500-09-027077-171

Court of Appeal of Québec

Montréal

On appeal from a Judgment of the Superior Court, District of Montréal, rendered on September 11, 2017 by the Honourable Stephen W. Hamilton, J.S.C.

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:*

MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL and NEIL JOHNSON as Representatives of the Salaried / Non-Union Employees and Retirees

APPELLANTS / INCIDENTAL RESPONDENTS
(Mis 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-

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BLOOM LAKE GENERAL PARTNER LIMITED,
QUINTO MINING CORPORATION,
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,
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MISES EN CAUSE –
(Mises en cause)

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TABLE OF CONTENTS
(1)

Page

APPELLANTS' ARGUMENT

TABLE OF CONTENTS
(2)

Page

C A N A D A
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

C O U R T O F A P P E A L

No. 500-09-027077-171 C.A.
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APPELLANTS' ARGUMENT

PART I – THE FACTS

1. The Appellants and all non-union employees and retirees whom they represent (collectively, the "**Salaried Members**") are members of one single pension plan established, administered, and regulated in Newfoundland and Labrador ("**Newfoundland**") under the Newfoundland *Pension Benefits Act*[1] ("**NLPBA**"), namely the Salaried Plan.[2]

2. The Salaried Members were required to join the Salaried Plan as a term of their employment, and were required to contribute part of their regular pay, regardless of the location where they worked. The required contributions by the Employer[3] to the fund of the plan were comingled, administered and invested together with the employee contributions in one fund in compliance with the regulatory standards of the NLPBA.[4]

3. The Salaried Plan is underfunded on a wind-up basis by $27,450,000[5], which has caused a 25% reduction to the Salaried Members' monthly pension benefits, and which is a claim in the proceedings instituted in this file (the "**CCAA proceedings**").[6]

4. The Salaried Members have asserted claims to recover the wind-up deficit based on the deemed trusts and the lien and charge provided in minimum standards pension statutes, most notably, the NLPBA.

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1 *Pension Benefits Act*, 1997, S.N.L. 1996, c. P-4.01 ("**NLPBA**"), **Joint Schedules ("J.S."), vol. 4, pp. 1111-1149**.

2 Known as the Contributory Pension Plan for Salaried Employees of Wabush Mines, Cliffs Mining Company, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company, Limited, R-24 ("**Salaried Plan**"), **J.S., vol. 6, pp. 2106-2183**.

3 Salaried Plan, **J.S., vol. 6, p. 2113**, para. 2.18: "Employer" means Wabush Mines, Cliffs Mining Company, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company, Limited."

4 Salaried Plan, **J.S., vol. 6, p. 2140**, Section 10.01 (b) and 10.03; Salaried Employees Pension Plan Wind-Up Report, December 2016, R-25, ("**Salaried Wind-Up Report**"), **J.S., vol. 6, p. 2202**.

5 The wind-up deficit includes special payments owed to the Salaried Plan by the Employer, which were suspended after the commencement of the CCAA proceedings. The unpaid special payments due to the Salaried Plan, as at the wind-up date, amount to $2,185,756.

6 Judgment by Justice Hamilton J.S.C. on the Monitor's Amended Motion for Directions ("**Hamilton Judgment**" or "**judgment *a quo***"), **J.S., vol. 1, pp. 4 and 6**, paras. 11 and 20. The Salaried Members have also lost their health benefits, life insurance benefits and unfunded supplemental pension benefits (collectively known as "other post-employment benefits" or "**OPEBs**"). The payment of the OPEBs was terminated by the Employer, without prior notice, after the initiation of the CCAA proceedings. The amounts owing to the retirees in respect of the terminated OPEBs have also been submitted in the CCAA proceedings as an unsecured claim.

5. The Salaried Plan was registered exclusively with the provincial regulator in Newfoundland, the Superintendent of Pensions ("**NL Superintendent**")[7], pursuant to the NLPBA and was never registered with the Office of the Superintendent of Financial Institutions ("**OSFI**") pursuant to the *Pension Benefits Standards Act*[8] ("**PBSA**"). All regulatory filings were made with the NL Superintendent.[9]

6. The estates of the Employer against which the Salaried Members and the plan administrator (the "**Administrator**")[10], respectively, are asserting the deemed trusts and the Administrator's lien and charge for the amounts owing to the plan by the Employer are not debtor companies under the *Companies' Creditors Arrangement Act*[11] ("**CCAA**") nor petitioners in the CCAA proceedings, but are Mis-en-cause therein.

7. The present case is a liquidating CCAA wherein the CCAA was used to sell all of the assets of the Debtors[12] and Mis-en-cause (collectively, the "**Wabush CCAA Parties**") without any restructuring of a company.[13] In the judgment *a quo*, the Honourable Justice Stephen Hamilton, J.S.C. (the "**CCAA Judge**") determined that the Wabush CCAA Parties were in liquidation since the CCAA filing date of May 20, 2015.[14]

8. The creditors with the highest monetary claims in the CCAA proceedings are parties that are related to the Wabush CCAA Parties, who have filed claims totaling in the billions of dollars.[15] Thus, the contest in the present case is essentially between the claims of retirees and the claims of parties related to the Wabush CCAA Parties. If the judgment *a quo* stands, the vast majority of the estate will be distributed to those related parties.

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7 Hamilton Judgment, **J.S., vol. 1, p. 3**, para. 7.
8 *Pension Benefits Standards Act*, 1985, c. 32 (2nd Supp) ("**PBSA**"), **J.S., vol. 3, pp. 745-832**.
9 Salaried Wind-Up Report, **J.S., vol. 6, p. 2187**.
10 On March 30, 2016, Morneau Shepell was appointed in replacement of the Employer as Administrator of the Salaried Plan: Replacement Plan Administrator Notice by Newfoundland & Labrador Superintendent of Pensions, March 30, 2016, **J.S., vol. 6, pp. 1871-1872**.
11 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("**CCAA**"), **J.S., vol. 3, pp. 973-1039**.
12 Namely, Wabush Iron Co. Limited and Wabush Resources Inc.
13 Hamilton Judgment, **J.S., vol. 1, p. 35**, paras. 172-173.
14 Hamilton Judgment, **J.S., vol. 1, pp. 34-35**, paras. 169-173.
15 Twenty-Fourth Report of the Monitor dated October 6, 2016, **J.S., vol. 8, p. 2537**, para. 85.

9. There is no plan of compromise or arrangement (a "**CCAA Plan**") being brought forward by the Wabush CCAA Parties. In any event, without the consent of the Salaried Members (and the union members), no CCAA Plan is possible in this case.[16]

10. On January 15, 2018, the Newfoundland Court of Appeal in a Reference decision confirmed that the NLPBA pension deemed trusts cover unpaid current service costs, unpaid special payments as well as unpaid wind-up deficit.[17] It also confirmed that the lien and charge of the Administrator under Section 32(4) NLPBA creates a valid secured claim, as a separate remedy, over the same amounts owing and is a "fixed charge" that applies against all of an employer's assets regardless of their nature or location.[18] The NLPBA deemed trusts and/or lien and charge will have a very significant positive impact on the Salaried Members' recovery to compensate them for their significant pension losses in this case.

PART II – ISSUES IN DISPUTE

11. The issues in dispute raised by this appeal and the concurrent appeals brought by the other appellants are stated in the Issues in Appeal table[19] and the submissions herein follow the order of that table. No submissions are made herein on issue #8, which was not raised in the Appellants' Notice of Appeal;[20] the Appellants nevertheless reserve their right to support the submissions of other appellants with respect thereto.

PART III – SUBMISSIONS

Introduction

12. In 2013, the Supreme Court of Canada released its landmark decision in *Sun Indalex Finance, LLC v. United Steelworkers*[21] where the Court held that provincial statutory

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16 No creditor who is related to a debtor may vote for a compromise or arrangement relating to the company, as per Section 22(3) CCAA, **J.S., vol. 3, p. 1101**.

17 *Reference re Section 32 of the Pension benefits Act, 1997*, 2018 NLCA 1 ["**Newfoundland Reference**"], **J.S. vol. 2, p. 686.11**, para. 27.

