# 500-09-027076-173

# COURT OF APPEAL OF QUEBEC

(Montréal)

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

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N° 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*:**

**ATTORNEY GENERAL OF CANADA, acting on behalf of the OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS**

**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)

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## APPELLANT'S BRIEF

**8568391 CANADA LIMITED**
**CLIFFS QUÉBEC IRON MINING ULC**
**WABUSH IRON CO. LIMITED**
**WABUSH RESOURCES INC.**

**MISES EN CAUSE**
(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**
**SYNDICAT DES MÉTALLOS, SECTION LOCALE 6285**
**MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL, and NEIL JOHNSON**
**HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR**
**MORNEAU SHEPELL LTD.**
**RETRAITE QUÉBEC**

**MIS EN CAUSE**
(Mis en cause)

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## APPELLANT'S ARGUMENT

### *OVERVIEW*

1. This appeal is about ensuring that the express intention of Parliament to protect certain amounts due to pension plans is fulfilled.

2. In subsection 8(2) of the *Pension Benefits Standards Act, 1985*[1] (*PBSA*), Parliament provided that certain amounts owing to a pension plan are, in the event of a liquidation of the company, deemed to be held in trust for the beneficiaries of the pension plan. Those amounts include those covering normal and special payments.

3. Having found that a liquidation occurred, the trial judge correctly determined that the *PBSA* deemed trust was established.

4. However, the trial judge subsequently erred in concluding that this deemed trust provision conflicted with a provision of the *Companies' Creditors Arrangement Act* (*CCAA*)[2] and was therefore inoperative or "not enforceable". Only irreconcilable conflict with another law of Parliament can render a provision of a federal law inoperative. No such conflict exists between the *PBSA* and the *CCAA* in the present case because the relevant provision of the *CCAA* applies only when a plan of arrangement has been proposed to and approved by creditors. At no time have the companies proposed a plan of arrangement to their creditors or suggested an intention to do so.

5. As long as the companies remain under the protection of the *CCAA* and until creditors accept a plan of arrangement, the *PBSA* deems the amounts of the normal and special payments due to the pension plans in respect of the railway employees to be held separate from the companies' assets.

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[1] RSC 1985, c 32 (2nd Supp) (*"PBSA*").
[2] RSC 1985, c c-36 ("*CCAA").*

# PART I – FACTS

## *A. The Role of the Office of the Superintendent of Financial Institutions (OSFI)*

6. The Superintendent of Financial Institutions is responsible for the oversight of the *PBSA* and as such is the regulator responsible for private pension plans in areas of federal jurisdiction.[3] In the present case, the AGC has intervened on behalf of OSFI to ensure the application of the *PBSA* to protect the rights and interests of the beneficiaries of the pension plans.

## *B. The Wabush Companies*

7. The *mise-en-cause* companies ("*CCAA* Parties") are a group of related companies who sought relief from their debts pursuant to the *CCAA.* These companies collectively operated iron ore mines in Labrador and northern Quebec, except Wabush Lakes Railway Company Ltd and the Arnaud Railway Company (the Railways), which operated two railroads.[4]

8. Some of the *mise-en-cause* companies – Wabush Iron Co Ltd, Wabush Resources Inc, and the Railways (the "Wabush Companies") - collectively offered two defined benefit pension plans: one for salaried employees, and one for unionized employees. Some members of these plans worked in the mining operations, and some members worked on the Railways.[5]

9. In 1960, the railway works and undertakings of the Railways were declared to be works for the general advantage of Canada,[6] bringing them under exclusive federal jurisdiction pursuant to sections 91(29) and 92(10) of the *Constitution Act, 1867.*

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3 *Office of the Superintendent of Financial Institutions Act,* RSC 1985, c 18 (3rd Supp) at ss 4(2.1) and 4(3).

4 **Joint schedules of the parties in support of the proceedings in appeal ("JS"), Vol 1, p 2,** Judgment on the amended motion by the monitor for directions with respect to pension claims ("Judgment on appeal"), at paras 1-3.

5 **JS, Vol 1, pp 2-3,** Judgment on appeal, at paras 4-6; see also **JS, Vol 6, p 2106,** R-24, Salaried Plan and **JS, Vol 6, p 2095,** R-23, Unionized Plan.

6 **JS, Vol 1, p 14,** Judgment on appeal, at para 61; see also *An Act respecting Wabush Lake Railway Company Limited and Arnaud Railway Company,* (1960) 8-9 Eliz II, c 63, at s 2.

10. The Wabush Companies ceased operations in 2014; the mining activities were suspended, and most employees were terminated.[7]

11. On May 20, 2015, the Wabush Companies were granted protection under the *CCAA* by the Initial Order of Justice Hamilton of the Quebec Superior Court (the "trial judge").[8]

12. Pursuant to the *CCAA* and under the Court's supervision, the Wabush Companies' property has been liquidated.[9] The proceeds of that property are in the hands of the respondent FTI Consulting Canada Inc., the court-appointed monitor for all the *CCAA* Parties.[10]

### *C. CCAA proceedings related to the pension claims*

13. Following the Initial Order, the Wabush Companies sought and obtained an order from Justice Hamilton on June 26, 2015 suspending certain payments (special payments and annual lump sum "catch-up" payments) to the two pension plans.[11]

14. On December 16, 2015, the pension plans were terminated by the Newfoundland and Labrador Superintendent of Pensions and the federal Superintendent of Financial Institutions on the grounds that the plans failed to meet solvency tests, that the employer had discontinued all of its business operations, and that it was highly unlikely that any potential buyer would assume the liabilities of the pension plan.[12]

15. On September 20, 2016, the Monitor filed a motion seeking directions in respect of various issues related to the pension claims. That motion, as amended, gave rise to the judgment that is the subject of the present appeal.[13]

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[7] **JS, Vol 1, pp 2, 3 et 34,** Judgment on appeal, at paras 2, 3, 4 and 170.
[8] **JS, Vol 2, p 518,** Initial Order dated May 20, 2015.
[9] **JS, Vol 1, p 35,** Judgment on appeal, at para 173.
[10] **JS, Vol 2, p 518,** Initial Order dated May 20, 2015; *CCAA, supra* note 2, at ss 2 and 23.
[11] **JS, Vol 1, p 4,** Judgment on appeal, at para 8; **JS, Vol 2, pp 363-392, esp. 383-388,** Suspension Order dated June 26, 2015.
[12] **JS, Vol 1, p 4,** Judgment on appeal, at para 9; **JS, Vol 5, pp 1863-1866,** R-13, Termination letters of NL; **JS, Vol 6, pp 1867-1870,** R-14, Termination letter of OSFI.
[13] **JS, Vol 1, p 2,** Judgment on appeal, at para 1; **JS, Vol 2, p 544,** Monitor's Amended Motion for directions with respect to pension claims dated Apr. 13, 2017.

