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, as amended

AND

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

AND

IN THE MATTER OF a Reference of The Lieutenant Governor in Council to the Court of Appeal, for its hearing, consideration and opinion on the interpretation of the scope of section 32 of the *Pension Benefits Act*, 1997, SNL 1996, c P-4.01

FACTUM OF THE MONITOR

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Part I - **Concise Statement of Facts**

1. Under the authority of Section 13 of the *Judicature Act*, RSNL 1990, c. J-4, as amended, (the "**NL Judicature Act**") the Lieutenant Governor in Council referred the following questions to this Court by way of Order in council OC 2017-103 dated March 27, 2017:

> 1) The Supreme Court of Canada has confirmed in *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6, that, subject only to the doctrine of paramountcy, provincial laws apply in proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985 c C-36. What is the scope of section 32 of the *Pension Benefits Act, 1997*, SNL 1996 c P-4.01 deemed trusts in respect of:
>
> a) unpaid current service costs;
>
> b) unpaid special payments; and
>
> c) unpaid wind-up deficits?
>
> 2) The Salaried Plan is registered in Newfoundland and Labrador and regulated by the *Pension Benefits Act, 1997*.
>
> a) (i) Does the federal *Pension Benefits Standards Act*, RSC 1985, c-32 deemed trust also apply to those members of the Salaried Plan who worked on the railway (i.e., a federal undertaking)?
>
> (ii) If yes, is there a conflict with the *Pension Benefits Act, 1997* and *Pension Benefits Standards Act*? If so, how is the conflict resolved?
>
> b) (i) Does the Quebec *Supplemental Pension Plans Act*, CQLR, c R-15.1 also apply to those members of the Salaried Plan who reported for work in Quebec?
>
> (ii) If yes, is there a conflict with the *Pension Benefits Act, 1997* and the Quebec *Supplemental Pension Plans Act*. If so, how is the conflict resolved?
>
> (iii) Do the Quebec Supplemental Pension Plans Act deemed trusts also apply to Quebec Salaried Plan members?
>
> 3) Is the *Pension Benefits Act, 1997* lien and charge in favour of the pension plan administrator in section 32(4) of the *Pension Benefits Act, 1997* a valid secured claim in favour of the plan administrator? If yes, what amounts does this secured claim encompass?

(each, a "**Reference Question**", collectively, the "**Reference Questions**").

2. The Intervenor, FTI Consulting Canada Inc., is acting as the court-appointed monitor (the "**Monitor**") to Wabush Iron Co. Limited, Wabush Resources Inc., Wabush Mines, Arnaud Railway Company and Wabush Lake Railway Company Limited (collectively, the "**Wabush**

CCAA Parties") in the context of proceedings initiated pursuant to the terms of the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36, as amended (the "**CCAA**") before the Quebec Superior Court for the District of Montreal, Commercial Division (the "**CCAA Court**") in the Court record bearing number 500-11-048114-157 (the "**CCAA Proceedings**").

3. On September 20, 2016, the Monitor filed a *Motion for Directions with Respect to Pension Claims*, as amended on April 13, 2017 (the "**Monitor's Motion for Directions**") with respect (a) to the priority of pension claims filed by the plan administrator of two defined benefit plans (commonly referred to as the Union DB Plan and Salaried DB Plan, collectively the "**DB Plans**"), as well as (b) the applicability and scope of deemed trust, lien and charge, if any, under the *Pensions Benefits Standards Act*, RSC 1985, c. 32 (2nd Supp.) (the "**PBSA**"), the Newfoundland & Labrador *Pensions Benefits Act*, SNL 1996, c. P-4.01 (the "**PBA**"), as well as the Quebec *Supplemental Pension Plans Act*, RLRQ, c. R-15.1 (the "**SPPA**").

4. Although all the parties before the CCAA Court, including Her Majesty the Queen in right of Newfoundland & Labrador, acknowledged that the CCAA Court had exclusive jurisdiction to hear the Monitor's Motion for Directions and to deal with all the issues raised therein, certain parties asked to have certain questions respecting the scope of the PBA and its effect on the CCAA Proceedings referred instead to the Courts of Newfoundland and Labrador.

