Dossier N° _____

COUR SUPRÊME DU CANADA

(EN APPEL D'UN AVIS DE LA COUR D'APPEL DE TERRE-NEUVE ET LABRADOR)

IN THE MATTTER of Section 13 of part 1 of the *Judicature Act*, RSNL 1990, c. J-4

AND IN THE MATTER OF Section 32 of the *Pension Benefits Act, 1997,* SNL 1996, c. P-4.01

AND IN THE MATTER OF a reference of Lieutenant-Governor in Council of Newfoundland and Labrador to the Court of Appeal of Newfoundland and Labrador, for its hearing, consideration and opinion on the interpretation of the scope of section 32 of the *Pension Benefits act, 1997*

VILLE DE SEPT-ÎLES

APPELANTE

et

SUPERINTENDENT OF PENSIONS OF NEWFOUNDLAND AND LABRADOR

et

ATTORNEY GENERAL OF NEWFOUNDLAND AND LABRADOR

INTIMÉS

et

FTI CONSULTING CANADA INC.

et

ATTORNEY GENERAL OF QUEBEC

et

ATTORNEY GENERAL OF CANADA

et

REPRESENTATIVE MEMBERS OF THE WABUSH SALARIED PENSION PLAN

et

BLOOM LAKE GENERAL PARTNER LIMITED

QUINTO MINING CORPORATION

8568391 CANADA LIMITED

CLIFFS QUEBEC IRON MINING ULC

WABUSH IRON CO LIMITED

WABUSH RESOURCES INC.

et

MORNEAU SHEPELL LTD.

et

SYNDICAT DES MÉTALLOS, SECTIONS LOCALES 6254 ET 6285

INTERVENANTS

AVIS D'APPEL DE VILLE DE SEPT-ÎLES
(articles 36 et 60 de la *Loi sur la Cour suprême du Canada* et
article 33 des *Règles de la Cour suprême du Canada*)

SACHEZ que Ville de Sept-Îles (« *l'Appelante*») interjette appel de plein droit à la Cour suprême du Canada de l'avis de la Cour d'appel de Terre-Neuve et Labrador prononcé le 15 janvier 2018, en vertu des article 36 et 60 de la *Loi sur la Cour suprême du Canada*, L.R.C. (1985), ch. S-26 et de l'article 33 des *Règles de la Cour suprême du Canada*.

Fait à Québec, province de Québec, le 12 février 2018

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ANNEXE

Avis de la Cour d'appel de Terre-Neuve et Labrador rendu le 15 janvier 2018
(Docket : 201701H0029)

Original

IN THE COURT OF APPEAL OF NEWFOUNDLAND AND LABRADOR

Citation: *Reference re Section 32 of the Pension Benefits Act, 1997*, 2018 NLCA 1
Date: 20180115
Docket: 201701H0029

IN THE MATTER OF Section 13 of Part I of the *Judicature Act*, RSNL 1990, c. J-4;

AND IN THE MATTER OF Section 32 of the *Pension Benefits Act, 1997*, SNL 1996, c. P-4.01;

AND IN THE MATTER OF a Reference of the Lieutenant-Governor in Council to the Court of Appeal, for its hearing, consideration and opinion on the interpretation of the scope of section 32 of the *Pension Benefits Act, 1997*.

Coram: Green C.J.N.L., Welsh and White JJ.A.

Reference Regarding Section 32 of the *Pension Benefits Act, 1997*.

Heard: September 21 and 22, 2017
Opinion Rendered: January 15, 2018

Reasons for Opinion on the Reference: By the Court

* Green C.J.N.L. elected supernumerary status and resigned as Chief Justice on December 1, 2017.

Filed	Jan 15/18	JB

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By the Court:

[1] The Lieutenant-Governor in Council for Newfoundland and Labrador referred questions regarding the interpretation of provisions of the *Pension Benefits Act, 1997*, SNL 1996, c. P-4.01, to this Court pursuant to sections 13 and 14 of the *Judicature Act*, RSNL 1990, c. J-4. Following are the decision and opinion of the Court, including an analysis of submissions made by intervenors regarding the appropriate context within which the questions should be considered.