### *D. The PBSA 1985 and the funding of the Wabush pension plans*

16. Under legislation respecting private pension plans in Canada, there are two basic types of payments that must be made to a pension plan: normal and special payments. Normal payments are the basic payments prescribed by a pension plan for current accrual of service.[14] When an active plan is found to be insufficiently funded, special payments must be made to compensate over time for the shortfall.[15]

17. In the event that a pension plan is wound up, the total amount that would be required to fully fund the plan at the date of termination is known as the wind-up deficit.[16]

18. In the present case, normal monthly payments were made to both plans up to December 16, 2015, the date on which the plans were terminated.[17]

19. The Wabush Parties were required to make special payments to both plans. However, the obligation to make the special payments was suspended by the court on June 26, 2015,[18] as will be discussed below. The outstanding special payments, for both plans combined, collectively total approximately nine million dollars.[19]

20. Assuming the special payments are made, each plan will still have a wind-up deficit of over twenty million dollars.[20]

21. The exact quantum of the pension claims under the *PBSA* is not an issue before the courts and is not in evidence. It suffices to say that this amount is a portion of the sums owing for normal and special payments. The *PBSA* does not protect amounts owing for the full wind-up deficit.

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[14] *Pension Benefits Standards Regulations, 1985,* SOR/87-19, at s 9(4)(a) (*"PBSR"*).

[15] *PBSR, Ibid*, s 9(4)(b), (c) and (d). See also discussion in *Buschau v Rogers Communications Inc,* 2006 SCC 28, at para 15, [2006] 1 SCR 973 ("*Buschau v Rogers")*.

[16] See *PBSA, supra* note 1, at s 29(6.1).

[17] **JS, Vol 1, pp 4-5,** Judgment on appeal, at para 13.

[18] **JS, Vol 1, p 5,** Judgment on appeal, at paras 15-16; **JS, Vol 2, p 392,** Suspension Order dated June 26, 2015.

[19] **JS, Vol 1, p 5,** Judgment on appeal, at paras 15-16; see also **JS, Vol 6, p 1880**, R-16, Salaried Employees Summary Table and **JS, Vol 6, p 1881,** R-17, Union DB Plan Summary Table.

[20] **JS, Vol 1, pp 5-6,** Judgment on appeal, at paras 19-20.

## PART II – ISSUES

22. The AGC appeals on issues 3, 6, 7, and 8:[21]

(3) Did the *CCAA* Judge err in holding that the deemed trust in the *Pension Benefits Standards Act, 1985* are inoperative[22] in the Wabush Mines *CCAA* proceedings because they conflict with Parliament's intent?

(6) 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?

(7) Did the *CCAA* Judge err in holding that the priority of the *PBSA* deemed trusts for amounts owing by the employer to the Wabush Mines pension plans as against a secured claim is dependent on the deemed trusts coming into effect before the secured claim?

(8) Should the *CCAA* Judge have determined if the going concern[23] payments were required to have been made by the employer to the Wabush Mines Union Plan for the period from December 17 to 31, 2015?

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[21] As instructed (**JS, Vol 1, p 65 (**Minutes of Case Management hearing on Dec. 13, 2017), these questions are produced verbatim from the table set out in **JS, Vol 1, pp 49ff.**
[22] *N.b.,* the question as posed refers to operability, however, it is not an issue of paramountcy.
[23] That is, the normal payments.

## PART III – ARGUMENTS

***(3) Did the CCAA Judge err in holding that the deemed trust in the Pension Benefits Standards Act, 1985 is inoperative in the Wabush Mines CCAA proceedings because it conflicts with Parliament's intent?***[24]

23. The trial judge correctly concluded that subsection 8(2)[25] of the *PBSA* created a deemed trust covering the amounts owed in respect of the normal and special payments to the pension plans in the event of a liquidation, assignment, or bankruptcy of the employer.[26] He also correctly concluded that, as a question of fact, a liquidation event did occur[27] and, consequently, that the deemed trust created by that provision had indeed been triggered at the time of the Initial Order.[28]

24. Having reached these conclusions, he then looked to whether the deemed trust was valid in the *CCAA* context. The AGC submits that it is at this stage of his analysis that the trial judge erred.

25. The judge appears to have assumed that subsection 6(6)[29] of the *CCAA* was engaged in the circumstances of the case because he noted that subsection 6(6) does not protect special payments, and he then concluded that there was a conflict between subsection 6(6) of the *CCAA* and subsection 8(2) of the *PBSA* (which does protect special payments).[30] He further erroneously relied on *Century Services v Canada* to conclude that the *PBSA* deemed trust was not enforceable in the present case.[31]

26. Fundamentally, the trial judge erred in considering subsection 6(6) of the *CCAA.* Subsection 6(6) is simply not engaged in the present case, as no plan of arrangement has been proposed or accepted. The focus on subsection 6(6) led the trial judge to attempt to resolve a conflict that simply did not exist between the *CCAA* and the *PBSA*.

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[24] *N.b.,* the question as posed refers to operability, however, the issue is not one of paramountcy.

[25] See below at para 39.

[26] **JS, Vol 1, p. 19,** Judgment on appeal, at para 88.

[27] **JS, Vol 1, p 34,** Judgment on appeal, at para 166.

