial law, over an interpretation which would result in conflict.[37] As the Supreme Court has recognized time and again, "[t]he fact that Parliament has legislated in respect of a matter does not lead to the presumption that in doing so it intended to rule out any possible provincial action in respect of that subject".[38]

29. Finally, this tendency to favour the co-existence of federal and provincial law means that provincial law can supplement the rights, obligations, or standards imposed nationally by federal law, even if this means preferring a different way of balancing competing interests. As Binnie and LeBel opined in *Canadian Western Bank*, "a provincial law may in principle add requirements that supplement the requirements

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33 *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22, at para. 74.

34 *Bank of Montreal v. Marcotte*, [2014] 2 S.C.R. 725, 2014 SCC 55, at para. 72; *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at paras. 21 and 27; *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13, at para. 21.

35 *Bank of Montreal v. Marcotte*, [2014] 2 S.C.R. 725, 2014 SCC 55, at para. 72; *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22, at para. 74; *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 52, at para. 84.

36 *Bank of Montreal v. Marcotte*, [2014] 2 S.C.R. 725, 2014 SCC 55, at para. 72; *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22, at para. 74.

37 *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22, at para. 75, citing *Attorney General of Canada v. Law Society of British Columbia*, 1982 CanLII 29 (SCC), [1982] 2 S.C.R. 307, at p. 356; see also Reference *re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837, at paras. 59-60.

38 *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22, at para. 74.

of federal legislation".[39] Cooperative federalism is thus said to normally favour "the application of valid rules adopted by governments at both levels as opposed to favouring a principle of relative inapplicability designed to protect powers assigned exclusively to the federal government".[40]

30. Indeed, ever since *O'Grady* was decided in 1960[41], it has been common and constitutionally inoffensive for provincial law to co-exist and to overlap with federal law in this way. *O'Grady* concerned the alleged conflict between the *Criminal Code*, which made it an offence to drive a motor vehicle recklessly, and Manitoba's *Highway Traffic Act*, which made it an offence to drive a motor vehicle without "due care and attention". In the dissenting view of Cartwright J., Parliament had definitely decided what degree of negligence was punishable, and any provincial attempt to impose a different legislative choice created conflict:[42]

> In my opinion when Parliament has expressed in an Act its decision that a certain kind or degree of negligence in the operation of a motor vehicle shall be punishable as a crime against the state it follows that it has decided that no less culpable kind or degree of negligence in such operation shall be so punishable. By necessary implication the Act says not only what kinds or degrees of negligence shall be punishable but also what kinds or degrees shall not.

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39 *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22, at para. 72; *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536, at para. 66; *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at para. 26.

40 *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at para. 22, citing *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38 (CanLII), [2010] 2 S.C.R. 453, at para. 118, per Deschamps J.

41 *O'Grady v. Sparling*, [1960] S.C.R. 804.

42 *Ibid.*, at pp. 820-821.

31. The majority opinion of Judson J. held instead that "both provisions can live together and operate concurrently".[43] *O'Grady* has since been viewed as a landmark decision, firmly in line with the guiding principle of cooperative federalism.[44]

32. Thus in *Spraytech*[45]*,* a municipal by-law all but prohibiting the use of certain pesticides was allowed to exist alongside federal legislation allowing the use of those same products. In *Rothmans, Benson & Hedges*[46], provincial tobacco control legislation banning all advertisements of tobacco products directed at minors was allowed to exist alongside the more relaxed federal legislation allowing retailers to display tobacco products in certain circumstances. And in *Lemare Lake Logging*[47]*,* a provincial law imposing a burdensome 150-day delay to commence an action to enforce a real-right was allowed to operate alongside the federal *BIA*, which provides for a much shorter 10-day delay to appoint a national receiver.

33. Canadian jurisprudence has flatly rejected the idea – seemingly endorsed by the CCAA Judge – that by simply weighing competing interests and legislating nationally, Parliament has definitively decided a given question. Professor Peter Hogg has even gone as far as to conclude that the "covering the field" frame of analysis "no longer has any place in Canadian constitutional law".[48]

34. The Supreme Court, for its part, has repeatedly instructed courts to only impute to Parliament an intention to "cover the field" if Parliament employs "very clear statutory

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43 *Ibid.*, at p. 811.

