

2017 01H 0029  
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
COURT OF APPEAL

IN THE MATTER OF Section 13 of  
Part 1 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 interpretation of  
the scope of section 32 of the *Pension  
Benefits Act, 1997*, SNL 1996 c P-4.01

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SUPPLEMENTARY FACTUM OF THE ATTORNEY GENERAL OF  
NEWFOUNDLAND AND LABRADOR

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## INTRODUCTION

1. The Court of Appeal has sought further written submissions on subsection 32(4) of the *Pension Benefits Act, 1997*, SNL 1996, c P-4.01 [the "NL PBA"]:

32 (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).

*Pension Benefits Act, 1997*, SNL 1996, c P-4.01  
Factum of the Monitor, Tab 20

2. This provision is similar to a provision found in Ontario's *Pension Benefits Act*, RSO 1990, c P.8 [the "Ontario PBA"]:

57 (5) The administrator of the pension plan has a lien and charge on the assets of the employer in an amount equal to the amounts deemed to be held in trust under this section.

*Pension Benefits Act*, RSO 1990, c P.8  
Factum of the Monitor, Tab 22

3. The purpose of these provisions, and one of the purposes of the NL PBA, is to provide additional protection to the beneficiaries under a pension plan. This statutory lien creates a legal, as opposed to equitable, interest in the assets of the employer.

*Davies Ward, Carswell's Pension Manual*, para 10.7(c)(ii)  
Supplementary Factum of the AG NL, Tab 1

4. While subsection 32(4) of the NL PBA is a concise provision, it is necessary to apply the proper principles of statutory interpretation when determining its meaning. The Court of Appeal spoke to the proper approach to statutory interpretation in the recent case of *Lynch v St. John's (City)*, 2016 NLCA 35 ["*Lynch*"], where Justice Barry wrote as follows:

[31] As noted by the majority of this Court in *Archean Resources Ltd. v. Newfoundland (Minister of Finance)*, 2002 NFCA 43, 215 Nfld. & P.E.I.R.

124 (Nfld. C.A.), at para. 15, the Supreme Court of Canada has adopted as its "modern rule" of statutory interpretation the statement in Driedger, *The Construction of Statutes* (2nd ed., 1983), at p. 87:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

[32] The majority in *Archean Resources Ltd.*, at paragraph 19, also pointed to s. 16 of our *Interpretation Act*, R.S.N. 1990, c. I-19:

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.<sup>1</sup>

*Lynch v. St. John's (City)*, 2016 NLCA 35  
Supplementary Factum of the AG NL, Tab 2

5. The remedial nature of subsection 32(4) of the NL *PBA* and the application of a liberal construction are imperative in reaching a proper conclusion in relation to the questions asked by the Court of Appeal. The questions asked are as follows:
1. When does the lien and charge arise and what triggers its creation?
  2. What is the nature of the lien? Is it fixed or floating?
  3. How does the lien attach in a non-bankruptcy context?
  4. How does the lien in s. 32(4) compare to other statutory liens?

**1) When does the lien and charge arise and what triggers its creation?**

6. The lien and charge found in subsection 32(4) of the NL *PBA* arises and is triggered at the same time as the trusts under subsection 32(1) and 32(3). That is to say, the lien and charge arises with respect to subsection 32(1) when amounts

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<sup>1</sup> Leave to appeal to the Supreme Court of Canada dismissed at 2017 CarswellNfld 41.

referred to in paragraphs 32(1)(a) and (c) first exist. The deemed trust in subsection 32(1) exists on an ongoing basis throughout the life of the plan, and so the lien and charge also exists throughout the life of the plan. This regulation of the plan on an ongoing basis is referred to by Justice Blair of the Ontario Court of Justice in *Canada (Attorney General) v Confederation Life Insurance Co.*, 1995 CarswellOnt 318, where the Ontario PBA was at issue:

[300] If the arrangements did constitute a pension plan within the meaning of the PBA, however, Confederation Life's promise to pay the supplementary pension benefits -- as the Ontario Court of Appeal had noted in *Re St. Marys Paper Inc.* (1994), 1994 CanLII 1232 (ON CA), 19 O.R. (3d) 163 at p. 168, 116 D.L.R. (4th) 448 -- would be "a promise which is subject to the carefully calibrated regulatory scheme set out in the PBA and its regulations". It would be subject to the minimum standards set out in the Act, including the minimum funding requirements of s. 55(1). In *Re St. Marys Paper*, Justices Arbour and Osborne stated (at p. 173):