[28] **JS, Vol 1, p 35,** Judgment on appeal, at para 173.

[29] See below at para 31.

[30] **JS, Vol 1, pp 37-39 and 44**, Judgment on appeal, at paras 184-188 and 211.

[31] **JS, Vol 1, pp 44-45,** Judgment on appeal, at paras 214-216.

### *A. Principles of interpretation*

27. When the words used in a statute are clear and unambiguous, no further step is needed to identify the intention of Parliament.[32] There is only one approach to statutory interpretation: "the words of an act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[33] Each provision is presumed to be remedial and the law is considered as always speaking.[34]

28. When considering more than one provision of the same legislature (in this case, Parliament), the starting point is a "virtually irrebuttable"[35] presumption of legislative coherence: "the body of legislation enacted by a legislature does not contain contradictions or inconsistencies, that each provision is capable of operating without coming into conflict with any other".[36] The presumption of coherence between statutes dictates that one avoid interpretations that would bring the provisions into conflict. As explained by Pierre-André Côté, the assumption of rationality leads to the presumption of absence of conflict between laws:[37]

> Different enactments of the same legislature are deemed to be as consistent as the provisions of a single enactment. All the legislation of a legislature is deemed to make up a coherent system. Thus, interpretations favouring harmony between statutes should prevail over those favouring conflict, because the former are presumed to better represent the thought of the legislature.[38] [Footnotes omitted]

29. The Supreme Court of Canada instructs that "an interpretation which results in conflict should be eschewed unless it is unavoidable". "Unavoidable" is a high threshold:[39]

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32 *R v Multiform Manufacturing Co.,* [1990] 2 SCR 624, p 630.
33 *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 SCR 27, pp 40-41,154 DLR (4th) 193.
34 *Interpretation Act,* RSC 1985, c I-21, at ss 10 and 12.
35 Ruth Sullivan, *Sullivan on the Construction of Statutes,* 6th ed (Canada: LexisNexis, 2014), p 338 ("*Sullivan*").
36 *Ibid.*, p 337.
37 Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th ed (Montréal: Thémis, 2009), p 374.
38 *Ibid.,* p 365. See also generally, *Sullivan, supra* note 35, pp 337-372.
39 *Lévis (City) v Fraternité des policiers de Lévis Inc.,* 2007 SCC 14, at para 47, [2007] 1 SCR 591, see also at para 85 per Deschamps and Fish JJ.

> [….] The test for determining whether an unavoidable conflict exists is well stated by Professor Côté in his treatise on statutory interpretation:
>
> > According to case law, two statutes are not repugnant simply because they deal with the same subject: application of one must implicitly or explicitly preclude application of the other.
> >
> > (P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 350)
>
> Thus, a law which provides for the expulsion of a train passenger who fails to pay the fare is not in conflict with another law that only provides for a fine because the application of one law did not exclude the application of the other (*Toronto Railway Co. v. Paget* (1909), 1909 CanLII 10 (SCC), 42 S.C.R. 488). Unavoidable conflicts, on the other hand, occur when two pieces of legislation are directly contradictory or where their concurrent application would lead to unreasonable or absurd results. A law, for example, which allows for the extension of a time limit for filing an appeal only before it expires is in direct conflict with another law which allows for an extension to be granted after the time limit has expired (*Massicotte v. Boutin*, 1969 CanLII 97 (SCC), [1969] S.C.R. 818).

30. In short, conflicts between two statutes of Parliament are exceptional and can be found to occur only after no harmonious interpretation can be found.

### *B. Subsection 6(6) of the CCAA*

31. Section 6(1) of the *CCAA* provides that where a majority of creditors agree to a plan of compromise or arrangement, the compromise or arrangement may be sanctioned by the court. If sanctioned by the court, the plan becomes binding. Subsections (2) through (5) restrict the court's power to sanction such a plan, in certain cases, such as where amounts are owing to the crown, to the Canada Pension Plan, or certain wages are owing to employees. Subsection 6(6) adds a further restriction:

| | |
|---|---|
| 6(6) If the company participates in a prescribed pension plan for the benefit of its employees, <u>the court may sanction a compromise or an arrangement</u> in respect of the company <u>only if</u> | 6(6) Si la compagnie participe à un régime de pension réglementaire institué pour ses employés, <u>le tribunal ne peut homologuer la transaction ou l'arrangement</u> que si, à la fois : |
| **(a)** <u>the compromise or arrangement provides for payment of the following amounts</u> that are unpaid to the fund | **a)** <u>la transaction ou l'arrangement prévoit que seront effectués des paiements correspondant au total des sommes</u> ci-après qui n'ont |

| | |
|---|---|
| established for the purpose of the pension plan: | pas été versées au fonds établi dans le cadre du régime de pension : |
| […] | […] |
| **(ii)** if the prescribed pension plan is regulated by an Act of Parliament, | **(ii)** dans le cas d'un régime de pension réglementaire régi par une loi fédérale : |
| **(A)** an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and | **(A)** les coûts normaux, au sens du paragraphe 2(1) du Règlement de 1985 sur les normes de prestation de pension, que l'employeur est tenu de verser au fonds, |
| […] | […] |
| **(b)** the court is satisfied that the company can and will make the payments as required under paragraph (a). | **(b)** il est convaincu que la compagnie est en mesure d'effectuer et effectuera les paiements prévus à l'alinéa a). |

[Our emphasis]

32. Thus this provision comes into application after creditors have voted on a plan of arrangement or compromise. While the latitude given to the debtor and a majority of its creditors to reach an agreement is very broad, Parliament requires the court to ensure that the debtor and creditors have provided that certain payments in the public interest be made. Specifically with respect to subsection 6(6), when a plan of arrangement or compromise has been approved by the creditors, the Court must ensure that the plan provides for the normal payments.

33. In the present file, no plan of arrangement or compromise has been proposed to the creditors. There is no suggestion of any intent to prepare such a plan.

34. Section 6 is simply not engaged in the present case. The trial judge erred in not considering this threshold issue, and thus erred in applying subsection 6(6) of the *CCAA*. This error is determinative in his reasoning as to the effectiveness of the *PBSA* deemed trust.

