

File No. 2017 01H 0029

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

IN THE MATTER OF Section 13 of Part I
of the *Judicature Act*, R.S.N.L. 19990, c. J-4

AND

IN THE MATTER OF Section 32 of the
Pension Benefits Act, 1997, S.N.L. 1996, c. P-
4.01

AND

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

**FACTUM OF REPRESENTATIVE COUNSEL
TO THE MEMBERS OF THE WABUSH SALARIED PLAN
(Volume 1 of 2)**

KOSKIE MINSKY LLP

20 Queen St. West, Suite 900
Toronto, ON M5H 3R3

Andrew J. Hatnay - LSUC NO. 31885W

Tel: 416-595-2083 / Fax: 416-204-2872
Email: ahatnay@kmlaw.ca

Demetrios Yiokaris - LSUC# 45852L

Tel: 416-595-2130
Email: dyiokaris@kmlaw.ca

Amy Tang – LSUC No. 70164K

Tel: 416-542-6296
Email: atang@kmlaw.ca

Representative Counsel to the Representatives
of the Salaried Members of Wabush Mines in the Reference

INDEX

A.	INTRODUCTION	2
B.	REFERENCE QUESTION #1 – Scope of the Deemed Trust and Lien and Charge Outlined in the NLPBA	11
C.	REFERENCE QUESTION #2(a) – The Application of the NLPBA and Federal PBSA Deemed Trusts to the Salaried Plan	22
D.	REFERENCE QUESTION #2(b) – The Application of the NLPBA and Quebec SPPA Deemed Trusts to the Salaried Plan	34
E.	REFERENCE QUESTION #3 – The NLPBA Lien and Charge	44
F.	APPENDIX A – Authorities	Tab 1
G.	APPENDIX B – Legislation	Tab 24

FACTUM OF REPRESENTATIVE COUNSEL

Introduction

1. This is the factum of the Intervenors, Representative Counsel to the Representatives of the members of the *Contributory Pension Plan for Salaried Employees of Wabush Mines, Cliffs Mining Company, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company, Limited*, Newfoundland and Labrador Registration No. 021314, CRA No. 0343558 (the "**Wabush Salaried Plan**").
2. Since 1965, the Wabush Mines group of companies, namely, Wabush Iron Co. Limited, Wabush Resources Inc., Wabush Mines, Arnaud Railway Company, and Wabush Lake Railway Company Limited (collectively, "**Wabush Mines**") operated an open-pit iron ore mine in the Town of Wabush, Newfoundland and Labrador, and processing and transport facilities in the Town of Sept-Iles, Quebec.¹
3. Wabush Mines operated as an integrated company for all its employees. The iron ore would first be mined and concentrated at the Scully Mine in the Town of Wabush in south west Labrador. The iron ore concentrate would be loaded into railcars (privately owned by Wabush Mines) and transported by rail to another Wabush Mines facility (Pointe Noire) located near the Town of Sept-Iles, on the St. Lawrence River in Quebec.
4. At Pointe Noire, the concentrated ore was made into small iron ore pellets (pelletized) to make it more efficient for smelting in steel mill blast furnaces. The steel makers operating these steel mills are the major consumers of iron ore. The ore pellets would then be loaded into "Lakers" ships and shipped down the St. Lawrence River and into the Great Lakes to customers in Canada and the USA.

¹ Statement of Facts of the Newfoundland and Labrador Attorney General ("**NLAG Statement of Facts**") at para 1.

5. All of the salaried employees of Wabush Mines - regardless of where in the organization they worked, whether mining the ore, transporting the ore by rail, processing the ore, or loading it onto Lakers for river transport, were employees of Wabush Mines and earned pension benefits in the same plan: the Wabush Salaried Plan.

6. In 2013, the parent company of Wabush Mines, Cliffs Natural Resources ("CNR"), based in Cleveland, Ohio, decided it would disengage and shut down its mining operations in Eastern Canada, including the mine at Wabush Mines.²

7. On May 20, 2015, Wabush Mines was rendered insolvent and obtained protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C 1985, c. C-36 ("CCAA"). Since the head office of Wabush Mines is located in Montreal, pursuant to section 9 of the CCAA, Wabush Mines applied for CCAA protection from the Québec Superior Court in Montreal.³

8. Wabush Mines did not restructure. Instead, while under CCAA protection, it shut down mining operations, terminated the employees, and has been liquidating all of its assets to eventually pay toward its creditors' claims.

9. The Monitor in the CCAA proceedings (FTI Consulting Inc., an intervenor in the Reference) has reported there will be substantial shortfalls in paying creditors' claim.

10. The treatment of the Wabush Mines retirees in the CCAA proceedings has been extraordinarily harsh. The retirees have lost their entire health and life insurance benefits and have had a 25% reduction to their monthly pension benefits. This has resulted in significant financial hardship to the retirees.⁴

11. This case is very sensitive for the Wabush retirees, their families, and their communities.

² NLAG Statement of Facts at para 2.

³ NLAG Statement of Facts at para 3.

⁴ NLAG Statement of Facts at para 16.

a) The loss of health and life insurance benefits

12. At the outset of the CCAA proceedings, in June, 2015, and without prior notice, Wabush Mines suspended the retirees' health benefits, life insurance benefits, and unfunded supplemental pension benefits (collectively, "other post-employment benefits" or "OPEBs").⁵ The CCAA Court acknowledged that the suspensions have caused hardship to the retirees.⁶ Representative Counsel to the non-union retirees was appointed on June 22, 2015, and objected to the suspensions. The suspensions were upheld by the CCAA Judge. Leave to appeal to the Québec Court of Appeal was sought, but leave was denied.⁷

b) The losses to monthly pension benefits

13. The Wabush Salaried Plan was established in 1968 and is registered in Newfoundland and Labrador and regulated under the *Pension Benefits Act*, 1997, S.N.L. 1996, c P-4.01 ("NLPBA") by the Newfoundland Superintendent of Pensions (the "**Newfoundland Superintendent**").⁸ All regulatory filings for the plan were made with the Newfoundland Superintendent.

14. The Wabush Salaried Plan is a "contributory" defined benefit plan, meaning that employees were required to contribute a percentage of their regular pay into the plan.⁹ The company was required under the terms of the plan and the NLPBA to contribute all amounts so that the plans would pay the pension benefits in the amount earned by the employees.

15. Wabush Mines failed to fund the Wabush Salaried Plan appropriately. It is underfunded on a wind up basis by \$27,450,000.¹⁰

⁵ NLAG Statement of Facts at para. 27.

⁶ *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCS 3064, Book of Authorities of Representative Counsel ("**BOA of Rep Counsel**") Tab 2, at para. 133.

⁷ *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCA 1351, BOA of Rep Counsel, Tab 3.

⁸ NLAG Statement of Facts at para 7.

⁹ NLAG Statement of Facts at para 6.

¹⁰ NLAG Statement of Facts at para 18.

16. On January 26, 2016, the Salaried retirees received a letter from Wabush Mines notifying them that the Newfoundland Superintendent directed Wabush Mines to reduce the amount of monthly pension benefits of the Salaried Members by 25%.¹¹

17. On December 16, 2015, the Newfoundland Superintendent declared that the Wabush Salaried Plan be terminated effective as of that date. The Plans are in the process of being wound up by Morneau Shepell, the actuarial consulting firm appointed by the Newfoundland Superintendent of Pensions on March 30, 2016 as the replacement pension plan administrator.¹²

The Monitor's Pension Motion

18. In September 2016, the Monitor filed a motion before the CCAA Court seeking various relief relating to the Wabush Salaried Plan (as well as the Wabush Union Plan).

19. In the context of that motion, Representative Counsel, the Newfoundland Superintendent, and Morneau requested that certain questions relating to the interpretation of the NLPBA be transferred to the Supreme Court of Newfoundland and Labrador (Trial Division) for interpretation. In the CCAA Court decision dated January 30, 2017 declining to transfer the questions to the Newfoundland court, the CCAA court stated:

[89] Finally, the Court does not consider the question of whether its decision will or will not be treated as a precedent to be a relevant consideration. Similarly, the Court does not consider the possibility of intervenants to be relevant. The Court's focus is on resolving the difficulties of the parties appearing before it. *If the government of Newfoundland and Labrador wishes to obtain a judgment from the courts of the province on the interpretation of the NLPBA, it can refer a matter to the Court of Appeal of Newfoundland and Labrador.*¹³
[emphasis added]

20. On March 27, 2017, with acknowledgment of the CCAA Court's statement in paragraph 89 above, the Newfoundland & Labrador government issued an Order in Council directing that a

¹¹ NLAG Statement of Facts at para 16.

¹² NLAG Statement of Facts at para 13.

¹³ *Arrangement relatif à Bloom Lake*, 2017 QCCS 284, BOA of Rep Counsel, Tab 4, at para. 89. The Monitor's motion proceeded before the CCAA Court on June 28 and 29, 2017 and the decision is under reserve.

Reference be brought before the Newfoundland & Labrador Court of Appeal for opinions on certain questions relating to section 32 of the NLPBA (the “NL Reference”).¹⁴

Legal Principles from the Supreme Court of Canada

21. To set the legal context for the Reference questions, the Supreme Court of Canada has confirmed a number of relevant principles:

(a) Pension benefits are the *deferred wages* of employees that they earned during their employment service for an employer;¹⁵

(b) A registered pension plan is the vehicle by which an employer delivers those pension benefits – the deferred wages - on the retirement of their 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”;¹⁶

(c) One of the purposes of pension legislation is to protect employees who have earned pension benefits to ensure that they receive all of the pension benefits they earned;¹⁷

(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; and¹⁸

(e) Provincial laws, such as provincial deemed trusts in favour of pension plan beneficiaries, continue to apply in CCAA proceedings, subject only to the doctrine of paramountcy.¹⁹

The three categories of contributions required to be paid to a pension plan

22. At the outset, it is helpful to review the three categories of contributions that an employer is responsible to pay into a pension plan so that the plan can pay the benefits earned by the employees: a) current service payments; b) special payments contributions; and, c) wind up

¹⁴ Newfoundland Labrador, Cabinet Secretariat, *Orders in Council Database*, OC2017-103 (27 March 2017).