The Questions

[2] By Orders-in-Council 2017-103 and 2017-137, the Lieutenant-Governor in Council for Newfoundland and Labrador referred the following questions to this Court (the "Questions"):

> 1. The Supreme Court of Canada has confirmed in *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, that, subject only to the doctrine of paramountcy, provincial laws apply in proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36. What is the scope of section 32

of the *Pension Benefits Act, 1997*, SNL 1996, c. P-4.01 deemed trusts in respect of:

a) unpaid current service costs;

b) unpaid special payments; and

c) unpaid wind-up deficits?

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

a)

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

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

b)

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

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

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

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

Context for the Questions

[3] In December 2015, the Superintendent of Pensions of Newfoundland and Labrador terminated pension plans covering employees of Wabush Mines, a company operating in Labrador. The employer had discontinued operations and was the subject of proceedings in the Quebec courts under

the *Companies' Creditors Arrangement Act* (the "Quebec Proceedings"). The Monitor in that action sought directions regarding priorities with respect to claims under the *Act*. A preliminary issue was raised as to whether the Quebec Superior Court "should request the aid" of the Newfoundland and Labrador courts regarding the "scope and priority of the deemed trust and other security" created by the Newfoundland and Labrador *Pension Benefits Act, 1997* (decision of the Quebec Court, 500-11-048114-157, January 30, 2017, at paragraph 2). The Court decided to proceed without referring any issues to the courts of this Province. On September 11, 2017, Hamilton J.S.C. issued his decision, concluding, among other things:

> [218] ...
>
> > f) Nothing in the [*Pension Benefits Act, 1997* of Newfoundland and Labrador] limits the assets covered by the deemed trust to assets located in the province of Newfoundland and Labrador;
> >
> > g) The Court would not recognize or enforce the deemed trust under the [*Pension Benefits Act, 1997* of Newfoundland and Labrador] against assets located in the province of Québec.
>
> [219] Finally, with respect to the orders sought by the Representative Employees in their Argumentation Outline, the Court adds that the Plans are governed by the [federal pension legislation] for the railway employees, by the [Québec pension legislation] for the non-railway employees who reported for work in Québec, and by the [Newfoundland and Labrador pension legislation] for the non-railway employees who reported for work in NL.
>
> [220] At the outset, the Court said it would reserve the rights of the parties to ask the Court to revise the conclusions of the present judgment if: (1) the [Newfoundland and Labrador Court of Appeal] decides that the interpretation of the [*Pension Benefits Act, 1997*] is different from the interpretation that the Court assumed, and (2) that difference is material to the Court's conclusions.
>
> [221] However, based on its analysis and conclusions in the present judgment, the Court can now remove that reserve, because the interpretation of the [*Pension Benefits Act, 1997*] was not material to the Court's conclusions.

[4] In concluding that the *Pension Benefits Act, 1997* was not material, Hamilton J.S.C. explained:

> [210] In light of all these circumstances, the Court concludes that it would frustrate the purpose of Parliament if the deemed trust under the [*Pension Benefits Act, 1997*] operated in the context of a CCAA proceeding. The doctrine of federal

> paramountcy therefore renders the deemed trust under the [*Pension Benefits Act, 1997*] inoperable.

[5] In the meantime, in April 2017, proceedings were commenced to inscribe the Reference in which the Lieutenant-Governor in Council referred the Questions to this Court. Several of the parties and intervenors expressed concern that, in answering the Questions, the Court would interfere with the Quebec Proceedings. At the hearing, it became clear that references, if any, to the Wabush Mines' pension plans would be for the sole purpose of providing a context for considering the Questions insofar as an example may be helpful. The responses to the Questions would not determine rights as between the parties to the Quebec Proceedings except to the extent that the Court's interpretation of the legislation may subsequently be applied in those particular circumstances.

[6] While a Reference may have its roots in litigation between parties, in fact, it is designed to provide the Lieutenant-Governor in Council with the Court's opinion regarding issues of concern to the government such as the validity of proposed legislation or the interpretation and effect of legislative language. For example, in *Reference Re Sections 32 and 34 of the Workers' Compensation Act (Nfld.)* (1987), 67 Nfld. & P.E.I.R. 16 (Nfld. C.A.), the judge had expressed the view that two provisions of the legislation were of no force or effect. Since this was *obiter dictum*, which did not provide grounds for an appeal, the Lieutenant-Governor in Council referred the question of the validity of the legislation to the Court of Appeal. See also: *Re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, in which the Lieutenant-Governor in Council referred questions as to the constitutional validity of proposed legislation.