44 *In Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13, at para. 21, Major J. referred to the "path of judicial restraint in questions of paramountcy" that had been the Supreme Court's position since O'Grady.

45 *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241.

46 *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13.

47 *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419.

48 Peter Hogg, *Constitutional Law of Canada*, 5th ed., supplemented (Toronto: Carswell, 2007), at pp. 16-10.6 to 16-11.

language to that effect". The majority reasons in *Rothmans* and in *Lemare Lake* state this rule in these terms:[49]

> 21 I do not accept the respondent's argument that Parliament, in enacting s. 30, intended to make the retail display of tobacco products subject only to its own regulations. In my view, to impute to Parliament such an intention to "occup[y] the field" in the absence of very clear statutory language to that effect would be to stray from the path of judicial restraint in questions of paramountcy that this Court has taken since at least *O'Grady* (p. 820).[50]
>
> [27] And, as previously noted, paramountcy must be applied with restraint. In the absence of "very clear" statutory language to the contrary, courts should not presume that Parliament intended to "occupy the field" and render inoperative provincial legislation in relation to the subject: *Canadian Western Bank*, at para. 74, citing *Rothmans, Benson & Hedges Inc.*, at para. 21.[51]

35. In the absence of such clear statutory language, the "fundamental rule of constitutional interpretation" requires that courts interpret federal legislation as if it *welcomes* the overlapping application of provincial law.[52]

36. This requirement is similar to the equally well-established rule requiring the legislature to employ "clear, explicit and unequivocal language" if it desires to abrogate solicitor-client or litigation privilege.[53] Parliament is naturally presumed to be respectful of solicitor-client and litigation privilege, just as it is presumed to be respectful of the provinces' legislative authority. These bedrock principles cannot be

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49 *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13, at para. 21; *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at para. 27; see also *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22, at para. 74.

50 *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13, at para. 21.

51 *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at para. 27; see also *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22, at para. 74.

52 *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at paras. 27 and 21.

53 *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, [2016] 2 S.C.R. 521.

abrogated simply by implication or by inference. If Parliament wishes to abrogate norms that are central to the workings of our legal order, it must be absolutely clear that that is its intention.

37. Finally, and with respect, the CCAA Judge's reliance on *Lemare Lake* is misplaced. In the CCAA Judge's view, the majority of *Lemare Lake* considered the legislative history of s. 243 *BIA* in determining whether the operation of provincial law frustrated the federal purpose. He reasoned that if legislative history was relevant in that case, it ought to be here as well. However, in *Lemare Lake*, there was a genuine concern – voiced in the dissenting opinion of Justice Côté – that s. 243 was intended to provide secured creditors with a timely and effective remedy, one which would be practically thwarted by a provincial law requiring creditors to wait 150 days before commencing legal proceedings. In short, there was a concern that the animating federal purpose behind s. 243 could be genuinely frustrated, and so that federal purpose had to be closely investigated.

38. In this case, there is no such concern. Sections 6(6) and 36(7) *CCAA* are intended to ensure the payment of a limited class of pension claims, an objective *shared* by section 32 *NLPBA*. In the CCAA Judge's view, it is not this animating purpose that is frustrated by provincial law, but rather Parliament's decision not to confer more protection for pensioners. In a word, the CCAA Judge was of the view that Parliament had intended to settle this issue decisively, and any provincial law which purports to weigh the various competing interests differently must necessarily frustrate this federal intent. This is a far more sweeping conclusion, one that fails to recognize the importance of overlap between federal and provincial legislation, and that fails to exercise the proper care to ensure "not to give too broad a scope to paramountcy on the basis of frustration of federal purpose".[54]

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[54] *Bank of Montreal v. Marcotte*, [2014] 2 S.C.R. 725, 2014 SCC 55, at para. 72; *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22, at para. 74.

iii. Parliament simply exercised its every-day prerogative of preferring one policy option over another; there is no clear evidence that Parliament intended to bar any potential provincial action in regards to this subject matter