### *C. The purpose of the CCAA*

35. Though subsection 6(6) is clear, it is nonetheless apposite to the present case to bear in mind Parliament's intent in enacting the *CCAA* as a whole.

36. The purpose of the *CCAA* is stated in its long title: "An Act to facilitate compromises and arrangements between companies and their creditors". The courts have confirmed this purpose. In *AbitibiBowater Inc,*[40] Justice Gascon, then of the Superior Court, observed:

> Si la familiarité des nombreux intervenants avec le processus varie grandement, l'objectif de cette loi est tout de même bien connu. La *LACC* vise à permettre à AbitibiBowater de restructurer ses affaires, ses opérations et sa dette.
>
> Le moyen que la loi met à sa disposition est l'élaboration, la négociation et la mise en œuvre d'un plan d'arrangement juste et raisonnable avec ses créanciers et sur lequel ils seront appelés à voter.
>
> Le processus est avant tout celui des débitrices et de ses créanciers. Le rôle du Tribunal en est un de supervision. Le but ultime recherché est la conclusion d'un plan d'arrangement fructueux dans une perspective de continuité des opérations et de survie de l'entreprise. Il en va de l'intérêt de tous les intervenants, voire celui de la société en général selon certains. Pour paraphraser les propos du juge Blair dans l'arrêt *Metcalfe**[4]***, l'on parle ici d'une loi qui comporte un « *broader social economic purpose* » et un « *wider public interest* ». [Our emphasis]

37. In *Century Services Inc. v Canada (Attorney General),*[41] Justice Deschamps described the possible outcomes of a *CCAA* process:

> […] Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. […]

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40 *AbitibiBowater inc. (Arrangement relatif à),* 2009 QCCS 2152, at paras 4-6.
41 2010 SCC 60, at para 14, [2010] 3 SCR 379.

38. As the trial judge observed, though in practice the *CCAA* is now used for liquidations, this use was not the intention of Parliament:

> […] the *CCAA* is not intended to be the vehicle for a liquidation of assets and distribution of the proceeds. The *CCAA* is intended as a vehicle for the restructuring of the debtor.[42]

### *D. The purpose of the PBSA* and subsection 8(2)

39. Section 8 of the *PBSA* provides:

| English | Français |
| --- | --- |
| 8 (1) An employer shall ensure, with respect to its pension plan, that the following amounts are kept separate and apart from the employer's own moneys, and the employer is deemed to hold the amounts referred to in paragraphs (a) to (c) in trust for members of the pension plan, former members, and any other persons entitled to pension benefits under the plan: | 8 (1) L'employeur veille à ce que les montants suivants soient gardés séparément de ceux qui lui appartiennent et est réputé les détenir en fiducie pour les participants actuels ou anciens ainsi que pour toutes autres personnes qui ont droit à des prestations de pension ou à des remboursements au titre du régime : |
| (a) the moneys in the pension fund, | a) les sommes versées au fonds; |
| (b) an amount equal to the aggregate of the following payments that have accrued to date:<br>(i) the prescribed payments, and<br>(ii) the payments that are required to be made under a workout agreement; and | b) le montant correspondant à la somme des paiements, accumulés à la date en cause, prévus par règlement ou par un accord de sauvetage; |
| (c) all of the following amounts that have not been remitted to the pension fund: | c) les montants suivants qui n'ont pas été versés au fonds de pension : |
| (i) amounts deducted by the employer from members' remuneration, and | (i) les montants déduits par l'employeur sur la rémunération des participants, |
| (ii) other amounts due to the pension fund from the employer, including any amounts that are required to be paid under subsection 9.14(2) or 29(6). | (ii) les autres sommes que l'employeur doit au fonds de pension, notamment celles visées aux paragraphes 9.14(2) ou 29(6). |

[42] **JS, Vol 1, p 42,** Judgment on appeal, at para 203.

| | |
|---|---|
| (2) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (1) is deemed to be held in trust shall be deemed 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 moneys or from the assets of the estate. | (2) En cas de liquidation, de cession des biens ou de faillite de l'employeur, un montant correspondant à celui censé détenu en fiducie, au titre du paragraphe (1), est réputé ne pas faire partie de la masse des biens assujettis à la procédure en cause, que l'employeur ait ou non gardé ce montant séparément de ceux qui lui appartiennent ou des actifs de la masse. |

[Our emphasis]

Subsection 29(6) of the *PBSA* adds that if a pension plan is terminated, the employer shall, without delay, pay into the pension fund all amounts, including:

| | |
|---|---|
| (a) an amount equal to the normal cost that has accrued to the date of the termination; | a) une somme correspondant aux coûts normaux accumulés à la date de la cessation; |
| (b) the amounts of any prescribed special payments that are due on termination or would otherwise have become due between the date of the termination and the end of the plan year in which the pension plan is terminated; | b) une somme correspondant aux paiements spéciaux prévus par règlement qui sont exigibles à la cessation ou qui seraient devenus exigibles, en l'absence de cessation, entre la date de celle-ci et la fin de l'exercice du régime où elle survient; |

40. The trial judge's reading of subsection 8(2) is not contested: subsection 8(2) creates a valid deemed trust over the amounts in the pension fund and over an amount equal to the amounts owing for the normal and special payments.[43] In the present case, this deemed trust protects amounts in respect of the benefits of the Railway members.

41. This is consistent with the purpose of the *PBSA* to provide protection for pension plans administered for the benefit of employees in federal spheres of work. The *PBSA* does not oblige employers to offer pension plans, but if they do, the plans, as well as their funding and administration, must meet the minimum standards set out in the *PBSA*. Indeed, as stated at the bill's second reading, the *PBSA* would "ensure greater fairness,

[43] **JS, Vol 1, p 19,** Judgment on appeal, at para 88.

greater flexibility and greater security" for Canadians participating in private federally-regulated pension plans.[44]

42. The economic and social importance of pension plans underlies the *PBSA* and must be taken into account:[45]

> Pension benefits also serve broader social goals, […] Together with government programs and individual savings, pension plans provide an aging population with invaluable financial support [….]
>
> […]
>
> The underlying social policy objective of the legislation is to promote the establishment and maintenance of private pension plans in order to provide income security for employees and their families in retirement. As this Court recognized in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, 2004 SCC 54, at para. 38, modern pension statutes are public policy legislation that recognize the "vital importance of long-term income security". The "locking-in" provisions, portability provisions, as well as the termination and winding-up provisions are all part of the objective of ensuring retirement income security.

