SUPERIOR COURT

(*Commercial Division*)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

No: 500-11-048114-157

DATE: September 11, 2017

PRESIDED BY: THE HONOURABLE STEPHEN W. HAMILTON, J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

BLOOM LAKE GENERAL PARTNER LIMITED
QUINTO MINING CORPORATION
8568391 CANADA LIMITED
CLIFFS QUÉBEC IRON MINING ULC
WABUSH IRON CO. LIMITED
WABUSH RESOURCES INC.
Debtors
And
THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP
BLOOM LAKE RAILWAY COMPANY LIMITED
WABUSH MINES
ARNAUD RAILWAY COMPANY
WABUSH LAKE RAILWAY COMPANY, LIMITED
Mises en cause
And
MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON
SYNDICAT DES MÉTALLOS, SECTIONS LOCALES 6254 ET 6285
MORNEAU SHEPELL LTD, IN ITS CAPACITY AS
REPLACEMENT PENSION PLAN ADMINISTRATOR
RETRAITE QUÉBEC
THE ATTORNEY GENERAL OF CANADA, ACTING ON BEHALF OF
THE OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS
HER MAJESTY IN RIGHT OF NEWFOUNLAND AND LABRADOR,
AS REPRESENTED BY THE SUPERINTENDENT OF PENSIONS

VILLE DE SEPT-ÎLES
Mises en cause
And
FTI CONSULTING CANADA INC.
Monitor-Petitioner

JUDGMENT ON THE AMENDED MOTION BY THE MONITOR FOR DIRECTIONS WITH RESPECT TO PENSION CLAIMS (#494)

INTRODUCTION

[1] The Debtors have filed proceedings under the *Companies' Creditors Arrangement Act* ("CCAA").[1] They owe substantial liabilities under two pension plans, including special payments, catch-up special payments and wind-up deficiencies. The Monitor filed a motion for directions with respect to the priority of the various components of the pension claims and the applicability and scope of the deemed trusts created under the relevant pension legislation.

CONTEXT

[2] On May 19, 2015, the Petitioners Wabush Iron Co. Limited and Wabush Resources Inc. and the Mises-en-cause Wabush Mines (a joint venture of Wabush Iron and Wabush Resources), Arnaud Railway Company and Wabush Lake Railway Company, Limited (together the "Wabush CCAA Parties") filed a motion for the issuance of an initial order under the CCAA which was granted the following day by the court.

[3] Prior to the filing of the CCAA motion, Wabush Mines operated (1) the iron ore mine and processing facility located near the Town of Wabush and Labrador City, Newfoundland and Labrador and (2) the Pointe-Noire port facilities and pellet production facility in Sept-Îles, Québec. Arnaud Railway and Wabush Lake Railway are both federally regulated railways that transported iron ore concentrate from the Wabush mine to the Pointe-Noire port. The operations had been discontinued and the employees terminated or laid off prior to the filing of the CCAA motion.

[4] The Wabush CCAA Parties had two pension plans for their employees which include defined benefits:

- A pension plan for unionized hourly employees at the Wabush mine and Pointe-Noire port, known as the Pension Plan for Bargaining Unit Employees of Wabush Mines, Cliffs Mining Company, Managing Agent, Arnaud Railway

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[1] R.S.C. 1985, c. C-36.

Company and Wabush Lake Railway Company, Limited (the "Union Plan")[2] and

- A hybrid pension plan for salaried employees at the Wabush mine and the Pointe-Noire port hired before January 1, 2013 known as the Contributory Pension Plan for Salaried Employees of Wabush Mines, Cliffs Mining Company, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company, Limited (the "Salaried Plan").[3]

[5] Wabush Mines was the administrator of both Plans.

[6] The majority of the employees covered by the Plans reported for work at the Wabush mine in Newfoundland and Labrador while many reported for work at the Pointe-Nord facility in Québec. In fact, on the current numbers, a slight majority of the Salaried Plan members reported for work in Québec. Moreover, some of the employees worked for Arnaud Railway and Wabush Lake Railway which are federally regulated railways. The current breakdown is as follows:

	Union Plan	Salaried Plan	TOTAL
Newfoundland & Labrador	1,005	313	1,318
Québec	661	329	990
Federal	66	14	80
TOTAL	1,732	656	2,388

[7] Both Plans provide that they are to be interpreted pursuant to the laws applicable in the province of Newfoundland.[4] Both Plans are registered with the provincial regulator in Newfoundland and Labrador, the Superintendent of Pensions (the "NL Superintendent") pursuant to the Newfoundland and Labrador *Pension Benefits Act, 1997* ("NLPBA").[5] The federal pension regulator, the Office of the Superintendent of Financial Institutions ("OSFI") has also exercised some regulatory oversight, in particular with respect to the Union Plan,[6] pursuant to the federal *Pension Benefits Standards Act* ("PBSA").[7] The Québec regulator, Retraite Québec, has not played an active role in the regulation of the Plans, but it asserts that the Québec *Supplemental*

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2 Exhibit R-23.
3 Exhibit R-24.
4 Exhibits R-23 and R-24, Section 12.06.
5 S.N.L. 1996, c. P-40.1.
6 It seems that OSFI acted on the erroneous view that no members of the Salaried Plan were covered by the PBSA.
7 R.S.C. 1985 (2nd Supp.), c. 32.

Pension Plans Act ("SPPA")[8] is applicable to the employees who reported for work in Québec.

[8] On June 26, 2015, in the context of approving the interim financing of the Debtors, the Court issued the Suspension Order whereby it ordered the suspension of payment by the Wabush CCAA Parties of the monthly amortization payments and the annual lump sum "catch-up" payments coming due under the Plans, and confirmed the priority of the Interim Lender Charge over the deemed trusts with respect to the pension liabilities. The Court also ordered the suspension of payment of other post-retirement benefits, including life insurance, health care and a supplemental retirement arrangement plan.[9]

[9] On December 16, 2015, the NL Superintendent terminated both Plans effective immediately on the bases that (1) the Plans failed to meet the solvency requirements under the regulations, (2) the employer has discontinued all of its business operations and (3) it was highly unlikely that any potential buyer of the assets would agree to assume the assets and liabilities of the Plans.[10] On the same date, OSFI terminated the Union Plan effective immediately for the same reasons.[11]

[10] Both the NL Superintendent and OSFI reminded the Wabush CCAA Parties of the employer's obligation upon termination of a pension plan to pay into the pension fund all amounts that would be required to meet the solvency requirements and the amount necessary to fund the benefits under the plan. They also referred to the rules with respect to deemed trusts.[12]

[11] On January 26, 2016, the salaried retirees received a letter from Wabush Mines notifying them that the NL Superintendent had directed Wabush Mines to reduce the amount of monthly pension benefits of the members by 25%.[13] Retirees under the Union Plan had their benefits reduced by 21% on March 1, 2016.[14]

[12] On March 30, 2016, the NL Superintendent and OSFI appointed Morneau Shepell Ltd as replacement administrator for the Plans.[15]

[13] The Wabush CCAA Parties paid the monthly normal cost payments for both Plans up to the termination of the Plans on December 16, 2015. As a result, the monthly normal cost payments for the Union Plan were fully paid up to December 16,

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8 CQLR, c R-15.1, s. 49.
9 2015 QCCS 3064, motion for leave to appeal dismissed, 2015 QCCA 1351 (the "Suspension Order").
10 Exhibit R-13.
11 Exhibit R-14.
12 Exhibits R-13 and R-14.
13 Exhibit RESP-7.
14 Affidavit of Terence Watt, sworn December 14, 2016, par. 19.
15 Exhibit R-15.