5. On January 30, 2017, Justice Stephen W. Hamilton, rendered a decision (the "**January 30 Decision**")[1] declining to refer any questions to the Courts of Newfoundland and Labrador, including specifically the questions articulated at paragraph 25 thereof, which are identical to the Reference Questions. The preamble to the Reference Questions makes specific reference to paragraph 25 of the January 30 Decision.

6. The Reference Questions are inextricably related to the CCAA Proceedings in relation to the Wabush CCAA Parties. As such, there exist a significant risk that the Reference could lead certain interested parties to mistakenly believe that issues relating to Wabush CCAA Parties are open for adjudication both before the CCAA Court and this Court. The Monitor is particularly concerned by any actual, possible or perceived duplication of process, inconsistency or

[1] *Arrangement relatif à Bloom Lake*, 2017 QCCS 284 [**Tab 1**].

contradiction in the parallel adjudicative process before the CCAA Court and the consultative process before this Court. The first part of the Statement of Facts, which is limited exclusively to the CCAA Proceedings, further compounds the risk of either creating unfounded expectations by the members and beneficiaries of the Salaried DB Plan (as defined at paragraph 9 of the June 26, 2017 Factum of the Superintendent of Pensions of Newfoundland and Labrador, the "**NL Superintendent of Pensions' Factum**"), exacerbate the consequences which could result from potentially conflicting rulings by the CCAA Court and this Court or undermine the legitimacy of the CCAA Court's authority and ultimately of the Reference process.

7. The Monitor's Motion for Directions has been heard on the merits by the CCAA Court on June 28 and 29, 2017 and that matter has been taken under advisement by the CCAA Court. The CCAA Court was duly informed as part of said hearing about the preliminary ruling of this Court rendered on June 9, 2017 with respect to the Monitor's Application for Directions.

8. The Factum of Representative Counsel clearly and unequivocally illustrates the risk of conflating this Reference using a summary Statement of Facts to serve as an hypothetical fact pattern to bring focus on the Reference Questions to be answered by way of a consultative opinion, with a relitigation of pending disputed issues currently heard by a Court of another province exercising exclusive jurisdiction over that matter.

9. The Monitor does not believe the Introduction to the Factum of Representative Counsel to be helpful or appropriate given that none of these facts have been adduced into evidence and that the Statement of Facts should merely serve as an hypothetical scenario. Also, the Monitor is of the view that paragraphs 32 to 35 (as they related with the occurrence of a "liquidation", a mixed issue of fact and of law to be answered only by the CCAA Court), 53 to 62 (as they relate to paramountcy, impact of the CCAA and scope of previous orders by the CCAA Court), 77 to 80 (pertaining to the PBSA), and 84 (as it relates to paramountcy) should be struck out from the Representatives Counsel's Factum and should not be considered by this Court.

Part II - **List of the Issues**

10. The three questions which were originally articulated by Representative Counsel as part of the preliminary jurisdictional dispute before the CCAA Court rest on two incorrect legal premises:

    (a) First, that the PBA deemed trust, lien and charge, unlike the deemed trusts created by the PBSA and SPPA (both of which do not create a similar lien and charge), cover not only unpaid normal and special contributions, but that they also extend to the wind-up deficit;

    (b) Second, that PBA deemed trust applies not only in favour of salaried employees that reported to work in Newfoundland, but also extended in favour of employees that reported to work in Quebec or to federally regulated undertakings.

11. Although it conceded before the CCAA Court that the deemed trusts created pursuant to the PBSA and SPPA did not extend to the wind-up deficit, Representative Counsel took the position that all Salaried members could benefit from the PBA deemed trust even though they reported to work in Quebec or to a federally regulated undertaking. This position was not supported by Retraite Québec, the Office of the Superintendent of Financial Institution (**OSFI**), the Newfoundland and Labrador Superintendent of Pensions (the "**NL Superintendent of Pensions**") or by the Monitor.

12. The proper scope of application of pension legislation subsumed in Reference Question #2 was debated before the CCAA Court on June 28 and 29, 2017. Given that the Monitor and the NL Superintendent of Pensions are in basic agreement concerning the proper application of the PBA, PBSA and SPPA and the absence of operational conflict, the Court does not understand why Reference Questions #2 was submitted, or why the Newfoundland Attorney General insists to receive a consultative opinion on these private issues already litigated before a competent Court exercising exclusive jurisdiction over the matter.