18 Newfoundland Reference, **J.S., vol. 2, pp. 686.15-686.18**, paras. 41-51.

19 Summary Tables of Issues in Appeal, **J.S., vol. 1, pp. 49-54**.

20 Representative of Salaried/Non-Union Employees & Retirees Notice of Appeal, **J.S., vol. 1, pp. 290-306**.

21 2013 SCC 6, [2013] 1 SCR 271 ["***Indalex***"].

pension deemed trusts for amounts owing by an employer to a pension plan are valid in proceedings under the CCAA, subject only to the doctrine of paramountcy. The principles of *Indalex* have been applied and followed in at least four subsequent cases, as well as in negotiations among stakeholders in other CCAA cases.[22]

13. The Newfoundland Court of Appeal also recently followed the directions from the Supreme Court in *Indalex* that pension standards protections for pension plan members are to be interpreted in a "purposive manner":[23]

> [45] [...] the legislation must be interpreted in a manner consistent with its purpose. As set out above, that purpose is to protect the benefits accrued to employees under a pension plan, recognizing that such benefits "have consistently been viewed as an entitlement earned by the employee".

14. In the judgment *a quo*, the CCAA Judge ruled with different interpretations and on different theories, that the pension deemed trusts in the NLPBA, the Quebec *Supplemental Pension Plans Act* [24] ("**SPPA**"), and the PBSA are of no force or effect in the CCAA proceedings. His decision has highly prejudicial consequences for the Salaried Members (and unionized members) who he effectively rendered as unsecured creditors, and who face, based on his findings, a *de minimus* recovery in the CCAA proceedings. The CCAA Judge's decision injects uncertainty into pension and insolvency law regarding the NLPBA, the SPPA, and the PBSA pension deemed trusts.

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22 (a) Following the Supreme Court's decision, the CCAA court in *Indalex* approved a settlement that distributed funds to the pension plan members that was achieved through the Supreme Court's finding that the pension deemed trust was valid in the CCAA proceeding, and only subordinated to the priority granted to the debtor-in-possession ("**DIP**") loan: *Indalex Ltd. (Re)*, [2013] O.J. No. 5916, para. 6;

(b) In the Timminco CCAA, the Ontario pension plan administrator recovered the first priority distribution in respect of the Ontario pension plan deficit: *Timminco Limited (Re)* (24 June 2014), Toronto CV-12-9539-00CL (Ont SCJ), para. 4.

(c) In *Timminco ltée (Arrangement relatif à),* 2014 QCCS 174 ["***Timminco***"], the Quebec pension plan recovered a priority payment pursuant to the decision of Mr. Justice Mongeon, J.S.C. who held, following *Indalex*, that the deemed trusts in Section 49 SPPA are valid with respect to unpaid current service payments and unpaid special payments; and,

(d) In *Essar Steel Algoma,* the CCAA court held that pension deemed trust continue to exist in the CCAA proceedings: "Under the *Pension Benefits Act*, there is a deemed statutory trust for the unpaid special payments. That trust has not gone away because of the CCAA proceeding. It still exists." Endorsement of Newbould J., *Re Essar Steel Algoma Inc. et al* (13 January 2016) CV-15-00001169-CL (Ont. S.C.J.).

23 Newfoundland Reference, **J.S., vol. 2, p. 686.14**, para. 35.

24 *Supplemental Pension Plans Act*, CQLR c R-15.1 ("**SPPA**"), **J.S., vol. 4, pp. 1216-1336**.

15. In *Century Services*, the Supreme Court confirmed that the remedial purpose of the CCAA is "to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets".[25]

16. However, in this case, the Wabush CCAA Parties opted to utilize the CCAA solely to conduct a liquidation of their assets to exit Canada without any goal of continuing as restructured entities and, to that end, they have achieved their objective. In the context of such liquidating CCAA proceedings, the remedial nature of the CCAA disappears and there is no resulting public policy imperative to eviscerate the concurrently applicable remedial objectives of pension statutes that have been broadened to ensure that employees receive the pension benefits they earned and have the legitimate expectation of receiving.

17. The present case does not give rise to concerns that the enforcement of pension deemed trusts will frustrate the ability of debtors to finance a going concern solution by way of DIP financing, or impact commercial lending in general. Rather, this case is largely a contest between (i) vulnerable retirees who are being deprived of their earned pensions, and (ii) the related companies of the Wabush CCAA Parties who have asserted billions of dollars of claims and stand to receive the bulk of the proceeds of the liquidation.

18. Furthermore, the judgment *a quo* misapplies the settled law from *Indalex* in many respects, including that it purports to import into the CCAA the distribution scheme in the *Bankruptcy and Insolvency Act*[26] ("**BIA**"), which is directly contrary to *Indalex*.

19. There is also an incongruity in the judgment *a quo* in that the CCAA Judge infers legislative intent in the CCAA on matters where the CCAA is silent, whereas he narrowly interprets and disregards the clear intent expressed in the SPPA in order to render inoperative the SPPA deemed trusts created thereunder that are designed to ensure that pension benefits are paid.

20. The Appellants' position that the statutory deemed trusts and Administrator's lien and charge continue to apply despite the CCAA proceedings is all the more compelling

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[25] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 SCR 379 ["**Century Services**"], para. 15.

[26] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("**BIA**"), **J.S., vol. 4, pp. 1040-1088.**

considering that the Employer/sponsors of the Salaried Plan (namely, Wabush Mines, Arnaud Railway Company and Wabush Lake Railway Company, Limited), for their own reasons, never sought to become petitioners in the CCAA proceedings and were only Mis-en-cause.[27] The judgment *a quo* thus deprives the Salaried Members of their statutory rights and renders the pension protections legislated in their favour inoperative in the context of a liquidating CCAA where the Employer entities are not even CCAA debtors. It is inconceivable that the federal legislator would have intended such a result.

21. In addition to *Indalex,* the Supreme Court has confirmed a number of principles that are relevant to this appeal:

(a) Pension benefits are the *deferred wages* of employees that they earned during their employment service for an employer;[28]

(b) A registered pension plan is the vehicle by which an employer delivers those deferred wages on the retirement of employees. Employees "almost invariably agree to accept lower wages and fewer employment benefits in exchange for the employer's agreeing to set up the pension trust in their favour";[29]

(c) One of the purposes of pension legislation is to protect employees to ensure that they receive the pension benefits they earned;[30]

(d) Property deemed to be held in trust does not form part of the debtor's estate, and therefore operates as a priority payment in favour of the trust beneficiaries;[31] and

(e) Pension legislation is "intended to benefit and protect the interests of members and former members of pension plans."[32] The NLPBA, SPPA and PBSA are

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27 Motion for the Issuance of an Initial Order, **J.S., vol. 2, pp. 650-651**, paras. 7-10.
28 *IBM Canada Limited v. Waterman,* 2013 SCC 70, [2013] 3 S.C.R. 985, para. 4.
29 *Schmidt v. Air Products Canada Ltd.,* [1994] 2 S.C.R. 611, para. 66.
30 *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, paras. 14 and 50.
31 *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 (S.C.C.) ["***Henfrey***"], para. 38; *Alternative granite & marbre inc., Re,* 2009 SCC 49, para. 15. BIA s. 67(1): "The property of a bankrupt divisible among his creditors shall not comprise (a) property held by the bankrupt in trust for any other person".
32 *Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)*, 2009 SCC 39, para. 28.

"benefits conferring legislation" and should "be liberally construed so as to advance the benevolent purpose of the legislation."[33]

22. For the issues in this Appeal, it is important to note that there are three categories of contributions required to be made by an employer into a pension fund so that the pension plan can pay the defined pension benefits earned by the employees in accordance with the plan's terms and benefits formulae: a) current service payments; b) special payments; and, c) wind up payments (also referred to as wind up deficit) on the wind up of the pension plan.[34]

Issue #1: Did the CCAA Judge err in holding that the deemed trusts in the NLPBA and the SPPA are inoperative in the Wabush Mines CCAA proceedings based on the doctrine of paramountcy?

23. In the case under appeal, the CCAA Judge assumed that the NLPBA pension deemed trusts are valid.[35] He is correct. The same conclusion was also reached in the Newfoundland Reference, which provided extensive reasons.[36]

24. However, the CCAA Judge then erred by concluding that the valid NLPBA deemed trusts are in conflict with the provisions of the CCAA and therefore rendered inoperative on a wholescale basis based on paramountcy.[37]

25. The doctrine of paramountcy in the context of a pension deemed trust in a CCAA proceeding was comprehensively considered in *Indalex*.[38] The Supreme Court applied paramountcy to the limited extent of subordinating the pension deemed trusts to the DIP loan's super-priority, which had been ordered by the Court pursuant to its jurisdiction under the CCAA. In the CCAA proceedings, there is no contest with a DIP loan.