2015.[16] The monthly normal cost payments for the Salaried Plan had been overpaid in the amount of $169,961 as of December 16, 2015.[17]

[14] The Wabush CCAA Parties also generally paid the special payments, until their obligation to make the special payments was suspended in June 2015 by the Court.

[15] With respect to the Union Plan, the status of the special payments is as follows:

a) The special payments required to be paid prior to the date of the Wabush Initial Order were underpaid in the amount of $146,776;

b) One special payment in the amount of $393,337 was paid after the date of the Wabush Initial Order and before the Suspension Order, which payment constituted an overpayment of $16,308; and

c) The special payments after the date of the Suspension Order were not paid and amount to $3,016,232.[18]

[16] With respect to the Salaried Plan, the status of the special payments is as follows:

a) The special payments required to be paid prior to the date of the Wabush Initial Order were paid in full except for $3;

b) One special payment in the amount of $273,218 was paid after the date of the Wabush Initial Order and before the Suspension Order, which payment constituted an underpayment of $1; and

c) The special payments after the date of the Suspension Order were not paid and amount to $2,185,752.[19]

[17] Further, the Wabush CCAA Parties did not make the lump sum “catch-up” special payments that came due after June 2015. The amount payable with respect to the Union Plan is $3,525,125.[20] There are no “catch-up” special payments due with respect to the Salaried Plan.

[18] Finally, the Plans are underfunded.

[19] In December 2016, the actuary filed a report that concludes that the unfunded wind-up liability for the Union Plan as at December 16, 2015 was $27,486,548.[21]

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16 Exhibit R-17. There is a debate as to whether the Wabush CCAA Parties were required to pay the full monthly payment for December 2015 or only a pro-rated portion. The amount at issue for the period from December 17 to 31, 2015 is $21,462 according to one calculation or $22,893 according to another.

17 Exhibit R-16.

18 Exhibit R-17.

19 Exhibit R-16.

20 Exhibit R-17. The Union argues that $1,175,040 relates to the pre-filing period.

21 Exhibit R-26. There is a further wind-up liability of $2,349,912 set out in the report for the benefits covered by Section 17 PBSA which ranks after the wind-up deficit (referred to as “Priority no.2”).

[20] Further, the Plan Administrator filed a wind-up actuarial valuation for the Salaried Plan that estimates the wind-up shortfall as at December 16, 2015 to be approximately $27,450,000.[22]

[21] Both wind-up reports remain subject to review and approval by the pension regulators.

[22] Subject to the comments set out above, the Monitor provides the following summary of the amounts owing to the two Plans:

	Union Plan	Salaried Plan
Normal Cost Payments		
Pre-filing	$0	$0
Post-filing	$0	$0
Total	**$0**	**$0**
Special Payments		
Pre-filing	$146,776	$3
Post-filing	$2,999,924	$2,185,753
Total	**$3,146,700**	**$2,185,756**
Catch-up Special Payments		
Pre-filing	$0	$0
Post-filing	$3,525,120	$0
Total	**$3,525,120**	**$0**
Estimated Wind-Up Deficiency	$27,486,548	$27,450,000

[23] Wabush Mines, as plan administrator, filed a proof of claim in respect of the Union Plan that includes a secured claim in the amount of $29 million and a restructuring claim in the amount of $6,059,238,[23] and a proof of claim with respect to the Salaried Plan that includes a secured claim in the amount of $24 million and a restructuring claim in the amount of $1,932,940.[24]

[24] The differences in the numbers are not important at this stage. The numbers will be finalized in due course. It is sufficient to note that there are very large claims and that

[22] Exhibit R-25.
[23] Exhibit R-19.
[24] Exhibit R-18.

the plan administrator claims the status of a secured creditor with respect to a substantial part of the claims.

[25] It is also important to note that the Wabush CCAA Parties held assets both in Newfoundland and Labrador and in Québec. All or substantially all of the assets have been sold and have generated substantial proceeds currently held by the Monitor.

[26] Of particular relevance given the intervention of the Ville de Sept-Îles, are two transactions approved by the Court on February 1, 2016 that included the sale of immoveable property in the Ville de Sept-Îles with respect to which the Ville de Sept-Îles claims unpaid taxes.[25] In both instances, the approval and vesting order issued by the Court provided for the vesting of the assets on a free and clear basis, with the net proceeds from both transactions standing in the place and stead of the purchased assets. The result is that the Ville de Sept-Îles claims priority with respect to those proceeds.

[27] In order to determine the priorities of the various claims, the Monitor applies to the Court for an order declaring that:

a) normal costs and special payments outstanding as at the date of the Wabush Initial Order are subject to a limited deemed trust;

b) normal costs and special payments payable after the date of the Wabush Initial Order, including additional special payments and catch up payments established on the basis of actuarial reports issued after the Wabush Initial Order, constitute unsecured claims;

c) the wind-up deficiencies constitute unsecured claims; and

d) any deemed trust created pursuant to the NLPBA may only charge property in Newfoundland and Labrador.

[28] The Monitor is supported by the Wabush CCAA Parties and the Ville de Sept-Îles. The Monitor's motion is opposed by the Representative Employees, the Union, the Replacement Plan Administrator, Retraite Québec, OSFI and the NL Superintendent (the "Pension Parties").

[29] A preliminary issue arose as to whether the Court should request the aid of the Supreme Court of Newfoundland and Labrador with respect to the interpretation of the NLPBA, and in particular the scope and priority of the deemed trust and the lien created by the NLPBA and whether the deemed trust and the lien extend to assets located outside of Newfoundland and Labrador. On January 30, 2017, the Court decided that it had jurisdiction to deal with those issues and that it would not refer the issues to the Newfoundland and Labrador Supreme Court.[26] There was no appeal from that decision.

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[25] Exhibits R-10 and R-12.

[26] 2017 QCCS 284.

[30] Subsequent to the judgment, on March 27, 2017, the government of Newfoundland and Labrador referred a number of questions to the Newfoundland and Labrador Court of Appeal ("NLCA").[27]

[31] The hearing before the NLCA is scheduled for September 21 and 22, 2017.