13. The Monitor respectfully submits that this Court should first consider its jurisdiction and discretion to decline answering at all the Reference Questions.

14. In the alternative, should this Court decline answering at all the Reference Questions, the Monitor submits that Reference Questions #1 and #3 should be folded into a single question and

be limited to the wind-up deficit, inasmuch as the extension of Section 32 PBA to cover unpaid normal and special contributions is not controversial.

15. In any event, the Monitor will invite this Court to decline to answer Reference Question #2 inasmuch as the Monitor concurs with the position advanced by the NL Superintendent of Pensions, that this question is inextricably tied to the affairs of the Wabush CCAA Parties and, absent any evidence to the contrary, is only of interest to members and beneficiaries of the (Wabush) Salaried Plan.

16. For the purpose of articulating its arguments, the Monitor submits the three following questions:

(a) Does this Court possess the jurisdiction to decline to answer the Reference Questions (or to interpret same) and how should it exercise its discretion in the circumstances?

(b) What is the proper scope of application of the pension legislation (PBA, PBSA and SPPA) in the context of a multi-jurisdictional pension plan covering employees that reported to work in Newfoundland, in Quebec and to federally regulated undertakings?

(c) What is the scope of Section 32 PBA and does it extend to the wind-up deficit?

which three questions will be reviewed in turn in Part III of this Factum.

Part III - **Argument**

A. Jurisdiction and discretion to decline to answer questions or to interpret same

17. This Court possesses a residual discretion not to answer reference questions.[2] Although used sparingly, this discretionary power has been framed in very broad terms by the Supreme Court of Canada in the *Same-Sex Reference*[3] (at paragraph 62):

> "… [T]he Court may decline to answer reference questions where to do so would be inappropriate, either because the question lacks sufficient legal content (which is not the case here) or because attempting to answer it would for other reasons be problematic."

18. For example:

- In *Re The Quebec Timber Company*, (1882) Coutlee 43, Jrnls of Sen. of Can XVI at 158-59 [**Tab 3**] (declining to answer the Canadian Senate's question of whether a company incorporated under the *Companies Act* of 1862 to 1880, such as the Quebec Timber Company, has a legal corporate existence in Canada) (*per curiam*):

  > "The Court pray to be excused from answering this question, on the ground that the question affects private rights which may come before it judicially, and which ought not to be passed upon without trial."

- *A.G. for Canada v A.G. for Ontario, Quebec and Nova Scotia*, [1898] AC 700, at 717 [**Tab 4**] (declining to answer the Governor-General's question of whether "riparian proprietors, before confederation, [had] an exclusive right of fishing in navigable non-tidal lakes, rivers, streams, and waters, the beds of which had been granted to him by the Crown.") (*per* Herschell, L.J.):

  > "Their Lordships must decline to answer the last question submitted as to the rights of riparian proprietors. These proprietors are not parties to this litigation or represented before their Lordships, and accordingly their Lordships do not think it proper when determining the respective rights and jurisdictions of the Dominion and Provincial Legislatures to express an opinion upon the extent of the rights possessed by riparian proprietors."

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2 This power has been highlighted by this Court in its June 9, 2017 decision in this matter.
3 *Reference Re Same Sex Marriage*, [2004] 3 SCR 698 ("***Same-Sex Reference***") [**Tab 2**].

- *A.G. of Canada v Canadian Pacific Railway Company*, [1958] SCR 285, at 294 [**Tab 5**] (abstaining from answering three of the four questions asked by the Government of Manitoba in relation to title to land being acquired by a railway company such as the Canadian Pacific and Canadian National) (per Rand, J.):

> "In these circumstances, by answering questions 2, 3 and 4 we would be expressing an opinion that might seriously affect private rights in the absence of those claiming them, a step which would be contrary to the fundamental conception of due process, the application of which to opinions of this nature has long been recognized."

- *Reference Re Upper Churchill Water Rights Reversion Act*, [1984] 1 SCR 297 rev. 1980, (1982) 36 Nfld. & P.E.I.R. 273, at 306 (Nfld CA) [**Tab 6**]. This Court only answered questions relating to the validity of the Act in its entirety, but declined to respond to the four questions in connection with the particular effects of those sections (*per* Morgan J.A.):

> "It is undesirable for the Court to answer in the abstract questions that may involve consideration of debatable fact and which may affect the rights of persons not represented before it."