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33 Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada, 2014) ["***Construction of Statutes***"], at 509; See also *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, para. 36.

34 Ari Kaplan & Mitch Frazer, *Pension Law*, 2nd ed (Toronto: Irwin Law Inc, 2013) ["**Pension Law**"] at 379; *Indalex Limited (Re)*, 2011 ONCA 265, paras. 83-85, 90.

35 Hamilton Judgment, **J.S., vol. 1, p. 25,** paras. 113-114.

36 Newfoundland Reference, **J.S., vol. 2, p. 686.10-686.11,** paras. 25-26.

37 Hamilton Judgment, **J.S., vol. 1, p. 25**, para. 210.

38 *Indalex*, paras. 50-60, 242 and 265.

26. A party relying on paramountcy must "demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law".[39]

27. *Indalex* involved a priority dispute between the Ontario pension deemed trusts and the guarantor of the DIP loan over certain proceeds from asset sales of the debtor. The Supreme Court held that the provincial pension deemed trusts were valid; however, the super-priority granted to the DIP lender to fund the CCAA proceeding by order of the CCAA court under that federal statute, took precedence over the deemed trusts based on paramountcy. Moreover, the Supreme Court did not find a frustration of purpose between the provincial deemed trust and the CCAA pension provisions.

28. Similarly, in an Endorsement of the Ontario judge supervising the CCAA proceeding in *Timminco*,[40] paramountcy was invoked to order the suspension of mandatory special payments under the Ontario *Pension Benefits Act* on the basis that such payment would impair the debtor from being able to pursue a restructuring while under CCAA protection. In both those instances, paramountcy was limited to rendering the provincial provisions inoperative, but only to the extent of the operational conflict with a specific order of the CCAA court made under the federal CCAA.

29. The pension protection provisions in Sections 6(6), 6(7) and 36(7) CCAA provide that a CCAA court can only approve a CCAA Plan, or a sale outside the ordinary course of business, if it addresses the payment of unpaid normal cost contributions owing to a pension plan, unless the relevant parties and the applicable pension regulator agree to treat those unpaid pension contributions otherwise in the CCAA Plan. These provisions are not in conflict with the NLPBA deemed trusts (nor for that matter with the SPPA deemed trusts, nor the Ontario deemed trusts considered in *Indalex*).

30. The CCAA does not provide for any scheme of distribution or order of priority and as such is not frustrated by the application of the provincial deemed trust pension legislation. The

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[39] *Indalex*, para. 56; The Supreme Court recently summarized the doctrine of federal paramountcy in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 419, paras. 15-27.

[40] *Timminco Limited (Re)*, 2012 ONSC 5959.

only scheme of distribution or order of priority under the CCAA is that which is negotiated in a CCAA Plan and approved by the creditors and the court.

31. Parliament, through Section 6(6), has simply imposed one requirement on the debtor, the creditors and the court – to address a category of contribution owing to a pension plan in a CCAA Plan. However, even such protection is not absolute. Indeed, Section 6(7) provides for the discretion of the court to sanction a CCAA Plan that does not include the full payment of these minimum protected amounts, if it is shown that the unpaid contribution has been addressed by the affected parties and the relevant pension regulator. This is reflective that "the purpose of CCAA proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent".[41]

32. Furthermore, there is nothing in Section 6, or elsewhere in the CCAA, that would preclude a CCAA court from approving a transaction in a CCAA Plan that provides for the payment of additional pension contributions that are owing, including the special payments due and the wind-up deficits, or even the continuation of a pension plan with payment of monthly benefits, if the majority of the creditors so agree.[42] There would be nothing in such a CCAA Plan that would frustrate the purpose of the CCAA.

Issue #2: Did the CCAA Judge err in holding that sections 49 and 264 of the SPPA are not sufficient to create deemed trusts in respect of the unpaid going concern payments and special payments owing by the employer to a pension plan in the context of the Wabush Mines CCAA proceedings?

33. The CCAA Judge erred in holding that the language in Sections 49 and 264 SPPA is inherently defective and does not create a valid deemed trust.

34. The judgment *a quo* is in stark contradiction to the decision of the Honourable Justice Robert Mongeon, J.S.C. in *Timminco* who found that Section 49 SPPA does create a valid deemed trust in favour of pension plan beneficiaries for the unpaid going concern

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41 *Indalex*, para. 205.

42 This occurred in the recent plan of compromise approved by the CCAA court in U.S. Steel (a.k.a. Stelco): *U.S. Steel Canada Inc. (Re)* (9 June 2017) Toronto CV-14-10695-00CL (Ont SCJ), paras. 41-43.

and special payments contributions owing by the employer (but not extending to the wind-up deficit).

35. If the judgment *a quo* is maintained, Quebec would become virtually the only province that does not have valid deemed trust provisions to protect pension plan members.

36. In *Timminco*, Justice Mongeon correctly followed and applied the principles from *Indalex*. He analyzed the relevant provisions of the *Civil Code of Quebec* ("**CCQ**"), the SPPA and the CCAA and found that the deemed trust in the SPPA is valid and applies in the context of a CCAA proceeding. He held that the deemed trust takes effect as soon as the contributions and accrued interest become due and payable and outranks the priority of a secured creditor.

37. Moreover, in *Timminco*, the deemed trust had arisen after the secured creditor had registered its hypothec. Justice Mongeon referred to Section 264 SPPA, which states that all contributions to be paid to the pension fund are unassignable and unseizable, and concluded that even though they had already been hypothecated at the time the SPPA deemed trust came into effect, the charged assets became subject to a trust such that a secured creditor could not exercise its rights over them.[43]

38. Despite Justice Mongeon's detailed analysis in *Timminco*, the CCAA Judge in this case interpreted the SPPA very differently, and respectfully, incorrectly. He found that since Section 49 SPPA does not contain express language identifying the property covered on a deemed trust "triggering event", such an omission is fatal to the validity of the SPPA deemed trust on the face of the statute.[44]

39. The interpretation by the CCAA Judge that Section 49 SPPA is not sufficient to create a trust at all is inconsistent with the principle of statutory interpretation that the legislator does not speak in vain, and that meaning should be given to legislative text. Adopting a narrow interpretation to remedial pension legislation is also "contrary to the [...]

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43 *Timminco*, paras. 135 and 162.
44 Hamilton Judgment, **J.S., vol. 1, pp. 22-23**, paras. 99 and 103-104.

legislator's trend toward broadening the protection" and was discouraged by the Supreme Court in *Indalex*.[45]

40. The creation of a deemed trust under Section 49 SPPA is consistent with Article 1262 CCQ, which allows for the creation of a trust by operation of law. As McLachlin J. confirmed in *British Columbia v. Henfrey Samson Belair Ltd.*,[46] the provinces may define 'trust' as they choose for matters within their own legislative competence.

41. It is in the very nature of a trust under Quebec civil law that the subject property falls outside of the employer's patrimony. As the trust is a patrimony by appropriation distinct from that of the employer, the assets deemed to be held in trust are subtracted from its property, in accordance with Article 1261 CCQ.

42. The creation of the statutory deemed trust in Section 49 SPPA is further buttressed by Section 264 SPPA. This Section echoes Article 696(1) 4° and (2) 3° of the new *Code of Civil Procedure* and its predecessor, Article 553(7) of the old *Code of Civil Procedure*, which also render the contributions unpaid to the pension fund unseizable.

43. The combined effect of Sections 49 and 264 SPPA therefore ensures that the amounts owing to the pension fund are excluded from the debtor's patrimony and are out of the reach of the debtor's other creditors, whether or not secured, and whether they benefit from a security which is earlier than the due date of the paid or unpaid contributions. This is further confirmed by Articles 2644, 2645 and 2668 CCQ, which provide, *inter alia*, that unseizable assets may not be the object of a hypothec.

44. Respectfully, the CCAA Judge's reasoning in this case is based on an incorrect application of the judgments of the Supreme Court and the Court of Appeal of Quebec in *Sparrow*,[47] *Nolisair* and *Sécurité Saglac*.[48]

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45 *Indalex*, para. 43.
46 *Henfrey,* [1989] 2 S.C.R. 24 at p. 35, 59 D.L.R. (4th) 726, at p. 742.
47 *Royal Bank of Canada v. Sparrow Electric Corp.* [1997] 1 S.C.R. 411 ["***Sparrow***"].
48 *Quebec (Deputy Minister of Revenue) v. Nolisair International Inc. (Trustee of); Sécurité Saglac (1992) inc. (Trustee of) v. Quebec (Deputy Minister of Revenue)* [1999] 1 S.C.R. 759, reversing *Quebec (Sous-ministre du Revenue) v. Richter & associés inc.*, [1997] R.J.Q. 2433 (C.A.) ["***Nolisair***"] and *Sécurité Saglac (1992) Inc. (Syndic de)*, [1997] R.J.Q. 2448 (C.A.) ["***Sécurité Saglac***"].