¹⁵ *IBM Canada Limited v. Waterman*, 2013 SCC 70, [2013] 3 S.C.R. 985, BOA of Rep Counsel, Tab 5, at para 4.

¹⁶ *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611, BOA of Rep Counsel, Tab 6, at para. 66.

¹⁷ *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, BOA of Rep Counsel, Tab 7, at paras 14, 50.

¹⁸ *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 (S.C.C.) BOA of Rep Counsel, Tab 8, at para 38; *Alternative granite & marbre inc., Re*, 2009 SCC 49, BOA of Rep Counsel, Tab 9, at para 15.

¹⁹ *Re Indalex*, 2013 SCC 6, BOA of Rep Counsel, Tab 10, at para 44.

payments (or wind up deficit). The nature of these payments are well-summarized by Madam Justice Gillese of the Ontario Court of Appeal in *Indalex* in the context of the Ontario *Pension Benefits Act*, but the same concepts apply to the Wabush Salaried Plan:

[81] To understand the wind up process, one must first understand how the pension plan operates while it is ongoing. [page655]

[82] A pension plan to which the employees contribute is called a contributory plan. In the case of contributory plans, the employer is obliged to remit the employee contributions, including payroll deductions, within a specified time frame....

[83] In addition to remitting the employee contributions, if any, while a defined benefit pension plan is ongoing, the employer must make two types of contributions to ensure that the plan is adequately funded and capable of paying the promised pension benefits.

(1) Current service or "normal cost" contributions -- the employer contributions necessary to pay for current service costs in respect of benefits that are currently accruing to members as a result of their ongoing participation in the plan as active employees. These must be made in monthly instalments within 30 days after the month to which they relate.

(2) Special payments -- a plan administrator must file an actuarial report annually in which the pension plan is valued on two different bases: a "going-concern" basis, where it is assumed the plan will continue to operate indefinitely; and a "solvency" basis, where it is assumed that the employer will discontinue its business and wind up its plan. If the actuarial report discloses a going-concern liability, the employer is required to make monthly special payments over a 15-year period to fund the unfunded liability. If the actuarial report discloses a solvency deficiency, the employer is required to make monthly special payments over a five-year period to fund the deficiency.

[84] It is important to understand that the solvency valuation is not the same thing as a wind up report. To repeat, the solvency valuation is prepared while the pension plan is ongoing. A solvency valuation is required while the plan is ongoing because it is crucial that there be adequate funds with which to pay pensions if the company becomes insolvent and the plan is wound up.

[85] The wind up of a pension plan is defined in the Ontario PBA as "the termination of the pension plan and the distribution of the assets of the pension fund" (s. 1(1)). At the effective date of wind up, the plan members cease to accrue further entitlements under the plan. Naturally, no new members may join the plan after the wind up date. The pension

fund of a plan that is wound up continues to be subject to the PBA and the Regulations until all of the assets of the fund have been disbursed (s. 76). [page656]

[86] Winding up a pension plan must be distinguished from closing the plan, which simply means that no new entrants are permitted to join the plan.

...

[90] Section 75(1)(a) [the wind up section of the Ontario PBA] requires the employer to make all payments that are due immediately or that have accrued and not been paid into the pension fund. Any unpaid current service costs and unpaid special payments are caught by this subsection. In other words, by virtue of this subsection, any payments that the employer had to make while the plan was ongoing must be paid. It will be recalled that while the plan was ongoing, some special payments could be made over time.

[91] Section 75(1)(b) requires the employer to pay additional amounts into the pension fund if there are insufficient assets to cover the value of the pension benefits in the three categories set out in s. 75(1)(b).

[92] It will be apparent that on wind up, an employer will often be faced with having to make significant additional contributions under s. 75(1)(b), in addition to being required to bring all contributions up to date because of s. 75(1)(a).²⁰

²⁰ *Indalex Limited (Re)*, 2011 ONCA 265, BOA of Rep Counsel, Tab 11.

23. As discussed herein, a summary of the current state of the law on application of the deemed trusts in the Ontario PBA, PBSA, and Québec SPPA follows:

	PENSION DEEMED TRUST APPLICABILITY		
	Going-Concern Payments owing	Special Payments owing	Wind-up Payments owing
Ontario PBA	✓	✓	✓
PBSA	✓	✓	
SPPA	✓	✓	

24. As submitted herein, the applicability of the NLPBA deemed trusts is as follows:

	PENSION DEEMED TRUST APPLICABILITY		
	Going-Concern Payments owing	Special Payments owing	Wind-up Deficit owing
NLPBA	✓	✓	✓

25. Despite the NLPBA applying to the entire Wabush Salaried Plan from its inception, the regulators of two other pension statutes, the federal *Pension Benefits Standards Act* ("**PBSA**") and the *Quebec Supplemental Pension Plans Act* ("**SPPA**") have taken the position in the CCAA proceedings that their statutes apply to the Wabush railway retirees and the Quebec retirees, respectively, because railways are a federal undertaking, and the SPPA applies to employees who report for work "in Quebec". These regulators appear to argue that their statutes displace or override the NLPBA for both of those groups of retirees. Their positions are supported by the Newfoundland Superintendent of Pensions.

26. The positions of the regulators are both wrong at law and very unfair to the Wabush railway retirees and the Quebec retirees. The implications of their positions, if accepted, create a highly prejudicial outcome for the Wabush railway retirees and Quebec retirees due to the inferior nature of the PBSA and SPPA deemed trust provisions, compared to the superior deemed trusts in the NLPBA. While the three statutes overlap to a certain point by providing deemed trusts for unpaid current service payments and unpaid special payments in favour of the

plan members, the PBSA and SPPA deemed trusts do not cover the unpaid wind up deficit, while the NLPBA does. The wind up deemed trust is the heart of this Reference.

27. If the PBSA and SPPA are held to displace the NLPBA for the Wabush railway and Quebec retirees, those retirees will not be able to benefit from the NLPBA wind up deemed trust to offset the 25% losses they are enduring to their monthly pension benefits. As submitted herein, such a result for the railway retirees and Quebec retirees is wrong at law, manifestly unfair to those groups of retirees, and would be an absurd interpretive result. The correct answer is that the NLPBA applies to all the Wabush Salaried Plan retirees, and all of them should recover from the wind up deemed trust priority mandated by the NLPBA that is aimed at providing a remedy for pension plan members in exactly the predicament that all the Wabush retirees are now in.

REFERENCE QUESTION #1: The Supreme Court of Canada has confirmed in *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, that, subject only to the doctrine of paramountcy, provincial laws apply in proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c.C-36.

What is the scope of section 32 of the *Pension Benefits Act*, 1997, S.N.L.1996 c. P-4.01 deemed trusts in respect of:

- a) unpaid current service costs;
- b) unpaid special payments; and
- c) unpaid wind-up deficit?

ANSWER: Section 32 of the NLPBA creates deemed trusts over unpaid current service costs, unpaid special payments and unpaid wind-up deficit.

The Newfoundland Pension Benefits Act

28. Section 32 of the NLPBA contains lengthy and detailed deemed trusts for amounts owing to a pension plan by an employer in favour of the members of the pension plan:

Amounts to be held in trust

32. (1) An employer or a participating employer in a multi-employer plan *shall ensure*, with respect to a pension plan, that

- (a) the money in the pension fund;
- (b) *an amount equal to the aggregate of*
 - (i) the *normal actuarial cost*, and
 - (ii) any *special payments* prescribed by the regulations, that have accrued to date; *and*
- (c) *all*
 - (i) amounts deducted by the employer from the member's remuneration, and
 - (ii) *other amounts due under the plan from the employer that have not been remitted* to the pension fund

are kept separate and apart from the employer's own money, *and shall be considered to hold the amounts referred to in paragraphs (a) to (c) in trust for members, former members, and other persons* with an entitlement under the plan.

(2) In the event of a liquidation, assignment or bankruptcy of an employer, *an amount equal to the amount that under subsection (1) is considered to be held in trust shall be considered to be separate from and form no part of the estate in liquidation, assignment or*

bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own money or from the assets of the estate.

(3) *Where a pension plan is terminated in whole or in part, an employer who is required to pay contributions to the pension fund shall hold in trust for the member or former member or other person with an entitlement under the plan an amount of money equal to employer contributions due under the plan to the date of termination.*

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

The intention of the Newfoundland legislature is to protect pension benefits by creating trusts over amounts owing by an employer

29. The intention of the Newfoundland legislature in section 32 is unequivocally to protect the security of pension benefits:

Mr. Speaker, I am pleased to be able to introduce to second reading this legislation, which will provide increased pension benefits for workers in the Province ... *Mr. Speaker, this act certainly secures the future for people in the Province who are looking to obtain funds from a pension.* This act provides enhanced pension benefit coverage for the people of the Province through the increased payments, procedures and conditions, as well as improved investment regulations and monitoring requirements, and *the act promotes increased security of pension benefits promised.*²¹
[Emphasis added]

The NLPBA deemed trust provisions create broad deemed trusts, and also make clear that they apply in liquidation, bankruptcy, and plan wind-up situations

30. Section 32 of the NLPBA is expansively drafted. This section contains three inter-related deemed trust protections discussed below:

Section 32(1): A broad requirement that all the amounts owing to the pension plan by an employer are deemed to be held in trust

31. Under sections 32(1)(b) and 32(1)(c)(ii), an employer is required to "ensure" that, *inter alia*, the amount equal to the normal actuarial (i.e., going concern) funding costs, special

²¹ Newfoundland and Labrador, Legislative Assembly, Hansard, 43rd General Assembly, 1st Sess, No 55 (17 December 1996) (Ernie McLean), BOA of Rep Counsel, Tab 12, at p. 73.

payments, and "*all other amounts* due under the plan from the employer that have not been remitted to the pension fund...are to be 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 [plan] members". These sections on their own language create a deemed trust for *all amounts* owing by an employer to a pension plan.

Section 32(2): Additional provisions relating to liquidation and bankruptcy situations

32. Section 32(2) contains additional express language dealing with liquidation and bankruptcy situations. This subsection also states that the amounts in section 32(1) (i.e., normal costs, special payments, and all other amounts due) are "considered to be held in trust" and to *add clarity in liquidation and bankruptcy situations*, where payments to other creditors are possible, section 32(2) makes clear that the amounts deemed to be held in trust "shall form no part of the estate in liquidation, assignment, or bankruptcy". This is to ensure that the amounts subject to the deemed trust are not to be distributed to other creditors other than the pension plan beneficiaries.

