

October 10, 2017

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***Via E-mail***

Supreme Court of Newfoundland and Labrador  
Court of Appeal  
287 Duckworth Street  
PO Box 937 Stn C.  
St. John's, Newfoundland and Labrador  
A1C 5M3

Attention: Yvonne Fleming, *Registrar*

Dear Registrar and Counsel:

- Re: 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 (the "NLPBA") (the "Reference")**
- Re: In the matter of Section 13 part I of the *Judicature Act*, RSNL 1990, c. J-4**
- Re: In the matter of Section 32 of the NLPBA, 1997**

We are the court-appointed Representative Counsel to all non-union employees and retirees of Wabush Mines.

At the conclusion of the Hearing before the Court of Appeal on September 22, 2017, the Court requested additional submissions on the pension plan's administrator's lien and charge in Section 32(4) of the NLPBA. We enclose a copy of our submissions which we ask you to bring to the panel's attention.

We will be sending a hard copy and our Book of Authorities via courier. Thank you for your assistance in this matter.

Yours truly,  
**KOSKIE MINSKY LLP**



Andrew J. Hatnay  
AJH:hh  
Encls.

c. Parties to the Reference  
KM-3002476v1

File No. 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*, R.S.N.L. 1990, c. J-4

**AND**

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

**AND**

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

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**SUPPLEMENTARY SUBMISSIONS OF REPRESENTATIVE COUNSEL**  
**Re: Pension Plan Administrator's lien and charge in section 32(4) of the**  
***Pension Benefits Act*, S.N.L. 1996 c. P-4.01**

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Representative Counsel to the non-union  
employees and retirees of Wabush Mines

1. These are the Supplementary Submissions of Representative Counsel regarding the Pension Plan Administrator's lien and charge in section 32(4) of the NLPBA.<sup>1</sup> At the conclusion of the hearing on September 22, 2017, the Court requested additional submissions on this issue.

### **The pension plan administrator's lien and charge**

#### ***a) The Administrator's lien under section 32(4) covers amounts due to the plan***

2. As submitted at the hearing and in Representative Counsel's main factum, the purpose of section 32 of the NLPBA is to protect the pension benefits of members of underfunded pension plans by creating deemed trusts with respect of all amounts owing to a pension plan by an employer and also by creating a lien and charge in favour of the pension plan administrator (the "**Administrator**"). Section 32 of the NLPBA states:

#### **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.

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<sup>1</sup> Representative Counsel continues the abbreviations contained in its factum filed for the Reference, dated July 31, 2017.

(2) In the event of a liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that under subsection (1) is considered to be held in trust shall be considered to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own money or from the assets of the estate.

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

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

3. Subsections 32(1) to (3) of the NLPBA state that the amounts owing to a pension plan by an employer that are not paid are deemed to be held in trust "for members, former members, and other persons with an entitlement under the plan". As a trust, the amounts deemed to be held in trust are not the property of the debtor and cannot be distributed to creditors of the debtor. The amount subject to the deemed trusts are thus to be distributed for the benefit of the pension plan beneficiaries effectively operating as a priority, (subject only to federal paramountcy).

***b) The Administrator's lien is a distinct remedy***

4. The lien and charge of the Administrator in section 32(4) is a distinct remedy to protect pension plan members. It creates a statutory secured claim for the Administrator over the same amounts owing to the plan by the employer that are also captured by the deemed trusts. Two main differences between the deemed trusts and the lien and charge are readily apparent:

- (a) the lien and charge creates a secured claim (not a trust claim); and
- (b) the lien and charge is granted to the Administrator, who has a fiduciary duty to the pension plan members (as opposed to the deemed trusts granted in favour of the pension plan beneficiaries).

5. The distinction between a statutory deemed trust and a statutory lien and charge has been summarized as follows:

Although many government claims are protected by both a “deemed trust” and a “statutory lien”, *they are fundamentally different in character. A lien is a form of security* in the sense that it provides the government with access to assets of the debtor to recover payment of a debt. A deemed trust attempts to redefine the property so as to exclude sufficient assets in its possession to satisfy the government claim and to 'deem' such assets to be the property of the government.<sup>2</sup>

6. As distinct remedies, the lien and charge can be effective in case the deemed trusts are not. The Administrator, as a fiduciary, is required to act in the best interests of the pension plan beneficiaries. Certain duties and powers, therefore, flow from the lien and charge, requiring the Administrator to take positive steps to enforce its lien and charge in respect of the pension fund.<sup>3</sup>