45. As noted by Justice Mongeon in *Timminco*, on proper consideration, it is apparent that the opinions of Justices Chamberland and Fish in *Nolisair* and *Sécurité Saglac* establish one thing only: for a deemed trust to exist, it is necessary that the language used to constitute it be sufficient and demonstrate that the amounts or property deemed held in trust really are held as such, even without separating the property or amounts from the remaining property of the debtor. As Justice Mongeon correctly found, the text of Section 49 SPPA contains words confirming the existence of a deemed trust, whether or not the employer has kept the contributions it must remit to the pension fund separate from its other property.

46. Furthermore, the CCAA Judge erroneously concluded that Section 264 SPPA could not possibly deal with the same amounts as those already covered by Section 49, and that the amounts or contributions in Section 264 were limited to the amounts payable by or to the members of the pension fund and not to amounts payable by the employer.[49] This restrictive interpretation is not supported by either the current wording nor the legislative evolution and history of the provision.

47. Section 264 SPPA does not state that only member contributions are unassignable and unseizable; it states that it is the case of "all contributions paid or payable to the pension fund". This includes, *inter alia*, member contributions as well as employer contributions.

48. It is noteworthy that in the original wording of Section 264 adopted in 1989, the legislator expressly provided that both member and employer contributions were unassignable and unseizable.[50] The provision was amended in 2000 to strike out the words "member or employer",[51] and to refer instead simply to "all contributions", without distinction. The stated purpose of the amendment was to harmonize the provisions of Section 264 SPPA with those of the *Code of Civil Procedure* relating to unseizability and to ensure that all contributions, without exception, were rendered unassignable and unseizable, including

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49 Hamilton Judgment, **J.S., vol. 1, pp. 23-25**, paras. 105-111.

50 Statutes of Quebec 1989, Chap. 38, s. 264: "264. Unless otherwise provided by law, the following amounts or contributions are unassignable and unseizable: (1) all member or employer contributions paid or payable into the pension fund or to the insurer, with accrued interest".

51 Statutes of Quebec 2000, Chap. 41, s. 171.

additional voluntary contributions,[52] which had been left out in the original wording of Section 264.[53]

49. The fact that the Suspension Order authorized the Employer to stay the payment of the special payments owing under the Salaried Plan between the date of the Suspension Order and the termination of the plan does not, in any way, entail that those payments are no longer due or extinguished. The CCAA Judge expressly acknowledged at the time that he suspended these payments that the beneficiaries of the pension plans would not be prejudiced by this suspension since the debt would remain and benefit from whatever priority it is entitled at law.[54]

50. The Suspension Order was issued by the CCAA Judge to provide breathing space for the Wabush CCAA Parties at the outset of the proceedings, but in view of the fact that, with the benefit of hindsight, the CCAA Judge has now determined that this was a liquidation from the CCAA filing date and never a restructuring, there is no basis not to recognize the claim for these amounts as being captured by the SPPA (as well as NLPBA and PBSA) deemed trusts.

51. Indeed, one must distinguish between the exigibility of a debt and a (temporary) suspension of the obligation to make payment. In view of the foregoing, the unpaid special payments in this case remain due even though the actual payment of such amounts was suspended.

Issue #3: Did the CCAA Judge err in holding that the deemed trusts in the PBSA are inoperative in the Wabush Mines CCAA proceedings because they conflict with Parliament's intent?

52. The CCAA Judge erred in holding that the federal PBSA deemed trusts, which cover only unpaid current service costs and unpaid special payments (but not the unpaid wind-up

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52 SPPA, s. 37, **J.S., vol. 4, pp. 1231**.

53 Index du Journal des débats, 36e législature, 1re session (2 mars 1999 - 9 mars 2001), Commission permanente des affaires sociales, Projet de loi n° 102 - CAS-59: 1-46, Fascicule n°59, 16 août 2000, pp. 1-46.

54 Judgment on Pension Priority and Suspension of Certain Payments ("**Suspension Order**"), **J.S., vol. 2, pp. 387-388**, paras. 112, 116 and 117. To the same effect see: *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 2028, para. 24.1; *Fraser Papers Inc. (Re)*, 55 CBR (5th) 217, 2009 CanLII 39776 (ON SC), para. 21.

deficit), are not effective in the CCAA proceedings because Parliament intended to render them inoperative in a CCAA when it amended the CCAA in 2009. There is no evidence of such an intention and, on the contrary, the evidence reveals the opposite intention.

53. In the CCAA and the PBSA, there is no language that excludes or limits the protection of the PBSA deemed trust in a CCAA proceeding. Despite this, the CCAA Judge erroneously implies such an exclusion, where none exists.

54. The CCAA Judge erred by adopting the reasoning from an article written by an insolvency lawyer:

> [215] The Court adopts the following reasoning to resolve the conflict:
>
> > Given that the pension provisions of the BIA and CCAA came into force much later than s. 8 of the PBSA, normal interpretation would require that the later legislation be deemed to be remedial in nature. Likewise, since those provisions of the BIA and CCAA are the more specific provisions, normal interpretation would take them to have precedence over the general. Finally, the limited scope of the protection given to pension claims in the BIA and the CCAA would, by application of the doctrine of implied exclusion, suggest that Parliament did not intend there to be any additional protection. In enacting BIA subs. 60(1.5) and 65.13(8) and ss. 81.5 and 81.6 and CCAA subs. 6(6) and 37(6), while not amending subs. 8(2) of the PBSA (by adding explicit priority language or by removing the insolvency trigger), Parliament demonstrated the intent that pension claims would have protection in insolvency and restructurings only to the limited extent set out in the BIA and the CCAA.

55. The CCAA Judge made two errors in this regard.

56. First, the article he refers to contains a factual error by stating that the CCAA was amended after the PBSA. In fact, the chronology of federal legislative amendments to the PBSA and CCAA is as follows:

- **June 1986**: the PBSA deemed trust provisions are created over unpaid current service costs, special payments, and wind-up deficit;[55]

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[55] *An Act respecting pension plans organized and administered for the benefit of persons employed in connection with certain federal works, undertakings and businesses*, SC 1986, c 40.

- **November 2005 and December 2007**: the CCAA is amended to add the provisions of Sections 6(6), 6(7) and 36(7) CCAA;[56] and
- **July 2010**: Section 8 PBSA is amended to delete the deemed trust from applying to wind-up deficit.[57]

57. Parliament obviously turned its mind to pension deemed trusts by amending the PBSA in 2010 to remove its application for wind-up deficits *after* it amended the CCAA, but clearly did not remove the other PBSA deemed trusts and instead kept them in place. This reveals that in 2010, Parliament believed the PBSA deemed trust for unpaid wind-up deficit to be effective and enforceable, and surgically deleted it from the PBSA. This also indicates that Parliament must have intended to keep the other PBSA pension deemed trusts operative in the context of the CCAA.

58. Second, the CCAA Judge erred in finding that a conflict exists between the CCAA and the PBSA.[58] His conclusion that the limited scope of the protection given to pension claims in the BIA and the CCAA would, by application of the doctrine of implied exclusion, suggest that Parliament did not intend there to be any additional federal protection in CCAA proceedings, is based on an erroneous understanding of the object of Section 6(6) CCAA. The PBSA deemed trusts apply to a different scenario than that envisioned by Section 6(6) CCAA, which only comes into application after creditors have approved a CCAA Plan, which is not the case in these proceedings.

59. The situation of deemed trusts for amounts owing to a pension plan by an employer must be distinguished from and contrasted with other deemed trusts provided for claims of Her Majesty in right of Canada or a province (each a "**Crown**") under Section 37 CCAA.

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[56] *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47, s. 126; *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36, ss. 78 and 106. The provisions came into effect in 2009: *Order Fixing September 18, 2009 as the Date of Coming into Force of Certain Sections of the Acts*, SI/2009-68 August 19, 2009.

[57] *Jobs and Economic Growth Act*, SC 2010, c. 12, s. 1791.