43. These principles were reaffirmed in *Lacroix*:[46]

> The object of the *PBSA*, like its scheme, supports the respondents' position. The case law is replete with discussion about the object of pensions and pension legislation: see, for example, *Monsanto*, *Buschau* and *Rio Algom*.
>
> A main object of pensions is to provide long-term financial security to workers after their withdrawal from active employment. Pension legislation, such as the *PBSA*, establishes expert regulatory supervision over and minimum standards for pension plans. The overall aim of the legislation is to protect and safeguard the pension rights and benefits of current and former plan members. In the words of Deschamps J. in Monsanto, at para. 38 (speaking of the Ontario legislation):
>
> > The *Act* thus seeks, in some measure, to ensure a balance between employee and employer interests that will be beneficial for both groups and for the greater public interest in established pension standards.

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44 *House of Commons Debates,* 33rd Parl., 1st Sess (Jan 28, 1986), pp. 10248-10249; *PBSA, supra* note 1, s 3.

45 *Buschau v Rogers, supra* note 15, at paras 13, 19 and 96.

46 *Lacroix v Canada Mortgage and Housing Corporation*, 2012 ONCA 243, at paras 75-76.

44. In summary, subsection 8(2) creates a deemed trust to protect amounts in respect of normal and special payments that ought to have been made to a pension plan but were not. The underlying intention of Parliament behind the *PBSA,* including subsection 8(2), was to prescribe the balance of fairness between employers who choose to promise pension plans to their employees, and those employees.

### *E. Section 8(2) of the PBSA is effective in the CCAA context*

45. The protection of the amounts set out in section 8 of the *PBSA* is the very essence of that provision and central to the objectives of the act as a whole. To conclude that Parliament intended that this protection was not applicable in particular circumstances – such as in proceedings under the *CCAA* - would require explicit language to that effect. The *CCAA* suggests no such exception.

46. The protection of the *CCAA* does not automatically suspend the effects of all other statutes.[47] Nor is subsection 6(6) of the *CCAA* of any assistance in a case such as this, where the prerequisite for that provision – approval of a plan of arrangement – is not met.

47. Subsections 8(2) of the *PBSA* and 6(6) of the *CCAA* can be read harmoniously in the context of the present case. There can be no conflict between them unless a plan of arrangement is accepted by the creditors – that is, by the beneficiaries of the pension plan. Even then, subsection 6(6) does not have the effect of rendering subsection 8(2) of the *PBSA* "not enforceable" or "inoperable" in the context of *CCAA* proceedings. Rather, at the moment of the creditors' vote, the beneficiaries of the deemed trust (who are creditors) are able to decide what is in their own interests. A vote by the creditors in favour of a plan of arrangement simply renders the deemed trust of subsection 8(2) of the *PBSA* no longer necessary to protect the interests of the beneficiaries; the only legislated protection remaining is that of the normal payments as set out in 6(6). This reasoning is consistent with the purpose of the *PBSA* of balancing employee and employer interests: In a *CCAA* context, it may well be in the employees' interest to accept an amount lower than that protected by the *PBSA* if it means that their jobs continue to exist or that the pension plan itself continues to be funded.

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[47] See below at para 81.

48. In a case such as the present, in which the vast majority of employees were dismissed even before the 2015 Initial Order and in which the pension plans were terminated in December 2016, the protection granted by the *PBSA* applies.

49. Parliament cannot have intended, as was argued by the Monitor, the *CCAA* Parties and the city of Sept-Îles, on one hand to create a deemed trust expressly in the event of bankruptcy or liquidation in order to protect an amount equal to the payments due to the pension plans, and on the other hand to limit such protection only to cases of bankruptcy and liquidation under specific statutes other than the *CCAA*. This approach is contrary to the purpose of the *PBSA* and finds no textual support in either the *PBSA* or the *CCAA.*

50. Moreover, the trial judge's reasoning would lead to a result that would be contrary to Parliament's intent in both the *CCAA* and the *PBSA.* Following the reasoning of the trial judge, by simply obtaining protection under the *CCAA,* a debtor could impose on the beneficiaries of a pension plan a payment lower than that which the *PBSA* protects in cases of liquidation, even without presenting a plan of arrangement to them. In the result, an insolvent person who seeks *CCAA* protection would never be obliged to pay to its employees' pension plan any amounts other than normal payments. This does not reflect the intention of the *PBSA* to protect normal and special payments. Nor does it reflect the intention behind the *CCAA* requiring debtors to submit a proposal and reach a fair agreement with their creditors.

### ***a. The caselaw and the history of the present case support this conclusion***

51. The Wabush Parties, with the approval of the Monitor, made the normal payments after the Initial Order and until the termination of the plan, suggesting recognition that the *PBSA* applied despite the *CCAA*.

52. That the Wabush Parties also sought a suspension of the special payments,[48] and that the trial judge saw fit to grant it,[49] further demonstrates that the provisions of the *PBSA* are seen as continuing to apply during the *CCAA* proceedings and, moreover,

[48] **JS, Vol 2, p 620,** Motion for, *inter alia,* suspension of certain payments, dated May 29, 2015.
[49] **JS, Vol 2, p 363,** Order suspending certain payments, dated June 26, 2015.

that the Monitor and the Wabush Parties considered that but for that order, the special payments would be due under the protection of the *CCAA.*

53. Although the Wabush Parties were authorized under the terms of the initial order to stay the payment of their special payments, this authorization, usually granted in the course of a business restructuring under the *CCAA*, was intended to permit them to restructure. At the time, the court was of the view that obtaining interim financing would "promote the survival" of the *CCAA* Parties[50] and it was clear that such financing would not occur if the special payments had to be made.[51]

54. However, since that order, the assets have been sold and it has become clear that no plan of arrangement would be presented to the creditors. Amounts due to a pension fund belong, by virtue of the *PBSA*, to neither the Wabush Parties nor the estate. As such, it has become unfair and unlawful to deprive the pension plan beneficiaries of these amounts.

