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*, RSNL 1990, c. J-4

AND

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

AND

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

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PART I – OVERVIEW

1. The present reference arises from an Application in a proceeding under the *Companies' Creditors Arrangement Act*. Parliament intended that dispute to be resolved by the Quebec Superior Court. While this Court has a duty to consider the questions referred to it by its Lieutenant-Governor in Council, in so doing it should avoid appearing at odds with the express intention of Parliament.

2. The crux of the present reference seeks this Court's opinion on how the laws of Newfoundland and Labrador, Quebec, and Canada apply to the pension benefits of members of a multijurisdictional pension plan. On this matter, Canada, Quebec, and Newfoundland and Labrador all agree: by providing for benefits to employees in more than one jurisdiction of Canada, the plan is subject to the laws of each jurisdiction. Pension standards for employees reporting for work in a province, within provincial jurisdiction, are provided for by the laws of that province, and pension standards for employees of a federal work are provided for by federal statute.

3. This may result in different pension standards applying to different members of the same private pension plan. These differences are consequences of Canada's federal structure and of policy decisions made by the legislative and executive branches of each jurisdiction. While uniformity across jurisdictions in Canada may be desirable, it has not been realized, and that is not a matter to be remedied by a court.

4. The federal government mandates pension standards for federal members of private pension plans in Canada. The federal government has played, and will continue to play, an active role in the Wabush case to ensure that these standards are met.

PART II – STATEMENT OF FACTS

5. The Attorney General of Canada (AGC) pleads this matter on its own behalf and in the name of the Office of the Superintendent of Financial Institutions (OSFI). OSFI is the regulator responsible for the administration of the *Pension Benefits Standards Act, 1985* RSC 1985 c 32 (2nd supp) [*PBSA 1985*] and the regulation of private pension matters in respect of employees subject to federal jurisdiction.

6. The hypothetical factual scenario supporting the present reference is set out by the Statement of Facts filed by the Attorney General of Newfoundland and Labrador. The following summary of facts may be useful for the purpose of the present factum.

Legislative context

7. Pension plans and retirement benefits in some form have existed for centuries. As organized contractual obligations, they became much more common in the early-to-mid twentieth century. The federal government first established pension standards through the application of the *Income Tax Act* in the 1940s. At the time, pension plans often granted the employer broad unilateral powers to amend or terminate the plan and to revoke retirement benefits. Eventually, legislation aimed specifically at setting standards for private pension plans in Canada was established in the mid twentieth century. Ontario and Quebec passed legislation in 1965. The first federal legislation, the *Pension Benefits Standards Act,* was passed in 1967. In 1986, this law was replaced by the *Pension Benefits Standards Act, 1985 (PBSA 1985),* which is the current federal pension benefits standards legislation.

Ari Kaplan & Mitch Frazer, *Pension Law, 2nd ed* (Irwin Law, Canada: 2013) pp 39-44 **[AGC Tab 23]**
Morneau Shepell, Morneau Shepell Handbook of Canadian Pension and Benefit Plans, 15th Ed., (CCH Canadian Ltd, 2012) at 251-253. **[AGC Tab 26]**

8. The *PBSA 1985* was introduced to "ensure greater fairness, greater flexibility and greater security" for Canadians participating in private federally-regulated pension plans. At the same time, it encourages freedom of contract so that "employers, employees and unions can work out specific arrangements which best suit their circumstances and expectations." Like its provincial equivalents, the *PBSA 1985* does not oblige employers to offer pension plans, but if they do, the plans must meet the minimum standards set out in the *PBSA 1985*. Parties to the contract are free to provide in the plan for provisions *more* advantageous towards the members or other beneficiaries.

House of Commons Debates 33rd Parl. 1st Sess (Jan 28 1986) pp. 10248-10249. **[AGC Tab 41]**
PBSA 1985 s. 3 **[AGC Tab 38]**

9. However, Parliament also chose to strike a balance between interests: Parliament did not want to dissuade employers from offering pension plans. At the time of introduction of the proposed act, the Minister of State (Finance) noted:

> [b]oth employers and employees must judge pension plans to be worth while and cost effective. They must be willing to pay for them. The cause of pension reform will be set back rather than advanced if the cost or administrative burden of plans became such that employers were discouraged from sponsoring plans and workers were discouraged from joining them.

*House of Commons Debates (*1986) pp 10248-10249 **[AGC Tab 41]**

10. Today, every province except Prince Edward Island has its own pension standards legislation in force and its own pension regulator.[1] Under these regulatory schemes, millions of Canadians have been able to better prepare for and support themselves in retirement.

[1] The *PBSA 1985* applies to private pension plans in the territories; PEI has legislation that has never been declared in force.

Ari Kaplan and Mitch Frazer, Pension Law, 2nd Ed. (Irwin Law, Canada: 2013) pp 3-4, 20 **[AGC Tab 23]]**
Morneau Shepell, *Morneau Shepell Handbook of Canadian Pension and Benefit Plans*, 15th Ed., (CCH Canadian Ltd, 2012) at 251-253. **[AGC Tab 26]**

11. Many plans have been created by companies operating in more than one province or territory or which, by the nature of their operations, are subject in part to federal jurisdiction. Today, over two thousand "multijurisdictional" private pension plans exist.