The PBA and regulations impose an obligation on an "employer" [See Note 1 at end of document] to ensure that a pension plan is adequately funded, both on an ongoing basis and on a wind-up of the plan. *This obligation exists quite apart from the particular funding requirements set out in the pension plan itself. This obligation is central to the regulatory scheme established by the PBA.* The Act requires that its minimum funding standards be met.  
(Emphasis added)

Consequently, if the Confederation Life supplementary retirement income arrangements were governed by the "carefully calibrated regulatory scheme set out in the PBA", it would follow, in my view, that the deemed statutory trust and the deemed statutory charge and lien of ss. 57(3) and (5) would be operative. I think arguments to the effect that the company, in the particular circumstances of the Confederation Life arrangements, is not an employer required to make contributions to a pension plan, cannot prevail in view of the law as articulated in *Re St. Marys Paper Inc.*, supra.<sup>2</sup> [Emphasis added]

***Canada (Attorney General) v Confederation Life Insurance Co.***  
**1995 CarswellOnt 318**  
**Supplementary Factum of the AG NL, Tab 3**

7. This ongoing regulation is also referenced by Kaplan and Frazer in their discussion of the deemed trusts in the Ontario PBA:

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<sup>2</sup> This decision was affirmed on appeal at 1997 CarswellOnt 62, [1997] OJ No. 123, but see paragraph 48 where Justice Austin found, in view of previous conclusions, it was not necessary to consider whether subsections 57(3) and (5) of the Ontario PBA created a "deemed trust" and lien on the assets of Confederation.

Generally, the deemed trust operates in an ongoing plan and on plan wind up. The deemed trust covers employee contributions held by an employer prior to deposit in the pension fund, and employer contributions that are due, but not yet paid into the pension fund. Amounts equal to the required contributions are deemed to be held in trust by the employer until paid into the pension fund, and the plan administrator has a lien and charge on the assets of the employer for an amount equal to the deemed trust. [Emphasis added]

Ari Kaplan & Mitch Frazer, *Pension Law*, pp 389-390  
Supplementary Factum of the AG NL, Tab 4

8. What also follows from the above is that the lien and charge in the NL *PBA* arises with respect to subsection 32(3) when the trust required by that subsection is triggered by the termination in whole or in part of a pension plan.
9. The point at which the lien and charge arise under subsection 57(5) of the Ontario *PBA* is also clarified by a provision in Ontario's *Personal Property Security Act*, RSO 1990, c P.10 (the "Ontario *PPSA*"):
  - 20 (1) Except as provided in subsection (3), until perfected, a security interest,
    - (a) in collateral is subordinate to the interest of,
      - (i) a person who has a perfected security interest in the same collateral or who has a lien given under any other Act or by a rule of law or who has a priority under any other Act, or
      - ...
  - (2) The rights of a person,
    - (a) who has a statutory lien referred to in subclause (1) (a) (i) arise,
      - ...
      - (ii) in any other case, when the lienholder has taken possession or otherwise done everything necessary to make the lien enforceable in accordance with the provisions of the Act creating the lien; ...

*Personal Property Security Act*, RSO 1990, c P.10  
Supplementary Factum of the AG NL, Tab 5

10. Speaking to the Ontario *PBA* and the Ontario *PPSA*, the *Estates Trusts & Pensions Journal* states as follows:

(b) The PBA Statutory Lien

Section 57(5) of the *PBA* provides the administrator of the pension plan with a statutory lien and charge over the employer's assets in the amount of the deemed trust. The priority of this lien is not addressed in either the *PBA* or the *PPSA*. However, s. 20(2)(a)(ii) of the *PPSA* provides that the rights of a person to enforce a statutory lien arise after the lienholder has done everything required by the statute under which the lien was created to make it enforceable. Under the PBA, a statutory lien arises concurrently with the deemed trust. The plan administrator's right to the lien arises as soon as the plan sponsor fails to make the required payments to the plan and such amounts automatically become subject to a deemed trust. If the statutory lien arises prior to the rights of the secured creditor, the plan administrator's lien will have priority. However, if a secured creditor's security interest exists before the plan administrator's lien arises, then the secured creditor's security interest will have priority over the statutory lien in favour of the plan administrator.