7. As a secured claim, as opposed to a trust claim, the Administrator’s lien creates a secured claim in favour of the Administrator over all the employer’s assets, and as such competes with other secured creditors’ claims:

Because the assets subject to the lien remain the property of the debtor, *the question of priority of a competing security interest must be answered by reference to both the statute and the general principles of law.* These principles exclude the priority regimes included in PPSA legislation which expressly apply only to PPSA security interests.<sup>4</sup>  
[Emphasis added]

8. The nature of the Administrator's lien and charge in the Ontario *Pension Benefits Act* ("OPBA") provides further guidance. In *Abraham v. Coopers & Lybrand Ltd.*, the court found that the pension plan *members' lien* under section 23(3) and (4) of an earlier version of the OPBA was separate and distinct from the deemed trusts.<sup>5</sup> Wilson J. held that:

[L]ooking at ...s. 23(3) of the *Pension Benefits Act*, *it is clear that there is both a trust and a separate lien created to protect the employees.* The provincial statutory provisions elevate the employees entitlement beyond

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<sup>2</sup> McElcheran, K., *Commercial Insolvency in Canada* (Butterworths, 2005) at p. 110, Tab 10. See also *Abraham*, *infra*.

<sup>3</sup> *Indalex Limited (Re)*, 2011 ONCA 265 at para. 144, Tab 8.

<sup>4</sup> McElcheran, K., *Commercial Insolvency in Canada* (Butterworths, 2005) at p. 110, Tab 10.

<sup>5</sup> The OPBA was subsequently amended in 1983 to provide the Pension Plan Administrator with the lien and charge, rather than the pension plan members.



simple debt in a creditor/debtor relationship. The provincial legislation creates a lien against assets in the amount of the trust claim.<sup>6</sup>

Wilson, J. went on to find that the plan members' lien places the plan members in the position of secured creditors.

9. In *Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd.* ("**General Chemical**"), the Ontario Superior Court of Justice held that the OPBA:

"creates what is called a "deemed trust" against the employer's assets in an amount equal to the unpaid payments [and] *goes further, and creates a lien in favour of the pension administrator.* This is described as a "lien and charge" on the employer's assets, in an amount equal to the amounts deemed to be held in trust by the deemed trust provisions."<sup>7</sup> [emphasis added]

c) *How the Administrator's lien and charge operates*

i) *The Administrator's lien is a floating charge*

10. The law draws a clear distinction between fixed and floating charges. The basic distinction was articulated by Lord Macnaghten in *Illingworth v. Houldsworth*:

A specific charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, *hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp.*<sup>8</sup> [emphasis added]

11. A statutory lien has been characterized by the Supreme Court of Canada as a device that exists between a fixed and a floating charge, superior to the floating charge but subordinate to a pre-existing, crystallized fixed charge:

[46] The critical significance of the characterization of an interest as being fixed or floating, of course, is that it describes the extent to which a

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<sup>6</sup> *Abraham v. Coopers & Lybrand Ltd.* (1993), 13 O.R. (3d) 649 (Gen. Div.) pp. 664, 695, Tab 2.

<sup>7</sup> *Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd.*, 2006 CanLII 25540, para 41, Tab 6.

<sup>8</sup> *Illingworth v. Houldsworth*, [1904] A.C. 355 (H.L.), at p. 358, Tab 7, cited with approval by the Supreme Court of Canada in *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 at para. 45, Tab 13.

creditor can be said to have a proprietary interest in the collateral. In particular, during the period in which a charge over inventory is floating, the creditor possesses no legal title to that collateral. *For this reason, if a statutory trust or lien attaches during this time, it will attach to the debtor's interest and take priority over a subsequently crystallized floating charge.* However, if a security interest can be characterized as a fixed and specific charge, it will take priority over a subsequent statutory lien or charge...<sup>9</sup> [emphasis added]

12. Under the Supreme Court's characterization, a statutory lien is a proprietary interest of the holder of the lien that has priority over floating charges that have not yet crystallized and so have not affixed to any property of the debtor. However, fixed charges that existed prior to the creation of the statutory lien have already crystallized a proprietary interest in applicable assets, which subordinates the statutory lien with respect to such assets. Since the Administrator's lien takes effect as soon as the amounts owing to the pension plan by an employer became due, the lien creates a secured interest over the assets of the employer, subject only to a fixed security interest that existed prior to the outstanding pension debts first becoming due.