Statement of Facts para 23
For example: *Boucher v Stelco* 2005 SCC 64 para 2 **[NL Superintendent, (NLS) Tab 4]**

12. Parliament has recognized the desirability of uniformity of minimum standards for private pension plans for over fifty years. Indeed, for decades, various attempts at harmonization of pension standards legislation have been made amongst the jurisdictions. For the most part, these efforts have been in the nature of intergovernmental agreements that ease administrative burdens or provide for a more streamlined application of the legislative scheme(s), in part or in whole, to multijurisdictional plans.

House of Commons Debates, 27th Parl. 1st Sess (Mar 10, 1967), p 13841 **[AGC Tab 42]**
Statement of Facts, paras 26-32/Memorandum of Agreement 1986/CAPSA Agreement.
See also *Boucher v Stelco* paras 3-4, **[NLS Tab 4]**

13. Many jurisdictions have chosen not to sign agreements amongst themselves and thus not to harmonize their laws, as is entirely their prerogative. For example, Newfoundland and Labrador and Quebec have an agreement addressing administration of pension plans only. Canada and Newfoundland and Labrador have no agreement. Canada and Quebec have an agreement, but only in respect of companies operating in the territories.

Statement of Facts, paras 26-29

The Wabush Entities

14. In 1960, the railway works and undertakings of Wabush Lake Railway and the Arnaud Railway [the Railways] were declared to be works for the general advantage of Canada, bringing them under federal jurisdiction under section 91(29) of the *Constitution Act, 1867*. These two companies are part of the Wabush Entities[2]. The principal activity of the other Wabush Entities was mining.

An Act respecting Wabush Lake Railway Company Limited and Arnaud Railway Company, 8-9 Eliz II c 63 s 2 **[AGC Tab 30]**
Statement of Facts, para 3

15. The Wabush Entities sponsored two defined benefit pension plans, one for their salaried employees and one for union employees. Each plan provided for benefits to members who worked in the mining industry in northern Quebec and in Labrador as well as those who worked for the Railways. Both of the pension plans were registered by the Wabush Entities with the Superintendent of Pensions of Newfoundland and Labrador (NL Superintendent). They also registered the Union Plan with the federal Office of the Superintendent of Financial Institutions (OSFI).

Statement of Facts, paras 6, 7, 10

16. The Wabush Entities shut down in 2014 and were granted protection from their creditors by the Quebec Superior Court under the *Companies' Creditors Arrangement Act* in May, 2015. The pension plans were terminated in December, 2015. Since then, the monthly benefits of retired members of the plans who had worked in the mines have been reduced in accordance with the approval of the NL Superintendent. No such approval has been given by the federal Superintendent and no reduction has taken place for members of either plan who worked on the Railways.

Statement of Facts, para 16

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[2] Includes Wabush Iron Co Ltd., Wabush Resources Inc, Arnaud Railway Company and Wabush Lake Railway Company Ltd.

PART III – LIST OF ISSUES

17. The Attorney General of Canada addresses the following issues in the present factum:

I) Should this Court exercise its discretion to limit the scope of its opinion on the Reference questions set out in Newfoundland and Labrador Order in Council 2017-103?

II) Does the federal *Pension Benefits Standards Act, 1985* RSC 1985 c-32 deemed trust also apply to those members of the Salaried Plan who worked on the Railways (i.e., a federal undertaking)? If yes, is there a conflict with the *Pension Benefits Act, 1997* and *Pension Benefits Standards Act*? If so, how is the conflict resolved? **[Reference Questions 2(a)(i) and 2(a)(ii)]**

III) How should the Court interpret or respond to the other Reference questions?

PART IV – ARGUMENT

I) Should this Court exercise its discretion to limit the scope of its opinion on the reference questions

Answer: If this Court considers that the only purpose of the present reference case is to affect the rights of parties in the *CCAA* case, then this Court should decline to answer any of the reference questions. However, if this Court considers that it can provide useful advice to the Lieutenant-Governor in Council, then it may do so, but it should do so without reference to the Wabush Entities. Moreover, it should be clear and precise as to the scope and impact of its opinion.

18. While some of the matters on which the Lieutenant-Governor in Council has sought this Court's opinion are confined to the interpretation of the laws of Newfoundland and Labrador, others raise issues of interpretation of Quebec and federal laws. More generally, the Court is asked to opine on the parallel application of legislation of three different jurisdictions in the context of the insolvency of a sponsor of a specific multijurisdictional pension plan.

19. The AGC's submissions in this section are in two parts: First, we comment on the confusion as to the scope and effect of a reference; Second, we discuss the options available to this Court in addressing the reference questions.

a) Concern as to the Scope and effect of a Reference

20. As the Court has recognized, a reference opinion is advisory in nature. It cannot affect rights or bind parties. A reference opinion cannot be enforced.

> *Ruling on Application for Directions,* June 9, 2017; *In Re References by the Governor-General in Council* (1910) 43 SCR 536 **[AGC Tab 11]**.

21. Notwithstanding these well-established principles, this Court's opinion is sought with regard to facts specific to proceedings brought under the *Companies' Creditors Arrangement Act* [*CCAA*]. Little effort has been made to dissociate the reference from these other proceedings before the Quebec Superior Court. The Reference Questions are

preceded by a preamble specifically invoking the *CCAA* case. Question 2(a) and (b) refer to the actual pension plans, employees and works at issue before the *CCAA* Court.