On appeal, McIntyre J., for the Supreme Court, held the Act *ultra vires* in response to the ninth question, making the other eight questions moot. In passing, McIntyre J. noted the decision of this Court to decline to answer four of the referenced questions and quoted the brief passage above (at page 315).

- *Reference re Same-Sex Marriage*, [2004] 3 SCR 698, paras. 61-71 [**Tab 2**] (declining to answer the fourth reference question as to whether the opposite-sex requirement for marriage established by the common law and set out for Québec in the *Federal Law–Civil Law Harmonization Act, No. 1* consistent with the *Canadian Charter*) (*per curiam*):

> "A unique set of circumstances is raised by Question 4, the combined effect of which persuades the Court that it would be unwise and inappropriate to answer the question.

> The first consideration on the issue of whether this Court should answer the fourth question is the government's stated position that it will proceed by way of legislative enactment, regardless of what answer we give to this question. . . .
>
> The second consideration is that the parties to previous litigation have now relied upon the finality of the judgments they obtained through the court process. . . .
>
> There is no precedent for answering a reference question which mirrors issues already disposed of in lower courts where an appeal was available but not pursued. Reference questions may, on occasion, pertain to already adjudicated disputes: see, e.g., Reference re Truscott, 1967 CanLII 66 (SCC), [1967] S.C.R. 309; Reference re Regina v. Coffin, 1956 CanLII 94 (SCC), [1956] S.C.R. 191; Reference re Minimum Wage Act of Saskatchewan, 1948 CanLII 36 (SCC), [1948] S.C.R. 248; and Reference re Milgaard (Can.), 1992 CanLII 96 (SCC), [1992] 1 S.C.R. 866. In those cases, however, no appeal to the Supreme Court was possible, either because leave to appeal had been denied (Truscott and Milgaard) or because no right of appeal existed (Coffin and Minimum Wage Act of Saskatchewan). The only instance that we are aware of where a reference was pursued in lieu of appeal is Reference re Newfoundland Continental Shelf, 1984 CanLII 132 (SCC), [1984] 1 S.C.R. 86. That reference is also distinguishable: unlike the instant reference, it was not a direct response to the findings of a lower appellate court and the parties involved in the prior proceedings had consented to the use of the reference procedure.
>
> The final consideration is that answering this question has the potential to undermine the government's stated goal of achieving uniformity in respect of civil marriage across Canada. There is no question that uniformity of the law is essential."

19. The Monitor submits that this Court should decline to answer the Reference Questions or subsidiarily to reformulate Reference Questions #1 and #3 (as previously suggested in Part II) considering the cumulative impact of the following factors:

(a) The CCAA Court is not only a competent Court to hear the Monitor's Motion for Directions, but also exercises exclusive jurisdiction over that matter as part of the Wabush CCAA Proceedings;

(b) The CCAA Court has heard the Monitor's Motion for Directions on June 28 and 29, 2017 and has taken the matter under advisement;

(c) The parties before this Court are all represented in the Wabush CCAA Proceedings and have made representations before the CCAA Court, not only as part of the June 28 and 29 hearings, but also with respect to the jurisdictional issues decided by way of the January 30 Decision;

(d) Her Majesty in Right of Newfoundland, as represented by the NL Superintendent of Pensions did not appeal the January 30 Decision, participated in the June 28 and 29 hearings and recognized in its factum (at paragraph 11) that the CCAA Court exercises exclusive jurisdiction over the Monitor's Motion for Directions and the issues raised therein;

(e) The Reference Questions are amongst the issues which were already argued before Justice Stephen W. Hamilton who has acted throughout as the supervising judge with carriage of the Wabush CCAA Proceedings;

(f) In deciding the scope and operation of the deemed trust, lien and charge pursuant to Section 32 PBA, the CCAA Court will also need to determine additional issues which do not form part of the Reference Questions, including the issue of constitutional paramountcy / interplay between pension legislation and the CCAA, and the question as to whether the application of Section 32(2) PBA has been triggered based on the occurrence of a "liquidation" before or since the inception of the Wabush CCAA Proceedings;