55. Moreover, an authorization to stay payments to a pension plan does not in any way imply that those payments are set aside or expunged. The *CCAA* judge clearly noted at the time that he suspended these payments that he was not being asked to extinguish the obligation to pay those amounts.[52]

56. This is consistent with previous cases. Justice Pepall noted in *Fraser Papers Inc.*:[53]

> The relief requested by the Applicants, importantly in my view, does not extinguish or compromise or even permit the Applicants to compromise their obligations with respect to special payments. Indeed, the proposed order expressly provides that nothing in it shall be taken to extinguish or compromise the obligations of the Applicants, if any, regarding payments under the pension plans. Failure to stay the obligation to pay the special payments would jeopardize the business of the Applicants and their ability to restructure. The opportunity to restructure is for the benefit of all stakeholders including the employees. That opportunity should be maintained. [Our emphasis]

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50 **JS, Vol 2, p 384,** Order suspending certain payments, dated June 26, 2015, at para 94.

51 **JS, Vol 2, p 387,** Order suspending certain payments, dated June 26, 2015, at para 112.

52 *Ibid.,* at para 116.

53 *Fraser Papers Inc. (Re)*, 2009 CanLII 39776 (ON SC), at para 21, 55 CBR (5th) 217; see also *United Air Lines Inc. (Bankruptcy), Re*, 2005 CanLII 7258 (ON SC), at para 4 and 9, CBR (5th) 159.

57. In *AbitibiBowater Inc.,* Justice Mayrand authorized a stay of payments to the pension plan in a context where not staying these payments would jeopardize the chances of restructuring. He took care to state that the terms of repayment of those amounts could ultimately be agreed on once the restructuring was completed:[54]

> Par ailleurs, *Abitibi*, de concert avec l'ensemble de ses créanciers, employés, prêteurs et fournisseurs, peut réussir son pari et sortir de l'impasse en convenant d'un arrangement pour remettre l'entreprise sur les rails, à court ou moyen terme. Des modalités, pour le remboursement des cotisations suspendues, pourront être convenues avec l'aval des autorités compétentes. Cela se fera à une autre étape. [Our emphasis]

58. *A fortiori,* in the circumstances of the present case, where the sale proceeds of the assets are more than enough to pay the special payments, the amount due should be deposited in the pension plan.

59. The Wabush Parties cannot request the protection of the Court in order to sell their assets, ask that special payments due to the pension plan be stayed, and then have those very payments essentially expunged by distributing the proceeds of sale to the creditors other than the pension beneficiaries, all in a context in which no plan is even proposed (let alone approved) to the creditors in general nor to the beneficiaries of the plans in particular. Such a manner of proceeding would result in a *de facto* preference of certain creditors that is contrary to the intention of Parliament in the *CCAA* and the *PBSA*.

### *F. The Court erred in using case law concerning deemed trusts in favour of the Crown to interpret the scope of the deemed trust in section 8(2) of the PBSA*

60. In addition to erring with respect to the application of subsection 6(6) of the *CCAA*, the trial judge erred in applying caselaw based on deemed trusts in favour of the Crown to a pension deemed trust to determine the effectiveness of the pension deemed trust under the *CCAA*. The statutory contexts and the social and policy considerations underlying these two types of deemed trust do not permit direct analogies to be made.

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[54] *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 2028, at para 51, [2009] JQ no 4473 (QL).

### *a. Parliament chose to treat these deemed trusts differently*

61. The trial judge erred in finding that it was Parliament's intent to treat deemed trusts under the *PBSA* in the same way as deemed trusts in favour of the Crown.[55]

62. By virtue of changes made to the *CCAA* in 2009, statutory deemed trusts in favour of the crown are expressly no longer effective in the *CCAA* (with some exceptions):

| | |
|---|---|
| **37 (1)** Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for her Majesty, 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. | **37 (1)** Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition. |

63. No such changes were made with respect to other deemed trusts, including the deemed trust created by subsection 8(2) of the *PBSA*; these continue to be effective.

64. The *PBSA* was amended in 2010. Parliament chose to modify the deemed trust in subsection 8(2) to clarify that only certain amounts such as normal and special payments are covered – the wind-up deficit is not.[56] The objective of this amendment was to spread the losses among the various creditors in an insolvency context.

65. The trial judge correctly noted that while Parliament specifically chose to continue to protect in a *CCAA* context *some* deemed trusts in favour of the crown, Parliament did not provide this same protection to deemed trusts under subsection 8(2) of the *PBSA*.[57] However, the trial judge then failed to consider the 2010 amendments to the *PBSA* in his analysis of Parliament's protections of pension deemed trusts. Had he done so, he would have concluded that amounts owing to pension deemed trusts (in respect of normal and special payments), unlike amounts owed to deemed trusts in favour of the crown, are clearly intended to be protected.

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55 **JS, Vol 1, p 27,** Judgment on appeal, at paras 123-124.

56 *Jobs and Economic Growth Act,* SC 2010, c 12, at s 1816(5).

57 *CCAA, supra* note 2, at s 227.

66. The trial judge referred to Justice Deschamps's analysis in *Sun Indalex* regarding the opportunity that Parliament had to grant a particular protection to members of pension plan and the reasons which led it not to do so.[58]

67. With respect, the reference to S*un Indalex* does not support the trial judge's reasoning. In *Sun Indalex,* the issue was not the application of subsection 6(6) of the *CCAA* with the *PBSA,* but rather an issue of paramountcy as between a provincial law that would have protected the wind-up deficit, and an order pursuant to a federal statute granting priority to a DIP lender.