[7] In summary, the response by the Court to the Questions comprises an advisory opinion, with reasons, designed to assist government and persons having an interest with an interpretation of the legislation at issue. As a result of the Reference, the rights of parties to litigation may be affected, but this is an incidental effect that may flow from application of the Court's response to the Questions.

Paramountcy of Federal Legislation

[8] The Reference specifically exempts from consideration the question of whether the relevant provisions of the *Pension Benefits Act, 1997* are

rendered inoperative, based on the doctrine of paramountcy, where the *Companies' Creditors Arrangement Act* applies.

The Legislation

[9] Section 32 of the *Pension Benefits Act, 1997* provides for pension funds to be held in trust:

> (1) An employer or a participating employer in a multi-employer plan shall ensure, with respect to a pension plan, that
>
> (a) the money in the pension fund;
>
> (b) an amount equal to the aggregate of
>
> (i) the normal actuarial cost, and
>
> (ii) any special payments prescribed by the regulations, that have accrued to date; and
>
> (c) all
>
> (i) amounts deducted by the employer from the member's remuneration, and
>
> (ii) other amounts due under the plan from the employer that have not been remitted to the pension fund
>
> are kept separate and apart from the employer's own money, and shall be considered to hold the amounts referred to in paragraphs (a) to (c) in trust for members, former members, and other persons with an entitlement under the plan.
>
> (2) In the event of a liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that under subsection (1) is considered to be held in trust shall be considered to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own money or from the assets of the estate.
>
> (3) Where a pension plan is terminated in whole or in part, an employer who is required to pay contributions to the pension fund shall hold in trust for the member or former member or other person with an entitlement under the plan an amount of money equal to employer contributions due under the plan to the date of termination.

Section 32(4) provides for a lien and charge on the employer's assets:

> (4) An administrator of a pension plan has a lien and charge on the assets of the employer in an amount equal to the amount required to be held in trust under subsections (1) and (3).

[10] Section 61 of the *Act* provides for payment into a pension fund upon termination of the plan:

> (1) On termination of a pension plan, the employer shall pay into the pension fund all amounts that would otherwise have been required to be paid to meet the requirements prescribed by the regulations for solvency, including
>
> (a) an amount equal to the aggregate of
>
> (i) the normal actuarial cost, and
>
> (ii) special payments prescribed by the regulations,
>
> that have accrued to the date of termination; and
>
> (b) all
>
> (i) amounts deducted by the employer from members' remuneration, and
>
> (ii) other amounts due to the pension fund from the employer
>
> that have not been remitted to the pension fund at the date of termination.
>
> (2) Where, on the termination, after April 1, 2008, of a pension plan, other than a multi-employer pension plan, the assets in the pension fund are less than the value of the benefits provided under the plan, the employer shall, as prescribed by the regulations, make the payments into the pension fund, in addition to the payments required under subsection (1), that are necessary to fund the benefits provided under the plan.

Question One

[11] What is the scope of the deemed trusts in section 32 of the *Pension Benefits Act, 1997* (the "Newfoundland legislation") in respect of:

(a) unpaid current service costs;

(b) unpaid special payments; and

(c) unpaid wind-up deficits?

Unpaid Current Service Costs and Unpaid Special Payments

[12] In *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, Deschamps J., for the Court on the issue, concluded that, since 1983, the deemed trust set out in the Ontario legislation was intended to include current service costs and special payments. The legislation required an employer, upon terminating a pension plan, to pay to the administrator an amount equal to the current service cost and prescribed special payments that had accrued to the date of termination. (See also the concurring reasons of Cromwell J., at paragraphs 133 and 151.) The Newfoundland legislation has a similar effect.

[13] Section 32(1) requires an employer to ensure that an amount equal to "the normal actuarial cost" and prescribed special payments "that have accrued to date" is kept separate from the employer's money. That amount is considered to be held in trust for pension beneficiaries. Section 32(3), which applies upon termination of a pension plan, requires an employer to hold in trust "an amount of money equal to employer contributions due under the plan to the date of termination". Read together with subsection (1), this language clearly includes unpaid current service costs and special payments such that those amounts, due to the date of termination, are deemed to be held in trust for pension beneficiaries.