*ii) The Administrator's lien attaches as soon as an amount owing to the pension plan becomes due*

13. A security interest arises upon *attachment*.<sup>10</sup> Attachment refers to the "creation of the security interest":

The PPSA uses the term "attachment" to describe *the creation of the security interest* as distinct from the entry into of the security agreement. Until attachment occurs, no security interest exists and the secured party's rights against the debtor are purely personal and contractual. Conversely, once a security interest attaches, *the secured party acquires proprietary rights in the collateral*.<sup>11</sup>

14. The NLPBA does not set out any conditions required for the Administrator's lien and charge to attach to all the assets of the employer. In the absence of any restrictions or conditions, the lien and charge attaches as soon as the amounts identified under section 32(1) and (3) are due

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<sup>9</sup> *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 at para. 46, Tab 13.

<sup>10</sup> Ronald C.C. Cuming et al, "Personal Property Security Law" (Toronto: Irwin Law Inc., 2005) at pp. 17-18, Tab 12.

<sup>11</sup> *Ibid.*

under the NLPBA. Section 32(4) states that the administrator "has a lien and charge". This use of the word "has" states the existence of the lien and charge in the present tense based on the existence of amounts owed to the pension plan. Based on the plain language of section 32 creating both the deemed trusts and the lien and charge, the charge attaches concurrently when the deemed trust arises, i.e., when an amount becomes due to be paid by an employer and is not paid.

*iii) The Administrators lien attaches to all the assets of the employer*

15. Section 32(4) is broadly drafted to create a lien and charge over all "the assets" of the employer. There are no limits on the type of assets in section 32(4). Black's Law Dictionary defines "assets" to mean every type of property and includes "property of all kinds, real and personal, tangible and intangible".<sup>12</sup>

16. As courts have noted, "the search for [the] meaning [of a word] must not end with a glance at the dictionary" and the definition of a term should be "given a purposive construction".<sup>13</sup> In section 32(4), the word "assets" is used without any modifying or limiting adjective making clear that the lien attaches to all assets of the employer, regardless of their nature or geographic location. The purpose of using the unmodified term "assets" is to provide the broadest protection for pension plan members and retirees.

17. The breadth of the word "assets" can be compared with the use of the phrase "current assets" in section 2 of the *Bankruptcy and Insolvency Act* ("BIA"). Section 2 of the BIA defines "current assets" as "cash, cash equivalents – including negotiable instruments and demand deposits – inventory or accounts receivable, or the proceeds from dealing with those assets".<sup>14</sup> The BIA does not define "assets", thus making the interpretation of assets submitted above as the correct one.

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<sup>12</sup> Black's law dictionary, 6<sup>th</sup> edition, at page 117, Tab 5.

<sup>13</sup> *King Seagrave Ltd. v. Canada Permanent Trust Co.*, 1985 CarswellOnt 884 at para. 30, Tab 9.

<sup>14</sup> *Bankruptcy and Insolvency Act*, Section 2, Tab 15.



18. Indeed, where a legislature intends to place limiting factors on a statutory lien, it has done so.<sup>15</sup>

*iv) Priority over other unsecured creditors*

19. Statutory liens are secured claims and as such are paid in priority to other unsecured creditors no different than other provincially-created statutory liens that create secured creditor status. There is no registration requirement under the NLPBA and nothing that specifies the subordination of the Administrator's lien to other secured creditors or unsecured creditors. The validity of the Administrator's lien as a secured claim is therefore *not* conditional on the registration of the lien.

*v) Priority over other secured creditor(s) to be determined by the "first-in-time" rule*

20. The Supreme Court of Canada has confirmed that provinces are entitled to create security interests that are enforceable in federal insolvency proceedings.<sup>16</sup> However, generally, "non-consensual security interests [such as statutory liens] do not fall within the scope of the PPSA."<sup>17</sup> As such, the lien and charge in section 32(4) of the NLPBA is neither mentioned nor is its priority determined by the Newfoundland and Labrador *Personal Property Security Act*,<sup>18</sup> (NLPPSA"). Since the NLPBA is silent, priority contests between the Administrator's lien and other secured creditors can be determined by the "first in time rule", which means that the creditor whose fixed charge security arose first will have priority, subject to the principles of equity.<sup>19</sup>

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<sup>15</sup> See for example the Newfoundland *Mechanics' Lien Act*, R.S.N.L. 1990 c. M-3, which creates a lien in favour of contractors doing work on real property over the estate or interest of the owner in the land, building, structure or works and appurtenances and the land occupied or enjoyed, Tab 17.