39. Respectfully, the CCAA Judge too readily accepted that Parliament had definitively decided a question within its competence. At first instance, the CCAA Judge was presented with evidence of Parliament's intention when it enacted sections 6(6) and 36(7) *CCAA*, drawn principally from the submissions made to Parliament, as well as the deliberations of various committees. The only evidence actually reproduced by the CCAA Judge are the concluding paragraphs of Deschamps J.'s reasons in *Indalex*, where she describes how Parliament once considered affording super-priority protection to certain pension claims, but chose not to.[55] Curiously, the passage reproduced in *Indalex* from the Standing Senate Committee on Banking, Trade and Commerce dates from well-before the 2009 amendments, and has simply nothing to say about the federal intention underlying what is now sections 6(6) and 36(7) *CCAA*. Respectfully, it was inappropriate of the CCAA Judge to rely on this particular report.

40. But even if it is accepted that Parliament *did* consider other policy options and ultimately preferred the more limited protection reflected in sections 6(6) and 36(7), this evidence is not on its own sufficient. It is Parliament's fundamental duty to weigh competing interests and consider different policy choices before settling on its preferred path. For a democratically-accountable legislature, this is everyday work. It would not be in keeping with the "guiding principle" of cooperative federalism if this regular process of legislative decision-making could, on its own, result in Parliament leaving "no room for the provinces", as the CCAA Judge put it. Such a result would repudiate both the Supreme Court's restrained approach to the doctrine of

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55 *Sun Indalex Finance LLC v. United Steelworkers*, [2013] 1 S.C.R. 271, 2013 SCC 6, at para. 81.

paramountcy, to say nothing of the importance of the provinces' jurisdiction over property and civil rights.

41. There is simply no clear evidence that Parliament ever had the intention of legislating to the total exclusion of the provinces. There is certainly no clear statutory language to this effect. On their face, sections 6(6) and 36(7) merely represent minimum requirements that must be met in order for a *CCAA* Court to approve a sale or plan of arrangement. Conceivably, a distribution or plan of arrangement could in fact provide for *more* than what is contemplated in those sections. The words of the majority in *Lemare Lake* are indeed apposite: "[t]he effect of the provision is to set a minimum waiting period. This does not preclude *longer* waiting periods under provincial law".[56]

42. The absence of any explicit statutory language "covering the field" is made all the more conspicuous by the fact that Parliament actually *did* rule out the continued application of provincial law elsewhere in the *CCAA*. Most glaringly, Parliament explicitly ruled out the continued application of some provincial deemed trusts in favour of the Crown in section 37:[57]

> 37(1) Subject to subsection (2), <u>despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty</u>, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
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> (Underlining added)

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56 *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at para. 46.

57 Parliament also ruled out the continued application of provincial shareholder approval requirements in section 36(1) *CCAA*, which states that a court may approve a sale or disposition of assets "[d]espite any requirement for shareholder approval, including one under federal or provincial law". Provincial law is also explicitly excluded in certain matters relating to the monitor's personal liability: see subsections 11.8(1), (3), and (5) CCAA.

43. In the absence of any such clear language, the "fundamental rule of constitutional interpretation" requires this Honourable Court to interpret sections 6(6) and 36(7) *CCAA* as if Parliament contemplated the co-existence of federal and provincial law.[58] The *NLPBA*'s deemed trust should therefore continue to be operative.

44. Finally, while it is not determinative, paramountcy arguments rarely succeed without the express support of the federal government, speaking through its Attorney General.[59] In this case, the Attorney General has opposed the CCAA Judge's interpretation of sections 6(6) and 36(7) *CCAA* and expressed support at first instance for the proposition that the *NLPBA*'s deemed trust can co-exist with the similar protections envisioned in the *CCAA*. Only the Monitor and the Wabush CCAA Parties have sought to invoke the doctrine, and render provincial law inoperative.

iv. *Indalex* was misread and misapplied in *Grant Forest*

45. At first instance, the Monitor relied heavily on *Grant Forest Products*, a decision which held that a provincial deemed trust which arises post-filing is inoperative for that reason alone.[60] Even though *Grant Forest* was not relied on by the CCAA Judge in his reasons, it may still be worth addressing.