Unpaid Wind-up Deficits

[14] In *Sun Indalex*, Deschamps J., for the majority on the question of the wind-up deficiency, concluded:

> [45] In sum, the relevant provisions, the legislative history and the purpose are all consistent with inclusion of the wind-up deficiency in the protection afforded to members with respect to employer contributions upon the wind up of their pension plan. I therefore find ... that Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency.

[15] In reaching this conclusion, Deschamps J. explained:

> [34] ... The wind-up deemed trust concerns "employer contributions accrued to the date of the wind up but not yet due under the plan or regulations". Since the employees cease to accumulate entitlements when the plan is wound up, the entitlements that are used to calculate the contributions have all been accumulated before the wind-up date. Thus the liabilities of the employer are complete – have

> accrued – before the wind up. The distinction between my approach and the one Cromwell J. takes is that he requires that it be possible to perform the calculation before the date of the wind up, whereas I am of the view that the time when the calculation is actually made is not relevant as long as the liabilities are assessed as of the date of the wind up. The date at which the liabilities are *reported* or the employer's *option* to spread its contributions as allowed by the regulations does not change the legal nature of the contributions.
>
> (Italics in original; underlining added.)

[16] That conclusion follows from an interpretation of the language of the Ontario legislation which deems "an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations" to be held in trust for pension beneficiaries (*Sun Indalex*, at paragraph 26, underlining added). Rejecting a narrow definition of "accrued", Deschamps J. determined that "a contribution has "accrued" when the liabilities are completely constituted, even if the payment itself will not fall due until a later date" (*Sun Indalex*, at paragraph 36). That is, under the legislation, liabilities for payments to the pension plan:

> [36] ... are completely constituted at the time of the wind up, because no pension entitlements arise after that date. In other words, no new liabilities accrue at the time of or after the wind up. ...

[17] The legislative language addressed in *Sun Indalex* is somewhat different from that used in the Newfoundland legislation. In contrast to "contributions accrued to the date of the wind up but not yet due under the plan or regulations", which is used in the Ontario legislation, the Newfoundland legislation refers to actuarial cost and special payments "accrued to the date of termination" together with "all other amounts due to the pension fund from the employer that have not been remitted to the pension fund at the date of termination" (section 61).

[18] In analyzing the Newfoundland legislation, it is important to apply a purposive interpretation to the relevant provisions, which must be read together. Section 61 addresses the employer's responsibilities on termination of a pension plan. Subsection (1) requires the employer to "pay into the pension fund all amounts that would otherwise have been required to be paid to meet the requirements prescribed by the regulations for solvency". Section 11 of the *Pension Benefits Act Regulations*, NLR 114/96, addresses determination of a solvency deficiency:

> In the preparation of an actuarial valuation report to determine the existence of a solvency deficiency, a solvency valuation shall be performed in the following manner:
>
> > (a) the solvency liabilities of a pension plan shall be determined on the basis that the plan is terminated or on a basis that is certified by an actuary to be reasonably approximate to that, taking into account any significant increases or decreases in pension benefits to the plan members as a result of the termination; ...

[19] Payments that an employer is required or liable to make under section 61(1) must be made within thirty days of the date of termination of the pension plan (section 25 of the *Regulations*).

[20] Pursuant to section 61(2) of the *Act*, upon termination, where "the assets in the pension fund are less than the value of the benefits provided under the plan", the employer is required to make payments, in addition to those under section 61(1), "that are necessary to fund the benefits provided under the plan". However, section 25.1(1) of the *Regulations* allows for payment over time:

> The amount required to be paid under subsection 61(2) of the Act shall be divided into equal payments that are calculated over a period of not more than 5 years commencing from the date of termination of the pension plan.

[21] The fact that an employer may make payments required under section 61(2) over time does not lead to the conclusion that the amounts are not, in fact, "due to the pension fund" at the date of termination. As explained by Deschamps J. in *Sun Indalex*, liabilities for payments under the pension plan "are completely constituted at the time of the wind up, because no pension entitlements arise after that date" (paragraph 36). While the language used in the Ontario legislation is slightly different from that used in the Newfoundland legislation, the explanation set out by Deschamps J. would apply equally to both.