POSITION OF THE PARTIES

1. Monitor

[32] The Monitor's position can be summarized as follows:

- The Court should deal with all of the issues now, without waiting for the judgment of the NLCA;
- The SPPA applies to the Québec members of the Plans, the PBSA applies to the federal members, and the NLPBA applies to the Newfoundland and Labrador members;
- The deemed trusts under the SPPA, PBSA and NLPBA and the lien and charge under the NLPBA are limited to normal, special and catch-up payments and do not extend to the wind-up deficiency;
- The deemed trust and the lien and charge under the NLPBA do not extend to assets outside Newfoundland and Labrador;
- The SPPA does not create a deemed trust;
- The deemed trusts under the PBSA and the NLPBA were not triggered because there was no "liquidation, assignment or bankruptcy" of the employer;
- In any event, the deemed trusts under the SPPA, PBSA or NLPBA and the lien and charge under the NLPBA, if they exist, are not effective in proceedings under the CCAA;

2. Wabush CCAA Parties

[33] The positions taken by the Wabush CCAA Parties were largely consistent with the positions taken by the Monitor.

3. Ville de Sept-Îles

[34] The Ville de Sept-Îles was in general agreement with the position of the Monitor and the Wabush CCAA Parties. In addition, it argued that its prior claim against the proceeds of the sale of immoveable properties in the Ville de Sept-Îles with respect to unpaid property and water taxes on those properties ranks ahead of the deemed trusts for pension claims.

4. Representative Employees

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[27] Order-in-Council 2017-103, dated March 27, 2017.

[35] The Representative Employees argue that the NLPBA deemed trust covers the normal payments, the special payments and the wind-up deficit and that the NLPBA, and its deemed trust provisions, apply to all members of the Salaried Plan (and by extension the Union Plan), including those who reported for work in Québec and those who worked on the railways.[28]

[36] They also argue that there was a liquidation in the course of the present CCAA proceedings and that the NLPBA deemed trusts are fully operative in the context of CCAA proceedings.

5. Union

[37] The Union generally supports the arguments put forward by the Representative Employees and the NL Superintendent, and it supports the regulators for the interpretation of their statutes.

[38] The Union submits that all three statutes create deemed trusts but that only the NLPBA deemed trust covers the wind-up deficit. It argues that the three statutes establish minimum standards and that the Court should apply the most advantageous deemed trust provisions under the three pension statutes, which will benefit all members of the Union Plan (and by extension the Salaried Plan). It also argues that the deemed trust under the NLPBA should extend to all assets of the employer, wherever located.

6. Replacement Pension Administrator

[39] The Replacement Plan Administrator adopts the arguments put forward by the Representative Employees, the Union and the NL Superintendent, and it defers to Retraite Québec and OSFI for the interpretation and application of their statutes.

7. Retraite Québec

[40] Retraite Québec suggests that the Court should answer all of the questions without waiting for the judgment of the NLCA.

[41] It argues that the SPPA applies and regulates the rights of the Québec members of the Pension Plans.

[42] It argues that the protection afforded by the deemed trust under Section 49 SPPA and the unseizability under Section 264 SPPA are limited to unpaid contributions, which include current service contributions, amortization payments and special payments, and do not extend to the solvency deficit on termination of the Plans.

[43] Further, it argues that the deemed trust and unseizability under the SPPA create a priority over all secured and unsecured creditors of the employer, and are valid in the context of CCAA proceedings.

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[28] They advanced in their argumentation outline a constitutional argument to the effect that the NLPBA had paramountcy over the PBSA under Section 94A of the *Constitution Act*, but they abandoned that argument at the hearing.

8. OSFI

[44] OSFI argues that the PBSA applies in respect of the Plans for the employees who worked on the railways. It argues that the PBSA does not cover the wind-up deficit but it does cover the normal cost payments, the special payments and the special catch-up payments. OSFI argues that the PBSA continues to apply in CCAA proceedings where the debtors have liquidated their assets and do not submit a plan to their creditors.

9. NL Superintendent

[45] The NL Superintendent generally supports the submissions of the Representative Employees, the Union and the Replacement Plan Administrator, although he does not plead that the NLPBA applies to all of the Plan members. He defers to Retraite Québec and to OSFI on any interpretive issues regarding the SPPA and the PBSA respectively.

[46] The NL Superintendent pleads that the Wabush CCAA proceedings are in fact liquidation proceedings and that these liquidation proceedings trigger the deemed trust under the NLPBA. He also pleads that the deemed trust under the NLPBA covers at least part of the wind-up deficiency and that it can attach to the proceeds of property formerly located in Québec.

ISSUES

[47] The Court will deal with the following issues:

1. Should it wait for the judgment of the NLCA on the Reference before rendering its judgment?
2. Which pension statutes apply to which members?
3. What is the proper scope of the protection afforded by the pension statutes?
    a. Do the pension statutes create a valid deemed trust or other valid charges?
    b. What is the priority of the deemed trusts and other charges in relation to secured creditors?
    c. Which amounts owing to the pension fund are covered by the deemed trusts or other charges?
    d. Do the deemed trusts or other charges created by the NLPBA extend to assets in Québec?
4. Has there been a “liquidation” that triggers the deemed trusts under the PBSA and the NLPBA?
5. Are the deemed trusts and other charges valid in CCAA proceedings?
6. In light of the answers to the preceding questions, what conclusions are appropriate?

ANALYSIS

1. Timing of this judgment in relation to the NLCA Reference

[48] The first issue for the Court is whether it should delay its judgment until it has the benefit of the judgment of the NLCA on the Reference, or whether it should render its judgment now, without waiting for the NLCA judgment on the Reference. The hearing before the NLCA is scheduled for September 21 and 22, 2017.

[49] In the context of the Monitor's Motion for Directions, a preliminary issue arose as to whether the Court should request the aid of the Supreme Court of Newfoundland and Labrador with respect to the interpretation of the NLPBA, and in particular the scope and priority of the deemed trust and the lien created by the NLPBA and whether the deemed trust and the lien created by the NLPBA extend to assets located outside of Newfoundland and Labrador. On January 30, 2017, the Court decided that it had jurisdiction to deal with those issues and that it would not refer the issues to the Newfoundland and Labrador Supreme Court.[29] There was no appeal from that decision.

[50] Instead, on March 27, 2017, the government of Newfoundland and Labrador referred the following questions to the NLCA:

> 1) The Supreme Court of Canada has confirmed in *Sun Indalex Finance, LLC* v. *United Steelworkers*, 2013 SCC 6, that, subject only to the doctrine of paramountcy, provincial laws apply in proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c.C-36. What is the scope of section 32 of the *Pension Benefits Act, 1997*, SNL1996 cP-4.01 deemed trusts in respect of:
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> a) unpaid current service costs;
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> b) unpaid special payments; and
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> c) unpaid wind-up deficits?
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> 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*, R.S.C. 1985, c-32 deemed trust also apply to those members of the Salaried Plan who worked on the railway (i.e., a federal undertaking)?
>
> (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?