22. The parties are also caught up in this uncertainty. Multiple versions of the Statement of Facts (and comments relating to it) were filed, with most parties endeavoring to ensure that it accurately reflected the facts before the *CCAA* Court. Some parties assert the direct relevance and application of the eventual opinion of this Court to those proceedings, for example, informing this Court of the importance of this Reference case on the "Wabush retirees, their families, and their communities". There is obvious confusion as to the role of this Court on a Reference and the eventual impact that its opinion may have.

Newfoundland and Labrador OC2017-103; See Factum of Representative Counsel to the Members of the Wabush Salaried Plan, para 11

23. This confusion as to the effect of the Court's potential opinion is of particular concern in the present case, in which the exercise of the reference power must be balanced with the express intention of Parliament that the Wabush case be adjudicated by the Quebec Superior Court.

24. Matters of insolvency are assigned to the federal government by 91(21) of the *Constitution Act.* Pursuant to this power, Parliament assigned jurisdiction over "any application under" the *CCAA* to the court that has jurisdiction in the province within which the head office or chief place of business of the company is situated.

CCAA s 9(1) **[AGC Tab 32]**

25. The Supreme Court of Canada has confirmed Parliament's authority to concentrate all litigation in relation to an insolvent company before a single court, noting in respect of both winding-up and bankruptcy proceedings that:

> No doubt some inconvenience will be involved in such exceptional cases as this where the winding-up of the company is conducted in a province of the Dominion far distant from that in which persons interested as creditors or claimants may reside. But Parliament probably thought it necessary in the interest of prudent and economical winding-up that the court charged with

> that duty should have control not only of the assets and property found in the hands or possession of the company in liquidation, but also of all litigation in which it might be involved. The great balance of convenience is probably in favour of such single control though it may work hardship in some few cases[3].
>
> *Sam Lévy & Associés Inc* v *Azco Mining* 2001 SCC 92 paras 25-27, 38 **[AGC Tab 20]**

26. Pursuant to section 9(1) of the *CCAA*, and given that the head office of the Wabush Entities is in Quebec, jurisdiction over issues raised in the Wabush *CCAA* case belongs exclusively to the Quebec Superior Court.

27. The interpretation and application of the *PBSA 1985*, the *Pension Benefits Act 1997* SNL c. P-4.01 [*PBA*] and the *Supplemental Pension Plans Act* CQLR c R-15.1 [*SPPA*] deemed trusts in the context of the Salaried Plan were raised by Application pursuant to the *CCAA* before the Quebec Superior Court. These issues are under deliberation. In addition, the validity, priority, and quantum of claims against the debtor companies will all arise pursuant to the *CCAA*. Indeed, the Quebec Superior Court has already issued some orders addressing these issues.

> See for example *Arrangement relative à Bloom Lake g.p.l* 2015 QCCS 3064 **[NLS tab 3]**; *Claims Procedure Order*, Nov 16, 2015 **[AGC Tab 7]**

28. The Lieutenant-Governor in Council seeks the Court's opinion on the interpretation and application of the *PBSA 1985*, the *PBA* and the *SPPA* deemed trusts with explicit reference to the Wabush *CCAA* case. It also seeks this Court's opinion as to the validity and *quantum* of certain claims. The Lieutenant-Governor in Council's referral of these issues under the *Judicature Act* is at odds with Parliament's clear intent that these matters be adjudicated by a single court. This Court should not participate in the circumvention of the *CCAA* by rendering indirectly a judgment that it lacks jurisdiction to render directly.

> *Reference re: Secession of Quebec* [1998] 2 SCR 217 para 26 **[AGC Tab 19]**

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[3] Citing *Stewart v Lepage* (1916) 53 SCR 337

29. A secondary concern is that were the present case to appear to affect the property or operations of the CCAA parties, such as by determining claims against the property, it would run afoul of the Stay Order issued by the CCAA Court. That stay, issued in May, 2015 and extended since then, orders that no proceeding be commenced in respect of the Wabush CCAA parties except with leave of the Superior Court. This order has full force and effect in Newfoundland and Labrador.

CCAA s 16 **[AGC Tab 32]**
Arrangement relative à Bloom Lake, g.p.l, May 20, 2015, para. 7 **[AGC Tab 2]**

30. A different concern is raised by the summary nature of the "hypothetical" factual record available to this Honourable Court. This Court does not have the benefit of a full factual and procedural record. The Court has no actuarial information about the particular case before it. Nor does it have more than the barest of broader contextual evidence usually made available to assist a Court in appreciating the impact of its opinion, for example as to the usual practice in multijurisdictional pension plans or pension plans generally in any of the three jurisdictions.

31. Finally, judicial comity may weigh in favour of this Court restraining the application of its opinion or even declining to opine on a dispute that is live before its colleagues in another province.

32. The AGC submits that the appropriate scope and impact of a reference case, and of the opinion that a court provide in response, are clearly established by the caselaw. To the extent that this Court concludes that it is appropriate to respond to the reference questions, the particular context of this case justify precautions. This Court should resist the invitation to adjudicate this reference with respect to the Wabush facts, and should make clear in its opinion that it is not doing so.

b) The Court's discretion on a Reference

33. If this Court infers from the context that the only purpose of the present reference case is to affect the rights of parties in the *CCAA* case, then this Court should decline to

answer the reference questions. Where a question would take the Court beyond its proper role on a reference or would not advance the interests of justice, the Court should decline to provide its opinion. The Court's primary concern must be its proper role within the constitutional framework. It should also avoid creating a result that would lead to confusion.