33. First, it is incorrect to refer to a "liquidation deemed trust", as suggesting it is a separate stand-alone deemed trust. As set out below, the deemed trusts arise from the broad language granting deemed trusts over *all* the amounts owing by an employer to a pension plan in the opening sections of both section 32(1) of the NLPBA and (section 8(1) of the PBSA, discussed below).

34. Section 32(2) of the NLPBA and section 8(2) of the PBSA then both refer to "liquidation" scenarios to add extra provisions to ensure the effectiveness of the deemed trusts so that the amounts that are subject to the deemed trusts do not form part of the estate and thereby prevent distributions of those amounts to other creditors.

35. The preambles of both section 32(2) of the NLPBA and section 8(2) of the PBSA begin with the phrase "In the event of a liquidation...". There is no additional qualification that the liquidation must occur before or after the CCAA filing date anywhere in the statute or case law

in order for the deemed trust to be effective. Therefore, whether the liquidation occurs pre-CCAA filing date or post-CCAA filing date is irrelevant.

Section 32(3): Additional provisions for wind-up situations

36. Section 32(3) contains additional language to deal with situations where a plan is wound up. It states that an employer who is required to pay contributions to the pension fund on wind-up "shall hold in trust for the member or former member...an amount of money equal to employer contributions due under the plan to the date of termination". This section is directed to a situation where the employer continues to exist (i.e., not in bankruptcy) and would therefore also apply to the Wabush CCAA proceeding.

Section 61: Provisions relating to the wind up of a pension plan

37. Section 61 of the NLPBA sets out the payment requirements on an employer when a plan is wound up. This section ties back to subsection 32(1)(a)(b) and (c), and specifically subsection 32(3), all of which, as discussed above, create deemed trusts over the amounts owing by an employer to a pension plan:

Termination payments

61. (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.[emphasis added]

38. Section 61(1) states that on the termination of the pension plan, the employer shall pay into the pension fund all amounts required under the regulations for insolvency including normal costs contributions, special payments, *and* in addition, "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".

39. Section 61(2) directs an employer to make all payments into the pension fund "in addition to the payments required by subsection [61](1) that are necessary to fund the benefits provided under the plan".

40. Thus, section 61 specifies that employers are required to contribute all amounts to a plan on wind-up "that are necessary to fund the benefits provided under the plan". Section 32(3) then specifies that those unpaid amounts are "held in trust for the members".

41. Section 32 of the NLPBA has not been considered by any court. However, the pension deemed trusts of other statutes have been considered and are discussed below.

The current law relating to pension deemed trusts

a) The Ontario PBA deemed trusts

42. The pension deemed trusts of three jurisdictions have been considered by the courts: the Ontario PBA, the Québec SPPA, and the federal PBSA. Each is discussed below.

43. The leading case on pension deemed trusts in CCAA proceedings is *Indalex*.²² In the case, the Supreme Court of Canada confirmed that provincial laws such as the Ontario PBA, continue to apply in CCAA proceedings, subject only to the doctrine of paramountcy.

44. Once it is confirmed there is no issue of paramountcy²³, the next step of the analysis is to review the language of the particular deemed trust provisions, to determine which amounts

²² *Re Indalex*, 2013 SCC 6 [2013] 1 S.C.R. 271, BOA of Rep Counsel, Tab 10.

owing to the pension plan by the employer (i.e., unpaid going-concern, pre-wind-up special payments, or wind-up deficit) are covered by the deemed trusts.

45. In *Indalex*, the Supreme Court held that the Ontario PBA deemed trusts over unpaid going-concern contributions, unpaid special payment contributions, and the wind-up deficit created a trust in favour of the plan beneficiaries over the wind-up liability owing by the employer:

[46]...[Section] 57(3), which provides that the deemed trust protecting employer contributions exists *while a plan is ongoing*, s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up...Thus, the deemed trust entitlement arises only once the condition precedent of the plan being wound up has been fulfilled. This is true even if it is certain that the plan will be wound up in the future. [emphasis added].²⁴

46. The facts of *Indalex* involved a priority dispute between the pension plan members and the guarantor of the DIP loan over sales proceeds from asset sales of the company held in a reserve fund. The Supreme Court held that although the Ontario PBA deemed trusts were valid as priority claims, the DIP priority granted by order of the CCAA Judge in that case subordinated the Ontario PBA deemed trusts priority. As a result, the guarantor DIP lender received the money in the reserve fund.²⁵

47. However, following the payment to the DIP lender, the salaried and unionized pension plan members claimed next-in-line priority over the remaining funds in the estate based on the Ontario PBA wind-up deemed trust confirmed by the Supreme Court. That dispute was

²³ Paramountcy can be invoked by the CCAA court in the granting of a super-priority to the DIP lender at the outset of the CCAA proceeding ahead of a pension deemed trust priority. The basis is that an order under the CCA, a federal statute, has paramountcy over the provincial law in those particular circumstances. Accordingly, just like the application of the Ontario PBA in the CCAA proceedings of *Indalex*, the NLPBA deemed trusts apply to the CCAA proceedings of *Wabush Mines*.

²⁴ *Re Indalex*, 2013 SCC 6 [2013] 1 S.C.R. 271, BOA of Rep Counsel, Tab 10, at para. 46.

²⁵ In reality, it was the debtor company's parent corporation, as *guarantor* of the DIP loan, that was the DIP lender, as the actual DIP lenders (a consortium led by JP Morgan, that was repaid the DIP loan years prior to the Supreme Court decision). The DIP lender participated in the court proceedings.

ultimately settled among the pension plan members and a party claiming as a secured creditor. The settlement was approved by the CCAA court.²⁶

48. Two years later, in the *Timminco* CCAA proceedings with respect to the Ontario Timminco estate²⁷, and based on *Indalex*, the monitor of Timminco accepted the wind-up deemed trust priority claim of the Ontario pension plan administrator and paid a distribution of all amounts in the estate to the pension plan administrator in priority to other creditors. This payment is recorded in that Monitor's report:

As previously reported, there is a deemed trust claim in respect of the solvency deficit of the Timminco pension plan (the “Haley Deemed Trust”), which was estimated to be approximately \$5.1 million as at January 1, 2012. The Administrator estimates the solvency deficit to be approximately \$4.3 million as at February 28, 2014. While the Monitor has not yet agreed the quantum of the Haley Deemed Trust Claim, absent a bankruptcy of Timminco overturning the Haley Deemed Trust and subject to the costs of the completion of the Timminco CCAA Proceedings, ***the remaining Timminco Estate Funds would be payable to the Administrator of the Haley Plan*** unless the Haley Deemed Trust Claim was less than \$1.17 million (the amount of funds available to the Timminco estate).²⁸ [emphasis added]

49. Thus, in CCAA proceedings, the Ontario PBA deemed trusts apply to unpaid going-concern payments, special payments, and the wind-up deficit, to generate a priority claim for the pension plan beneficiaries (subject only to paramourty).

c) The federal PBSA

50. As a federal statute, there is no dispute that the PBSA can apply in CCAA proceedings. There is no issue of paramourty.

²⁶ *Indalex Limited (Re)*, 2013 ONSC 7932, BOA of Rep Counsel, Tab 13.

²⁷ The Ontario *Timminco* estate is not the Québec *Timminco* estate that led to the decision of Mr. Justice Mongeon of this Court, who reversed his deemed trust decision in *White Birch* and found that the SPPA deemed trust applies in favour of Québec pension plan beneficiaries claiming into the Québec *Timminco* estate.

²⁸ *Timminco Limited* (CV-12-9539-00CL), Twenty-Fifth Report of the Monitor dated June 9, 2014, BOA of Rep Counsel, Tab 14, at para. 60.

51. The PBSA pension deemed trust provisions have been considered in two cases: *Aveos* and, to a limited extent, the Wabush CCAA proceedings.

52. The deemed trust provisions of the PBSA initially created deemed trusts over all three categories of amounts owing to a pension plan by an employer (i.e., unpaid going-concern, pre-wind-up special payments, and wind-up liability). However, in 2011, the PBSA was amended by Parliament when it introduced sections 29 (6.2) and (6.5) to exclude the wind up deficit from the scope of the deemed trusts outlined in subsection 8(1) of the PBSA. Notably, no such amendments have ever been made by the Ontario or Newfoundland legislatures to the Ontario PBA nor to the NLPBA.

The CCAA Court's DIP Priority decision in the Wabush Mines CCAA proceeding

53. As noted above, in the Wabush Mines CCAA proceedings, the CCAA Court discussed the effectiveness of PBSA deemed trusts in the context of the motion brought by the company to approve a priority to the DIP lender at the outset of the Wabush CCAA proceedings. The subordination of the deemed trusts was opposed by the USW, the federal Superintendent of Financial Services, and the NL Superintendent.²⁹ In the CCAA Court's decision approving the priority to the DIP lender and subordinating the PBSA deemed trust priority, this Court commented on the interaction between the PBSA deemed trust, and the limited pension secured claim that was introduced into the CCAA in the 2009 amendments.

54. The CCAA Court wrote that despite the broader deemed trust coverage in the PBSA, the PBSA deemed trusts are effectively of no force or effect due to the inclusion of the pension secured claim in the CCAA. Respectfully, it is submitted that the CCAA Court's comments at paragraph 78 of its DIP priority decision are not conclusive.

55. The statements from the CCAA Court were in the context of opposition to the granting of a priority to the DIP lender and thereby subordinating the PBSA deemed trust (and NLPBA deemed trust) to the DIP loan. Section 11.2 of the CCAA, which was inserted into the CCAA

²⁹ Representative Counsel to the non-USW employees and retirees did not oppose the priority sought by the company for the DIP lender on that motion.

with the package of amendments to the *Bankruptcy and Insolvency Act* and the CCAA in 2009, confirmed the existing case law and expressly authorizes a CCAA court to grant a priority to a DIP lender in CCAA proceedings. The CCAA Court invoked section 11.2 of the CCAA to dismiss the objections to the DIP priority. The Court was correct in its conclusion at paragraph 80. The Court's reliance on section 11.2 of the CCAA is sufficient to dispose of the objections to that motion. However, the CCAA Court went further and in so doing, erred. It is respectfully submitted that the CCAA Court's statement with respect to the secured claim for unpaid going-concern payments in the CCAA amendments of 2009 as "occupying the field", and thereby neutralizing the PBSA deemed trust provisions, was incorrect and in any event was obiter dicta and not binding law because it was not essential to the disposition of the matters at issue.