On bankruptcy, the priorities of pension claims, and in particular, of the statutory deemed trust in favour of the beneficiaries and the statutory lien in favour of the plan administrator, change. ...

Marnie MK Whitaker et al, *Estates Trusts & Pensions Journal*, pp 288-289  
Supplementary Factum of the AG NL, Tab 6

11. Like the Ontario *PBA*, the NL *PBA* is silent on the priority of the lien and charge.

Unlike the Ontario *PPSA*, NL's *Personal Property Security Act*, SNL 1998, c P-7.1

(the "NL *PPSA*"), does not have a provision similar to subparagraph 20(2)(a)(ii).

The NL *PPSA* does provide as follows:

5. Except as otherwise provided in this Act, this Act does not apply to the following:

(a) a lien, charge or other interest given by rule of law or statute unless the statute provides that this Act applies;

*Personal Property Security Act*, SNL 1998, c P-7.1  
Supplementary Factum of the AG NL, Tab 7

12. The NL *PPSA* does not provide otherwise, and the NL *PBA* does not provide that the NL *PPSA* applies. Therefore, the NL *PPSA* does not apply to the lien under the NL *PBA*.
13. Regardless, as discussed above, the lien and charge in subsection 32(4) of the NL *PBA* arises and is triggered concurrently with the deemed trusts. It is logical that the time at which the lien arises would determine its priority in relation to other secured interests in a non-bankruptcy context.

**2) What is the nature of the lien? Is it fixed or floating?**

14. As discussed above, the deemed trust under subsection 32(1) of the NL *PBA* exists throughout the life of a pension plan. The lien and charge provided by subsection 32(4) as it relates to the deemed trust under subsection 32(1) is, therefore, in the nature of a floating charge on the “assets of the employer” during the life of a pension plan. This interpretation accords with commercial reality, as it allows the employer to deal with its assets in the ordinary course throughout the life of a pension plan.
15. Conversely, the trust under subsection 32(3) of the NL *PBA* arises only on partial or complete termination of a pension plan. The purpose of this subsection is to provide greater protection for plan beneficiaries, which is a particular concern at the time of partial or complete termination of a pension plan. As a result, the lien and charge provided by subsection 32(4) as it relates to the trust under subsection 32(3) is a fixed charge on the “assets of the employer” at the time of partial or

complete termination of a pension plan. It must have been the intent of the legislature to encumber the assets of the employer at partial or complete termination of a pension plan in order to ensure a greater likelihood that the plan beneficiaries will be able to maximize their promised benefits. This interpretation accords with the approach to statutory interpretation endorsed by the Court of Appeal in *Lynch*.

### 3) How does the lien and charge attach in a non-bankruptcy context?

16. Several cases discuss the lien and charge in the context of a bankruptcy. Two such examples are *Ivaco Inc., Re*, 2005 CarswellOnt 3445,<sup>3</sup> and *Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd.*, 2007 ONCA 600.<sup>4</sup>

*Ivaco Inc., Re*, 2005 CarswellOnt 3445, para 12  
Supplementary Factum of the AG NL, Tab 8

*Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd.*,  
paras 3, 16, 25-26, & 32  
2007 ONCA 600  
Supplementary Factum of the AG NL, Tab 9

17. While there are a number of cases that discuss the lien and charge in the context of bankruptcy, there are few, if any, that discuss the lien and charge in a non-bankruptcy context.
18. As discussed above, the lien and charge, like the lien and charge in the Ontario *PBA*, exists at the time the deemed trust arises. In a non-bankruptcy context, this

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<sup>3</sup> Affirmed on appeal at 2006 CarswellOnt 6292, [2006] OJ No 4152 (OnCA). While leave to appeal was granted by the Supreme Court of Canada at [2006] SCCA No 490, 2007 CarswellOnt 2855, no decision from the Supreme Court of Canada was found.