Reference re Secession of Quebec para. 26, 30-31 **[AGC Tab 19]**; *Reference re: Same-Sex marriage 2004 SCC 79* paras 68, 70 **[Monitor Tab 2]**

34. However, if this Court considers that it can provide useful advice to the Lieutenant-Governor in Council, then it may do so. So as not to augment the confusion, it should do so without reference to the Wabush Entities. Moreover, it would be helpful if the opinion spoke to the scope and impact of a reference opinion.

35. As will be discussed below, some of the questions asked of this Court would, but perhaps for the context, fall within its usual jurisdiction on a reference. However, *parts* of the questions would seem, on some readings, to exceed the appropriate role of the Court. In such a case, the Court may interpret or qualify a question.

Broome et al v. Government of Prince Edward Island et al 2010 SCC 11 para 7 **[AGQ Tab 3]**; See for example: *Hirsch v Protestant Board of School Commissioners* [1926] SCR 246, pp. 269-271 **[AGC Tab 9]**

36. Finally, the Court may find that the factual record is either insufficient in respect of certain questions, or lacking the broader contextual information it would like. Where the factual record is less than exhaustive on a reference case, a Court can provide an opinion expressly applicable to the limited scope of the facts provided. To the extent that this Court opines on some of the questions, such a *caveat* would be appropriate.

Broome, supra para 6 **[AGQ Tab 3]**

II) **Does the federal *Pension Benefits Standards Act,* RSC 1985 c-32 deemed trust also apply to those members of the Salaried Plan who worked on the Railways (i.e., a federal undertaking)? If yes, is there a conflict with the *Pension Benefits Act, 1997* and *Pension Benefits Standards Act*? If so, how is the conflict resolved? [Question 2(a)(i) and 2(a)(ii)]**

Answer: The federal *Pension Benefits Standards Act, 1985* is the only pension benefits standards legislation that applies in respect of plan members employed by a federal work or undertaking. The present case raises no conflict between the *PBSA 1985* and the *PBA.*

a) Purpose and Scope of the federal Pension Benefits Standards Act, 1985

37. The purpose of the *PBSA 1985* is apparent from the full title: "An Act respecting pension plans organized and administered for the benefit of persons employed in connection with certain federal works, undertakings and businesses".

38. Section 4 states that the *PBSA 1985* applies in respect of pension plans, defined as

> "...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...."

The same section defines "included employment" as

> "employment, other than excepted employment, on or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada...."
> [our emphasis]

In case of doubt, section 4 also provides a non-limitative and non-exhaustive list of examples of included employment, including:

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

39. In short, it is clear from the *PBSA 1985* that it is intended to set out minimum standards applicable to pension plans organized to provide pension benefits to employees employed in federal works, undertakings, or businesses. It is equally clear that the application of the *PBSA 1985* is limited by the boundaries of federal jurisdiction – it does not purport to apply to pension benefit standards for employees who do not meet the definition of "included employment".

40. How, then, does the *PBSA 1985* apply to a multijurisdictional pension plan? In the *PBSA 1985,* two means to harmonize standards applicable to multijurisdictional pension plan were provided. The Governor in Council may make regulations excepting employment from "included employment" where it is satisfied that provision has been made for the coverage of employees under a pension plan registered under the law of a province. The Governor in Council may also approve federal-provincial agreements on "any matter relating to pension plans". Such an agreement may, among other things, limit, exempt, or adapt the application of the *PBSA 1985;* make applicable the pension legislation of a province; or establish additional requirements other than those in the *PBSA 1985* or the province's law.

PBSA 1985 s 4(6)(b)(i), s 6.1(1) and (2). **[AGC Tab 38]**

41. In providing these options by which the executive may choose to simplify the administration of these plans, Parliament was clearly cognizant of, and accepted, the possibility that in the absence of such an agreement, both federal and provincial legislation would apply to the different members of a multijurisdictional pension plan.

42. There is no regulation or agreement modifying the application of the *PBSA 1985* relevant to the present reference. The standards for pension benefits set out in the *PBSA 1985* must be read as applying to the Plan, but only in respect of the members employed by the federal works.

Act respecting Wabush Lake Railways Company Limited and Arnaud Railways Company 8-9 Elizab II c-63 s. 2 **[AGC Tab 30]**

43. The "deemed trust" provisions to which this reference question refer set out that when an employer is insolvent, the employer holds in trust, or is deemed to have done so, certain amounts in respect of benefits accrued by members.

44. Section 8(1) of the *PBSA 1985* establishes certain amounts that are to be held in trust for members of the pension plan, former members, and any other persons entitled to pension benefits under the plan such as spouses and beneficiaries.

45. Section 8(2) of the *PBSA 1985* sets out that:

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.	En cas de liquidation, de cession des biens ou de faillite de l'employeur, un montant correspondant à celui censé détenu en fiducie, au titre du paragraphe (1), est réputé ne pas faire partie de la masse des biens assujettis à la procédure en cause, que l'employeur ait ou non gardé ce montant séparément de ceux qui lui appartiennent ou des actifs de la masse.

46. Section 8 specifically provides for amounts in respect of pension benefits. Its application can and should be isolated to the benefits of the "federal" members. Parliament did not intend to require an employer to put aside amounts in relation to employees not under its jurisdiction.

See *PBSA 1985* **[AGC Tab 38]**, see also Hansard, January 28, 1986, p 10249 **[AGC Tab 41]**

b) The Newfoundland and Labrador PBA does not purport to apply to employees of federal works, undertakings, or companies.