56. On a motion for leave to appeal, the Québec Court of Appeal stated that whether the PBSA deemed trusts are entirely ousted in CCAA proceedings is not a settled issue:

The issue of the effectiveness of the PBSA deemed trust in CCAA proceedings raised in both motions meets this first criterion. This issue is not, as the respondent argued, a settled matter. In pointing to the CCAA Judge's comment in paragraph [61] to the effect that "[these are not new issues", respondent has, it seems to me, quoted the judge out of context. It is of course true, as the CCAA Judge observed, that courts, including the Supreme Court, have been called upon to consider the effect of statutory deemed trusts in insolvency on numerous occasions. But as the CCAA Judge's own reasons make plain, the interpretation of the deemed trust protection in subsection 8(2) PBSA in light of amendments made to the CCAA in 2009, in particular subsections 6(6) and 36(7), involve a different exercise of statutory interpretation. In undertaking that work, the judge did have the benefit of principles set out in *Century Service* relating to the conflict between the deemed trust for the GST and the CCRA, in *Sparrow Electric* dealing with a deemed trust in favour of the Crown in respect of payroll deductions for taxation, as well as *Indalex* in which a conflict between provincial deemed trust and federal insolvency law was in part at issue. But these settings were different from that of the case at bar. Others have observed that difficulties arising out of the interaction between deemed trust rules for pensions and the CCAA persist, notwithstanding the jurisprudence of the Supreme Court on point. Moreover, the narrow issue would be new to this Court and the practice would have a precise consideration of the interaction between the federal deemed trust in subsection 8(2) and the CCAA by an appellate court.³⁰

³⁰ *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCA 1351, BOA of Rep Counsel, Tab 3, at para. 35.

57. Parliament amended the PBSA in 2010 – two years after it amended the CCAA - to expressly remove the PBSA deemed trust from applying to wind up *deficit*. The PBSA deemed trusts thus only apply to unpaid current service contributions and unpaid special payment contributions. The same legislator – Parliament – could have readily amended the CCAA at the same time to make clear that the PBSA deemed trust provisions no longer apply on a wholesale basis in a CCAA proceeding. Parliament did not do so. Parliament obviously turned its mind to pension deemed trust priorities by amending the PBSA to remove its application for wind-up deficit, but Parliament did not make any amendment to the CCAA to exclude the remaining PBSA deemed trusts from having application in CCAA proceedings. It must be concluded that Parliament intentionally left the PBSA deemed trusts in place.

58. The conclusion is that Parliament deliberately intended to keep the deemed trust pension priorities in place in the PBSA (i.e., the deemed trusts for going-concern and pre-wind-up special payments) *and* have those continue to co-exist with the limited pension priority for unpaid current service in the CCAA. While this result may appear to be anomalous, it is not. Changes to the CCAA create a *secured* claim for unpaid going-concern payments, while the PBSA creates a *deemed trust* over that same category of unpaid current service amounts and unpaid special payments. Parliament must have intended the different pension protections of these statutes to work together, and they do.

59. The two provisions work harmoniously. Section 6(6) of the CCAA requires that no Plan of Compromise can be sanctioned without payment of the super-priority amount for unpaid going-concern payments being recognized. The PBSA's deemed trust priorities are not linked to a Plan of Compromise. If a Plan of Compromise is accepted by creditors, there is no need for the PBSA deemed trusts to operate. But, in the absence of a Plan of Compromise, Parliament's intention is that the PBSA deemed trusts will apply to unpaid going-concern and pre-wind-up special payments by keeping those provisions in the PBSA. Parliament also makes clear in the PBSA that these deemed trusts apply in "liquidation" situations. The two statutes can readily co-exist. There is no conflict.

60. Thus, in CCAA proceedings, the federal PBSA deemed trust applies to unpaid going-concern and special payments, but not wind-up liability.

61. The deemed trusts in the NLPBA arise as soon as an amount owing to a pension plan by an employer is not paid. For the applicability of the wind up deemed trust, whether the plan was wound up after the date of the Initial Order is irrelevant. The only condition for a wind-up deemed trust to be applicable is the event of the plan wind up.

62. The Supreme Court decision in *Indalex* makes clear that the effectiveness of the PBA wind up deemed trust was determined *as of the date of the sale/distribution motion*. The only condition precedent is that the plan must be wound up for the wind-up deemed trust to be effective. There is no pre-condition or significance of the date of the Initial CCAA Order for the effectiveness of the wind up deemed trust. The CCAA filing date is merely the day chosen by the company to apply to the court for CCAA protection:

[46] Unlike s. 57(3), which provides that the deemed trust protecting employer contributions exists while a plan is ongoing, s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up. This is a choice made by the Ontario legislature. I would not interfere with it. Thus, *the deemed trust entitlement arises only once the condition precedent of the plan being wound up has been fulfilled. This is true even if it is certain that the plan will be wound up in the future. At the time of the sale*, the Executive Plan was in the process of being, but had not yet been, wound up. Consequently, the deemed trust provision does not apply to the employer's wind-up deficiency payments in respect of that plan. [emphasis added]³¹

³¹ *Indalex Limited (Re)*, 2013 SCC 6 [2013] 1 S.C.R. 271, BOA of Rep Counsel, Tab 10, at para. 46.

REFERENCE QUESTION #2(a):

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

ANSWER: Yes. The PBSA applies to railway retirees, in addition to the NLPBA applying.

(ii) If yes, is there a conflict with the [Newfoundland] *Pension Benefits Act*, 1997 and the *Pension Benefits Standards Act*?

ANSWER: No. There is no conflict. The NLPBA deemed trusts cover unpaid going concern payments, unpaid special payments, and unpaid wind-up deficit. The PBSA deemed trust covers unpaid going concern payments and unpaid special payments, but not unpaid wind-up deficit.

(iii) If so, how is the conflict resolved?

ANSWER: The NLPBA and PBSA deemed trusts over unpaid current service payments and unpaid special payments overlap and are not in conflict. The NLPBA deemed trust for the unpaid wind-up deficit applies for all beneficiaries of the Salaried Plan, including those 14 railway retirees who are concurrently also subject to the PBSA. The PBSA does not displace the NLPBA deemed trust over the wind-up deficit for the railway retirees.

63. As noted above, since its inception in 1968, the Wabush Salaried Plan has been registered in Newfoundland and Labrador and regulated exclusively by the Newfoundland Superintendent of Pensions in accordance with the NLPBA. The NLPBA has historically been the exclusive pension statute applied to all the beneficiaries of the Wabush Salaried Plan.

64. The federal regulator of the PBSA, the Office of the Superintendent of Financial Institutions ("OSFI"), has had no regulatory involvement with the Salaried Plan while the plan was being administered by the company. OSFI only became involved with the Salaried Plan very recently in 2015 after the wind-up plan administrator appointed by the Newfoundland Superintendent of Pensions on March 30, 2016, Morneau Shepell, informed OSFI that it believed that fourteen Wabush Salaried employees³² worked on the Wabush railway that linked the

³² Representative Counsel is looking into the identity of the 14 retirees to confirm they worked on the Wabush railway.

Wabush open pit mine in the Town of Wabush, Newfoundland and Labrador, to the iron ore processing facility and shipping dock located in the Town of Sept-Iles, Quebec.

65. The arrival of OSFI for the Salaried Plan in the CCAA proceedings means that another pension statute in addition to the Québec *Supplemental Pension Plans Act* (which is discussed below, also applies to the Wabush Salaried Plan members who worked in Québec, making three pension statutes concurrently apply to the Wabush Salaried Plan) is potentially engaged for the Wabush Salaried Plan and not just the NLPBA.

66. The Attorney General of Canada, on behalf of OSFI, takes the position that since some Wabush Salaried Plan employees worked on the Wabush railway – and since railways are a federally-regulated undertaking – this means that the PBSA applies to those retirees because section 4(4) of the PBSA applies to pension plan members who work in a federally-regulated undertakings.

67. Since OSFI did not sign the Reciprocal Agreement (discussed below), ordinary principles of statutory interpretation must be applied to answer this Reference question.

68. Representative Counsel does not disagree that *prima facie*, the PBSA would also apply to the 14 Wabush Salaried retirees who worked on a federally regulated undertaking, in addition to the NLPBA also applying to those individuals. However, Representative Counsel does not agree that the PBSA displaces the NLPBA deemed trust over the unpaid wind up deficit for the 14 railway retirees.

The federal Pension Benefits Standards Act ("PBSA")

69. Sections 4(1) and 4(2) of the PBSA state:

Application of Act

4 (1) This Act applies in respect of pension plans.

Definition of pension plan

(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 (and former employees) and to which

the employer is required under or in accordance with the plan to contribute, whether or not provision is also made for other benefits or for benefits to other persons, and includes a supplemental pension plan, whether or not the employer is required to make contributions under or in accordance with the supplemental pension plan....

The NLPBA deemed trust covers the wind up deficit; the PBSA does not

70. Section 8 of the PBSA, set out in full below, creates deemed trusts over the property of the employer for amounts that the employer owes to the pension plan. However, there is a critical difference: the PBSA has inferior deemed trust provisions from the NLPBA. As submitted earlier, the NLPBA creates deemed trusts over all three categories of contributions: unpaid current service costs, unpaid special payments, and unpaid wind-up deficit. The PBSA by express statutory language, excludes its deemed trusts from applying to the wind-up deficit. Since the unpaid wind up deficit is typically the largest amount owing to a wound up pension plan, the non-payment of which causes the reductions to retirees' monthly pension benefits, the deemed trust over the wind-up deficit is by far the most important deemed trust for pension plan beneficiaries when their pension plan is wound up in an insolvency of their employer and they are forced to compete with other creditors for recoveries from the estate of the company. The NLPBA deemed trust over unpaid wind-up deficit extends a more significant remedy for the Wabush Salaried Plan beneficiaries than does the PBSA.