[22] That interpretation is consistent with the legislative history of the Newfoundland legislation. Subsection (2) was added to section 61 by amendment in 2008 (SNL 2008, c. 16). The purpose of adding subsection (2) was explained by the Minister when the Bill was considered for second reading (Hansard, April 24, 2008, Vol. XLVI No. 16):

> Before I get into the aspects of the bill, one of the most important aspects of a person's life as they age is their benefit of having a pension that they would have

> when they retire to get older and enjoy life to the fullest once their work life is over. So, it is very, very important, as the minister responsible for my department, to make sure that we protect the employees in regard to that pension plan, in its fullest, all the way along until their eventual retirement. That is what this amendment does, Mr. Speaker. It ensures the protection of pension plans for workers all over this Province.
>
> There is a need to improve this protection by amending the Pension Benefits Act, and to ensure – and what this amendment does is ensure that funding of deficits in pension plan windups is fully funded; because, if it is not fully funded thus it decreases the benefits to the employee. The benefits that they expected in the front end when they started paying into the pension plan would not be there at the end, once they retire.
>
> ...
>
> If there is a solvency deficit, the pension plan sponsor is now required to fund that deficit over a five year period. That is what this amendment will do, thus certainly ensuring that the employee is certainly protected over the lifetime of the pension and certainly at the end.

[23] In a similar vein, although in the context of the interplay between pension benefits and compensation for wrongful dismissal, in *IBM Canada Limited v. Waterman*, 2013 SCC 70, [2013] 3 S.C.R. 985, Cromwell J., for the majority, wrote:

> [85] Pension benefits have consistently been viewed as an entitlement earned by the employee. As Lord Reid put it in *Parry* [*v. Cleaver*, [1970] A.C. 1], at p. 16: "The products of the sums paid into the pension fund are in fact delayed remuneration for [the employee's] current work. That is why pensions are regarded as earned income." The pension is therefore a form of retirement savings earned over the years of employment to which the employee acquires specific and enforceable rights. ...

[24] The net effect of section 61 gleaned from the language, history and purpose of the legislation is that, upon termination of a pension plan, the employer must pay all amounts that are due to the pension fund or that are necessary to fund the benefits provided under the plan.

[25] Consistent with this purpose, section 32 of the *Act* imposes a trust on the monies required to be paid in respect of a pension plan. In the case of termination of a plan, section 32(3) requires the employer to hold in trust for the pension beneficiaries an amount equal to "employer contributions due

under the plan to the date of termination". Those amounts are set out in section 61.

[26] In the result, under section 32, all amounts due under the plan to the date of termination are covered by the deemed trust (sections 32(1)(c)(ii) and 32(3)). The amounts due as of that time are set out in section 61, which includes all amounts necessary to make the plan actuarially sound going forward. No entitlements under the pension plan arise after its termination, but the plan must have sufficient funds so that the value of the benefits provided under the plan may be satisfied. It follows that, upon the termination of a pension plan, any unpaid wind-up deficiency falls within the scope of the deemed trusts under section 32 of the *Act*.

[27] Accordingly, the answer to Question One is: (a) unpaid current service costs, (b) unpaid special payments, and (c) unpaid wind-up deficits fall within the scope of the deemed trusts under section 32 of the *Act*.

Question Two

[28] Consistent with the purpose of a Reference, Question Two, while stated in terms of the Wabush Mines situation, will not determine issues as between the parties to litigation (paragraph 7, above). With this in mind, the essential question raised by the Reference is one of jurisdiction, that is, whether the Newfoundland legislation would apply to: (1) employees who work on a federal undertaking such as a railway; and (2) employees who report for work in another province.

[29] We begin with principles discussed in Hogg, *Constitutional Law of Canada*, fifth edition, supplemented (Toronto, ON: Thomson Reuters Canada, 2017), at 23.2, pages 23-8 and 23-9:

> The power to regulate corporate activity is distributed in accordance with the classes of subject listed in the Constitution, especially in ss. 91 and 92. Once a company has been incorporated, its activity will be subject to the legislation of whichever order of government has validly enacted laws in respect of that activity. In ascertaining the appropriate regulatory jurisdiction, as opposed to the appropriate incorporating jurisdiction, the territorial extent of the company's objects is not decisive. The mere fact that a company's activity extends beyond the limits of any one province will not by itself bring the activity within federal regulatory jurisdiction. If the activity wears an aspect within provincial legislative jurisdiction such as "property and civil rights" – and most business activity does – then each province will have the power to regulate that part of the company's activity which occurs within the province's borders. Conversely, if

> the activity wears an aspect which is within federal jurisdiction, then it will be under federal control even if it is local. Some examples may clarify the point. ... An interprovincial telephone company may be incorporated provincially, but its rates will be subject to federal regulation. A hotel may be owned and operated by a federally-incorporated company, but its labour relations will be subject to provincial regulation. The point is that the jurisdiction of incorporation has the power to confer on a company its legal personality, its organization, and its essential powers; but its business will be regulated by whichever jurisdiction possesses and exercises the power to regulate that kind of business.