[58] Hamilton Judgment, **J.S., vol. 1, p. 44**, para. 211

60. Through legislative reform of Crown priorities initiated in the 1990's, Parliament caused the Crown to become an unsecured creditor in insolvencies.[59] Parliament also stipulated that deemed trusts in favour of the Crown would have no effect except as specifically acknowledged, which is the case for tax deductions at source, unemployment insurance premiums and government (CPP and QPP) pension contributions. Thus, it was necessary for Parliament to specifically recognize Crown deemed trusts for unremitted source deductions in Section 37(2) CCAA, lest they be subsumed by Section 37(1) CCAA and treated as unsecured claims.

61. Since pension deemed trusts were never rendered ineffective by insolvency legislation, such as Section 37, there is no need for specific confirmation of their survival in the CCAA. Although he acknowledged the importance of a Crown exception in this context,[60] the CCAA Judge failed to follow this distinction to its logical conclusion regarding the continued effect of pension deemed trusts in CCAA proceedings.

Issue #4: Did the CCAA Judge err in holding that:

a) **The PBSA applies exclusively to those Wabush Mines Salaried Members (and USW Plan Members) who as employees worked on the Wabush Mines railway?**

b) **The SPPA applies exclusively to those Wabush Mines Salaried Members (and USW Plan Members) who as employees were non-railway employees and who reported for work in Quebec?**

c) **The NLPBA applies exclusively to those Wabush Mines Salaried Members (and USW Plan Members) who as employees were non-railway employees and reported for work in Newfoundland?**

62. The CCAA Judge erred in utilizing a geographical approach to determining the pension remedies exclusively applicable to the various groups of employees.

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[59] *Century Services*, paras. 29 and 37-39.
[60] Suspension Order, **J.S., vol. 2, p. 377,** para. 72; Hamilton Judgment, **J.S., vol. 1, p. 42**, paras. 199-201.

Multi-Jurisdictional Pension Plans ("MJPP")

63. The regulation of pensions is subject to provincial jurisdiction under Property and Civil Rights in Section 92(13) of the *Constitution Act, 1867*.[61] Each province (except for P.E.I.) has enacted its own pension benefits minimum standards statute. For pension minimums standards for employees of companies engaged in federal works and undertakings, Parliament enacted the PBSA. In total, there are 10 different pension statutes across Canadian jurisdictions.

64. A MJPP refers to a single pension plan that has members who work for the employer in more than one Canadian jurisdiction. This scenario engages the potential application of two (or more) jurisdiction's pension statutes to the members of the same pension plan.

65. Commencing in 1968, in order to coordinate pension statutes for MJPPs and avoid jurisdictional conflicts and multiple regulators regulating the same pension plan, provincial governments established a "Memorandum of Reciprocal Agreement" (the "**1968 Reciprocal Agreement**"[62]). Its main concept is that one jurisdiction is designated as the dominant regulator (called the "Major Authority") of a MJPP which then regulates the plan in accordance with the Major Authority's statute, and to the extent another relevant jurisdiction has different rules, regulates the plan in accordance with those rules for the plan members who are also subject to the other jurisdiction.

66. There have been three versions of the Multi-Jurisdictional Pension Plan Agreements ("**MJPA**") over the years: in 1968, 2011, and 2016. The current 2016 version of the MJPA is the most comprehensive and states that the deemed trust provisions of the Major Authority's pension statute apply to the fund of the plan:[63]

> The pension legislation applicable to a pension plan shall be the pension legislation of the jurisdiction of the major authority for the plan in the following areas [...]
>
> **Pension fund assets**
>
> 8. Legislative provisions respecting: [...] **(c) requirements that the pension fund be held separate and apart from the employer's assets and**

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61 (UK), 30 & 31 Vict, c 3.

62 Memorandum of Reciprocal Agreement ("**1968 Reciprocal Agreement**"), **J.S., vol. 6, pp. 1979-1983**.

63 2016 CAPSA Agreement Respecting Multi-Jurisdictional Pension Plans ("**2016 Agreement**"), **J.S., vol. 6, p. 1971**, Schedule B, s.1(8).

> **deeming the pension fund to be held in trust for the active members or other persons; (d) an administrator's lien and charge on the employer's assets equal to the amounts deemed held in trust** [...] [emphasis added]

67. The CCAA Judge held that while Newfoundland and Quebec signed the 1968 Reciprocal Agreement, that agreement does not expressly address which jurisdiction's deemed trust provisions should apply to the fund of a MJPP.[64] Further, he stated that since Newfoundland has not yet signed the 2016 Agreement, that agreement cannot be used to resolve the debate in this case. However, the fact that Newfoundland has not yet expressly signed onto the 2016 Agreement should not exclude it from assisting in the interpretation required for this case.

68. Clearly, pension regulators across Canada have recognized that it is practical and appropriate that the deemed trust and lien and charge provisions of the Major Authority's statute apply to a pension fund of a MJPP as a whole, and confirmed such in the 2016 Agreement.

69. Significantly, Quebec, being an express signatory to the 2016 Agreement, has signaled that it is prepared to accept the application of another province's pension legislation in respect of Quebec members, including legislation which provides a more fulsome deemed trust and Administrator's lien and charge extending to the full wind-up deficit than the SPPA.

The pension fund operates as a whole for all of the pension plan members

70. As noted in an industry article on MJPPs discussing how to resolve multi-jurisdictional issues: "[i]n practice, the ***funding*** and investment laws of the registration jurisdiction are used..."[65]

71. In this case, the Salaried Plan fund operates as a single trust fund, holding and investing the funds that are contributed to it by the Employer and by the employees. The fund is used to pay the pension benefits to all retirees and beneficiaries of the Salaried Plan regardless of where they worked as employees. The actuarial valuations are performed

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64 Hamilton Judgment, **J.S., vol. 1, p. 15**, para. 69.
65 "The Agreement Respecting Multi-Jurisdictional Pension Plans" (14 July 2011) Mercer *Communiqué*, p. 1.

on the aggregated assets and liabilities of the single pension trust fund taking into account the pension benefit formula in the plan text and in accordance with the NLPBA.[66] The actuarial reports, including the wind-up report prepared by Morneau Shepell, expressly state that the wind-up deficit is calculated in accordance with the NLPBA.[67]

72. On the wind-up of the underfunded Salaried Plan, the wind-up deficit is calculated by the actuary as of the wind-up date and is based on the overall cost of the pension benefits earned and payable to all the pension plan members, as compared to the total value of the assets in the pension fund. The shortfall is the amount of the wind-up deficit that applies to the pension trust fund as a whole.

73. The CCAA Judge erred by concluding that three pension statutes – the NLPBA, SPPA, and PBSA – apply separately to three groups of retirees in the Salaried Plan[68] – i.e., that the NLPBA applies to Newfoundland retirees, the SPPA applies to Quebec retirees, and the PBSA applies to retirees who worked on the Wabush railway. He based his conclusion on erroneous concepts of pension funding (para. 79), and did not acknowledge that the pension trust fund as a whole is contributed to and thus funded in accordance with the NLPBA.

74. In support of his position, the CCAA Judge refers to an article by Professor Goldstein who writes in favour of this multiplicity of governing statutes,[69] without, however, acknowledging the necessary nuances such as those that arise in this case. In fact, Goldstein specifically states that the approach of interpreting the application of the statutes in this "distributive" way "*n'est pas la seule possible*".[70] He even suggests that applying the main statute to all members irrespective of their location may be appropriate for those matters concerning the pension plan as a whole.

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66 Salaried Plan, **J.S., vol. 6, pp. 2124-2125, 2140**, Section 6.01 (b) and (c), 10.01(a) and (b) and 10.02 (b); Termination Notices by Newfoundland & Labrador Superintendent of Pensions, December 16, 2015, **J.S., vol. 5, p. 1864**.

67 Salaried Wind-Up Report, **J.S., vol. 6, p. 2197**; see also Actuarial Valuation Report of the Salaried Employees Pension Plan, REPS-4, **J.S., vol. 7, p. 2343**.

68 Hamilton Judgment, **J.S., vol. 1, p. 17**, para. 80.

69 Hamilton Jugement, **J.S., vol. 1, pp. 14-15**, para. 64.

70 Gérald Goldstein, *Les conflits de lois relatifs aux régimes complémentaires de retraite* (Montréal : Thémis, 2005) p. 4-5.