71. The A.G. of Canada acknowledges that the PBSA deemed trusts apply to unpaid current service costs and unpaid special payments, but not to unpaid wind-up deficits.

72. The A.G. of Canada appears to take the position that the PBSA overrides and displaces the NLPBA wind up deemed trust for the 14 Wabush retirees who worked on the railway. The consequence of that position, if accepted, is that the 14 Wabush retirees would recover significantly *less* than the other beneficiaries of the Wabush Salaried Plan who would be able to recover from the NLPBA deemed trust for the unpaid wind-up deficit. That result would not only be unfair to the Wabush railway retirees, but would also be an absurd legislative result. Such an interpretation should not be accepted.

An overview of the PBSA deemed trust provisions

73. Section 8(1) and (2) of the PBSA state:

8 (1) An employer shall ensure, with respect to its pension plan, that the following amounts are kept separate and apart from the employer's own moneys, and ***the employer is deemed to hold the amounts referred to in paragraphs (a) to (c) in trust for members of the pension plan,*** former members, and any other persons entitled to pension benefits under the plan:

- (a) the moneys in the pension fund,
- (b) an amount equal to the aggregate of the following payments that have accrued to date:
 - (i) ***the prescribed payments [i.e., going concern and special payments],*** and
 - (ii) the payments that are required to be made under a workout agreement; and
- (c) all of the following amounts that have not been remitted to the pension fund:
 - (i) amounts deducted by the employer from members' remuneration, ***and***
 - (ii) ***other amounts due to the pension fund from the employer,*** including any amounts that are required to be paid under subsection 9.14(2) [amounts unpaid by a letter of credit should be paid by the employer] or **29(6). [amounts owing by employer on wind up]**

(2) In the event of *any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (1) is deemed to be held in trust shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy,* whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate. [emphasis added]

The PBSA exempts its deemed trust from the wind-up deficit

74. Like section 32(2) of the NLPBA, section 8 of the PBSA is expansively drafted and contains three inter-related deemed trust provisions discussed below:

Section 8(1) of the PBSA: A broad requirement that all the amounts owing to the pension plan by an employer are deemed to be held in trust

75. Under section 8(1)(b)(i), an employer is "deemed to hold... in trust for the members of the pension plan, former members, and any other persons entitled to pension benefits under the

plan" the prescribed payments [which, under the Regulation of the PBSA, encompass going-concern payments and special payments],³³ and under section 8(1)(c)(ii) "other amounts due to the pension fund from the employer, including amounts required to be paid under subsection 29(6) [which mandates payments by an employer on a wind-up]."

76. By its expansive breadth, this section creates deemed trusts over all amounts owing by the employer to the pension plan (subject only to an exception for wind-up payments in section 29(6.4), discussed below).

Section 8(2) of the PBSA: Additional provisions relating to liquidation and bankruptcy situations

77. Similar to section 32(2) of the NLPBA, section 8(2) of the PBSA contains additional language to reinforce the effect of deemed trusts in liquidation and bankruptcy situations. The subsection states that the amounts owing in subsection 8(2) (i.e., normal costs, special payments, and all other amounts owing) are "deemed to be held in trust and shall be deemed to be separate from *and form no part of the estate in liquidation, assignment, or bankruptcy*".

78. Section 29(6.4) of the PBSA states:

(6.4) On the winding-up of the pension plan or the liquidation, assignment or bankruptcy of the employer, the amount required to permit the plan to satisfy any obligations with respect to pension benefits as they are determined on the date of termination is payable immediately.

79. Section 29(6) of the PBSA sets out requirements on an employer when a plan is wound up. This section ties that to subsection 8(1)(c)(ii) which, as discussed above, creates a deemed trust over the amounts owing by an employer to a pension plan:

Payments by employer to meet solvency requirements

(6) If the whole of a pension plan is terminated, the employer shall, without delay, pay into the pension fund all amounts that would otherwise have been required to be paid to meet the prescribed tests and standards for solvency referred to in subsection 9(1) and, without

³³ Section 9 of SOR/97-19.

limiting the generality of the foregoing, the employer shall pay into the pension fund

- (a) an amount equal to the normal cost that has accrued to the date of the termination;
- (b) the amounts of any prescribed special payments that are due on termination or would otherwise have become due between the date of the termination and the end of the plan year in which the pension plan is terminated;
- (c) the amounts of payments that are required to be made under a workout agreement that are due on termination or would otherwise have become due between the date of the termination and the end of the plan year in which the pension plan is terminated;
- (d) all of the following amounts that have not been remitted to the pension fund at the date of the termination:
 - (i) the amounts deducted by the employer from members' remuneration, and
 - (ii) other amounts due to the pension fund from the employer; and
- (e) the amounts of all of the payments that are required to be made under subsection 9.14(2).

Section 29(6.5) of the PBSA: The deemed trust is expressly excluded for wind-up deficit owing

80. However, in contrast to the NLPBA, section 29(6.5) of the PBSA was added to the PBSA in 2011, to specifically exclude the application of the section 8(1) deemed trust from amounts owing by an employer on the wind up of the pension plan. The section does, however, make clear that the deemed trust continues to apply to all amounts owing before the wind up and before a liquidation, assignment, or bankruptcy:

29 (6.5) Subsection 8(1) [deemed trusts] does not apply in respect of the amount that the employer is required to pay into the pension fund under subsection (6.4) [wind-up payment]. However, it applies in respect of any payments that have accrued before the date of the winding-up, liquidation, assignment or bankruptcy and that have not been remitted to the fund in accordance with the regulations made for the purposes of subsection (6.1).

Summary: Section 8(1) of the PBSA creates a deemed trust over unpaid going-concern payments and special payments but section 29(6.5) exempts the deemed trusts from the amount owing for the wind up deficit.

The PBSA does not displace the NLPBA wind up deficit deemed trust for the 14 railway retirees

81. The Newfoundland Superintendent points to section 5 of the NLPBA to argue that the section operates to "exclude those members [from the NLPBA] who are governed by the PBSA". Section 5 states: "This Act applies to all pension plans for persons employed in the province, except those pension plans to which an Act of the Parliament of Canada applies." The interpretation suggested by the Superintendent is flawed for at least two reasons.

82. First, section 5 is intended to differentiate between the pension plans of companies in federally regulated industries located in Newfoundland from all the other pension plans for employees who report for work in Newfoundland. The pension plans "to which an Act of Parliament applies" include, for example, pension plans for employees in exclusively federal undertakings, such as aeronautics, shipping, or telecommunications. The PBSA would singularly apply to the pension plans of those companies and the NLPBA would not, despite that there would be Newfoundland employees employed in the province. Section 5 simply confirms that the NLPBA applies to all pension plans for persons employed in the province of Newfoundland and Labrador, except those pension plans for companies whose business is a federal undertaking. The section is premised on a "either-or" scenario, it says either the NLPBA applies to a pension plan or it does not. Section 5 does not provide an answer to the questions that arise in this Reference where a pension plan of a mining company is registered in Newfoundland, with Newfoundland employees in the province, 14 of whom happened to work on a railway owned by the company and thus triggering the application of the PBSA to those 14 employees, *in addition to* the on-going application of the NLPBA to the plan.

83. Second, the Newfoundland Superintendent submits that based on section 5, the NLPBA continues to apply to the Newfoundland retirees, but not to the railway retirees in the Wabush Salaried Plan. The logical extension of that argument is that the mere existence of 14 railway

retirees in the Wabush Salaried Plan would remove the application of the NLPBA from the Wabush Salaried Plan *in entirety*. The Newfoundland Superintendent does not argue for the wholesale exclusion of the NLPBA from the Wabush Salaried Plan merely because 14 employees worked on the railway, however, that would be the result if their interpretation of section 5 were to be accepted. That cannot be the intention of the legislature. The conclusion is that section 5 does not operate in the manner the Newfoundland Superintendent suggests. Section 5 merely confirms that the NLPBA applies to pension plans for employees employed in the province except those pension plans for employees who work for a company in a federal undertaking. Section 5 is of no assistance to the issues in this Reference.

84. The A.G. of Canada argues that the PBSA applies to the 14 retirees who are members of the Wabush Salaried Plan who worked on the Wabush railway, and that "provincial laws" (under either the NLPBA or the SPPA) apply to the "other" Wabush salaried employees. Effectively, the A.G. is saying that the PBSA displaces the NLPBA wind up deemed trust for the 14 railway retirees. Their argument should be rejected for the following reasons:

- a) The A.G. of Canada's argument is premised on the notion that the PBSA and the NLPBA are in operational conflict. There is no conflict. As noted above, the PBSA creates deemed trusts over two categories of unpaid contributions: unpaid going concern payments and unpaid special payments. The NLPBA creates deemed trusts over the same two categories of contributions (overlapping with the PBSA) *and* it also creates a deemed trust over the unpaid wind-up deficit. There is no conflict between the PBSA and the NLPBA over the deemed trusts over unpaid current service costs and unpaid special payments – both statutes create the same remedy over the same unpaid amounts. This is not a conflict, it is an overlap.
- b) The fact that the NLPBA deemed trusts go further to extend to unpaid wind-up deficit does not mean there is a conflict between the deemed trust provisions of the two statutes in respect to unpaid wind up deficit. The two statutes can readily work together. There is certainly no conflict with respect to the two overlapping deemed trusts – they generate the same remedy. There is also no conflict or inconsistency with the NLPBA deemed trust extending to the wind up deficit. Just because the PBSA does not contain that

remedy for plan beneficiaries does not mean it is in conflict with the NLPBA. The only way there would be a conflict or inconsistency is if there was express language within the PBSA, the NLPBA or the plan text stating that the wind up deemed trust of one statute is not to apply to assist those affected plan beneficiaries who are also subject to another statute that does not have a wind up deemed trust. There is no such language. Accordingly, giving effect to the more advantageous NLPBA deemed trust for an unpaid wind-up deficit does not offend the PBSA. It just means that one statute (NLPBA) creates an additional remedy for the Wabush pension plan beneficiaries that the other statute (PBSA) does not have. That is not a conflict or inconsistency.