<sup>4</sup> Leave to appeal to the Supreme Court of Canada refused at 2008 CarswellOnt 879.



means a lien and charge exists in the nature of a floating charge throughout the life of the plan in regard to the deemed trust under subsection 32(1) of the NL *PBA*. How the lien and charge in relation to the deemed trust in subsection 32(1) would attach and become fixed is not clear and is not dealt with in the NL *PBA*. Given that the purpose of the NL *PBA* and section 32 is to provide protection to pension plan beneficiaries, the lien and charge must be able to become fixed in order for it to have any remedial effect. That is to say, the legislature must have intended for this lien and charge to, at some point, become fixed and encumber the employer's assets, otherwise there would be no useful remedy provided by the language. The mechanism by which this lien and charge would crystallize and become fixed could be determined by an application to Court.

19. Also in a non-bankruptcy context, the lien and charge would arise and attach at the termination, in whole or in part, of a pension plan by an employer that is a going concern, which, per subsection 32(3) of the NL *PBA*, results in a trust.

#### **4) How does the lien in s. 32(4) compare to other statutory liens?**

20. In addition to s. 32(4) of the NL *PBA*, liens are created by several other statutes in Newfoundland and Labrador. Some of these statutes create similar legislative schemes in relation to their liens. For example, s. 30 of the *City of St. John's Municipal Taxation Act*, SNL 2006, c C-17.1, is a nearly identical provision to s. 101 of the *St. John's Assessment Act*, RSNL 1990, c S-1, and s. 134 of the *Municipalities Act*, SNL 1999, c M-24:

30. (1) Taxes fixed, established and imposed in respect of real property constitute a lien upon that real property, except where the real property is sold for tax arrears by the council.

(2) The lien attaches on the date on which the relevant tax was due to the council and continues for a period of 6 years after or after the last payment on account of the tax or acknowledgement in respect of the tax has been made or given to the council, whichever is the later.

(3) The lien described in subsection (1) is considered to rank in priority over a grant, deed, lease or other conveyance, and over a judgment, mortgage or other lien or encumbrance affecting the real property affected, or the title to the real property.

(4) Where proceedings are taken to enforce the lien within the period of 12 years, the lien shall continue in force until the completion of the proceedings.

(5) The registration of a grant, deed, lease or other conveyance, or of a judgment, mortgage or other lien or encumbrance, whether it was before or after the time the lien for rates attached, in no way affects the priority of the lien.

(6) It shall not be necessary to register the lien in the Registry of Deeds.

(7) Where the real property tax applicable to a property has been paid in full, the city clerk shall, upon demand, provide to a person entitled to the information, a certificate signed by him or her stating that the real property tax has been paid as of the date of the certificate.

21. Section 7 of the *Health and Post-Secondary Education Tax Act*, RSNL 1990, c H-1, s. 31 of the *Mining and Mineral Rights Tax Act, 2002*, SNL 2002, c M-16.1, and s. 18 of the *Revenue Administration Act*, SNL 2009, c R-15.01, are also all similar provisions in relation to the creation of a lien. The provisions state, with minor differences, the following (taken from the *Health and Post-Secondary Education Tax Act*):

7. (1) Until the amount of the tax required to be paid under this Act is paid, it is a 1st lien in favour of the Crown on the entire assets of the estate of the employer and the lien has priority over all other claims of a person against the employer.

(2) The lien referred to in subsection (1) attaches on the date the tax was due to the Crown and continues in force until paid, or until a clearance certificate has been issued by the minister.

(3) A lien for tax in respect of real property is considered to be a 1st mortgage ranking in priority over every grant, deed, lease or other conveyance and over every judgment, mortgage or other lien or encumbrance affecting the real property affected or the title to the real property affected and the minister may discharge the lien by power of sale under the Conveyancing Act.

(4) The registration of a grant, deed, lease or other conveyance, or of a judgment, mortgage, or other lien or encumbrance, whether the registration was before or after the time the lien was attached, does not affect the priority of the lien.

(5) The minister may register the lien in the Registry of Deeds.

22. Other statutes use different language. Section 122 of the *Workplace Health, Safety and Compensation Act*, RSNL 1990, c W-11, states:

122. (1) There shall be included among the debts which under the *Corporations Act* or the *Trustee Act* are in the distribution of the property in the case of an assignment or death or in the distribution of the assets of a company being wound up under either of those Acts to be paid in priority to other debts the amount of an assessment the liability for which accrued before the date of the assignment or death or before the date of the beginning of the winding-up and those Acts have effect accordingly.