47. The *Act respecting Pension Benefits* (the *PBA)* is an act setting out minimum standards for amounts payable under a pension plan for persons who perform service for an employer in the province of Newfoundland and Labrador (or, where an agreement exists, in a designated province).

PBA Ss 2, 3 **[AGC Tab 37]**

48. Section 5 of the *PBA* expressly excludes matters of federal jurisdiction from the application of their legislation. It 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."

49. Thus, the *PBA* expressly applies when a pension plan's members are exclusively employees not working in "included employment" [hereinafter, "provincial" members], and expressly does not apply when a pension plan's members are exclusively employees working in "included employment" [hereinafter, "federal" members].

50. The correct interpretation of section 5 is that when a pension plan has both "federal" and "provincial" members the *PBA* was intended to apply to the plan in respect of the "provincial" employees but not in respect of the "federal" employees (in respect of whom the *PBSA 1985* applies). This interpretation gives section 5 its fullest meaning and is coherent with the intention of the legislature. Moreover, there is no evidence to suggest that this interpretation is technically infeasible – on the contrary, the evidence suggests that it is being applied without incident.

Statement of Facts, para 16

51. Section 32 of the *PBA* is a substantive provision establishing the amounts which must be held in trust (or deemed to be so held) in respect of entitlements under the plan. It must be read in the context of section 5 and the whole context of the *PBA*: the provincial legislature did not intend to impose on an employer the obligation to put aside amounts in respect of benefits for "federal" members or members from other provinces. The deemed trust provisions of the *PBA* do not apply to the "federal" employees.

52. Contrary to the submissions of Representative Counsel, this interpretation is not based on the existence of conflict, nor is there any "displacement" or "overriding" of applicable law. The AGC's position is premised on principles of statutory interpretation

and the apparent intention of the Newfoundland and Labrador legislature, which by all appearances simply did not intend to provide for minimum standards for pension benefits of any workers of federal works, undertakings, or businesses.

53. In the case of a multijurisdictional plan, Representative Counsel propose to read section 5 by ignoring the words "except those pension plans to which an Act of the Parliament of Canada applies". In their view, in a multijurisdictional plan, the *PBA* standards apply in respect of every member, regardless of jurisdiction. Following this reading, a single "provincial" member in an otherwise "federal" plan would render the *PBA* applicable to all members of the plan. This interpretation of section 5 is not supported by the rules of statutory interpretation. It finds no support in the wording or the context of the *PBA.* It would render half of section 5 superfluous in this context. Moreover, it would be contrary to the presumption that the legislature intended to remain within its jurisdiction.

Factum of Representative Counsel, paras 82-83;
British Columbia (Forests) v Teal Cedar Products Ltd 2013 SCC 51 para 28 **[AGC Tab 5]**; *Nova Scotia (Board of Censors) v. McNeil*, [1978] 2 SCR 662 at 687-8, **[AGC Tab 15]**
Interpretation Act RSNL 1990 Ch I-19, s 10, 16. **[AGC Tab 33]**
*Re Rizzo and Rizzo Shoes Ltd [*1998] 1 SCR 27, p 43 **[NLS Tab 11]**

54. It is not a solution to ignore the latter half of section 5; the law is always speaking. All the words in section 5 must be allowed some meaning, and that meaning must be coherent in the scheme and object of the Act, and with the intention of the legislature. The object of the *PBA* is that all members to be protected by minimum standards. The legislature was clearly aware of multijurisdictional plans and intended to permit them. It did not intend to impose minimum standards in respect of "federal" members; indeed, it has no constitutional authority to do so. It would not have expected the federal law to impose minimum standards on "provincial" workers.

Winters v Legal Services Society [1999] 3 SCR 160 paras 11, 48 **[AGC Tab 22]**

Interpretation Act, supra **[AGC Tab 33]**
Archean Resources Ltd. v. *Newfoundland*, 2002 NFCA 43, paras 19-32 **[Freq. cited cases]**
Ruth Sullivan, Sullivan on Construction of Statutes, 6th ed (LexisNexis, Canada: 2008) p 7, 205 **[AGC Tab 28]**

c) Neither the administrator's actions, nor the wording of the Plan affect these conclusions

55. Representative Counsel is mistaken in invoking OSFI's lack of involvement with the Salaried Plan prior to the insolvency as a relevant factor in the analysis of the applicable law. Under the *PBSA 1985,* as is the case with many regulatory regimes, the onus is on each plan administrator to properly register the plan with the appropriate regulator. The *PBSA 1985* applies as soon as a pension plan with "federal" members exists. The plan administrator has an obligation to register the plan with OSFI. Though failure to do so could have consequences for the administrator, it does not affect the applicability of federal law to the Plan.

PBSA 1985 s. 4(1), 10 **[AGC Tab 38]**
Statement of Facts, paras 7, 13-16.
Factum of Representative Counsel, paras 63-65

56. It would also be an error to invoke the Plan's "choice of law" provision as relevant to Question 2. This general clause provides that the terms and conditions of the plan are to be interpreted in accordance with the law of Newfoundland and Labrador. It does not create entitlements to the particular benefits provided in the *PBA,* and it does not override the constitutional limits of the *PBA.* Nor does such a provision exclude the application of specific laws. Parties cannot (unless otherwise provided by law) by contract opt in or out of regulatory oversight or the application of pension standards legislation.