(g) The NL Superintendent of Pensions, nor the Attorney General for the Province of Newfoundland, have offered any justification for the need or the opportunity to submit the Reference Questions before a final decision is made by the CCAA Court (subject to possible appeals before the Quebec Court of Appeal or the Supreme Court of Canada);

(h) The general "importance" of the Reference Questions outside the Wabush CCAA Proceedings is questionable and has not been established.[4] The Statement of Facts contain no statistical evidence concerning the existence and the importance of multi-

[4] Unlike Section 53(3) of the *Supreme Court Act*, RSC 1985, c. S-26 [**Tab 25**], the *NL Judicature Act* [**Tab 19**] does not create a presumption that reference questions are "important".

jurisdictional defined benefit pension plans registered in Newfoundland including members that report to work in Quebec or in federally regulated undertakings;

(i) The NL Superintendent of Pensions and the Attorney General for the Province of Newfoundland, have refused to reformulate Reference Questions #1 and #3 as suggested by the Monitor in accordance with the comments made by the CCAA Court during a hearing held on May 31, 2017, the whole as submitted to this Court on June 9, 2017;

(j) The scheduling of the Reference in combination with the refusal of the Attorney General for the Province of Newfoundland to reconsider the formulation of the Reference Questions could amount effectively to a re-litigation before this Court of the same issues pending before the CCAA Court, with the associated risk that such duplicative proceedings might either waste scarce judicial resources (should this Court and the CCAA Court answer the same questions in the same way) or undermine the integrity of the administration of justice (should they answer differently);

(k) Given the fact that the Reference appears to be "justified" exclusively by the ongoing Wabush CCAA Proceedings, and the strong *nexus* between this Reference and the Wabush CCAA Proceedings, there appears to be no cogent reason justifying the Reference to proceed while a final decision, which may turn out to fully support the positions articulated by the Newfoundland Superintendent of Pensions, has not yet been rendered;[5]

(l) Even if this Court were of the view that Section 32 PBA extends to the wind-up deficit, the enforceability of a deemed trust to secure the payment of the wind-up deficit upon termination of the salaried DB Plan in December 2015 (after the commencement of the Wabush CCAA Proceedings) raises multiple additional questions which are clearly excluded from the Reference Questions, making any determination of Questions #1 and #3 in the present context highly problematic.

20. The integrity, credibility and effectiveness of the judicial and adjudicative process is at the core of the inherent discretion of the Court to prevent abuse of process and to bar the re-litigation of

[5] See: *Same Sex Reference*, *supra* note 3 at para. 68 [**Tab 2**].

identical issues in subsequent proceedings. Judicial economy and the need to avoid inconsistent rulings "compel[] a bar against relitigation" that is "unencumbered by the specific requirements of *res judicata*", as recognized by Arbour J. in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, paras. 42, 43, 51 [**Tab 7**]:[6]

> [I]f the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. [But] if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

21. In exercising its discretion to decide whether to decline answering the Reference Questions, this Court should also consider the underlying principle that "a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it."[7] Further, attention should be paid to the principles of comity, which "apply with much greater force between the units of a federal state",[8] including the constitutional mandate inherent in the Canadian Constitution to respect and uphold the judicial process of the courts of sister provinces as part of an "essentially unitary" court system.[9]

B. Scope of application of pension legislation

22. The Monitor is of the view that there exist no operational conflict between the PBA, which governs the deemed trust(s) created in favour of employees that reported to work in Newfoundland, the SPPA which governs the deemed trust created in favour of employees that reported to work in Quebec, and the PBSA which governs the deemed trust(s) created in favour of employees that reported to work to federally regulated undertakings.

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6 *See also Ontario v. Ontario Public Service Employees Union*, [2003] 3 SCR 149 at paras 9 and 12 [**Tab 8**]; *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, para. 51 [**Tab 9**]; *British Columbia (Attorney General) v. Malik*, 2011 SCC 18, paras. 40-43 [**Tab 10**]; *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 [**Tab 11**]; *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, paras. 37-42 [**Tab 12**].

7 *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, para. 20 [**Tab 13**] (describing the doctrine of collateral attack).

8 *Morguard Investments Ltd. v. De Savoye*, [1990] 3 SCR 1077, at 1098 [**Tab 14**].