75. The highly problematic and unfair extension of the CCAA Judge's statute "separation" approach is that the different deemed trusts in the three statutes would generate very different recoveries from the CCAA proceedings for the three groups of retirees in the same pension plan. The Newfoundland retirees would recover their full pension benefits based on the NLPBA deemed trust that covers the wind-up deficit (the largest amount owing), while the Quebec and railway retirees would not. This result is inconsistent with interpretative principles for a pension trust fund:

> [...] a pension trust should be interpreted, to the extent possible, in a manner that is evenhanded as between beneficiaries: interpretive results that favour a beneficiary group or group of beneficiaries over others, are to be avoided unless the trust document language mandates its results.[71]

76. The jurisdictional analysis for the application of the deemed trusts for amounts owing by the Employer to the trust fund of the Salaried Plan should not focus on the individual circumstances of the employees or where they reported for work. Instead, the focus should be on the *corpus* of the pension fund. By both the formation and administration of the Salaried Plan, as well as its express choice of applicable law, the *corpus* of the pension fund patently exists in the province of Newfoundland and thus the NLPBA applies as a whole.

77. The Salaried Plan has been funded in accordance with the NLPBA.[72] The NLPBA deemed trusts are related to the pension trust's funding, since the wind-up deficit is a direct result of the manner in which the pension fund was managed, or in this case, mismanaged. The amount of wind-up deficit that the Employer owes to the pension fund is based on actuarial calculations relating to the Salaried Plan trust *fund as a whole* and bears no relation to where the particular Salaried Members reported to work at a given time while they were employees.

78. The CCAA Judge erred by treating the employees in different jurisdictions as if they were in watertight categories, without taking into account the likelihood that some employees worked and earned benefits during the course of their Wabush career periodically in both

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71 Pension Law, p. 17-18, referencing *Electrical Industry of Ottawa Pension Plan v Cybulski* (2001), 30 CCPB 95 (Ont SCJ), para. 19.

72 Salaried Plan, Sections 10.01 (b) and 10.03, **J.S., vol. 6, p. 2140**.

Quebec and Newfoundland and the fact that the numbers of employees in each province constantly changed over the years that the plan was in effect due to the normal workflow fluctuations caused by terminations, resignations, retirements, and other events.

The NLPBA, SPPA, and PBSA deemed trusts overlap, but do not conflict

79. As noted earlier, the PBSA and SPPA deemed trusts do not cover the most significant amount owing to the fund of the Salaried Plan: the wind-up deficit, while the NLPBA does. The exclusion of the NLPBA deemed trust from applying to the Quebec and railway members causes significant prejudice to the retirees of those two groups.

80. When a court is called upon to interpret legislation, it is not engaged in an academic exercise. If adopting an interpretation would lead to an absurdity, the courts should reject that interpretation in favour of a plausible alternative that avoids the absurdity.[73]

81. In this case, having different deemed trusts recoveries for the same pension fund, for retirees who worked for the same company and accrued benefits in the same pension plan under the same benefit formula, would be an interpretative absurdity that should be rejected.

The PBSA deemed trusts do not oust the NLPBA deemed trusts – they overlap

82. For the deemed trusts for unpaid current service costs and unpaid special payments, both the NLPBA and the PBSA create the *same duplicative remedy* over the *same amounts that were not paid by an employer* to the same pension fund. That is a federal-provincial overlap, not a conflict. In such a case, compliance with one provision ensures compliance with the other provision and the possibility of conflict does not arise. The legislative purpose of Parliament will be fulfilled regardless of which statute is invoked by a remedy-seeker.[74] However, the NLPBA creates an additional remedy for the Salaried Members applicable to the same single pension fund that the PBSA does not have.

83. Moreover, the historic context militates in favour of applying the protection of the NLPBA deemed trusts to the 14 railway retirees. For over 50 years (since the inception of the

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[73] *Construction of Statutes*, p. 307.
[74] *Construction of Statutes*, pp. 345-346.

Salaried Plan until after the commencement of the CCAA Proceedings), the federal regulators had no involvement with the regulation of the Salaried Plan.

There is no frustration of federal purpose

84. The application of the NLPBA deemed trusts does not frustrate Parliament's purpose when it amended the PBSA in 2010 to delete the deemed trust for the wind-up deficit for companies with pension plans in federally regulated undertakings. Permissive federal legislation, without more, will not establish that a federal purpose is frustrated.[75]

85. If Parliament had intended that the deletion of the PBSA wind-up deficit deemed trust go further and displace the application of *other* concurrently applicable provincial pension statutes to the same pension plan that do have a wind-up deficit deemed trust, it would have so stated in its 2010 PBSA amendments. It did not, such that there is no frustration of federal purpose.

The SPPA does not oust the NLPBA for the Quebec pension plan members

86. Similarly, the concurrent application of the SPPA and the NLPBA to the Salaried Members who reported for work in Quebec, does not render the more advantageous NLPBA deemed trust for wind-up deficits inapplicable to the Quebec retirees.

87. The SPPA and the NLPBA are both *provincial* statutes. There is no language in either the SPPA or the NLPBA that renders the deemed trust for wind-up deficits inapplicable for a multi-jurisdictional pension plan such as the Salaried Plan. Giving effect to the more advantageous NLPBA wind-up deemed trust does not offend the SPPA.

88. Section 14 of the Salaried Plan contains "Special Provisions" for the application of the SPPA for employees in Quebec. Section 14.01 states that it "is included in order for the Plan to comply with the [SPPA]", and then incorporates the SPPA by reference to specific topics such as early retirement, postponed retirement, and other benefit issues. Significantly, Section 14 fails to state that the deemed trust provisions in the SPPA are to displace or oust the NLPBA deemed trusts. Nor does the Salaried Plan anywhere state that the NLPBA deemed trust provisions apply only to the members who were employed in Newfoundland. The silence by the Employer is indicative of an intention (which is

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[75] *Construction of Statutes*, p. 346.

perfectly logical and coherent) to leave the NLPBA deemed trusts in place for *all* Salaried Members.[76]

89. In any event, any operational conflict that may exist between the SPPA and NLPBA with respect to the wind-up deficit deemed trust would be resolved by the "choice of law" provisions in section 12.06 of the Salaried Plan:

> **Applicable Law**
>
> 12.06 The Plan shall be interpreted pursuant to the laws applicable in the province of Newfoundland.

In *Douez v. Facebook, Inc.*,[77] the Supreme Court confirmed the requirement for a court to give effect to a choice of law provision.

90. Thus, all the Salaried Members should be able to benefit from the wind-up deemed trust mandated by the NLPBA which extends to the unpaid wind-up deficit that is owing to the Salaried Plan fund.

The NLPBA Administrator's lien and charge secures the entire wind-up deficit

91. Even if this Honourable Court were to hold that only the Newfoundland members benefit from the NLPBA deemed trust for the wind-up deficit (which position, it is respectfully submitted, is ill-founded), the Administrator's lien and charge in Section 32(4) NLPBA would nevertheless secure the residual wind-up deficit attributable to the Quebec and railway employees as well.

92. The CCAA Judge failed to consider that the deemed trusts, on the one hand, and the Administrator's lien and charge, on the other hand, are different and concurrent remedies that have been created by the same legislator to achieve its purpose of ensuring that the pension benefits earned by employees under a pension plan are properly protected.

93. The Newfoundland Court of Appeal held that the Administrator's lien and charge in Section 32(4) NLPBA provides "additional protection" for pension beneficiaries of an

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[76] Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2nd ed. (Markham: LexisNexis Canada, 2012), pp. 119-120.

[77] *Douez v. Facebook, Inc.*, 2017 SCC 33, para 70: Generally, courts will give effect to choice of law clauses as long as they are *bona fide*, legal and not contrary to public policy (*Vita Food Products Inc. v. Unus Shipping Co.*, [1939] A.C. 277 (Jud. Com. of Privy Coun.), p. 290).

underfunded pension plan, in favour of a separate party[78], which applies even if a court determines that the deemed trusts are not effective.

94. Whereas the beneficiaries of the deemed trusts in Sections 32(1) and (3) NLPBA are the members, former members and other persons with an entitlement under the plan (who may or may not be governed by different statutes), the lien and charge in Section 32(4) is created in favour of the Administrator of the plan, who is constituted and governed only by the NLPBA.[79] The Administrator that was appointed in this case to wind up the Salaried Plan was appointed pursuant to Section 63 NLPBA, by the NL Superintendent.[80]

95. Under Section 32(4) NLPBA, the Administrator, as an indivisible entity, has a lien and charge on the assets of the Employer in respect of the pension fund as a whole for the full amount of the wind-up deficiency, namely $27,450,000, that is effective in the CCAA proceedings.[81] Accordingly, the Administrator holds valid security on the assets of the Employer in these CCAA proceedings. The CCAA Judge correctly assumed that the Administrator's lien and charge is a valid fixed charge in the CCAA proceedings, but did not go further to decide on its priority relative to other competing creditors.[82]

Issue #5: Did the CCAA Judge err in holding that the deemed trusts in section 32 of the NLPBA do not apply to Wabush Mines' assets located in Quebec and the sales proceeds therefrom?