Employees Who Work on a Federal Undertaking, in Particular, a Railway

[30] We reiterate that the purpose of a Reference is to interpret legislation, rather than to determine rights as between parties. To apply that principle here it is necessary to re-state the question, which refers specifically to the Wabush Mines situation in which employees worked on a railway. Re-stated, the question is whether the federal *Pension Benefits Standards Act*, RSC 1985, c. 32 (2nd Supp.) applies to employees of a company, operating in the Province, who work on a railway, and whether that legislation precludes the application of the Newfoundland legislation.

[31] The scope of application of the federal *Pension Benefits Standards Act* is addressed in section 4, which provides, in relevant parts:

> (1) This Act applies in respect of pension plans.
>
> (2) In this Act, "pension plan" means a superannuation or other plan organized and administered to provide pension benefits to employees employed in included employment ... .
>
> ...
>
> (4) In this Act, "included employment" means employment, other than excepted employment, on or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada, including, without restricting the generality of the foregoing,
>
> ...
>
> (b) any railway, canal, telegraph or other work or undertaking connecting a province with another province or extending beyond the limits of a province;
>
> ...

> (h) any work, undertaking or business that, although wholly situated within a province, is before or after its execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more provinces;
>
> ...

[32] Where, on the facts of a particular situation, employees fall within the scope of application of section 4, the federal pensions legislation would apply. However, as explained by Hogg in *Constitutional Law of Canada*, the particular circumstances must be considered. For example, at 22.9, page 22-19:

> Legislative jurisdiction over transportation by land depends upon the principles explained in the previous sections of this chapter. Jurisdiction over trains, ... depends primarily on whether they are operated as part of an interprovincial (or international) undertaking, in which case jurisdiction is federal under s. 92(10)(a), or whether they are operated as part of an intraprovincial undertaking, in which case jurisdiction is provincial under s. 92(10). Some intraprovincial undertakings, including many local railways, have been brought under federal jurisdiction by exercise of the declaratory power under s. 92(10)(c).

[33] Another consideration that may apply in particular circumstances relates to the extent to which a company's operations may involve more than one undertaking, and the extent to which the undertakings are operated separately or as part of the core business (Hogg, *Constitutional Law of Canada*, at 22.7, pages 22-10 to 22-15).

[34] In addition, the extent to which the federal and provincial legislation may operate together, without conflict, may be relevant. The constitutional doctrines of interjurisdictional immunity and pith and substance are discussed in detail in *Constitutional Law of Canada*, at 15.8, pages 15-28 to 15-38.8. At page 15-38.5, Hogg refers to the decision in *Bell Canada v. Quebec*, [1988] 1 S.C.R. 749:

> In *Bell 1988*, Beetz J. made an effort to define the boundary between the pith and substance doctrine, on the one hand, and the interjurisdictional immunity doctrine, on the other. ...
>
> According to this formulation, provincial laws may validly extend to federal subjects unless the laws "bear upon those subjects in what makes them specifically of federal jurisdiction". The rule that emerged from this formulation was this: if the provincial law would affect the "basic, minimum and unassailable" core of the federal subject, then the interjurisdictional immunity

> doctrine stipulated that the provincial law must be restricted in its application (read down) to exclude the federal subject. If, on the other hand, the provincial law did not affect the core of the federal subject, then the pith and substance doctrine stipulated that the provincial law validly applied to the federal subject.
>
> ... However, in *Canadian Western Bank* [*v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3] the majority narrowed the doctrine by insisting that, if a provincial law merely affected (without having an adverse effect on) the core of a federal subject, then the doctrine did not apply. In that case, the pith and substance doctrine would prevail, enabling the provincial law to apply to the core of the federal subject. Only if the provincial law would "impair" the core of the federal subject, would interjurisdictional immunity apply. ...