9 *Hunt v. T&N plc*, [1993] 4 SCR 289, at 322 [**Tab 15**].

23. The wording of the Salaried DB Plan (paragraph 2.25 and Section 14) clearly supports the existing legal framework and limitations.[10]

24. The 1986 Memorandum (unlike the 2011 and 2016 CAPSA Agreements)[11] specifically provides for the delegation of certain functions and powers by a "minor authority" in favour of a "major authority", but does not in any way contemplate, that the "major authority" will apply its own legislation to all members of a multi-jurisdictional pension plan.

25. Both OSFI and Retraite Québec concede that the deemed trusts created pursuant to the PBSA and the SPPA do not cover the wind-up deficit and do only extend to the benefit of employees that reported to work to a federally regulated undertaking and to a place of work in Quebec respectively.

26. The Monitor agrees with the NL Superintendent of Pensions that there exist no conflict and further restates that Question #2 need not to be answered.

C. Scope of 32 PBA and extension to the wind-up deficit

27. Section 32 PBA provides for a deemed trust to secure the different amounts described under Sections 32(1)(a), 32(1)(b) and 32(1)(c). Section 32(1) PBA simply states that the employer shall keep these amounts separate and apart from its own money and it be deemed to hold same in trust.

28. The deeming provision of Section 32(2) according to which an amount equal to the amounts described under Section 32(1) are to be considered held in trust and "considered to be separate from and form no part of the estate […] 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" is only triggered if certain conditions or trigger events occur.

29. These triggers are limited to liquidation, assignment or bankruptcy of the employer. While the scope and meaning of "assignment" or "bankruptcy" appear uncontroverted, there exist fundamental difference of opinions with respect to the proper meaning of "liquidation" as a

[10] See paragraphs 71 to 78 of the NL Superintendent of Pensions' Factum.
[11] The 2011 and 2016 CAPSA Agreements are filed in support of the NL Superintendent of Pensions' Factum [**Tabs 20 and 21**].

possible trigger for the crystallization of deemed trusts under the PBA and the PBSA: this issue will be decided by the CCAA Court and does not form part of the Reference Questions.

30. On the other hand, upon the termination of a plan (in whole or in part), Section 32(3) PBA merely states that the employer who is required to pay contributions to the plan shall hold in trust an equivalent amount of money, without additional deeming language found at Sections 32 (1) and (2) PBA. Section 32 PBA reads as follows:

> 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).
>
> [Our underlining]

31. In parallel to Section 32(3) PBA (which is very limited in scope and clearly does not extend to the full wind-up deficit and does not include extended deeming provisions charging the assets of the employer), Section 61 PBA provides for payments to be made on or after the event of termination:

> 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.
>
> [Our underlining]

32. The wind-up deficit is payable pursuant to Section 61(2) PBA.

33. The Monitor respectfully submits that the proper interpretation of the PBA does not allow for the wind-up deficit pursuant to Section 61(2) PBA to be included in the amounts the employer is obliged to hold in trust pursuant to Section 32(3) PBA.

34. In interpreting a law, there is only one principle or approach, namely, that the words of an act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the act, the object of the act, and the intention of Parliament. If there is an

ambiguity, it must be "real." The words of the provision must be "reasonably capable of more than one meaning."[12]

(i) The Scheme of PBA

35. At first glance, it is evident that Section 61(1) parallels the deemed trust language found at Section 32(1) PBA. The correspondence between the deemed trust of Section 32(1) and Section 61(1), and the absence of any such correspondence with Section 61 (2), makes it clear that the wind-up deficiency of Section 61(2) is not covered by the deemed trust provisions or the lien and charge pursuant to Sections 32 (3) and (4) PBA.