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[29] *Supra* note 26.

(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? [30]

[51] These are the questions that the Representative Employees proposed that the Court should resolve in the present judgment.[31]

[52] If the questions submitted to the NLCA dealt only with issues of Newfoundland and Labrador law, the Court would consider waiting for the decision of the NLCA.

[53] The first and third questions deal with the interpretation of the NLPBA, but the preamble to the first question clearly places the questions in the context of CCAA proceedings. The second question relates to the interpretation of federal and Québec law, the potential conflict between federal law and Québec law on the one hand and the NLPBA on the other, and how those conflicts are to be resolved. Moreover, with its references to the Salaried Plan and employees who worked on the railway or who reported for work in Québec, it is clear that the second question relates specifically to this matter. The NLCA has said that the circumstances of the present matter will provide the context within which the questions will be considered.

[54] These questions are within the jurisdiction of the Court and they are relevant to the judgment that this Court is rendering. The questions put to the NLCA therefore create a risk of contradictory judgments. The situation is unfortunate, but it is not one for which the NLCA or the Court is responsible.

[55] The NLCA has been made aware of the Court's concerns in relation to the scope of the questions that it is being asked to answer. While the NLCA is sensitive to the issue of potential overlap, it has decided for now not to restrict the scope of the questions:

> [1] Having heard the submissions of counsel, we are satisfied that the questions set out in the reference put by the Lieutenant-Governor in Council in Order-in-Council 2017-103, should be considered at the hearing in the language stipulated in the Order-in-Council. Whilst we are mindful of the importance of promoting judicial efficiency, we do not consider ourselves to be in a position today to determine the extent to which, if at all, we should decline to answer one or more of the questions posed or to interpret their scope.
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> [2] That said, we are cognizant of the concerns of some of the participants that the questions may invite the Court to opine in such a way as to impact the decisions of the Quebec CCAA Court that will determine the rights of the parties. Generally speaking, we subscribe to the view that questions posed on a

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30 Order-in-Council 2017-103, dated March 27, 2017.

31 This may explain why the questions refer to the Salaried Plan and not the Union Plan.

> reference should be treated as raising hypothetical questions and not directed at determining parties' rights.
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> [3] As recognized in case law, a reference is an advisory opinion provided by the Court at the request of the Lieutenant-Governor in Council. The CCAA Court in determining the matter before it may or may not advert to or apply the opinion provided by this Court. That said, the context of a reference is important. Accordingly, hypotheticals are useful to provide a context within which the questions can be considered. The record on the reference, therefore, should be limited to providing that context.
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> [4] The parties may, of course, make submissions as to whether the Court should decline to answer a question or part thereof, or narrow the scope of a question as part of the submissions made for purposes of the reference hearing.[32]

[56] In the circumstances, the Court is left with three options, none of which is particularly good:

- It can proceed to render judgment on all of the issues, without the benefit of the judgment of the NLCA, and thereby run the risk of being contradicted by the NLCA;
- It can wait for the judgment of the NLCA, which might extend to issues which are more properly within the jurisdiction of the Court and place the Court in the position of having some of its issues prejudged by the court of appeal of another province and potentially having to contradict that judgment; or
- It can render judgment on all issues other than the interpretation of the NLPBA.

[57] The Monitor, the Wabush CCAA Parties and the Ville de Sept-Îles plead that the Court should adopt the first position. The Pension Parties generally suggest that the Court should wait.

[58] In these circumstances, and with some hesitation, the Court has decided to adopt the third approach. It will render its judgment first, without waiting for the NLCA. However, it will not decide on the interpretation of the NLPBA, but rather will make certain assumptions:

- Where the NLPBA is identical to the PBSA, the Court will assume that the NLPBA is interpreted in the same way as the PBSA; and
- Where the NLPBA is different from the PBSA, the Court will adopt the interpretation put forward by the NL Superintendent.

[59] The Court will reserve the rights of the parties to ask the Court to revise the conclusions of the present judgment if: (1) the NLCA decides that the interpretation of

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[32] Ruling on Application for Directions, June 9, 2017.

the NLPBA is different from the interpretation that the Court assumed, and (2) that difference is material to the Court's conclusions.

[60] The Court will not revise its conclusions if the NLCA disagrees with the Court on any issue other than the interpretation of the NLPBA. That will be a matter that the parties can raise on appeal.

2. Application of the three pension statutes

[61] The scope of application of each of the three pension statutes is made clear by each pension statute:

- The SPPA applies to "pension plans provided for … employees who report for work at an establishment of their employer located in Québec".[33]
- The PBSA applies to "a superannuation or other plan organized and administered to provide pension benefits to employees employed in included employment (and former employees)".[34] The notion of "included employment" includes railways[35] and "any work, undertaking or business … declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more provinces".[36] The Arnaud Rail and Wabush Lake Rail are both railways and both were declared to be works for the general advantage of Canada.[37]
- The NLPBA 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".[38]

[Emphasis added]

[62] To the extent that this raises a question of the interpretation of the NLPBA, the Court notes that the language is clear and that the NL Superintendent states only that the NLPBA "would apply, at the very least, to the benefit of all of the employees who reported for work in the province (s. 5 PBA)".[39]

[63] As a result, on the face of the legislation, the Plans are governed by the PBSA with respect to the rail employees, by the SPPA with respect to the non-railway employees who reported for work in Québec, and by the NLPBA with respect to the non-railway employees who reported for work in Newfoundland and Labrador.

[64] Professor Goldstein writes in favour of this multiplicity of governing statutes:

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33 SPPA, s. 1(1).
34 PBSA, s. 4(2).
35 PBSA, s. 4(4)(b).
36 PBSA, s. 4(4)(h).
37 *An Act respecting Wabush Lake Railway Company Limited and Arnaud Railway Company*, (1960) 8-9 Eliz. II, ch. 63, s. 3.
38 NLPBA, s. 5.
39 Outline of Argument of the NL Superintendent, May 19, 2017, par. 98.

> Plusieurs lois pourraient donc potentiellement s'appliquer au même régime. En principe, il n'y a pas de conflit dans la mesure où chaque loi ne s'applique effectivement et distributivement qu'au profit de chaque catégorie de salariés selon son lieu de travail ou de paiement. Par exemple, si, sur 100 salariés participants au même régime, 60 sont employés en Ontario, 30 au Québec et 10 en Alberta, on considère que l'autorité ontarienne doit veiller à l'application distributive des lois ontarienne, québécoise et albertaine.[40]

[65] Moreover, this multiplicity of governing statutes does not present any particular practical problem. The wind-up reports prepared in relation to the Plans conclude that the Plans are governed by the PBSA for the railway employees, by the SPPA for the non-railway employees who reported for work in Québec, and by the NLPBA for the non-railway employees who reported for work in NL and they calculate the benefits according to the three statutes.[41]

[66] The Representative Employees, the Replacement Plan Administrator and the Union contest this conclusion. They argue that the NLPBA should apply to all members under both Plans.