- c) In this circumstance, Section 31 of the PBSA operates to continue the application of the NLPBA deemed trust over the unpaid wind-up deficit. It states:

31. Certain provisions of provincial law to apply

Except to the extent that they are inconsistent with this Act, *any provisions of any provincial law respecting the payment of benefits* or the designation of beneficiaries under pension plans that would be applicable to a pension plan organized and administered to provide pension benefits to employees employed in included employment *if that provincial law were applicable to such a pension plan shall be deemed to apply to such a pension plan* as though that employment were not included employment.[emphasis added]

There is no question that the NLPBA applies to the Wabush Salaried Plan. The NLPBA is not in conflict nor is it inconsistent with the PBSA deemed trusts. Section 31 therefore dictates that the NLPBA continues to apply.

i) No conflict between the NLPBA and PBSA over the deemed trusts for unpaid current service and unpaid special payments

- d) The fact that the NLPBA and PBSA both contain the same deemed trust remedy for unpaid current service payments and unpaid special payments means that the two statutes overlap. An overlap is not a conflict. The PBSA does not displace the NLPBA in respect of the same deemed trusts. The interpretative principles applicable to federal-provincial legislative overlaps (and operational conflict) are summarized below:

11.23 Federal-provincial overlaps. In cases of federal-provincial overlap, since neither enacting legislature is subordinate to the other and each is entitled to legislate to the full extent of its powers, it is not surprising that the courts have adopted a narrow definition of conflict, often referred to as "operational conflict". It would be a serious violation of rule of law if citizens were subjected to conflicting federal and provincial rules. However, to the extent federal law renders valid provincial law inoperative, the sovereignty of the provincial level of government is impaired. A narrow definition of conflict is needed to reconcile these competing concerns.

11.24. The operational conflict test as formulated by Dickson J. in *Multiple Access Ltd. v. McCutcheon* sets out the most stringent test for determining conflict – the impossibility of dual compliance. Dickson J. wrote:

In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says 'yes' and the other says 'no', 'the same citizens are being told to do inconsistent things'; compliance with one is defiance of the other.

The overlapping federal and provincial provisions at issue in the *Multiple Access* case were virtually identical prohibitions of insider trading; they duplicated one another. *In such a case compliance with one ensures compliance with the other and the possibility of conflict does not arise.*

...

Multiple Access Ltd. v. McCutcheon was a case involving duplicative federal and provincial legislation. This Court rejected the view that such enactments could not operate concurrently simply because resort to the one would preclude resort to the other...In the following excerpt Dickson J. provides a cogent and succinct rationale for this view, at pp. 189-90:

...there is no true repugnancy in the case of merely duplicative provisions since it does not matter which statute is applied; the legislative purpose of Parliament will be fulfilled regardless of which statute is invoked by a remedy-seeker; application of the provincial law does not displace the legislative purpose of Parliament. [emphasis added by La Forest J.]³⁴

³⁴ Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis Canada, 2014) ("*Construction of Statutes*"), BOA of Rep Counsel, Tab 15, at 345-346.

ii) No operational conflict

- e) The only way for the Attorney General's argument to be accepted that the PBSA displaces the NLPBA wind up trust is if it can prove there is either an operational conflict between the PBSA and the NLPBA deemed trust provisions or a "frustrated federal purpose". Neither of these conflicts exists. The NLPBA has the wind up deemed trust remedy and the PBSA does not. Despite the omission in the PBSA, this is not an operational conflict between the two statutes. The two statutes can still work together. Paramountcy is not invoked. The NLPBA also applies to the Wabush Salaried Plan and applying the NLPBA wind up deemed trust does not make compliance with the PBSA's non-existent wind up deemed trust impossible.

iii) No frustrated federal purpose

- f) Nor does NLPBA deemed trust over the wind-up deficit offend the second type of conflict of "frustrated federal purpose". The NLPBA does not frustrate the federal Parliament's purpose when it excludes the PBSA wind up deemed trust from applying to plans for federally regulated undertakings. In this case, the PBSA applies to only 14 railway retirees in a plan with a total of 656 members. If Parliament had intended that the removal of the PBSA wind up 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 deemed trust (such as the Ontario PBA and NLPBA), it would have said so in its PBSA amendments. It did not. In the absence of such language, there is no frustration of federal purpose for the PBSA with the co-existence of the NLPBA wind up deemed trust in the same pension plan. The NLPBA wind up deemed trust continues to apply to the 14 railway retirees.

11.25 In *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, the Court reformulated the test for federal-provincial conflict, limiting operational conflict to cases where compliance with one provision entails breach of the other and establishing frustrated federal purpose as a separate form of conflict. Commenting on the latter test, McLachlin C.J. wrote:

...The party seeking to invoke the doctrine of federal paramountcy bears the burden of proof...That party must prove that the impugned legislation frustrates the purpose of a federal

enactment. To do so, it must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose. *The standard for invalidating provincial legislation on the basis of frustration of federal purpose is high; permissive federal legislation, without more, will not establish that a federal purpose is frustrated* when provincial legislation restricts the scope of the federal permission. [emphasis added]³⁵

- g) The interpretation proposed by the A.G. of Canada should be rejected because it would lead to absurd results by providing inferior (or effectively no) recovery for 14 Wabush railway retirees, while allowing superior recovery for the other Wabush retirees who did not work on the railway. From a pension benefit perspective, that is an absurd result for the employees of the *same company*, who earned benefits in the *same pension plan*. An interpretation that leads to absurd results should always be avoided. As stated in Driedger:

When a court is called on to interpret legislation, it is not engaged in an academic exercise. Interpretation involves the application of legislation of facts in a way that affects the well-being of individuals and communities for better or worse. Not surprisingly, the courts are interested in knowing what the consequences will be and judging whether they are acceptable. Consequences judged to be good are presumed to be intended and generally are regarded as part of the legislative purpose. Consequences judged to be contrary to accepted norms of justice or reasonableness are labelled absurd and are presumed to have been unintended. If adopting an interpretation would lead to absurdity, the courts may reject that interpretation in favour of a plausible alternative that avoids the absurdity.³⁶

- h) The consequence of the A.G. of Canada's argument, if accepted, is that the 14 Wabush railway retirees would only receive the benefit of the inferior PBSA deemed trust provisions and would be deprived of the additional NLPBA deemed trust over unpaid wind-up deficit. This would mean that 14 retired employees of Wabush Mines who earned pension benefits in the same Wabush Salaried Plan, which has been regulated throughout by the Newfoundland Superintendent of Pensions, would be subjected to an inferior recovery for their pension benefit losses than the other beneficiaries of the

³⁵ *Construction of Statutes*, BOA of Rep Counsel, Tab 15, at 346.

³⁶ *Construction of Statutes*, BOA of Rep Counsel, Tab 15, at 307.

Wabush Salaried Plan who are not railway retirees. That would be a discriminatory, unfair, and absurd legislative result.

REFERENCE QUESTION #2 (b)

- 2(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?

ANSWER: Yes. In addition to the application of the NLPBA, the SPPA is applicable to Québec members.

- (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?

ANSWER: There is no conflict. The NLPBA deemed trusts cover unpaid going concern payments, unpaid special payments, and unpaid wind-up deficit. The SPPA deemed trusts only apply to unpaid going concern and unpaid special payment, but not wind-up deficit.

If so, how is the conflict resolved?

ANSWER: The NLPBA and SPPA deemed trusts over unpaid current service payments and unpaid special payments overlap and are not in conflict. The NLPBA deemed trust for the unpaid wind-up deficit applies for all beneficiaries of the Salaried Plan, including the Québec retirees who are concurrently also subject to the SPPA. The SPPA does not displace the NLPBA deemed trust over the wind-up deficit for the Québec retirees.

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

ANSWER: Yes. The SPPA deemed trusts for unpaid current service costs and unpaid special payments overlap with the deemed trusts in the NLPBA over those same unpaid amounts owing to the Wabush Salaried Plan.

85. Section 1 of the SPPA states it applies to pension plans for employees who report for work in Québec:

1. This Act applies to pension plans provided

- (1) for employees who report for work at an establishment of their employer located in Québec or, if not, who receive their remuneration from such an establishment, provided, in the latter case, they do not report for work at any other establishment of their employer;

The Québec SPPA deemed trusts cover unpaid going concern payments and special payments, but not wind-up deficit

86. Section 49 of the SPPA states:

49. Until contributions and accrued interest are paid into the pension fund or to the insurer, they are deemed to be held in trust by the employer, whether or not the latter has kept them separate from his property.

87. The Québec SPPA pension deemed trusts came before the same judge of the Québec Superior Court in two CCAA cases: *White Birch* and *Timminco*.

88. In *Timminco*, Mr. Justice Robert Mongeon, reversed his decision in *White Birch* and held that the SPPA deemed trusts apply to unpaid going-concern payments and unpaid special payments. However, based on the language of the SPPA, he held that the deemed trust did not extend to the wind-up liability owing. The outcome of those cases is that the court confirmed that the SPPA deemed trusts cover unpaid going concern payments and unpaid special payments, but not unpaid wind up deficit.

89. Mr. Justice Mongeon concluded that section 49 of the SPPA created a deemed trust over all contributions owing by the debtor company, including pre-wind-up special payments but excluded wind-up liability. He held that the deemed trust takes effect as soon as the contributions and accrued interest become due and payable. In *Timminco*, the deemed trust had arisen after the hypothec (i.e. secured claim) held by Investissement Québec had been perfected. Mr. Justice Mongeon referred to section 264 of the SPPA which states that *all contributions* to be paid to the pension fund cannot be assigned or seized. In addition to paragraph 49, he held:

[135] Serait donc insaisissable ou inaccessibles toute cotisation versée ou qui doit être versée à la caisse de retraite des employés syndiqués ou [sic] non-syndiqués de SBI. S'il faut donner un sens à cet article, il faut conclure que les cotisations ... « à être versées » ... sont littéralement hors de la portée des autres créanciers de SBI, que ces derniers soient garantis ou non, qu'ils bénéficient d'une garantie antérieure à la date d'exigibilité des cotisations payées ou non.