96. The CCAA Judge erred by holding that the NLPBA deemed trusts do not apply to the Employer's assets located in Quebec and to the sales proceeds therefrom being held by the Monitor,[83] and further erred by not finding that all such assets are also subject to the pension plan Administrator's lien and charge under Section 32(3) NLPBA.

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78 Newfoundland Reference, **J.S., vol. 2, p. 686.17**, para. 48.
79 Sections 12, 18 (3) and 79 NLPBA, **J.S., vol. 4, pp. 1121-1122, 1124 and 1148**.
80 Replacement Plan Administrator Notice by Newfoundland & Labrador Superintendent of Pensions, March 30, 2016, **J.S., vol. 6, p. 1871**,
81 In the Newfoundland Reference, the Newfoundland Court of Appeal confirmed that the lien and charge pursuant to Section 32(4) NLPBA applies to all payments that are necessary to fund the benefit provided under the pension plan, including the normal actuarial costs, the special payments as well as the wind up deficit. See Newfoundland Reference, **J.S., vol. 2, pp. 686.16 and 686.17-686.18**, paras. 44 and 51.
82 Hamilton Judgment, **J.S., vol. 1, pp. 26, 27 and 28**, paras. 118, 126 and 128.
83 Hamilton Judgment, **J.S., vol. 1, pp. 30**, **32 and 45**, paras. 144, 154 and 218 (g).

97. The NLPBA deemed trusts are recognized and given effect to under the laws of Quebec pursuant to Article 1262 C.C.Q., which recognizes that a trust can be established by operation of law. The CCAA Judge read that Article as being strictly limited to trusts created under Quebec law.

98. However, the Quebec rules of private international law specifically provide, at Article 3079 C.C.Q., that effect may be given to the mandatory provisions of law of another State with which the situation is closely connected, where legitimate and manifestly preponderant interests so require, taking into account their purpose and the consequences of their application. The "manifestly preponderant interest" pursued by the deemed trusts is to ensure that the pension plan is appropriately funded to pay the earned pension benefits; the applicable statute to determine whether the plan is properly funded is the Act that governs the administration of the plan, in this case, the NLPBA.[84]

99. The proposition that the NLPBA deemed trusts cover the Employer's property in Quebec does not entail that in every single case "any trust created by law anywhere in the world can validly charge assets in Quebec and that the Quebec courts must recognize such trusts", as the CCAA Judge suggested at paragraph 146 of his judgment.[85] In the present case, the Quebec courts are being asked to give effect to certain statutory provisions with which the situation is clearly very closely connected and to recognize the effect of these deemed trusts over the assets of the Employer, which operated as an integrated company across two provinces' boundaries.

100. A deemed trust, like other trusts, removes the subject assets from the property of the debtor divisible among its creditors. This principle is expressly recognized in Section 67 BIA.[86] A debtor has only one patrimony. As stated by Professor Pierre-Claude Lafond, this is the principle expressed by Articles 2, 2664 and 2645 C.C.Q.:[87]

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84 Salaried Plan, **J.S., vol. 6, p. 2140**, Section 10.01 (a) and (b).
85 Hamilton Judgment, **J.S., vol. 1, p. 31,** para. 146.
86 BIA s. 67(1) states: "The property of a bankrupt divisible among his creditors shall not comprise (a) property held by the bankrupt in trust for any other person…", **J.S., vol. 4, p. 1071**.
87 Pierre-Claude Lafond, *Précis de droit des biens*, 2nd ed. (Montréal : Thémis, 2007), p. 153.

> C. Indivisible
>
> 392 – Une personne ne possède qu'un seul patrimoine. Celui-ci est unique, tout comme son titulaire. Les biens patrimoniaux forment une masse indivisible.
>
> 393 – C'est le principe qu'énoncent les articles 2664 et 2645 C.c.Q. [...]

101. The Newfoundland Court of Appeal held that it is important to apply "*a purposive interpretation to the relevant provisions*".[88] In particular, the Court held that, consistent with the purpose of the NLPBA, the pension plan Administrator's lien and charge is a "fixed charge",[89] and that whenever a deemed trust arises pursuant to Section 32 NLPBA, the lien and charge attaches to the assets held by an employer "*regardless of their nature or location*".[90]

102. The principles referred to above regarding Article 3079 C.C.Q. apply *mutatis mutandis* to the Administrator's lien and charge as well.

103. Furthermore, some of the assets of the Wabush CCAA Parties consist of rolling stock (e.g., railway cars and other vehicles) which travelled between Newfoundland and Quebec[91] and Quebec law (Article 3103 C.C.Q.) recognizes that movable assets that are not intended to remain in one State may be charged with a security in accordance with the laws of another State.

104. The CCAA Judge erred by determining that if the NLPBA deemed trusts extended to property located in Quebec, that would prejudice the Quebec retirees who he held do not benefit from an SPPA deemed trust, because the Newfoundland retirees with the NLPBA deemed trusts, would be able to access assets in Quebec.[92] In so doing, he generated a new contest between different groups of retirees in the same pension plan, who are entitled to benefits from the same pension fund, which is unsupportable at law, contrary to the operation of a pension plan, as well as profoundly unjust to the retirees.

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88 Newfoundland Reference, **J.S., vol. 2, p. 686.8-686.9**, para. 18.
89 Newfoundland Reference, **J.S., vol. 2, p. 686.16-686.17**, para. 47.
90 Newfoundland Reference, **J.S., vol. 2, p. 686.17-686.18**, paras. 48 and 51.
91 Motion for the Issuance of an Initial Order, **J.S., vol. 2, p. 656**, para. 62.
92 Hamilton Judgment, **J.S., vol. 1, p. 32**, para. 153.

105. Respectfully, the flaw in the CCAA Judge's reasoning is made plain when one applies his geographic approach, by analogy, to other statutory deemed trusts that continue to apply in the context of insolvency proceedings.

106. In the event of a bankruptcy, Section 67(1)(a) BIA provides that the property of a debtor divisible among its creditors does not include property held in trust by the debtor. In particular, Section 67(3) BIA provides that property that is deemed to be held in trust for the Crown with respect to deductions at source, continues to be regarded as being held in trust, despite the occurrence of the bankruptcy. These deemed trusts for deductions at source are not defeased by Section 67(2) BIA. Section 37(2) CCAA provides a similar result in the case of CCAA proceedings.

107. In their treatment of these deemed trusts, neither the BIA or the CCAA separates the property of the debtor into as many estates as there are provinces in which the assets of the debtor are located at a particular time. The patrimony of the debtor is treated as one. For example, the deemed trusts in favour of the provincial Crown for unremitted source deductions are not confined to the assets of the debtor that are located within that particular province; they cover all of the assets wherever situated. This is especially logical where companies operate in more than one province and move their assets across provincial borders for business imperatives.

108. Had the legislator intended to confirm that assets are affected by deemed trusts on the basis of their geographic location at the time of insolvency, it would have specifically said so, as it has expressly provided for in other situations under the BIA, such as at Section 67(1)(b) and at Section 136(1)(f). No such territorial limits are imposed by the legislator with respect to property held in trust, including deemed trusts.

109. The geographic approach adopted by the CCAA Judge would also lead to untenable results in the context of true restructurings under the CCAA (i.e., not liquidations).

110. Followed to its logical conclusion, the CCAA Judge's determination that the deemed trusts created by the laws of another province are not recognized in Quebec and do not extend to assets located in Quebec, when applied in the context of a restructuring under the CCAA, would result in a situation where it would be impossible for a CCAA Plan to be

approved unless there are specific assets located in each province sufficient to address the payment of pension contributions that are subject to the statutory deemed trusts created by the laws in each of these provinces, even if the debtor has sufficient assets elsewhere. There is no "historical, legal or logical reason"[93] to interpret the application of statutory deemed trusts in this geographical restrictive way.

Issue #6: Did the CCAA Judge err in holding that the scheme of distribution to creditors in section 136 of the *Bankruptcy and Insolvency Act* applies in the Wabush Mines CCAA proceedings?