[67] The Representative Employees argue that the Memorandum of Reciprocal Agreement signed by the Quebec Pension Board (the predecessor of Retraite Québec) in 1968 and by the NL Superintendent in 1986[42] makes the NLPBA applicable to the Plans.

[68] The Court notes at the outset that the Memorandum was signed by representatives of nine provinces, but was not signed by a representative of the federal government. It therefore does not bind the federal government and cannot affect the application of the PBSA.

[69] Moreover, the scope of the Memorandum is limited. It recognizes that a pension plan may be regulated by several statutes. It provides that amongst the various pension regulatory authorities having jurisdiction in relation to a pension plan, the authority of the province where the plurality of the members are employed is the "major authority" and the others are "minor authorities". It provides that a plan need only be registered in the jurisdiction of the major authority. The Pension Parties pleaded that there had been until recently a plurality of members of both Plans in Newfoundland and Labrador. This would explain why both Plans were registered in Newfoundland and Labrador.

[70] The key provision of the Memorandum is section 2:

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

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40 Gérald GOLDSTEIN, *Les conflits de loi relatifs aux régimes complémentaires de retraite*, Montréal, Éditions Thémis, 2005, p. 4.

41 Exhibit R-25, p. 5-6, 8, 27-47 and Exhibit R-26, p. 5.

42 Exhibit R-22.

[71] In other words, the Memorandum operates merely as a delegation of powers from the minor authorities to the major authority. It does not in any way affect the application of the relevant statutes:

> The major authority is charged with administering the laws of the other province. What this means is that while a multi-jurisdictional pension plan need only be registered in one province, it does not necessarily mean that the laws of the other province do not apply in respect of employees working in that other province. For example, when a multi-jurisdictional pension plan is being wound up, the administrator is required to allocate and account for the assets and benefits by province.[43]
>
> [References omitted]

[72] This is consistent with Section 74 of the previous version of the SPPA[44] which was in force when the Memorandum was signed by Québec, which provides for reciprocal registration and inspection, delegation of functions and powers, and carrying out duties on behalf of the Board, but not the exclusion of Québec law. Agreements entered into under Section 74 of the former SPPA remain effective under the new SPPA.[45]

[73] This is to be contrasted with Section 249 of the current SPPA, which allows Retraite Québec to enter into agreements with other provincial authorities or the federal authority to determine to what extent each pension act applies to a plan. Similar provisions are found in Section 6.1 of the PBSA and Sections 8(2) and 8.2(2) of the NLPBA.

[74] Pursuant to these new powers, the federal authority and various provincial authorities entered into Agreements Respecting Multi-jurisdictional Pension Plans in 2011 and 2016. The 2011 and 2016 Agreements expressly provide that in certain circumstances, one pension act applies to the exclusion of the others. However, while Quebec and the federal government are parties to the 2011 and 2016 Agreements, Newfoundland and Labrador is not a party. As a result, the Agreements have no application to the Plans, and they cannot exclude the SPPA and the PBSA and make the NLPBA applicable to the Québec and federal members of the Plans.

[75] The Representative Employees also argue that the Applicable Law clause found at Section 12.06 in both Plans makes the NLPBA applicable to both Plans:

> **12.06 Applicable Law**

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[43] Ari KAPLAN and Mitch FRAZER, *Pension Law* (Second Edition), Toronto, Irwin Law, 2013, p. 106. See also *Régie des rentes du Québec* v. *Commission des régimes de retraite de l'Ontario*, 2000 CanLII 30139 (ON SCDC), par. 61; *Boucher* c. *Stelco inc.*, 2000 CanLII 18866 (QC CS), par. 71, appeals dismissed on other grounds, 2004CanLII 13895 (QC CA) and 2005 SCC 64. Contra, *Dinney* v. *Great-West Life Assurance Co.*, 2002 MBQB 277, par. 14; *Champagne* v. *Atomic Energy of Canada Ltd.*, 2012 CanLII 97650 (CA Lab.Arb.).

[44] CQLR, c R-17 (replaced by c R-15.1).

[45] SPPA, s. 285.

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

[76] The Court notes that, notwithstanding this provision, there are specific provisions in both Plans applicable to employees who report for work in Québec in order to comply with the SPPA.[46]

[77] In any event, the parties to a pension plan cannot pick and choose which pension laws apply to them and which do not. The legislation clearly provides to whom it applies. It leaves no room for the choice of the parties. Article 3118 C.C.Q. provides that a choice of law clause cannot deprive an employee of the protection afforded by the mandatory rules of the state where the employee habitually carries out his work. As a result, this contractual provision cannot be sufficient to set aside the clear language of the three statutes. Moreover, Section 12.06 provides only for the interpretation of the Plans. It does not provide that the Plans are governed by the NLPBA and does not incorporate by reference the provisions of the NLPBA.

[78] Finally, the Union recognizes that the three statutes apply and that the only effect of the Memorandum is to centralize the regulatory functions in one regulator. However, the Union argues that pension legislation enacts only minimum standards. As the three statutes apply to the Plans and each creates a deemed trust that covers certain contributions, the Court should apply the deemed trust that covers the greatest amount.

[79] This argument is based on the assumption that each contribution payable by the employer (whether normal cost payments, special payments, catch-up special payments or wind-up deficits) is a single amount in respect of the whole Plan. This is wrong. As is readily apparent from the detailed calculations included in the Salaried Plan wind-up valuation, the calculation of the contributions is done on a member-by-member basis.[47] As a result, it is not a single contribution governed by three statutes, but rather the contribution can be divided into three portions each of which is governed by a different statute.

[80] As a result, the Court concludes that the Plans are governed by the PBSA with respect to the railway employees, by the SPPA with respect to the non-railway employees who reported for work in Québec, and by the NLPBA with respect to the non-railway employees who reported for work in NL.

[81] None of the three regulators, Retraite Québec, OSFI and the NL Superintendent, contested this conclusion.

3. Proper scope of the protection afforded by the three pension statutes

a. Do the pension statutes create a valid deemed trust or other valid charges?

i. PBSA

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[46] Section 14 of each Plan.
[47] Exhibit R-25, p. 27-47.

[82] Section 8(1) and (2) PBSA provide in part as follows:

> 8 (1) An employer shall ensure, with respect to its pension plan, that the following amounts are kept separate and apart from the employer's own moneys, and the employer is deemed to hold the amounts referred to in paragraphs (a) to (c) in trust for members of the pension plan, former members, and any other persons entitled to pension benefits under the plan:
>
> […]
>
> (2) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (1) is deemed to be held in trust shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate.