[translation] [135] Any contribution paid or payable to the pension fund established for the unionized or the non-unionized employees of SBI would therefore be unseizable or unassignable. In order to give meaning

to this provision, it must be concluded that contributions... "payable"... are literally beyond the reach of the other creditors of SBI, whether they are secured or unsecured creditors, whether their security interest arose prior to the date when the contributions became due, whether paid or not.³⁷

90. *Timminco* indicates that even though the assets covered by the deemed trusts were already charged by a hypothec when the deemed trust came into effect, a secured creditor could no longer exercise its rights against such secured assets because they had become exempt from assignment and seizure due to sections 49 and 264 of the SPPA. In CCAA proceedings, the SPPA deemed trusts apply to unpaid going-concern and pre-wind-up special payments, but not wind-up liability, and generates a priority recovery for the pension plan members.

The 1968 Memorandum of Reciprocal Agreement signed by Québec and Newfoundland does not provide an answer for this Reference question – ordinary principles of interpretation do

91. A multi-jurisdictional pension plan ("MJPP") refers to a pension plan that covers employees in more than one province. This scenario engages the potential application of two (or more) jurisdiction's pension minimum standards statutes to the members of the same pension plan. Commencing in 1968, in an effort to simplify pension plan regulation for MJPPs, various provincial governments signed a "Memorandum of Reciprocal Agreement" (the "**1968 Reciprocal Agreement**"³⁸) that directs one province to be the dominant regulator of a pension plan that has members in more than one province. Although Québec and Newfoundland signed the 1968 Reciprocal Agreement in 1968 and 1986, respectively, the Agreement does not provide an answer as to which statute's deemed trust provisions apply to the Québec retirees, and in particular, to the question of whether the NLPBA wind up deficit deemed trust is displaced by the SPPA limited deemed trusts.

³⁷ *Timminco ltée (Arrangement relatif à)*, 2014 QCCS 174, BOA of Rep Counsel, Tab 16, at para. 135.

³⁸ There are subsequent versions of multi-jurisdictional agreements in 2011 and 2016 since the 1968 Reciprocal Agreement, but those agreements have not been signed by both Newfoundland and Québec and are therefore inapplicable to the questions in this Reference. Where the parties have not signed the 2016 agreement, the earlier Memorandum of Reciprocal Agreement would apply to the plan in respect of those members: see Financial Services Commission of Ontario, *Questions and Answers on 2016 Agreement Respecting Multi-jurisdictional Pension Plans* (26 September 2016)
Online: www.fSCO.gov.on.ca/en/pensions/administrators/pages/mjppaqanda.aspx

92. The 1968 Reciprocal Agreement creates the concept known as the "major authority". Once a jurisdiction is identified as the "major authority", that jurisdiction performs the regulatory function(s) for the pension plan, and not the other jurisdiction(s). The major authority is also to apply the other jurisdiction's pension regulator's "statutory functions and powers" as applicable. The purpose of the Agreement is to prevent regulatory duplication of having two or more pension regulator's agencies simultaneously regulating one pension plan with the provisions of their own pension statutes.

93. The preambles of the 1968 Reciprocal Agreement state:

WHEREAS each signatory hereto has statutory functions and powers with respect to pension plans covering employees in the jurisdiction represented by such signatory;

AND WHEREAS, by reason of some pension plans covering employees in more than one jurisdiction, more than one signatory may have statutory functions and powers in respect of the same pension plan;

AND WHEREAS the said signatories have deemed it desirable *that statutory functions and powers in respect of any one pension plan be exercised by one signatory only*, acting both on its own behalf and on behalf of any other signatory having statutory functions and powers in respect of such plan;

AND WHEREAS each signatory has accordingly agreed with each other signatory to the effect hereinafter set forth.

94. Section 1 defines "authority" as:

b) "authority" means a person or body having statutory functions and powers with respect to registration, *funding*, vesting, *solvency*, audit, obtaining information, inspection, *winding up*, and other aspects, of plans; [emphasis added]

95. Section 2 defines "major authority" as:

d) "major authority" means, with respect to a plan, the participating authority of the province *where the plurality of the plan members are employed*...[emphasis added]

96. Once the major authority is established, section 2 of the Reciprocal Agreement states that the major authority shall exercise both its functions, and the functions of the other applicable jurisdiction for the regulation of the plan:

2. The major authority for each plan shall exercise both its own statutory functions and powers and the statutory functions and powers of each minor authority for such plan.

97. Newfoundland has been the "major authority" for the Wabush Salaried Plan from its inception in 1968 and has continued to be the major authority ever since, despite the change in the plurality of the members over time between Newfoundland and Québec.

98. The 1968 Reciprocal Agreement does not provide an answer to whether the NLPBA deemed trusts continue to apply to the Québec retirees despite the application of the SPPA to these same retirees. Accordingly, the answer emerges from rules of statutory and contractual interpretation to lead to the conclusion that the NLPBA does apply to the Québec retirees.

The SPPA does not displace the NLPBA wind up deficit deemed trust for the Québec retirees

99. Retraite Québec argues that the SPPA applies to the Wabush employees who reported for work in Québec (at the iron ore processing and port facilities in the Town of Sept-Iles). While Representative Counsel does not disagree that the SPPA can also apply to the Québec retirees, it disagrees that the SPPA displaces the NLPBA wind up deemed trust for the Québec retirees in the Wabush Salaried Plan. The concurrent application of the SPPA to the Québec retirees, along with the NLPBA, does not render the NLPBA inapplicable for the following reasons:

- a) Retraite Québec is essentially arguing that the SPPA displaces or overrides the NLPBA for the Québec members of the Wabush Salaried Plan. Similar to the argument by the A.G. of Canada, the consequence of Retraite Québec's argument, if accepted, is that only the SPPA deemed trusts over unpaid current service amounts and unpaid special payments would apply to the Québec members. If that argument is accepted, the Québec retirees would be deprived of the more advantageous NLPBA deemed trust over unpaid wind-up deficit. Again, such a result would be discriminatory to the Québec retirees of

the Wabush Salaried Plan, would deprive them of meaningful recovery for the losses to their monthly pension benefits, and would be a legislatively absurd result.

- b) The SPPA and the NLPBA are both *provincial* statutes. There is no application of paramountcy in these circumstances. Both statutes continue to apply concurrently to the Wabush Salaried Plan. There is no operational conflict between the SPPA and NLPBA. The SPPA creates deemed trusts over two categories of unpaid contributions: unpaid going concern payments and pre-wind-up special payments. The NLPBA creates deemed trusts over the same two categories of contributions (overlapping with the SPPA) *and* it also creates a deemed trust over the unpaid wind-up deficit. Since there is no conflict between the SPPA and the NLPBA over the deemed trusts over unpaid current service costs and unpaid special payments – both statutes create the same remedy over the same unpaid amounts. This is an overlap, but not a conflict.
- c) The fact that the NLPBA deemed trusts go further to extend to unpaid wind-up deficit does not mean there is a conflict between the deemed trust provisions of the two statutes in respect to unpaid wind up deficit. The two statutes can readily work together. There is no language in the SPPA that renders the wind-up deemed trust provisions in another statute inapplicable in respect of a multi-jurisdictional pension plan. Accordingly, giving effect to the more advantageous NLPBA deemed trust for unpaid wind-up deficit does not offend the SPPA. It just means that one statute (NLPBA) creates an additional remedy for the Wabush pension plan beneficiaries that the other statute (SPPA) does not have.
- d) Even if there was an operational conflict between the SPPA and NLPBA wind up deficit deemed trust, the conflict is resolved by the "choice of law" provisions in section 12.06 in the Wabush Salaried Plan. Section 12.06 expressly states that the plan be interpreted pursuant to the laws applicable in the province of Newfoundland:

Applicable Law

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

The intention of the company was that the Wabush Salaried Plan would be interpreted by the NLPBA. In *Douez v. Facebook, Inc.*, the Supreme Court of Canada restated the requirement of a court to give effect to a choice of law provision:

Generally, common law 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.), at p. 290).³⁹

There is no issue of bona fides, legality, or contravention of public policy with the application of Newfoundland law to the Wabush Salaried Plan.

- e) Further, the Salaried Plan contains in section 14 a special provision entitled "Special Provisions for Quebec Employees" that expressly deals with the application and recognition of the SPPA for Wabush employees who were employed in Quebec. Section 14.01 states that it "is included in order for the Plan to comply with the [SPPA]", and then specifically applies the SPPA to specific topics such as early retirement, postponed retirement, and other benefit issues. Significantly, section 14 makes no mention that the deemed trust provisions in the SPPA apply to the Québec members and are to displace the NLPBA deemed trusts. Nor do the terms of the Wabush Salaried Plan elsewhere state that the NLPBA deemed trust provisions apply only to the members employed in Newfoundland and Labrador. The company clearly turned its mind to the application of the SPPA to the Québec members and set out specific provisions for those members, but it did not confine the application of the SPPA deemed trusts to the Québec employees only. Nor did the company exclude the NLPBA deemed trusts from the Québec members. Pursuant to the maxim of interpretation "*expressio unius exclusio alterius*": to express one thing is to exclude another, the silence by the company in section 14 with respect to any restriction of the application of the SPPA deemed trust to Quebec members

³⁹ *Douez v. Facebook, Inc.*, 2017 SCC 33, BOA of Rep Counsel, Tab 17, at para 70.

is indicative of the company's intention to leave the NLPBA deemed trusts in place for *all* members of the Wabush Salaried Plan.⁴⁰

- f) The Supreme Court of Canada has confirmed that pension legislation is "intended to benefit and protect the interests of members and former members of pension plans."⁴¹ Pension legislation establishes minimum standards and ensures that employees receive all of the pension benefits they earned. The NLPBA and the SPPA are therefore known as "benefits conferring legislation" and should "be liberally construed so as to advance the benevolent purpose of the legislation."⁴² This governing principle of interpretation supports a harmonious reading of the NLPBA and SPPA which advances the purposes of pension legislation to protect members in the most advantageous way. The interpretative principles for benefit conferring legislation are set out below:

Social welfare legislation is to be liberally construed so as to advance the benevolent purpose of the legislation. ***If reasonable doubts or ambiguities arise, they are to be resolved in favour of the claimant.*** By providing benefits to the community or to groups in the community, social welfare legislature achieves a fairer allocation of social goods and may improve the health, security or dignity of targeted members of the community. The courts' primary concern is ensuring that the intended benefits are received.