46. In *Grant Forest*, Campbell J. observed the following about the Supreme Court's decision in *Indalex*:

> All of the justices agreed that the deemed trust provision contained in s.57(4) of the *PBA* does not apply to the windup deficit of a pension plan that has not been wound up (the Indalex Executive Plan) at the time of *CCAA* proceedings.

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58 *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22, at para. 75, citing *Attorney General of Canada v. Law Society of British Columbia*, 1982 CanLII 29 (SCC), [1982] 2 S.C.R. 307, at p. 356.

59 *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13, at para. 26, citing *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31, at paras. 72-73.

60 *Grant Forest Products Inc. (Re)*, 2013 ONSC 5933.

> […]
>
> The Supreme Court of Canada decision in Indalex stands for the proposition that provincial provisions in pension areas prevail prior to insolvency but once the federal statute is involved the insolvency provision regime applies.[61]

47. These passages misread the facts and holding of that decision. The "Executive Plan" in *Indalex* was not inoperative because it arose post-filing. It was ineffective simply because the deemed trust did not yet exist under the terms of Ontario pension law at the time the debtor's assets were sold, and a distribution ordered.[62] *Indalex* therefore cannot stand for the proposition that a deemed trust that arises post-filing is ineffective for that reason alone. After all, such a conclusion would be inconsistent with *Indalex*'s central conclusion, namely 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*" (underlining added).[63]

B. The *NLPBA*'s deemed trust and lien should also charge the proceeds from assets formerly located in the Province of Quebec

48. The *NLPBA*'s deemed trust clearly applies to property formerly located in the Province of Newfoundland & Labrador, and to the proceeds resulting from the disposition of these assets. However, much of the Wabush CCAA Parties' assets were located in the Province of Quebec before being sold during the process of liquidation. On its own terms, the NLPBA's deemed trust and lien and charge are capable of applying to an employer's assets "regardless of their location".[64] As such, in order for the *NLPBA*'s deemed trust to have its full and intended effect, it must be

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61 *Ibid.*, at paras. 25 and 80.

62 See *Sun Indalex Finance LLC v. United Steelworkers*, [2013] 1 S.C.R. 271, 2013 SCC 6, at para. 46; *Re Indalex*, 2010 ONSC 1114, at paras. 23-24; *Indalex Limited (Re)*, 2011 ONCA 265, at paras. 69-110.

63 *Sun Indalex Finance LLC v. United Steelworkers*, [2013] 1 S.C.R. 271, 2013 SCC 6, at para. 52.

64 *Reference re Section 32 of the Pension Benefits Act, 1997*, 2018 NLCA 1, at paras. 48 and 52.

capable of charging these Quebec assets. The CCAA Judge decided otherwise. This being a distilled question of law, it is reviewable on the standard of correctness.

49. While article 3097 of the *Civil Code of Québec* posits the general proposition that matters of real rights are governed by the law of the place where the property is situated, article 3079 suggests that "effect may be given" to the law of Newfoundland & Labrador directly in this province:

> 3079. Where legitimate and manifestly preponderant interests so require, effect may be given to a mandatory provision of the law of another State with which the situation is closely connected.
>
> In deciding whether to do so, consideration is given to the purpose of the provision and the consequences of its application.

50. The Wabush insolvency indeed represents a compelling example of where article 3079 should be invoked and relied upon. Firstly, section 32 of the *NLPBA* is clearly a "mandatory provision" of "another State".[65] Second, the *NLPBA* is "closely connected" to this "situation". The "situation" referred to here is the insolvency of the Wabush CCAA parties, who hired employees to work in Newfoundland and registered all of their employees' pension plans with the Newfoundland & Labrador Superintendent of Pensions. The "situation" consists more specifically of a debate about how to distribute the proceeds of the CCAA liquidation, a matter intimately connected to the *NLPBA* and its deemed trust protecting pension funding.