68. That being said, some passages cited are indeed relevant. In *Sun Indalex*, Justice Deschamps cited the Senate Standing Committee to the effect that insolvency is characterized by an insufficiency of assets, and that choices must be made. Justice Deschamps noted that the choices made by Parliament itself must be respected and that the courts should not remedy what they wish Parliament had done through legislation.[59] Indeed, Justice Deschamps emphasized that courts may not read into the *CCAA* at will.[60]

69. In this case, contrary to *Sun Indalex,* Parliament has indeed made clear choices: to protect pensions, though not to protect the wind-up deficit of pension plans,[61] and to yield this protection only to a decision of the pension beneficiaries themselves.[62]

**b.** *The case Royal Bank v Sparrow Electric Corp. must be distinguished*

70. In describing the deemed trust mechanism in subsection 8(2), the trial judge cited the Supreme Court of Canada's decision in *Royal Bank of Canada v Sparrow Electric Corp.,* which dealt with deemed trusts in favour of the Crown:[63]

> Namely, such deemed trusts or liens are devices which legislators often employ in order to recover moneys which ought to have lawfully been paid to them but have been unlawfully misappropriated by a debtor who subsequently encounters financial difficulty and is forced into winding up its business.

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58 **JS, Vol 1, pp 39-40,** Judgment on appeal, at para 189.

59 *Sun Indalex Finance, LLC v United Steelworkers,* 2013 SCC 6, at para 81, [2013] 1 SCR 271 ("*Sun Indalex*").

60 *Ibid.,* at para 51.

61 *PBSA, supra* note 1, at ss 8 and 29.

62 *CCAA, supra* note 2, at s 6(6).

63 **JS, Vol 1, pp 18-19,** Judgment on appeal, at para 85, citing *Royal Bank of Canada v Sparrow Electric Corp.,* [1997] 1 SCR 411, at para 19, 143 DLR (4th) 385.

71. However, the trial judge ought to have made a distinction between deemed trusts in favour of the Crown and the deemed trust created by subsection 8(2) of the *PBSA*. The *PBSA* deemed trust is not in favour of the crown, it is in favour of the beneficiaries of the pension plan. Moreover, both the nature of the *PBSA* deemed trust in the present case and the protection that deemed trust provides differ from those of deemed trusts in favour of the Crown. As discussed below, the *PBSA* deemed trust is a protective measure to ensure that amounts that ought to have been kept separate are. The *raison d'être* of this protection is to establish the balance between pension interests and other stakeholders. This is a very different context than that of *Sparrow.* In *Sparrow,* the deemed trust in favour of the crown did not have this remedial nature, nor was it created to balance competing interests.

72. The other argument raised by the Monitor and *CCAA* Parties before the trial judge and based on *Sparrow*, to the effect that the deemed trust cannot apply because the product of the liquidation of assets, to which the deemed trust applies, has been mixed with the Wabush Companies' other assets, is surprising.

73. Contributions to a pension plan must be deposited into a segregated fund that does not constitute a part of the employer's assets.[64] This fund is exempt from seizure. The precise reason that the pension amounts are found to be held in a deemed trust under *PBSA* subsection 8(2) is because the employer failed to hold them separate and apart, as required by subsection 8(1), or because the payments of these amounts were suspended by the court. Subsection 8(2) remedies, in favour of plan beneficiaries, a failure of the employer to keep plan assets separate. It must also be recalled that the Wabush Companies had ceased their operations even before the Initial Order was issued. The liquidation was carried out, and the proceeds from the realization of the assets are being held in trust by the Monitor, all under the supervision and approval of the Court. The mixing argument cannot succeed.

74. The alternative – that through the actions of the Respondent or the *mise en cause* companies, the amounts due in respect of the pension deemed trust, though available have somehow become irretrievable – is unacceptable. To endorse such a proposition is

[64] *PBSR, supra* note 14, at s 11(1)(a).

to accept either that the Respondents' actions directly cause the loss of the pension amounts to the fund, or that the Monitor can affect the validity of claims simply by the way in which it holds the realizations of assets.

75. The AGC submits that the normal and special payments owing from the date of the Initial Order to the end of that year, in respect of the Railway workers, must be made. The amount is not unreasonable and respects the balance among the Wabush Parties, who in any case have sold all of their assets; the other creditors; and the plan members. The latter have already lost not only their jobs but also the benefits of their full promised pension plan due to its termination in significant deficit.

***(6) 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?***

76. In addition to relying erroneously on subsection 6(6) of the *CCAA* to determine the intention of Parliament, the trial judge also imported into the *CCAA* the scheme of distribution under the *Bankruptcy and Insolvency Act* (*BIA)* to conclude that the deemed trust created by subsection 8(2) is not part of this scheme of distribution. The *BIA*, as mentioned by the trial judge, creates a specific security on the assets to secure the normal payments owed to pension plans.[65]

77. While the *CCAA* is increasingly being used to liquidate the assets of a debtor company, its primary purpose is to arrive at an arrangement accepted by the creditors and ratified by the courts, enabling the debtor to start again without debt. The process necessarily requires the participation and consent of the creditors.

78. The *CCAA* does not include an asset distribution scheme. The negotiations with creditors and the plan of arrangement determine how the assets will be distributed.

79. The trial judge correctly recognized that liquidation was not within Parliament's intent in drafting the *CCAA.*[66] He also recognized that there is no distribution scheme in

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[65] *Bankruptcy and Insolvency Act,* RSC 1985, c B-3, at s 81.5.
[66] **JS, Vol 1, pp 4-5,** Judgment on appeal, at para 203.

the *CCAA*, Parliament having chosen to let the parties come to an agreement. These being established, it is difficult to follow the court to its conclusion that importing the *BIA* distribution scheme into the *CCAA* was necessary to fulfill some intention of Parliament. The *BIA* does not apply by default in the *CCAA.* The importation is not supported by the text or purpose of the *CCAA*.