111. There was no legal basis for the CCAA Judge to import and impose the scheme of distribution under the BIA into these proceedings and, in so doing, he erred.

112. In the present case, the Wabush CCAA Parties' parent company, CNR[94] and the Wabush CCAA Parties used the CCAA process to liquidate their assets in Canada to disengage from their Canadian mining operations.[95] This was not a case in which a failed CCAA Plan forced a company into liquidation under the BIA. They intentionally did not resort to the BIA, which provides "an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules,[96] presumably because they wanted to take advantage of the benefits of the CCAA, including its flexibility rather than the rules-based framework in the BIA.

113. As considered and determined in *Indalex*, this utilization of the CCAA as the vehicle for a liquidation of assets and the distribution of the proceeds, where the debtor never intended to present a reorganization plan to its creditors, does *not* mean that courts may read the priorities of the BIA into the CCAA:

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93 *Indalex*, para. 43.

94 Cliffs Natural Resources Inc., the ultimate parent of the Wabush CCAA Parties: Motion for the Issuance of an Initial Order, **J.S., vol. 2, p. 651**, paras. 11-14.

95 Andrew J. Hatnay, "Restructuring, Liquidating, Now Disengagement: The Use of the CCAA by Corporate Parents to Disengage from Canadian Operations", (2017) *Annual Review of Insolvency Law 2016*, p. 125.

96 *Century Services*, para. 15.

> [51] [...] [T]his 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.[97]

Issue #7: Did the CCAA Judge err in holding that the priority of the NLPBA, SPPA, and/or PBSA deemed trusts as against a secured claim is dependent on the deemed trusts coming into effect before the secured claim?

114. The CCAA Judge held that it was not necessary to decide the priority issues between the claim for unpaid property and water taxes of the Ville de Sept-Iles and the pension deemed trust claims of the Appellants.[98]

115. Nevertheless, the CCAA Judge, relying on *Aveos*[99] (a case dealing with the PBSA deemed trusts) and *Sparrow* (an earlier case dealing with a Crown deemed trust under the *Income Tax Act*, and not a pension deemed trust), made general statements on the priority rules purporting to apply to pension deemed trusts in insolvency proceedings.

116. Justice Mongeon in *Timminco* already considered and correctly concluded that the reasoning in *Sparrow* did not apply with respect to the SPPA pension deemed trusts.

117. In *Aveos,* Justice Mark Schrager, J.S.C. (as he then was) held that the PBSA pension deemed trust is not a "true trust" and cannot therefore defeat a pre-existing security interest, absent express statutory language granting a priority to the deemed trust in respect of property that is also subject to a security interest regardless of when such security interest arose. Respectfully, this reasoning is incorrect.

118. A statutory pension deemed trust is a valid trust that is "imposed by legislation to ensure that employers do not avoid various revenue and social obligations".[100] The objective of a legislative deemed trust is to forgo the formal requirements for a trust yet still constitute

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97 *Indalex*, para. 51.
98 Hamilton Judgment, **J.S., vol. 1, p. 28**, para. 128.
99 *Aveos Fleet Performance Inc./Aveos Performance aéronautique inc.,* 2013 QCCS 5762 ["**Aveos**"].
100 *Oosterhoff on Trusts: Text Commentary and Materials,* 6th ed, (Toronto: Thompson Carswell, 2004), p. 20.

an effective trust so that the legislator can achieve its policy objectives, in this case, the protection of pension benefits in an underfunded pension plan.

119. As the Supreme Court held in *Indalex*, and as was reiterated in the Newfoundland Reference, the pension deemed trust is remedial in nature and, in the case of competing priorities between creditors and in the absence of paramountcy, it should be afforded an interpretation that seeks to achieve the broadest protection possible.[101]

120. Statutory trusts in favour of pension plan members differ from those in favour of the Crown or other beneficiaries. Without statutory protection, employees and retirees cannot effectively obtain security from their employers with respect to their deferred wages for work they have already performed for the company.

121. The CCAA Judge incorrectly applied to pension deemed trusts other principles that are proper to Crown deemed trusts, whereas the latter are to be treated differently by the very provisions of the CCAA. Furthermore, the case of *First Vancouver Finance c. M.R.N.*[102] invoked by the CCAA Judge does not support his reasoning, as the issue in that case regarded the effect of a Crown deemed trust on property that no longer belongs to the debtor, which is not the issue in the present case.

122. As a valid trust, the legislated pension deemed trusts remove from the property of the employer the amounts that are deemed to be held in trust. The timing of a prior security interest and attachment of assets is therefore irrelevant.

123. By finding that a pension deemed trust attaches to the Employer's property "subject to other security which attached to the assets before the contributions were due",[103] the CCAA Judge erred and effectively elevated the priority status of a secured creditor to that of the beneficiary of a trust, which is not supported in law and entirely contrary to the manner in which trusts apply in CCAA (and BIA) proceedings.

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101 *Indalex*, para. 44.
102 [2002] 2 RCS 720, 2002 CSC 49.
103 Hamilton Judgment, **J.S., vol. 1, p. 27**, para. 122.

PART IV – CONCLUSIONS

FOR THESE REASONS, MAY IT PLEASE THIS HONOURABLE COURT :

ALLOW the appeal;

SET ASIDE the judgment in first instance;

DECLARE THAT:

i) the NLPBA, PBSA, and SPPA deemed trusts concurrently apply in favour of all the members of the Salaried Plan, are enforceable in the CCAA proceedings, and generate a priority recovery for the Salaried Plan members in respect of the amounts owing that are covered by the deemed trusts ahead of all other creditors, ranking only after the priorities granted to the DIP lender and other CCAA court-ordered charges in the CCAA proceedings;

ii) the pension plan Administrator's lien and charge under Section 32(4) of the NLPBA is a secured claim of the pension plan Administrator for the amount of unpaid current service payments, unpaid special payments, and unpaid wind up deficit in respect of all members of the Salaried Plan, including the Wabush retirees who worked on the railway and the Wabush retirees who had reported for work in Quebec;

iii) Sections 49 and 264 of the SPPA create a valid and enforceable deemed trust over the amount of all unpaid current service payments, and unpaid special payments owing to the Salaried Plan with respect to the Quebec retirees and that such contributions with interest are unassignable and unseizable;

iv) the NLPBA, SPPA, and PBSA deemed trusts charge or otherwise apply to all of the applicable Wabush CCAA Parties' assets, including their assets located in Quebec;

v) the pension plan Administrator's lien and charge under Section 32(4) of the NLPBA charges or otherwise applies to all of the applicable Wabush CCAA Parties' assets, including their assets located in Quebec;

vi) the scope of the NLPBA deemed trusts and the pension plan Administrator's lien and charge covers the amount of unpaid current service payments, unpaid special payments, and the unpaid wind-up deficit of the Salaried Plan; and

vii) such other declarations and orders as counsel may request and this Honourable Court will grant.

THE WHOLE RESPECTFULLY SUBMITTED.

Toronto and Montreal, this 24th day of January, 2018

(S) KOSKIE MINSKY LLP

KOSKIE MINSKY LLP

(S) FISHMAN FLANZ MELAND PAQUIN LLP

FISHMAN FLANZ MELAND PAQUIN LLP

Court-appointed Representative Counsel to the Appellants, Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson as Court-appointed Representatives of all non-union employees and retirees of the Wabush CCAA Parties

PART V – AUTHORITIES

Paragraph(s)

Legislation

Jurisprudence

Paragraph(s)

Paragraph(s)

Doctrine

Other

ATTESTATION

We, the undersigned, **KOSKIE MINSKY LLP** (Me Andrew J. Hatnay and Me Amy Tang) and **FISHMAN FLANZ MELAND PAQUIN LLP** (Me Mark E. Meland and Me Nicolas Brochu) hereby attest that this appeal brief is in compliance with the Civil Practice Regulation of the Court of Appeal. No transcripts were necessary for this appeal.

The time requested for our oral arguments is 2 hours and 30 minutes.

Toronto and Montreal, this 24th day of January, 2018

(S) KOSKIE MINSKY LLP

KOSKIE MINSKY LLP
(Me Andrew J. Hatnay and Me Amy Tang)

(S) FISHMAN FLANZ MELAND PAQUIN LLP

FISHMAN FLANZ MELAND PAQUIN LLP
(Me Mark E. Meland and Me Nicolas Brochu)

Court-appointed Representative Counsel to the Appellants, Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson as Court-appointed Representatives of all non-union employees and retirees of the Wabush CCAA Parties