Police Association of Nova Scotia Pension Plan v. Amherst (Town), 2008 NSCA 74 par 91 **[AGC Tab 17]**

57. In any case, it is well-settled that the "laws applicable in the province of Newfoundland" include the entire body of federal law, including the *PBSA 1985.*

ITO-Int'l Terminal Operators [1986] 1 SCR 752 pp 777-778. **[AGC Tab 12]**

d) The application of multiple laws is a fair result intended by Parliament and the Legislatures of the provinces

58. To return to the AGC's answer to question 2(a), the deemed trust created by section 8 of the *PBSA 1985* applies to amounts that relate to the members of a multijurisdictional plan who were engaged in "included employment". No deemed trust arising from a provincial law applies in respect of those members. The federal *PBSA 1985* deemed trust is the only deemed trust to apply for the benefit of the members of a multijurisdictional plan who worked for a federal work or undertaking.

59. This result, that different sets of rules apply in respect of different employees, is not unusual or new. Many companies who offer pension plans to their employees have activities in more than one province or carry out activities in both provincial and federal areas of authority. There are ten different laws establishing minimum defined benefit pension standards in Canada, and not all jurisdictions have intergovernmental agreements to harmonize the application of the different laws.

60. These laws differ in a variety of ways. For example, they provide for different minimum standards with respect to eligibility requirements, early retirement benefits, vesting, and treatment/definition of spouses.

PBSA 1985 ss 14-15 **[AGC Tab 38]**; *PBA* ss 23-24 **[AGC Tab 37]**; *SPPA* s34 **[AGC Tab 40]** (Eligibility)
PBSA 1985 s 16(2); *PBA* s 29 (Early retirement);
PBSA 1985 ss 17-18; *PBA* s. 43 (Vesting);
PBSA 1985 s 2(1); *PBA* s 2(c.1), (dd.1), (ff); *SPPA* s 85 (spouses)
See also *Boucher v Stelco,* para. 8 **[NLS Tab 4]**

61. More generally, across the subject matter of employee protection and benefits, differing standards between jurisdictions is the norm. A single company with activities in multiple jurisdictions is subject to differing laws in respect of labour relations, employment

standards (like minimum wage and hours of work) and occupational health and safety. Even the conditions of public pension benefits may differ between provinces. Each of these reflects different policy decisions made by Parliament and the provincial legislatures.

See for example:
Geoffrey England, *Individual Employment Law* (Irwin, Toronto: 2000) pp 90-93; 103-104, 106-107, 109 **[AGC Tab 24]**; *Reference re Minimum Wage Act of Saskatchewan* [1948] SCR 248 **[AGC Tab 14]**; *Labour Standards Regulations (Amendment)* Regulation 12/17 s 1 **[AGC Tab 34]**; *Règlement sur les norms du travail* N-1.1 r. 3 ss 3-4.1 **[AGC Tab 39]** (Employment Standards);

George W. Adams, *Canadian Labour Law* (Canada Law Book: Aurora, 2017) ch. 2.1 **[AGC Tab 25]**; *Ontario Hydro v Ontario (Labour Relations Board)* [1993] 3 SCR 327 **[AGC Tab 16]** (Labour Relations)
Bell Canada c. Québec (CSST), [1988] 1 R.C.S. 749 **[AGC Tab 4]** (Health & Safety)

Loi sur le régime de rentes du Québec RLRQ c R-9 art 120.1; *Canada Pension Plan Regulations* CRC c 385 art 78.3 (Public Pensions)

62. Legislation from one jurisdiction to another may not be uniform. It may even be substantially different. That is a feature of our federal system of government and of the sovereign choices of the legislatures, and of the executive branches of the governments of Newfoundland and Labrador, Quebec, and Canada. It is a political and legislative reality, and not a legal dilemma that the judiciary should resolve. The wisdom of policy decisions is not the purview of the courts.

Ontario Hydro, supra at pp 358, 375**[AGC Tab 16]**
In re References, supra, at p 594 **[AGC Tab 11]**

63. In any case, Parliament has taken significant and important measures to protect the interests of employees. In the *PBSA 1985,* Parliament sets out extensive minimum standards for pension benefits, including in the case of insolvency of the employer. It created an option for harmonization, dependent obviously on not only the will of the federal executive but of the provincial governments as well. It further created OSFI and empowered it to ensure that the rights and interests of plan members, as provided for by the *PBSA 1985* were protected.

> See for example *Arrangement relatif à Bloom Lake g.p.;* 2015 QCCS 3064 paras. 34-37 **[NLS Tab 3]**. See also Statement of Facts, para. 16; *Office of the Superintendent of Financial Institutions Act* RSC 1985 c 18 (3rd Supp) s 4(2.1) and (3) **[AGC Tab 36]**

64. Pension members rightly view their pension benefits as compensation, and there is a justifiable sense of unfairness whenever retirees' benefits are reduced. Through provisions like section 8(2) of the *PBSA 1985*, Parliament struck a balance, ensuring protection in the event of insolvency of the employer of some pension debts ahead of all other creditors, without discouraging the creation of private pension plans. OSFI has played, and will continue to play, an active role in the Wabush *CCAA* process to ensure that all rights and interests of the plan members provided for by law are protected.

e) The application of the PBSA 1985 and the non-application of the PBA to these employees are consistent with the division of powers

65. The AGC considers that the above discussion and statutory interpretation are dispositive of question 2(a). However, Representative Counsel argues that statutory interpretation leads to a different conclusion than that put forward by the NL Superintendent, the Attorney General of Quebec/Retraite Québec, and the AGC. Representative Counsel takes the position that the *PBA* purports to apply to federal members of a plan. Were the Court to accept this argument, the AGC would submit in the alternative that were the *PBA* to purport to apply in respect of "federal" members, the *PBA* would be constitutionally inapplicable by virtue of the doctrine of interjurisdictional immunity.