[83] The deemed trust mechanism found in Section 8(1) and (2) PBSA has been used by the federal Parliament and by provincial legislatures to give a special priority to certain claims. It has principally been used in taxation and other statutes, to protect Crown claims. As stated by Justice Gonthier in *Sparrow Electric*:

> Namely, such deemed trusts or liens are devices which legislators often employ in order to recover moneys which ought to have lawfully been paid to them but have been unlawfully misappropriated by a debtor who subsequently encounters financial difficulty and is forced into winding up its business.[48]
>
> [References omitted]

[84] The deemed trust under the PBSA operate in the following way:

- The employer is required to hold the amounts separate and apart and is considered to hold them in trust (Section 8(1) PBSA); and
- In the event of the employer's liquidation, assignment or bankruptcy, an amount equal to those amounts is 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 (Section 8(2) PBSA).

[85] The Supreme Court explained the operation of similar provisions (Section 227(4) and (5) of the *Income Tax Act*, relating to unremitted payroll deductions) as follows in *Sparrow Electric*:

> 31 In the present case, I find the language in s. 227(5) to be clear and unambiguous, especially when viewed as a provision directly following s. 227(4), which renders amounts unremitted as held in trust for Her Majesty. In my view, this section is designed to, upon liquidation, assignment, receivership or bankruptcy, seek out and attach Her Majesty's beneficial interest to property of the debtor which at that time is in existence. The trust is not in truth a real one,

[48] *Royal Bank of Canada* v. *Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, par. 19.

> as the subject matter of the trust cannot be identified from the date of creation of the trust: D. W. M. Waters, *Law of Trusts in Canada* (2nd ed. 1984), at p. 117. However, s. 227(5) has the effect of revitalizing the trust whose subject matter has lost all identity. This identification of the subject matter of the trust therefore occurs *ex post facto*. In this respect, I agree with the conclusion of Twaddle J.A. in *Roynat*, supra, where he states the effect of s. 227(5) as follows, at p. 647: "Her Majesty has a statutory right of access to whatever assets the employer then has, out of which to realize the original trust debt due to Her".[49]
>
> [Emphasis added]

[86] In other words, it is not enough for Parliament to simply declare that the debtor is deemed to hold the amounts in trust. The deemed trust under Section 8(1) PBSA is only effective if the property is identified and kept separate and apart. If the property is not identified and kept separate and apart, it is necessary to also have Section 8(2) PBSA, which causes the property to be identified on liquidation, assignment or bankruptcy and deems it to be kept separate and apart even if it is not.

[87] Justice Schrager, then of this court, concluded in *Aveos* that, whether at common law or under Article 1260 C.C.Q., the language of Section 8(1) PBSA was not sufficient for a valid deemed trust and that the language of Section 8(2) PBSA was necessary to the validity of the deemed trust:

> [58] Clearly, then, either at common law or in virtue of Article 1260 of the Civil Code of Québec ("C.C.Q."), no real trust exists in the present case since the property subject to the trust is not readily identifiable as funds were not segregated as required by Article 8(1) P.B.S.A., but rather, commingled. This situation is common; thus, the need for the legislator to create the deemed trust in Section 8(2) P.B.S.A. to protect sums due to pension plans.[50]
>
> [Emphasis added]

[88] The Court concludes that the combined effect of Section 8(1) and (2) PBSA is sufficient to create a deemed trust in the event of a liquidation, assignment or bankruptcy of the employer.

ii. SPPA

[89] Section 49 SPPA is very succinct:

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

[90] Section 49 SPPA simply deems "contributions" to be held in trust, whether or not they have been kept separate from the employer's other property. It includes the

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[49] *Id.*, par. 31.

[50] *Aveos Fleet Performance Inc./Aveos Performance aéronautique inc. (Arrangement relatif à)*, 2013 QCCS 5762, par. 58.

deemed trust language from Section 8(1) PBSA and the "whether or not the latter has kept them separate from his property" language from Section 8(2) PBSA, but it does not include the following key language found in Section 8(2) PBSA:

> 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 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 …

[91] This omission is fatal.

[92] Under *Sparrow Electric*, merely declaring that amounts are deemed to be held in trust is not effective if the property is not identified. It is clear that no property is identified by Section 49 SPPA. It provides only that "contributions" are deemed to be held in trust. A contribution is an obligation and not specific property. *Sparrow Electric* provides that the deemed trust is "revitalized" by providing that, upon a triggering event, an amount equal to the amount that is supposed to be held in trust is carved out of the estate. Without the carve-out on a triggering event, the deemed trust is not effective.

[93] The same principles apply in Québec. In *Sécurité Saglac* and *Nolisair*,[51] the provision at issue was the deemed trust under Section 20 of the *Ministry of Revenue Act*, which read as follows at the relevant time:

> 20. Every person who deducts, withholds or collects any amount under a fiscal law is deemed to hold it in trust for Her Majesty in right of Québec.
>
> Any such amount must be kept by the person who deducted, withheld or collected it, distinctly and separately from his own funds and, in the event of a winding-up, assignment or bankruptcy, an amount equal to the amount thus deducted, withheld or collected must be considered to form a separate fund not forming part of the property subject to the winding-up, assignment or bankruptcy.
>
> [...]
>
> [Emphasis added]

[94] The words ", whether or not the amount has in fact been held separately from the patrimony of that person or from his own funds" were added at the end of the second paragraph in 1993, after the events giving rise to the litigation but before the judgments of the Court of Appeal.

[95] The Court of Appeal decided, with Justice Fish dissenting, that the pre-1993 Section 20 MRA created a valid deemed trust. The Supreme Court reversed the Court of Appeal, essentially for the reasons given by Justice Fish.

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[51] *Quebec (Deputy Minister of Revenue)* v. *Nolisair International Inc. (Trustee of); Sécurité Saglac (1992) inc. (Trustee of)* v. *Quebec (Deputy Minister of Revenue)*, [1999] 1 S.C.R. 759, reversing *Sécurité Saglac (1992) Inc. (Syndic de)*, [1997] R.J.Q. 2448 (C.A.) and *Nolisair International Inc. (Syndic de)*, [1997] R.J.Q. 2433 (C.A.).

[96] Justice Fish held that the omission of the words “whether or not the amount has in fact been held separately from the patrimony of that person or from his own funds” was fatal to the deemed trust. Those words are present in Section 49 SPPA.