[35] Counsel for the intervenor, the representative beneficiaries of the Wabush salaried pension plan, submits that a statutory benefit in provincial legislation that provides a benefit in addition to benefits under the federal legislation would not constitute a conflict engaging the doctrine of interjurisdictional immunity. Accordingly, it is submitted, the additional benefit should be available to the employees.

[36] The proposition that interjurisdictional immunity is not engaged does not lead to the conclusion that pension beneficiaries may gain additional benefits not included in the applicable legislation. The relevant principle in response to counsel's submission is not which of federal or provincial legislation takes precedence. Where the legislation enacted by both levels of government deals with precisely the same matter, such as in the case of pension legislation, the question of conflict does not arise since either one legislative scheme or the other must apply on the particular facts. That is, it is not open to the pension beneficiaries to choose the provisions from both statutes that would provide the greater benefit. Similarly, it would not be open to the pension beneficiaries to take the benefit of a provision in another statute, that did not otherwise apply, on the assumption that the benefit in question should have been included in the applicable legislation. The essential principle is that, in the circumstances, in respect of a particular class of workers, the employer would be bound to comply with one pension scheme, not with portions of two schemes.

[37] In summary, the extent to which principles and doctrines such as the above may apply in a particular situation will depend on the facts at issue. For purposes of this Reference, it is not appropriate to conduct an analysis of the factual circumstances at play for the purpose of drawing conclusions regarding termination of the Wabush Mines pension plan.

Employees Who Report for Work in Another Province

[38] The generally applicable principle is that "each province will have the power to regulate that part of the company's activity which occurs within the province's borders" (Hogg, *Constitutional Law of Canada*, paragraph 29, above). For this reason, in general, where a company has operations in more than one province, the employment-related laws of the province where the employees work would apply.

[39] As set out above, it is not within the appropriate scope of this Reference to make determinations regarding termination of the Wabush Mines' pension plan. Whether issues such as the residence of a company's workers, as opposed to where the work is carried out, or the nature of a company's business which may involve work being done in another province, may affect the application of the general rule cannot be determined in this Reference. Such issues are essentially factual in nature and do not rely on an interpretation of the legislation that was placed before this Court. Nor were such issues argued in submissions to the Court.

[40] In summary, it is not possible to answer Question Two as stated in the Reference. It is clear from the above principles that many factors may affect the answer to the issues posed. The use of the Wabush Mines scenario as a possible example provides insufficient information on which to test relevant principles. The jurisdictional questions, that is, whether the Newfoundland pension legislation would apply to employees who work on a federal undertaking such as a railway or to employees who report for work in another province, may be determined only by applying the relevant law to all the facts of a particular situation.

Question Three

[41] Is the lien and charge provided for in section 32(4) of the *Act* a valid secured claim in favour of the plan administrator? If yes, what amounts does this secured claim encompass?

[42] Section 32(4) of the *Act* provides:

> (4) An administrator of a pension plan has a lien and charge on the assets of the employer in an amount equal to the amount required to be held in trust under subsections (1) and (3).

[43] At the hearing, the Court invited counsel to provide further written submissions on this question. In particular, the Court identified the following issues:

> 1. When does the lien and charge arise, and what triggers its operation?
>
> 2. What is the nature of the lien and charge?
>
> 3. How do the lien and charge operate in the context of termination of a pension plan?
>
> 4. How does the lien in section 32(4) compare to other statutory liens?

[44] The amount which the lien and charge secures is determined by the operation of sections 61 and 32 of the *Act*, as discussed above. That is, with respect to a pension plan that is terminated, the amount to which the lien and charge would apply is the total of the accrued normal actuarial costs and special payments and all other amounts due to the pension fund from the employer that have not been remitted at the date of termination, together with any other payments necessary to fund the benefits provided under the plan.

[45] In determining the nature of the lien and charge, 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" (paragraphs 22 and 23, above).

[46] Additional interpretive assistance may be gleaned from other legislative schemes that impose a lien and charge on assets. To that end, in his supplementary factum, the Attorney General of Newfoundland refers by example to taxing statutes as well as workers' compensation and mechanics' lien legislation. We agree with his explanation:

> 24. Depending on the statute, a lien may attach at different times, in different ways, and have different priorities, yet the ultimate effect is essentially the same. Each statute serves to create a legislative scheme in which a lien is created to offer additional protection to a beneficiary, a service provider, or even the Crown.
> ...