66. The doctrine of interjurisdictional immunity applies to protect the core of a federal head of power from intrusions that would impair the functioning of that head of power. If impairment would occur, the law is declared to be inapplicable. While the application of this doctrine to new areas has been limited since *Canadian Western Bank,* the doctrine is in its "natural area of operation" when protecting the activities of federal works and undertakings.

Canadian Western Bank v *Alberta* 2007 SCC 22 para 67 **[AGC Tab 6]**

67. When interjurisdictional immunity applies, questions of whether or not there is a conflict, and whether the government in whose favour the doctrine applies is exercising its jurisdiction, are irrelevant.

Canadian Western Bank par 44 **[AGC Tab 6]**

68. The first step is to determine whether the *PBA* "trenches on the protected "core" of a federal competence". If yes, the second step is to determine whether the effect on the exercise of the protected federal power is sufficiently serious.

Quebec (Attorney General) v Canadian Owners and Pilots Association 2010 SCC 39 para 27 **[AGC Tab 18]** (*"COPA"*)

69. A provincial law purporting to impose such conditions on a federal work would trench on the core content of federal jurisdiction.

70. The *PBSA 1985* and other statutes that set out standards for conditions of employment of employees of federal works and undertaking are enacted pursuant to section 91(29) of the *Constitution Act, 1867.* The federal government has jurisdiction over federal works and undertakings pursuant to s 91(29) and 92(10) of the *Constitution Act, 1867.* Federal jurisdiction over works, undertakings or businesses within the legislative authority of Parliament includes the jurisdiction to regulate employment in respect of those works.

71. Private pension benefits are part of the overall compensation that employees receive in exchange for their labour. They are part and parcel of wages and other essential conditions of employment.

Buschau v Rogers Communications Inc 2006 SCC 28 para 12 **[NLS Tab 6]**; *Association provinciale des retraités d'Hydro-Québec c Hydro-Québec*, 2005 QCCA 304 para 39 **[AGC Tab 3]**; *Huus v. Ontario (Superintendent of Pensions)*, 2002 CanLII 23593 para. 25 (ONCA) **[AGC Tab 10]**

72. The exclusive core federal jurisdiction over federal works and undertakings has been consistently held to include "the determination of such matters as hours of work, rates of wages, working conditions, and the like".

Tessier Ltée v Quebec (Commission de la santé et de la sécurité du travail) 2012 SCC 23 paras. 13-18 **[AGC Tab 21]**
Commission du Salaire Minimum v. Bell Telephone Company of Canada, [1966] SCR 767 **[AGC Tab 8]**; *Ontario Hydro v Ontario supra* **[AGC Tab 16]**

73. Were Representative Counsel's argument to be correct, the *PBA* would impose on the employer both substantive and procedural requirements concerning the financing of a pension plan and the rights of "federal" employees. It would trench on the core of the federal power.

74. With regard to the second step of the analysis, the Supreme Court of Canada has consistently held that intrusions into labour relations and conditions of employment in relation to federal works are serious. These intrusions do not merely "affect" the operation of the federal work, but amount to legislating in relation to it. This intrusion would impair the federal power over works and undertakings.

Ontario Hydro supra p 378 **[AGC Tab 16]**

Bell Canada (1966) supra p 772 **[AGC Tab 8]**; *Bell Canada c. Québec (CSST)*, [1988] 1 SCR

749, p. 862 **[AGC Tab 4]**, *COPA supra* paras. 27, 45, 48, 53 **[AGC Tab 18]**

75. This is the case in respect of a federal work even if it is part of an otherwise provincially-regulated company. For example, in *Ontario Hydro*, the Supreme Court of Canada considered the law applicable to five nuclear generating stations that had been declared to be works for the general advantage of Canada. A majority of the Court confirmed that the declaration had the effect of conferring federal control over "operation and management" of these works, and that this control included the regulation of labour relations between the company and the employees operating the nuclear generating stations. The provincial labour law was thus inapplicable in respect of the employees of the nuclear generating stations. These employees were subject to federal labour law while the rest of the employees of Ontario Hydro were subjected to provincial labour law.

Ontario Hydro **[AGC Tab 16]**

76. In short, it is clear that were the *PBA* to purport to apply in relation to federal members, it would be constitutionally inapplicable.

77. Finally, in the exercise of its exclusive jurisdiction, Parliament has chosen in the *PBSA 1985* to incorporate provincial rules with respect to certain matters, except in cases of conflict. This deemed adoption of general provincial rules is consistent with other areas of federal law in which the law of a province is incorporated as supplementary. Section 31 of the *PBSA 1985* provides:

31 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	**31** Sous réserve de leur incompatibilité avec les dispositions de la présente loi, les dispositions du droit provincial, relatives au service des prestations de pension ou à la désignation des bénéficiaires au titre de régimes de pension, qui seraient applicables à un régime de pension institué et géré en vue d'offrir des prestations à des salariés qui occupent des emplois inclus, si le droit provincial s'appliquait à ce régime, sont

deemed to apply to such a pension plan as though that employment were not included employment.	réputées s'appliquer à celui-ci comme si l'emploi en cause n'était pas un emploi inclus.