36. The distinct nature of the payments owing under Sections 61(1) and 61(2) PBA is echoed by distinct rules under Sections 25 and 25.1 of the *Pension Benefits Act Regulations,* NLR 114/96 (**PBA Regulation 114/96**):[13]

> Payments upon plan termination
>
> 25. Where an employer is required or liable to make payments into a pension fund in accordance with subsection 61(1) of the Act, the employer shall make those payments within 30 days of the date of termination of the plan.
>
> Payments upon plan termination to fund benefits
>
> 25.1 (1) The amount required to be paid under subsection 61(2) of the Act shall be divided into equal payments that are calculated over a period of not more than 5 years commencing from the date of termination of the pension plan.
>
> (2) Payments shall be made at least quarterly, with interest at the solvency valuation rate, commencing from the date of termination of the pension plan.
>
> (3) Notwithstanding subsection (2), the first payment is due no later than 2 weeks following the date that the report required by the superintendent under subsection 60(2) of the Act is filed by the administrator of the pension plan. […]

37. Section 61 PBA was amended in 2008 by adding paragraph 2.

38. Section 32 PBA was not amended to reflect the changes made by Section 61(2) PBA. Thus the amounts to be held in trust upon termination are limited to the amounts detailed in

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12 *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, [2002] 2 SCR 559, at paras. 26, 29 and 30 [**Tab 16**].
13 *Pension Benefits Act Regulations*, NLR 114/96 **[Tab 21]**.

Sections 32(1) and 61(1) PBA. Clearly the Act does not provide for the wind-up deficit to be held in a trust, since 61(2) and 61(1) PBA are mutually exclusive as stated already.

(ii) Grammatical and Ordinary Sense of the Word "Due"

39. Upon closer inspection of the language of the act, it becomes even more clear that the wind-up deficit under Section 61(2) PBA was never intended to be captured by the trust under Section 32 PBA.

40. Section 32(3) PBA states, in clear terms, that the trust extends only to "employer contributions due under the plan to the date of termination." Likewise Section 32(2)(c)(i) covers amounts due but not yet remitted.

41. Section 25.1 of the PBA Regulation 114/96, with respect to the wind-up deficit, when read in conjunction with Section 60(2) PBA, clearly provides that the first payment to be made on the account of the wind-up deficit "is due no later than 2 weeks" following the date of the wind-up report to be filed within 6 months after the effective date of termination, such that any payments due on account of the wind-up deficit cannot be considered as "… amounts due to the pension from the employer that have not been remitted to the pension fund at the date of termination", within the meaning of Sections 32(1)(c)(i) or 61(1)(c) PBA.

42. When referring to the *Indalex*[14] decision in aid to interpret the proper scope of Section 61(2) PBA and 25.1 PBA Regulation, it is important to point to the relevant applicable provisions of the Ontario *Pension Benefits Act*, RSO 1990, c P.8 ("**OPBA**"), including 57(4), considered by the Supreme Court. In *Indalex*, the Supreme Court of Canada had to determine whether the statutory deemed trust provided for in Section 57(4) OPBA also applied to the wind-up deficiency payments required by Section 75(1)(b) OPBA.

43. The issue at the heart of *Indalex* and the major disagreement between the majority and the minority decisions with regards to the wind-up deficit was the definition of the term "accrued." While the majority under Justice Deschamps opined that the wind-up deficit can be said to have "accrued" to the date of wind up, Justice Cromwell in dissent was of the opinion that the wind-

[14] *Sun Indalex Finance, LLC v United Steelworkers*, [2013] 1 SCR 271, 2013 SCC 6 ("***Indalex***"). NL Superintendent of Pensions Authorities [**Tab 14**].

up deficit has not accrued until its amount is fully constituted and precisely ascertained. The Court never questioned whether the wind-up deficiency was due – it was always understood that it was not.

44. In arriving at her conclusions, Justice Deschamps, writing for the majority, mentioned that as a question of statutory interpretation, an examination of both the wording and context of the relevant provisions of the OPBA was required.

45. The combined wording of Sections 32 and 61 PBA is very different and can easily contrasted with Section 57(3) and (4) OPBA:

> Accrued contributions
>
> (3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund. R.S.O. 1990, c. P.8, s. 57 (3).
>
> Wind up
>
> (4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations. R.S.O. 1990, c. P.8, s. 57(4).
>
> [Our underlining]

46. As stated by Justice Deschamps, the wind-up deemed trust provision provided in Section 57(4) OPBA does not place an express limit on the "employer contributions accrued to the date of the wind up but not yet due." Such interpretation cannot be transposed to the present matter. As a matter of fact, Section 61(1)(b)(ii)[15] PBA is limited to amounts due to the date of termination.