51. Thirdly, there are "legitimate and manifestly preponderant interests" that require that local effect be given to the *PBA*. The Wabush CCAA parties together ran a business that straddled the Newfoundland & Quebec border, hiring employees to work in both provinces and establishing two multijurisdictional pension plans. It would be both unjust and inequitable for the employees who reported for work in Quebec to potentially benefit from the deemed trust of s. 49 *SPPA*, while similarly-placed

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[65] Article 3077 CCQ provides that for the purpose of private international law, the law of another province is effectively the law of another State.

Newfoundland & Labrador workers have their deemed trust under s. 32 *PBA* languish without property to attach to.

52. The Salaried and Union DB Plans are multijurisdictional pension plans, the funding for which goes to benefit the plan as a whole. When an employer agrees to establish and sponsor such a multijurisdictional plan, all of the employer's assets in each of those jurisdictions should be chargeable. Plan members should be entitled to the same protection, regardless of whether they reported for work in Quebec or in Newfoundland. The principles of order and interprovincial comity demand nothing less.

53. Moreover, the purpose of section 32 *PBA* is entirely in line with existing Quebec legislation. Both the *PBA* and the *SPPA* attempt to secure some amount of pension funding in the event a sponsoring employer enters insolvency proceedings. This is clearly not a case where the purpose underlying the "foreign" legislation is incompatible with local values and principles, as it has been in so many of the cases where parties sought unsuccessfully to invoke art. 3079.[66]

54. These arguments were submitted to the CCAA Judge at first instance, and he did not take issue with them in his reasons. The CCAA Judge nevertheless declined to rely on article 3079, citing the following, singular concern:

> However, the NLPBA only applies to the workers who report for work in the province of Newfoundland and Labrador, while the SPPA applies to workers who report for work in the province of Quebec. If the NLPBA extended to property in Québec, this would be to the prejudice of the Québec workers who would see a deemed trust for the benefit of their co-workers applied to the assets to which the Québec workers report for work.[67]

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66 *Globe-X Management Ltd. (Proposition de)*, 2006 QCCA 290, (2006), AZ-50359122 (Azimut), J.E. 2006-558, [2006] R.J.Q. 724, at para. 44.

67 Motion Decision, at para. 153, **J.S., vol. 1, p. 32.**

55. Since the CCAA Judge concluded that the Quebec *SPPA* does not create a valid deemed trust – and even if it did such a deemed trust would only apply to normal costs, unremitted contributions and special payments – then to allow the *NLPBA*'s more generous deemed trust to attach to property in Quebec would disadvantage Quebec workers' unsecured pension claims.

56. Respectfully, this reasoning is unconvincing. As a matter of principle, it penalizes workers of Newfoundland & Labrador for the perceived legislative choices of the Province of Quebec. As a practical matter, in the circumstances of this case, the overwhelming amounts of unsecured debts owed by the Wabush CCAA Parties makes it unlikely that unsecured creditors will be able to achieve anything more than nominal recovery, regardless of whether Newfoundland & Labrador workers can enforce their deemed trust on Quebec assets or not. Since Quebec workers' recovery of unsecured debt will remain minimal in either case, concern for their interests simply cannot override the importance of giving full effect to a pension deemed trust in the context of a multi-jurisdictional pension plan.

C. Only Parliament can extend the *BIA*'s entire scheme of distribution to proceedings under the *CCAA*

57. The CCAA Judge identified an alternative ground for triggering the doctrine of federal paramountcy. In his view, the "bottom line is that a liquidating CCAA requires a scheme of distribution and the only one which makes sense is the scheme of distribution under the BIA".[68] It is common ground that the *BIA*'s exhaustive scheme cannot be applied concurrently with the *NLPBA*'s deemed trust.

58. In this, the CCAA Judge relies on *Century Services*, where Deschamps J. opined that the rights conferred under the *CCAA* should be interpreted harmoniously with the rights set out in the *BIA*, so as to avoid giving secured creditors any strategic

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[68] Decision on the Monitor's Amended Motion for Directions, at para. 208, **J.S., vol. 1, p. 43.**

incentive to petition a restructuring debtor into bankruptcy.[69] However, *Century Services* only provides guidance on how courts ought to *interpret* provisions of the *CCAA* and the *BIA*. It neither identifies nor provides any legal basis for grafting the *BIA*'s entire legislated scheme of distribution into a *CCAA* liquidation. This was later confirmed in *Indalex*, where this very argument was put before the Supreme Court and rejected:[70]

> [50] The Appellants' first argument would expand the holding of *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 (CanLII), [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*. […]
>
> [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

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69 *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 47.