[Our emphasis]

78. For example, provincial laws pertaining to the modalities of designating a beneficiary, and the beneficiaries designated thereunder, are deemed by Parliament to apply unless there is an inconsistency. Similarly, provincial law in relation to payment of benefits ("*dispositions du droit provincial relatives au service des prestations de pensions*") are also deemed to be applicable. For example, provincial laws allowing for garnishment of payments of pension benefits are applicable. Indeed, while the *PBSA 1985* clearly sets standards for benefits and beneficiaries, it is comparatively silent on the designation of beneficiaries and the actual payment of benefits.

79. Contrary to the submissions of Representative Counsel, this section has no application to the deemed trust provisions, which are related neither to designation of beneficiaries nor the payment of benefits.

f) Absence of conflict

80. For the reasons set out above, the factual scenario of the present case and the statutory language at issue raise no conflict between these two statutes. The *PBA* applies to the employer's obligations and the pension benefits in respect of the mine workers and the *PBSA 1985* applies to those in respect of the Railways workers. In determining amounts subject to a deemed trust, each law applies only in respect of amounts related to the benefits of the members within its legislature's jurisdiction.

81. Indeed, this application of the two laws to the plan is in fact currently occurring and has not been shown to create any conflict.

See Statement of Facts, para. 16

82. Were there an appearance of conflict, section 5 of the *PBA* would appear to have the effect of ceding to the federal law. No true conflict would occur.

83. Further in the alternative, were the possible conflict not resolved by principles of statutory interpretation, the constitutional doctrine of interjurisdictional immunity would render the statute inapplicable insofar as it impaired the exclusive federal power over federal works, undertakings and companies.

III) The AGC's representations with respect to reference questions 1, 2(b), and 3

a) 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? 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? Do the Quebec *Supplemental Pension Plans Act* deemed trusts also apply to Quebec Salaried Plan members? [Question 2(b)(i), (ii), and (iii)]:

84. The interpretation of law of another province in the context of a reference to a provincial Court of Appeal is an issue which both courts and governments have carefully avoided in the past.

> *Manitoba Egg Reference* [1971] SCR 689 **[AGC Tab 13]**, see discussion in Peter Hogg, *Constitutional Law of Canada,* Vol 1, 5th ed. Sup., 2016 Carswell p. 21-19 **[AGC Tab 27]**

85. If this Court decides to answer this question, the AGC notes that some members may have reported for work in Quebec for the Railways. As the AGQ recognizes, the *SPPA* would not be applicable to those members. As previously discussed, the *PBSA 1985* is the only law that could apply in respect of such members.

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

86. The AGC submits that the Court should exercise its discretion not to render an opinion on at least part of this question. Whether a lien created by the *PBA* constitutes a *secured* claim under the law of Newfoundland and Labrador and the question of who may

exercise rights provided for under that same law are well within the scope of a reference. The AGC takes no substantive position on these matters.

87. The "validity" of the claim and the whole second part of the question addressing "amounts" each pose serious problems. These cannot be read as seeking an opinion as to the state of the law in the province. They seek conclusions of fact and law in a particular case that is before the Quebec Superior Court.

88. The Court should decline any invitation to answer these aspects of Question 3. As previously indicated, the *CCAA* creates a single scheme for determining the validity, rank, and *quantum* of the different claims filed against the debtor companies. Respectfully, the Newfoundland and Labrador Court of Appeal should not be used to circumvent the process provided for under federal law, particularly on factual determinations.

c) What is the scope of section 32 of the *Pension Benefits Act 1997* SNL 1996 cP-4.01 deemed trusts in respect of (a) unpaid current service costs; (b) unpaid special payments; and (c) unpaid wind-up deficits? [Question 1]

89. The AGC understands this question to be seeking a clarification as to the interpretation to be given to section 32 of the *Pension Benefits Act, 1997*: whether, and to what extent, section 32 of the *PBA* covers unpaid current service costs, special payments, and wind-up deficits. The AGC takes no position on this question.

90. The Court is not asked whether or not the *CCAA* would have paramountcy over the *PBA*. Nor should the Court accept invitations to read into this question a request for their opinion on that matter.

PART V – CONCLUSIONS

For these reasons, the Attorney General of Canada respectfully submits that if this Court considers that the only purpose of the present reference case is to affect the *CCAA* case, then this Court should decline to answer any of the reference questions. However, if this Court considers that it can provide useful advice to the Lieutenant-Governor in Council, then it should do so, but it should do so without reference to the Wabush Entities. Moreover, it should speak to the scope and effect of a reference opinion.

With respect to the questions as posed by the Lieutenant-Governor in Council, the AGC submits the following positions:

Question 1: This question refers only to the interpretation of the *PBA* and does not raise a question of paramountcy. The AGC take no position on this question.

Question 2: The federal *Pension Benefits Standards Act, 1985* is the only pension benefits standards legislation that applies in respect of the members of the Salaried Plan who worked on the Railway, whether in Quebec or Newfoundland and Labrador. The present case raises no conflict between the *PBSA 1985* and the *PBA*.

Question 3: The Court should refrain from addressing the questions of "validity" and "amounts". The AGC takes no position on the remainder of this question.

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Appendix B - Legislation

Appendix B – Index of Legislation