47. The PBA, unlike the OPBA which was analysed in *Indalex*, does not contain a specific deemed trust triggered upon the termination or wind-up of a plan, or clear wording extending the deemed trust to all contributions owing even if not yet due. In addition, the clear wording of 32(3) PBA is limited to unpaid employer contributions to the date of termination.

[15] See also Sections 32(1) and 32(3) PBA [**Tab 20**].

48. Hence, the trust instituted pursuant to Section 32(3) PBA covers only the amounts due under the plan to the date of termination and not "to and including" or "on the date of termination." This is how both the minority and the majority of the Supreme Court in *Indalex* understood the meaning of the term "to the date of termination" (i.e. prior to the date of termination).[16]

49. In short, and as stated above, Section 31(1) PBA was never meant, either prior the 2008 amendment to 61(2) PBA or since that time, to extend to the wind-up deficit.

50. Furthermore, the *Indalex* analysis makes it clear that the argument raised by NL Superintendent of Pensions that only solvent employers can benefit from the payment schedule under Section 25.1 of the PBA Regulation 114/96 does not hold.

51. In *Indalex*, the appellant, like the case at hand, was an insolvent company under CCAA. Within this context of insolvency, Justice Cromwell wrote that Section 31 OPBA, which is in essence similar to Section 25.1 of the PBA Regulation 114/96, allows the employer to space its payments out over the course of five years (and therefore such payments are not yet due).[17] This reading of Section 31 OPBA was also echoed by the Ontario Court of Appeal in *Indalex*.[18]

52. Hence, it is respectfully submitted that both the plain wording of Sections 32 and 61 PBA and their proper interpretation based on a contextual and historical analysis, conducted in accordance with *Indalex*, support the position of the Monitor.[19]

53. The lien and charge in favour of the plan administrator pursuant to Section 32(4) PBA extends to the same amounts secured by the deemed trust in accordance with subsections (1), (2) and (3). Nothing more, nothing less. Again, it does not extend to the wind-up deficit for the same reasons stated above.[20]

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16 *Indalex*, *supra* note 14, at paras. 34 and 147-149.

17 *Indalex*, *supra* note 14, at paras. 128, 146 and 177.

18 *Indalex Limited (Re)*, 2011 ONCA 265, at paras 92, 98 to 103, more specifically para. 100. NL Superintendent of Pensions Authorities [**Tab 7**].

19 Section 16 of the *Interpretation Act*, RSNL 1990, c. I-19 [**Tab 18**] provides that: "*16. Every Act and every regulation and every provision of an Act or regulation shall be considered remedial and shall receive the liberal construction and interpretation that best ensures the attainment of the objects of the Act, regulation, or provision according to its true meaning.*"

20 The question as to whether said lien and charge remains valid and enforceable under the CCAA is a question to be answered by the CCAA Court alone and does not form part of the Reference Questions.

54. The interpretation suggested by the NL Superintendent of Pensions amounts to re-drafting of Sections 32(1), 32(3) and 61(2) PBA, first by importing a distinction between the regimes applicable to solvent and insolvent employers and creating distinct payment schedules not contemplated by the PBA and its regulations, and second by deeming the whole wind-up deficit payable as of the date of termination (paragraphs 40, 42 and 43 of the Factum) in clear contradiction of Sections 61(2) PBA and 25 and 25.1 of the PBA Regulation 114/96.

55. Irrespective of the optional five-year delay to repay the wind-up deficit, Section 25.1(3) of the PBA Regulation 114/96 nevertheless specifically provides that "… the first payment is due no later than 2 weeks following the date that the report" required by 60(2) PBA is filed: 60(2) PBA provides for the filing of such report within 6 months after termination of the plan.

56. The Monitor respectfully submits that should it decide to answer the Reference Questions, this Court should elect to render a consultative opinion concerning the proper interpretation and scope of 32 PBA as it relates to wind-up deficits, without reference to the Wabush CCAA Parties and to the CCAA Proceedings.

Part IV - **Order and Relief Sought**

57. The Monitor prays this Court to decline to answer the Reference Questions or alternatively state that the trust, lien and charge created under Section 32 PBA do not extend to the wind-up deficit.

DATED AT St. John's, Newfoundland and Labrador, this 14 day of August, 2017.

Martin Whalen Hennebury Stamp

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APPENDIX A – INDEX OF AUTHORITIES

APPENDIX B – STATUTES AND REGULATIONS