[47] In the case of pensions, consistent with the purpose of the legislation, the lien and charge is a fixed charge which is engaged upon creation of the

deemed trust under section 32. There is nothing in the language of the legislation that would make it only a floating charge, as was submitted in argument. Accordingly, the pension administrator has a lien and charge on the assets of the employer in an amount equal to the amount the employer is required to hold in trust but does not in fact hold.

[48] Whenever a deemed trust arises pursuant to subsections (1) or (3) of section 32, the lien and charge attach to the assets held by the employer regardless of their nature or location, in amounts that would satisfy the trust obligations as they exist from time to time. The effect is to provide additional protection for pension beneficiaries. That is, the lien and charge against the employer's assets would operate to give effect to the deemed trusts should the trusts fail due to a lack of funds.

[49] To impose a fixed lien and charge in this way is not inconsistent with appropriate business practice. The employer has an incentive to operate a solvent pension plan, maintaining the trust funds required to protect what has been earned by the employees. Further, the employer would not be encumbered from dealing with business assets since, where necessary, an estoppel certificate of compliance or, considering the nature and significance of the asset relative to any outstanding trust obligations, a waiver could be obtained from the pension administrator, which could be relied upon by any affected third party.

[50] Finally, the effect of section 32(4) of the *Act* in relation to the operation of the *Companies' Creditors Arrangement Act* is not addressed because that question was not included in the Reference. In any event, such a question, and particularly the question of priorities under that *Act*, would require an analysis based on a specific factual scenario such as arises in litigation between parties, a matter outside the scope of the Reference. Accordingly, it is not necessary to deal with the submissions by counsel for the intervenor, the representative beneficiaries of the Wabush salaried pension plan, as to the reasons why the decision in *Harbert Distressed Investment Fund, L.P. v. General Chemical Canada*, 2007 ONCA 600, which held that an administrative lien and charge was ineffective in a bankruptcy situation, should not apply because this case involves different statutory definitional language under the *Companies' Creditors Arrangements Act*.

[51] Accordingly, the answer to Question Three is: The lien and charge under section 32(4) of the *Act* create a valid secured claim in favour of the

plan administrator. The lien and charge would be engaged upon the creation of a deemed trust under section 32 and would attach to the assets held by the employer regardless of their location. The pension administrator has a lien and charge on the assets of the employer in an amount equal to the amount the employer is required to hold in trust under section 32 from time to time, as set out in section 61. In particular with respect to a pension plan that is terminated, the amount to which the lien and charge would apply is the total of the accrued normal actuarial costs and special payments and all other amounts due to the pension fund from the employer that have not been remitted at the date of termination, together with any other payments necessary to fund the benefits provided under the plan.

SUMMARY

[52] The answers to the Questions posed in the Reference are:

(1) Question One: Unpaid current service costs, unpaid special payments, and unpaid wind-up deficits fall within the scope of the deemed trusts under section 32 of the *Act*.

(2) Question Two: It is not possible to answer Question Two as stated in the Reference. It is clear from the principles discussed above that many factors may affect the answer to the issues posed. The use of the Wabush Mines scenario as a possible example provides insufficient information on which to test relevant principles. The jurisdictional questions, that is, whether the Newfoundland pension legislation would apply to employees who work on a federal undertaking such as a railway or to employees who report for work in another province, may be determined only by applying the relevant law to all the facts of a particular situation.

(3) Question Three: The lien and charge under section 32(4) of the *Act* create a valid secured claim in favour of the plan administrator. The lien and charge would be engaged upon the creation of a deemed trust under section 32 and would attach to the assets held by the employer regardless of their location. The pension administrator has a lien and charge on the assets of the employer in an amount equal to the amount the employer is required to hold in trust under section 32 from time to time, as set out in section 61. In particular with respect to a pension plan that is terminated, the amount to which the lien and charge would apply is the total of the accrued normal actuarial costs and special payments and all other amounts due to the pension fund from the employer that have not been remitted at the date of

termination, together with any other payments necessary to fund the benefits provided under the plan.

J. D. Green C.J.N.L.

B. G. Welsh J.A.

C. W. White J.A.