70 *Sun Indalex Finance LLC v. United Steelworkers*, [2013] 1 S.C.R. 271, 2013 SCC 6, at paras. 50-52.

> 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*.

59. This passage – endorsed as it was by a unanimous Court[71] – is clear. Merely reproducing it resolves this issue. Strikingly, the CCAA Judge never addresses this portion of Deschamps J.'s reasons, although he was repeatedly made aware of it in both oral and written submissions.

60. While this apparent repudiation of *Indalex* is an error in its own right, it is also unclear what authority *any* court would have to re-write the *CCAA* in such an important way. Respecting Parliament's prerogative means that courts cannot take it upon themselves to fill-in perceived gaps in legislation. And if there are indeed "gaps" in the *CCAA*, *Indalex* is clear: provincial law continues to apply unimpeded, as it "defines the priorities to which creditors are entitled until that legislation is ousted by Parliament".[72] The CCAA Judge erred by concluding that provincial law was ousted simply because it "makes sense" to do so.

61. The CCAA Judge's conclusion also sits poorly with his insistence, elsewhere in his reasons, on the importance of Parliament's choices. Parliament introduced what is now section 36 of the *CCAA* in its 2009 amendments to the statute, enshrining in legislation the *CCAA* Court's power to approve sales outside the ordinary course of business.[73] Even though these amendments predictably facilitated *CCAA* liquidations throughout Canada, and even though *CCAA* liquidations have been part

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71 Note the concurrence on this point of McLachlin C.J, Rothstein and Cromwell JJ. at para. 242 and the concurrence of LeBel and Abella JJ. at para. 265.

72 *Sun Indalex Finance LLC v. United Steelworkers*, [2013] 1 S.C.R. 271, 2013 SCC 6, at para. 51.

73 Before the 2009 amendments, a *CCAA* Court's power to approve the sale of assets in a *CCAA* proceeding was considered – albeit not un-controversially – to fall within the Court's inherent powers: see *Re Canadian Red Cross Society / Société Canadienne de la Croix-Rouge* (1998), 5 C.B.R. (4th) 299, [1998] O.J. No. 3306, 1998 CLB 4258 (Ont. Gen. Div.); see also Alfonso Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada", (2014) 56: *Canadian Business Law* 73, at p. 8.

of the insolvency law landscape since at least 1998[74], Parliament has not introduced to the *CCAA* any federal scheme of distribution mirroring the one found in the *BIA*. Respectfully, this Honourable Court has no choice but to respect that decision.

PART IV – CONCLUSIONS

62. For these reasons, may it please this Honourable Court to:

I. GRANT the Superintendent's appeal with costs;

II. DISMISS the Monitor's Amended Motion for Directions;

III. DECLARE that the deemed trust posited by the *NLPBA* is enforceable and operative during the course of *CCAA* proceedings;

IV. DECLARE that the *NLPBA*'s deemed trust and lien and charge may attach to the proceeds held by the Monitor from the sale of assets formerly located in the Province of Quebec.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of January, 2018.

Montréal, January 19, 2018

IMK LLP

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(Me Douglas C. Mitchell)
(Me Edward Béchard-Torres)
Lawyers for the Appellant

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74 Alfonso Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada", (2014) 56: *Canadian Business Law* 73, at p. 8.

PART V – AUTHORITIES

Jurisprudence **Paragraph(s)**

Jurisprudence *(cont'd)* **Paragraph(s)**

Doctrine

Doctrine *(cont'd)* **Paragraph(s)**

ATTESTATION

We undersigned, IMK LLP, do hereby attest that the above Appellant's Brief does comply with the requirements of the *Civil Practice Regulation of the Court of Appeal*. No transcripts were necessary for this appeal.

Length of time requested for the oral presentation of the arguments: To be determined with the Court

Montréal, January 19, 2018

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