15.60 This "favour the claimant" principle was first asserted by the Supreme Court of Canada in *Abrahams v. Canada (Attorney General)*. The issue in the case was whether the appellant was entitled to benefits under the *Unemployment Insurance Act*. Wilson J. wrote:

Since the overall purpose of the Act is to make benefits available to the unemployed, I would favour a liberal interpretation of the re-entitlement provisions. I think any doubt arising from the difficulties of the language should be resolved in favour of the claimant...

⁴⁰ Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2d ed (Markham: LexisNexis Canada, 2012), BOA of Rep Counsel, Tab 18, at 119-120.

⁴¹ *Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)*, 2009 SCC 39, BOA of Rep Counsel, Tab 19, at paragraph 28.

⁴² *Construction of Statutes*, BOA of Rep Counsel, Tab 15, at 509; *Rizzo & Rizzo Shoes Ltd. (Re)* 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, BOA of Rep Counsel, Tab 20, at para. 36.

Since *Abrahams* was decided, the notion that social welfare legislation is to receive a liberal construction has become firmly established.

...

15.62 The liberal approach to legislation has also been adopted to prevent abuses of power. In *Machtinger v. HOJ Industries Ltd.*, Iacobucci J. wrote:

...The objective of the [Employment Standards] Act is to protect the interests of employees by requiring employers to comply with certain minimum standards,...To quote Conant Co. Ct. J. in *Pickup*, ...'*the general intention of this legislation...is the protection of employees, and to that end it institutes reasonable, fair and uniform minimum standards.*' The harm which the Act seeks to remedy is that individual employees, and in particular non-unionized employees, are often in an unequal bargaining position in relation to their employers...

Accordingly, an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so *extends its protections to as many employees as possible, is to be favoured over one that does not.* [emphasis added]⁴³

- g) Given the absence of express statutory or Wabush Salaried Plan provisions that say that only the SPPA deemed trusts apply to the Québec retirees, and thus displace the NLPBA deemed trusts, the correct interpretation is that the NLPBA continues to apply to the Québec members and that they are also to have the benefit of the NLPBA wind up deficit deemed trust.

The Leco Decision

- h) The NL Superintendent relies on the Ontario *Leco* decision to argue that the NLPBA deemed trust provisions should apply only to the members employed in Newfoundland and Labrador and that the inferior deemed trusts in the PBSA and SPPPA should apply to

⁴³ *Construction of Statutes*, BOA of Rep Counsel, Tab 15, at 509-511.

the railway retirees and Québec retirees, respectively.⁴⁴ The facts in *Leco* are different and readily distinguishable. *Leco* involved a dispute over the process to withdraw surplus from a fully funded pension plan. There was no issue of beneficiaries having their monthly pension benefits reduced, nor having to compete with creditors for recovery in the insolvency process of its employer.

- i) In *Leco*, the pension plan was registered in Ontario but included employees in Quebec. The plan was wound up and the employer applied to the Ontario regulator to obtain a withdrawal of the surplus remaining in the plan pursuant to the Ontario surplus rules. The procedures for surplus withdrawal under Quebec legislation provide that a member may request arbitration if no agreement is reached on surplus distribution. In contrast, the Ontario legislation did not have provisions requiring arbitration and the Ontario regulator proceeded with the surplus withdrawal process under Ontario procedure only. Following objections by certain Quebec employees that the Québec surplus withdrawal process should apply to them, the Quebec regulator objected to the application of Ontario's rules to the Québec members of the plan. In *Leco*, the surplus rules of Ontario and Quebec were in operational conflict. Here, as discussed above, no such operational conflict exists between the SPPA and NLPBA wind up deemed trust provisions. Further, in *Leco*, the application of the SPPA surplus procedure was *more advantageous* to the affected Québec members; whereas, in this case, applying the approach argued by the NL Superintendent (and the A.G. and Retraite Québec) is certainly *less advantageous* to the Quebec members. Thus, *Leco* supports the interpretative proposition for pension plans that in the case of overlapping pension statutes, and in the absence of statutes or plan language to the contrary, the statute that is more favourable to pension plan members should be applied instead of the statute that is not.

⁴⁴ *Regie des rentes du Quebec v. Commission des regimes de retraite de l'Ontario*, 2000 CanLII 30139, commonly referred to as the *Leco* decision, BOA of Rep Counsel at Tab 21.

REFERENCE QUESTION #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?

ANSWER: Yes.

If yes, what amounts does this secured claim encompass?

ANSWER: The lien and charge covers the same amounts that are covered by the NLPBA deemed trusts: unpaid going concern contributions, unpaid special payments, and unpaid wind up deficit.

Section 32(4) creates a secured claim in favour of the pension plan administrator

100. Section 32(4) of the NLPBA states: "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)".

101. Under the CCAA, a lien and charge is a secured claim. The Alberta Court of Appeal in *Kerr Interior Systems Ltd.* recognized that the CCAA gives secured creditor status to the "holder of a lien" or any "bond of a debtor company secured by a ...charge, lien".⁴⁵

Section 2 provides:

"secured creditor" means a holder of *a mortgage, hypothec, pledge, charge, lien or privilege on or against*, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company *secured by a mortgage, hypothec, pledge, charge, lien* or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds.⁴⁶ [emphasis added]

⁴⁵ *Kerr Interior Systems Ltd., Re*, 2009 ABCA 240, BOA of Rep Counsel, Tab 22, at para 7.

⁴⁶ *Ibid.*

102. The plan administrator's lien and charge in the NLPBA covers the same amounts that are covered by the NLPBA deemed trusts, i.e, unpaid current service contributions, unpaid special payments and unpaid wind-up deficit.

103. In *National Bank of Canada v. Ontario (Director of Employment Standards)*, the court held that the lien and charge is a *secured property interest* in the assets of the debtor company:

*The result of the statutory provision for a lien and charge is therefore, in my opinion, to establish a remedy of a statutory nature, but assimilated to the legal and equitable remedies of a beneficiary under a trust created otherwise than by statute. The remedy is to create a property interest in favour of the employees in the assets of the employer, and to provide the machinery for tracing that interest into the hands of subsequent holders of those assets, even when the assets become intermingled with other assets before the trust interest is enforced.*⁴⁷ [emphasis added]

104. The NLPBA's plan administrator's lien and charge under section 32(4) is a secondary remedy for pension plan beneficiaries of underfunded pension plans. It operates as a backstop in case the deemed trust provisions contained in the same section fail. The lien and charge covers the same amounts owing by an employer to a pension plan as the deemed trusts. The deemed trusts operate to create trusts over the assets of the debtor such that the amounts owing become trust property and thus not the property of the debtor, and cannot be distributed to creditors of the debtor. If the deemed trust remedy operates, the pension beneficiaries can recover from the estate and there is no need for the lien and charge to apply. However, if for any reason the deemed trusts do not operate, then the lien and charge can step in as a secured claim for secured recovery of the same amounts to the pension plan albeit as a secured claim against the priority of the debtor, not a trust claim.

⁴⁷ *National Bank of Canada v. Ontario (Director of Employment Standards)*, 1983 CarswellOnt, 672, 3 P.P.S.A.C. 119, BOA of Rep Counsel, Tab 23, at para 55.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Toronto, Ontario, this 31st day of July, 2017

*D.Y.
per.* 

ANDREW J. HATNAY



DEMETRIOS YIOKARIS

*D.Y.
per.* 

AMY TANG

APPENDIX A: INDEX OF AUTHORITIES

	<u>TAB</u>
<i>Bloom Lake, g.p.l. (Arrangement relatif à)</i> , 2015 QCCS 3064	2
<i>Bloom Lake, g.p.l. (Arrangement relatif à)</i> , 2015 QCCA 1351	3
<i>Arrangement relatif à Bloom Lake</i> , 2017 QCCS 284	4
<i>IBM Canada Limited v. Waterman</i> , 2013 SCC 70, [2013] 3 S.C.R. 985	5
<i>Schmidt v. Air Products Canada Ltd.</i> , [1994] 2 S.C.R. 611	6
<i>Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)</i> , 2004 SCC 54	7
<i>British Columbia v. Henfrey Samson Belair Ltd.</i> , [1989] 2 S.C.R. 24 (S.C.C.)	8
<i>Alternative granite & marbre inc., Re</i> , 2009 SCC 49	9
<i>Re Indalex</i> , 2013 SCC 6	10
<i>Indalex Limited (Re)</i> , 2011 ONCA 265	11
Newfoundland and Labrador, Legislative Assembly, Hansard, 43rd General Assembly, 1st Sess, No 55 (17 December 1996) (Ernie McLean)	12
<i>Indalex Limited (Re)</i> , 2013 ONSC 7932	13
<i>Timminco Limited</i> (CV-12-9539-00CL), Twenty-Fifth Report of the Monitor dated June 9, 2014	14
Ruth Sullivan, <i>Sullivan on the Construction of Statutes</i> , 6 th ed (Markham: LexisNexis Canada, 2014)	15
<i>Timminco ltée (Arrangement relatif à)</i> , 2014 QCCS 174	16
<i>Douez v. Facebook, Inc.</i> , 2017 SCC 33	17
Geoff R. Hall, <i>Canadian Contractual Interpretation Law</i> , 2d ed (Markham: LexisNexis Canada, 2012)	18
<i>Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)</i> , 2009 SCC 39	19
<i>Rizzo & Rizzo Shoes Ltd. (Re)</i> 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27	20

<i>Regie des rentes du Quebec v. Commission des regimes de retraite de l'Ontario</i> , 2000 CanLII 30139	21
<i>Kerr Interior Systems Ltd., Re</i> , 2009 ABCA 240	22
<i>National Bank of Canada v. Ontario (Director of Employment Standards)</i> , 1983 CarswellOnt, 672, 3 P.P.S.A.C. 119, BOA of Rep Counsel	23

APPENDIX B: INDEX OF LEGISLATION

	<u>TAB</u>
<i>Companies' Creditors Arrangement Act</i> (R.S.C., 1985, c. C-36)	25
<i>Supplemental Pension Plans Act</i> , chapter R-15.1	26
<i>Pension Benefits Act</i> , 1997, SNL 1996 Chapter P-4.01	27
<i>Pension Benefits Standards Act</i> , 1985, R.S.C., 1985, c. 32 (2nd Supp.)	28
<i>Civil Code of Quebec</i> , chapter CCQ-1991	29