[97] However, Justice Chamberland (for the majority in the Court of Appeal overturned by the Supreme Court) analyzed the pre-1993 provision as follows:

> Le premier paragraphe est identique; le législateur y prévoit expressément, en utilisant les mots «est réputée», qu'une personne qui a déduit, retenu ou perçu un montant en vertu d'une loi fiscale détient ce montant en fiducie et que Sa Majesté aux droits du Québec est la bénéficiaire de cette fiducie. Le début du deuxième paragraphe est également identique; le législateur y crée l'obligation pour la personne visée de tenir le montant ainsi déduit, retenu ou perçu «distinctement et séparément de ses propres fonds». Si tel est le cas, il y a fiducie réelle et, advenant faillite, ces montants constituent des «biens détenus par le failli en fiducie pour toute autre personne», au sens de l'alinéa 67(1)(a) de la Loi FI, et ils ne sont pas compris dans les biens du failli.
>
> La seconde partie du deuxième paragraphe a été modifiée par l'ajout des mots «un montant égal au montant ainsi déduit, retenu ou perçu [...]». L'ajout de ces mots ne s'explique, à mon avis, que par la volonté du législateur de créer une fiducie réputée et de la distinguer de la fiducie réelle en éliminant expressément la nécessité de respecter la troisième des conditions essentielles à l'existence d'une fiducie, soit le fait pour le fiduciaire de conserver les biens affectés à la fiducie séparément et distinctement de son patrimoine. En effet, les mots «un montant égal au montant ainsi déduit, retenu ou perçu» sont inutiles dans le contexte où le failli tient un compte distinct et séparé de ses propres fonds pour les montants déduits, retenus ou perçus; les mots n'ont de sens que si le failli ne tient pas un tel compte distinct et séparé. Dans le contexte, ces mots suffisaient pour conclure à la création d'une fiducie réputée; le premier paragraphe de l'article 20 et le début du second visaient la fiducie réelle alors que le premier paragraphe et la fin du second visaient la fiducie réputée.
>
> D'où, à mon avis, la conclusion que le législateur a ainsi créé une fiducie réputée même s'il n'a pas repris tous les mots du législateur fédéral au paragraphe 5 de l'article 227. L'utilisation des mots «un montant égal au montant ainsi déduit, retenu ou perçu» rendait, à mon avis, inutile l'utilisation des mots «que ce montant ait été ou non, en fait, tenu séparé des propres fonds de la personne».[52]
>
> [Emphasis added]

[98] The Supreme Court’s reversal of the Court of Appeal does not mean that the language identifying the property covered on a triggering event is unnecessary. It means only that the words “whether or not the amount has in fact been held separately from the patrimony of that person or from his own funds” are necessary.

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[52] *Sécurité Saglac* (C.A.), *supra* note 51, p.2458.

[99] The Court concludes that the language identifying the property covered on a triggering event is necessary, for the reasons given by the Supreme Court in *Sparrow Electric* and by Justice Schrager in *Aveos*.

[100] Section 49 SPPA does not include this language. The consequence is that the deemed trust under Section 49 SPPA is not effective. As stated by Justice Mayrand in *AbitibiBowater*:

> [34] Avec égards, que ce soit en vertu de la LACC ou de l'article 49 de la *Loi sur les régimes complémentaires de retraite* (LRCR), les créances en cause sont des créances ordinaires, que le législateur n'a pas choisi de protéger dans le contexte de la présente restructuration. Le libellé de l'article 49 LRCR n'est pas suffisant en soi pour conclure à l'établissement d'une véritable fiducie devant avoir priorité sur les autres créanciers. D'ailleurs, la Cour d'appel de l'Ontario, dans l'affaire *Ivaco*, alors qu'elle décide de la portée de l'article 57(3) du *Pension Benefit Act* (dont les termes sont au même effet que ceux de l'article 49 LRCR), mentionne ce qui suit à l'égard des fiducies présumées (*Deemed Trust*) :
>
> > *[…] This Legislative designation by itself does not create a true trust. If the province wants to require an employer to keep its unpaid contributions to a pension plan in a separate account, it must legislate that separation. It has not done so* [53]
>
> [Emphasis added; references omitted]

[101] Justice Mongeon came to the same conclusion in *White Birch*:

> [188] Le second aspect est cependant problématique. Les sommes dues sont homogènes avec les autres argents de la compagnie. Il n'y pas de compte séparé ni de moyen de retracer précisément sur quel argent porte la fiducie réputée. L'employeur a toujours le « pouvoir » sur ces sommes. Le transfert vers un autre patrimoine n'est donc pas complet.
>
> [189] En conséquence, la fiducie présumée de la *LRCR* ne peut donc pas produire d'effet dans le présent contexte, les sommes dues demeurant dans le patrimoine de l'employeur. Comme le mentionnait d'ailleurs le professeur Beaulne, «pas de constitution de patrimoine, pas de fiducie […] ![63]». Évidemment, s'il n'y pas de transfert, il ne pourrait y avoir constitution d'un patrimoine d'affectation en concomitance avec le transfert du bien.
>
> […]
>
> [193] En conséquence des arguments mentionnés ci-dessus, la fiducie de l'article 49 LRCR ne peut constituer une fiducie réelle au sens du droit québécois.[54]
>
> [Emphasis added]

[102] Justice Mongeon came to the opposite conclusion in *Timminco.* After citing the extract from the Court of Appeal in *Sécurité Sagalac* set out above, he concluded:

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[53] *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 2028, par. 34.

[54] *White Birch Paper Holding Company (Arrangement relatif à)*, 2012 QCCS 1679, par. 188-189, 193,

> [96] Cette longue citation indique la manière retenue alors par la Cour d'appel pour conclure à l'existence d'une fiducie réputée en se basant sur les mots retenus par le législateur. En appliquant ce genre d'analyse à l'article 49 LRCR, on doit d'abord se poser la question à savoir si le texte de cet article est suffisamment clair et complet pour conclure à l'existence d'une fiducie réputée. Un tel exercice convainc le Tribunal que l'on doit répondre affirmativement à cette question surtout lorsque l'on constate que l'article 49 LRCR reprend les mots alors présumés manquants à l'article 20 LMRQ et qui, plus tard, feront en sorte que l'article 20 LMRQ crée effectivement une fiducie réputée.[55]
>
> [Emphasis added]

[103] With respect, the key language according to that judgment in *Sécurité Saglac* is not "whether or not the amount has in fact been held separately from the patrimony of that person or from his own funds". That language was not part of Section 20 LMRQ at the relevant time. Rather, the key language was

> […] in the event of a winding-up, assignment or bankruptcy, an amount equal to the amount thus deducted, withheld or collected must be considered to form a separate fund not forming part of the property subject to the winding-up, assignment or bankruptcy.

[104] That language is missing from Section 49 SPPA and its absence is fatal to the deemed trust.

[105] Retraite Québec and other Pension Parties argued that Section 264 SPPA completes Section 49 SPPA by rendering these same amounts unassignable and unseizable:

> **264.** Unless otherwise provided by law, the following amounts or contributions are unassignable and unseizable:
>
> (1) all contributions paid or payable into the pension fund or to the insurer, with accrued interest;
>
> (2) all amounts refunded or pension benefits paid under a pension plan or this Act;
>
> (3) all amounts awarded to the spouse of a member following partition or any other transfer of benefits effected pursuant to Chapter VIII, with accrued interest, and the benefits deriving from such amounts.
>
> Except as far as they derive from additional voluntary contributions or represent a portion of the surplus assets allocated after termination of the plan, any of the above-mentioned amounts that have been transferred to a pension plan contemplated by section 98, with accrued interest, any refunds of and benefits resulting from such amounts, and any pension or payment having replaced a pension pursuant to section 92 are also unassignable and unseizable.