80. Nor can the importation of the *BIA's* distribution scheme into the *CCAA* and imposition of this scheme on the creditors, when no plan was submitted to them, be supported by *Sun Indalex* as cited by the trial judge:[67]

> 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.* [Our emphasis]

81. On the contrary, there is no need to import the *BIA* scheme in the absence of a plan. *Sun Indalex* suggests that even if a scheme were sought, one could be found without having to import one from another federal law:[68]

> The provincial deemed trust under the *PBA* continues to apply in *CCAA* proceedings, subject to the doctrine of federal paramountcy [….]. The Court of Appeal therefore did not err in finding 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*. [Our emphasis]

82. Therefore, there is no need to import the *BIA* scheme of distribution into the *CCAA*. The deemed trust created by the *PBSA* continues to apply under the *CCAA* and can only

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[67] *Sun Indalex, supra* note 59 at para 51. **JS, Vol 1 pp 33-34,** Judgment on appeal at para 164, footnote 69.

[68] *Sun Indalex supra* note 59, at para 52.

be overridden by the filing of a plan of arrangement accepted by the creditors. In other words, in the context of the *CCAA* or a proposal under the BIA, only the beneficiaries may waive the protection granted to them by the deemed trust created by the *PBSA*, and even then, only in part.

***(7) Did the CCAA Judge err in holding that the priority of the PBSA deemed trusts for amounts owing by the employer to the Wabush Mines pension plans as against a secured claim is dependent on the deemed trusts coming into effect before the secured claim?***

83. Although he found that the *PBSA* deemed trust ineffective under the *CCAA*, the trial judge also held that this deemed trust should be characterized as a floating charge that generates its effects from the date of a triggering event (in this case, the liquidation that began, according to the judge, on the date of the initial order.)[69]

84. Given the above discussions, it is apparent that the trial judge erred in this conclusion. A deemed trust does not form part of the assets of the *CCAA* parties. It is not a charge.

85. Finding that a deemed trust were to be considered a floating charge would contradict the clear intent of Parliament that the amounts be deemed to be kept separate from the employer's assets. Moreover, it would render effectively null the impact of subsection 8(2) of the *PBSA*: the trigger of the application of 8(2) is an insolvency. In practice, if an employer is already insolvent when a floating charge comes into existence, there will never be sufficient available assets to cover it.

[69] **JS, Vol 1, p 27,** Judgment on appeal, at para 122. See also *First Vancouver Finance v M.N.R.,* 2002 SCC 49, [2002] 2 SCR 720.

***(8) Should the CCAA Judge have determined if the going concern*[70] *payments were required to have been made by the employer to the Wabush Mines Union Plan for the period from December 17 to 31, 2015?***

86. The trial judge recognized that there was a live issue regarding the normal payments for that period,[71] but failed to make a determination on this issue.

87. The issue arises from the fact that the Wabush Companies made the normal payments until the date the plans were terminated, that is, up to December 16, 2015. However, the unionized employees' pension plan states that this payment is made by month and not *pro rata* the number of days.[72]

88. The appellant submits that the judge erred in not ruling on this issue. The normal payments are owed, in the event of a liquidation, until the end of the month in which this termination occurs.

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70 That is, normal payments.
71 **JS, Vol 1, pp 4-5,** Judgment on appeal, at para 13 and footnote 16.
72 **JS, Vol 6, p 1992,** R-23, Unionized Plan, at ss 2.10(a), 4.02(a)(i), and 6.01(a).

## PART IV – CONCLUSIONS

89. The AGC submits that questions 3, 6, 7, and 8 should be answered as follows:

(3) Did the *CCAA* Judge err in holding that the deemed trust in the *Pension Benefits Standards Act, 1985* are inoperative[73] in the Wabush Mines *CCAA* proceedings because they conflict with Parliament's intent?

> Yes. The deemed trust provided under the *PBSA* continues to apply under the *CCAA,* at least until a plan of arrangement or compromise is voted upon by the creditors.

(6) 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?

> Yes. It was incorrect to import the scheme of distribution under the *Bankruptcy and Insolvency Act* into the *Companies' Creditors Arrangement Act.*

(7) Did the *CCAA* Judge err in holding that the priority of the *PBSA* deemed trusts for amounts owing by the employer to the Wabush Mines pension plans as against a secured claim is dependent on the deemed trusts coming into effect before the secured claim?

> Yes. The amounts protected by the deemed trust do not form part of the assets of the employer.

(8) Should the *CCAA* Judge have determined if the going concern[74] payments were required to have been made by the employer to the Wabush Mines Union Plan for the period from December 17 to 31, 2015.

> Yes. The trial judge omitted to answer this question. The payment is required.

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[73] *N.b.,* the question as posed refers to operability, however, the issue is one of effectiveness.
[74] That is, normal payments.

**FOR THESE REASONS, MAY IT PLEASE THE COURT:**

**GRANT** the appeal;

**OVERTURN** in part the judgment rendered in first instance;

**REJECT** in part the request for directives of the Monitor;

**DECLARE** that, in the context of liquidation under the *CCAA*, the deemed trust under section 8(2) of the *PBSA* applies;

**DECLARE** that the product of the sale of the debtor companies' assets, up to the amount that is due to the pension plans and protected by the deemed trust created by s 8(2) of the *Pension Benefits Standards Act, 1985*, is excluded from the debtor's assets;

**DECLARE** that the amounts owed must be paid to the pension plans unless the beneficiaries of the plans accept lesser amounts as part of a plan submitted to them;

**DECLARE** that normal payments are due up to December 31, 2015.

Montréal, January 19, 2018

**Attorney General of Canada**
**Per Mes Pierre Lecavalier, Michelle Kellam and Antoine Lippé**
**Counsel for the Attorney General of Canada, acting on behalf of the Office of the Superintendent of Financial Institutions**

## PART V – AUTHORITIES

**Législation** **Paragraph(s)**

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## ATTESTATION

We undersigned, M$^{e}$ Pierre Lecavalier and M$^{e}$ Michelle Kellam, 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: 1 heure.

Montréal, January 19, 2018

**Attorney General of Canada**
**Per M$^{es}$ Pierre Lecavalier, Michelle Kellam and Antoine Lippé**
**Counsel for the Attorney General of Canada, acting on behalf of the Office of the Superintendent of Financial Institutions**