<sup>16</sup> *Bank of Montreal v. Innovation Credit Union*, [2010] 3 SCR 3, 2010 SCC 47 at para. 32, Tab 3.

<sup>17</sup> Ronald C.C. Cuming et al, "Personal Property Security Law" (Toronto: Irwin Law Inc., 2005) at pp. 406-407, Tab 12.

<sup>18</sup> *Personal Property Security Act*, SNL 1998, c. P-7.1 ("NL PPSA"), Tab 20. Section 5(a) provides that the Act does not apply to a statutory lien unless the statute provides that this Act applies. The NLPBA is silent on the application of the NL PPSA.

<sup>19</sup> Ronald C.C. Cuming et al, "Personal Property Security Law" (Toronto: Irwin Law Inc., 2005) at p. 415, Tab 12. *Bulut v. Brampton* (2000) 48 O.R. (3d) 108 (C.A.) at paras. 73-80, Tab 4; *R. v. Dauphin Plains Credit*

21. As set out above, the Administrator's lien and charge arises over all the assets of the employer as soon as an amount owing to the pension plan becomes due. Applying the "first in time rule", the Administrator's secured claim for the amounts due and not paid to the pension plan would have priority over other secured creditors whose fixed charge priority post-dates the time that the employer's pension contributions become due.

*d) The lien and charge is effective as a secured claim in a CCAA proceeding*

22. In *General Chemical, supra*, the Ontario Court of Appeal considered the Administrator's lien and charge under section 57(5) of the OPBA in the context of the bankruptcy of the employer (not a CCAA). The Court recognized that the Administrator held a valid lien under section 57(5) of the OPBA over the bankrupt employer's assets in respect of the employer's unpaid pension contributions.<sup>20</sup>

23. However, the Court concluded that the Administrator's lien and charge was ineffective in the *bankruptcy* based on the definition of "secured creditor" in section 2 of the *Bankruptcy and Insolvency Act* (BIA). The court held that since the BIA defines a secured creditor as "a *person* holding a...charge or lien..." for "a *debt due* or accruing due *to the person from a debtor...*", and since the Administrator in that case was an outside actuarial firm appointed to wind up the plan (since the plan had been abandoned by the employer), the Administrator was not a "person" to whom a "debt" was "due" "from a debtor" and thus did not meet the definition of secured creditor under the BIA definition.

24. In contrast, the definition of secured creditor in CCAA is different and broader than the BIA definition and *does* readily capture the holder of the section 32(4) lien and charge. Under the CCAA, a secured creditor includes "a **holder** of a... charge, **lien...for indebtedness of the debtor company...** in respect of, all or any property of the debtor company..." Accordingly, the Administrator is a secured creditor in a CCAA proceeding.

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*Union Ltd. v. Xyloid Industries Limited* [1980] 1 S.C.R. 1182, Tab 11; *Royal Bank of Canada v. Sparrow Electric Corp* [1997] 1 S.C.R. 411, Tab 13.

<sup>20</sup> *Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd.*, 2007 ONCA 600 (CanLII) at para. 32, Tab 6.

25. A comparison of the two definitions is set out below:

<i>Bankruptcy and Insolvency Act</i>	<i>Companies' Creditors Arrangement Act</i>
<p>2 In this Act, ...</p> <p><i>secured creditor</i> means <i>a person holding</i> a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a <i>debt due or accruing due to the person from the debtor</i>, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable...[emphasis added]<sup>21</sup></p>	<p>2 (1) In this Act, ...</p> <p><i>secured creditor</i> means <i>a holder of</i> a mortgage, hypothec, pledge, <i>charge, lien</i> or privilege on or against, or any assignment, cession or transfer of, all or any property <i>of a debtor company as security for indebtedness of the debtor company</i>, or a holder of any bond <i>of a debtor company secured by</i> a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, <i>or a trust in respect of, all or any property of the debtor company</i>, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds; (creancier garanti)<sup>22</sup> [emphasis added]</p>

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

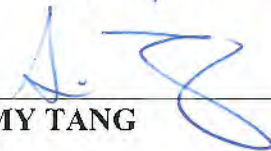
Dated at Toronto, Ontario, this 10<sup>th</sup> day of October, 2017



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**ANDREW J. HATNAY**



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**DEMETRIOS YIOKARIS**



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**AMY TANG**

<sup>21</sup> *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, s. 2, Tab 15

<sup>22</sup> *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, s. 2, Tab 16.

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