(2) Notwithstanding paragraph 124(d), the amount of an assessment or a judgment entered in relation to an assessment, is a first lien upon

(a) all property, real and personal, of the person to whom the assessment is charged, whether or not that property is used in or in connection with or produced by or in the industry in respect to which the employer is assessed; and

(b) all property used in or in connection with or produced in or by the industry for which the employer has been assessed that is owned by another person

subject to municipal taxes and a lien with respect to wages under the *Mechanics' Lien Act* .

(3) In subsection (2) the words "amount of an assessment" include a percentage payable under section 117.

23. While the following is a non-exhaustive list, statutory liens are also created by the *Mechanics' Lien Act*, RSNL 1990 c M-3, the *Mineral Holdings Impost Act*, RSNL 1990 c M-14, the *Petroleum and Natural Gas Act*, RSNL 1990 c P-10, the *Insurance Companies Tax Act*, RSNL 1990 c I-11, and the *Housing Act*, RSNL 1990 c H-11.
24. Depending on the statute, a lien may attach at different times, in different ways, and have different priorities, yet the ultimate effect is essentially the same. Each statute serves to create a legislative scheme in which a lien is created to offer additional protection to a beneficiary, a service provider, or even the Crown. The language used in s. 32(4) of the NL *PBA* also serves to create a statutory lien to be understood and interpreted in relation to the other subsections of the provision, as discussed above.

## **CONCLUSION**

25. In sum, the Attorney General of Newfoundland and Labrador would answer the questions posed by the Court of Appeal regarding s. 32(4) of the NL *PBA* as follows:
1. The lien and charge arises concurrently with the deemed trusts under subsections 32(1) and 32(3), with the former being a trust that exists throughout the life of a pension plan and the latter being a trust that exists on partial or complete termination of the plan.
  2. The lien in relation to subsection 32(1) is in the nature of a floating charge while the lien in relation to subsection 32(3) is in the nature of a fixed charge.
  3. An example of the lien and charge attaching in a non-bankruptcy context would be at any point during the life of a pension plan when the deemed trust under subsection 32(1) exists and the steps required to fix the lien and

charge, as potentially determined by an application to Court, are completed. A further example is where a business that is a going concern decides to terminate its pension plan, in whole or in part, resulting in a trust under subsection 32(3) being created and, consequently, a lien and charge that attaches immediately.

4. While the legislative scheme of the lien and charge created by s. 32(4) is different than in other provincial legislation, the section remains similar in that it creates a lien and charge to provide additional protection to plan beneficiaries.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

**DATED** at the City of St. John's, in the Province of Newfoundland and Labrador this 10<sup>th</sup>  
day of October, 2017.



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## APPENDIX A: LIST OF AUTHORITIES

Ari Kaplan & Mitch Frazer, <i>Pension Law</i> , 2nd ed (Toronto: Irwin Law, 2013)	<b>TAB 4</b>
<i>Canada (Attorney General) v Confederation Life Insurance Co.</i> , 1995 CarswellOnt 318	<b>TAB 3</b>
Davies Ward, <i>Carswell's Pension Manual</i> (Toronto: Thomson Reuters, 2014) (looseleaf updated 2017, release 2) vol 1	<b>TAB 1</b>
<i>Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd.</i> , 2007 ONCA 600	<b>TAB 9</b>
<i>Ivaco Inc., Re</i> , 2005 CarswellOnt 3445	<b>TAB 8</b>
<i>Lynch v. St. John's (City)</i> , 2016 NLCA 35	<b>TAB 2</b>
Marnie MK Whitaker et al, eds, <i>Estates Trusts &amp; Pensions Journal</i> , volume 26, (Aurora, Ontario: Canada Law Book, 2007)	<b>TAB 6</b>

**APPENDIX B: LIST OF STATUTES**

*Personal Property Security Act, RSO 1990, c P.10 [Extracts, Section 20]* **TAB 5**

*Personal Property Security Act, SNL 1998, c P-7.1* **TAB 7**