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[55] *Timmiinco ltée (Arrangement relatif à)*, 2014 QCCS 174, par. 96.

[106] Justice Mongeon accepted this argument in *Timminco*:

> [147] Le soussigné est d'avis qu'effectivement, les articles 49 et 264 LRCR doivent être lus et interprétés dans le même contexte.
>
> [148] Si l'article 49 LRCR crée une fiducie réputée opposable à IQ, cela veut dire que les biens visés par la fiducie réputée sont non seulement facilement identifiables et que les montants qu'ils représentent sont disponibles mais qu'effectivement, ils se trouvent clairement « identifiés » par l'effet même de l'article 49. De même, l'article 264 LRCR peut s'appliquer aux montants auxquels l'article 49 LRCR s'applique.
>
> [149] Il ne sera donc pas plus nécessaire dans ce contexte particulier de procéder à une séparation physique des cotisations d'équilibre à être versées du reste des actifs de SBI pour que le produit desdites cotisations jouisse du caractère d'incessibilité et d'insaisissabilité que leur procure l'article 264 LRCR, qu'il n'est nécessaire de le faire pour que la fiducie réputée de l'article 49 LRCR ne produise ses effets.
>
> [150] En ce sens, l'article 264 LRCR vient compléter la logique de l'article 49 LRCR et, autrement, ces deux mêmes articles deviennent complètement dénudés de leur sens de leur portée et de leur effet.[56]
>
> [Emphasis added]

[107] The Court does not agree.

[108] First, Section 264 SPPA is found in the final chapter of the SPPA entitled "Miscellaneous and Transitional Provisions". It would be an odd place to put a provision that deals with the same amounts already covered by Section 49 SPPA.

[109] Further, the enumeration of amounts or contributions in Section 264 SPPA appears to be a list of amounts payable by or to the member of the pension fund and not amounts payable by the employer. It appears that Section 264 protects the members of the plan by providing that they cannot assign these amounts and their creditors cannot seize them. Section 49, on the other hand, is intended to protect pension plans from the creditors of the employer.[57]

[110] Also, if Section 264 SPPA covers the same amounts as Section 49 SPPA, then the overlap between them is problematic. Why is it necessary to have both provisions protecting the same amounts? If the amounts are already covered by a deemed trust, then they are also unassignable and unseizable without the need for Section 264 SPPA. If they are unassignable under Section 264 SPPA, then how can they be transferred to the deemed trust?

[111] Finally and in any event, even if Section 264 SPPA applied to the amounts held by the employer to be paid into the pension plan, it is not clear how that would fix the

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[56] *Id.*, par. 147-150.

[57] Alain PRÉVOST, « Que reste-t-il de la fiducie réputée en matière de régimes de retraite » (2016), 75 R. du B. 23, p. 44-45.

deemed trust under Section 49 SPPA. Simply declaring amounts to be unassignable and unseizable does not make them any more identifiable. There is still no triggering event. Justice Mongeon suggests that the sums are identifiable under Section 49 SPPA, but the Court has already rejected that argument as a result of *Sparrow Electric*.

[112] The Court therefore concludes that the deemed trust under Section 49 SPPA and the unseizability under Section 264 SPPA are not effective and do not create a property or security interest.

iii. NLPBA

[113] The NLPBA includes in Section 32(1) and (2) language very similar to Section 8(1) and (2) of the PBSA:

> **32.** (1) An employer or a participating employer in a multi-employer plan shall ensure, with respect to a pension plan, that
>
> […]
>
> 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.
>
> [Emphasis added]

[114] The Court will assume for the purposes of the present judgment that Section 32(1) and (2) NLPBA create a valid deemed trust under the laws of Newfoundland and Labrador that operates in the same way as its counterpart in Section 8(1) and (2) PBSA.

[115] The NLPBA also includes in Section 32(3) a further trust in the event of termination of the plan.

> (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.
>
> [Emphasis added]

[116] However, this is simply an obligation to hold an amount of money in trust and not a deemed trust. Under *Sparrow Electric*, if the amounts are not actually held in trust, and in the present matter they are not, this provision does not create a trust. In any event, the Court is assuming that Section 32(1) and (2) NLPBA create a valid deemed

trust and, as set out below, the Court gives that deemed trust a broad interpretation. In those circumstances, Section 32(3) NLPBA does not add anything.

[117] Finally, in addition to the deemed trust, Section 32(4) NLPBA creates a lien and charge:

> (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).

[118] The Court will also assume that Section 32(4) NLPBA creates a valid lien and charge under the laws of Newfoundland and Labrador.

b. Priority

[119] In *First Vancouver*, the Supreme Court characterized the deemed trust as a floating charge over all of the assets of the debtor.[58]

[120] With respect to the priority between the deemed trust and the claims of secured creditors, the Supreme Court concluded as follows in *Sparrow Electric*:

> 34 It is to be observed that in addition to attaching Her Majesty's interest to the debtor's property upon the triggering of any of the events mentioned in s. 227(5), the deemed trust operates to the benefit of Her Majesty in a secondary manner. Namely, s. 227(5) permits Her Majesty's interest to attach to collateral which is subject to a fixed charge if the deductions giving rise to Her Majesty's claim arose before that charge attached to that collateral.
>
> …
>
> Thus, s. 227(5) alternatively permits Her Majesty's interest to attach retroactively to the disputed collateral if the competing security interest has attached after the deductions giving rise to Her Majesty's claim in fact occurred. Conceptually, the s. 227(5) deemed trust allows Her Majesty's claim to go back in time and attach its outstanding s. 227(4) interest to the collateral before that collateral became subject to a fixed charge.[59]

[121] In *Aveos*, Justice Schrager came to a similar conclusion under Québec law:

> [66] In the present case, <u>when the deemed trust for the special payments arose, the property of Aveos was encumbered by fixed charges in favour of the Secured Lenders.</u> Those fixed charges were created in 2010, except for the security in the Northwest Territories which was perfected in 2011. The deemed trust arose either upon the liquidation of Aveos (which would not have been before the C.C.A.A. filing on March 19, 2012) or at the earliest when a special payment became due following the actuarial valuation report filed in June 2011. Even if the obligation to make the special payments was somehow retroactive to December 31, 2010 (which was not argued by the Superintendent), the fixed charges in favour of the Secured Lenders were already perfected at such date.

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[58] *First Vancouver Finance* v. *M.N.R.*, 2002 SCC 49, par. 40.

[59] *Sparrow Electric*, *supra* note 48, par. 34.

> Moreover, Aveos made the special payments up to and including January 2012 so it is difficult to deem the trust prior to any payments being in default.
>
> [67] Consequently, this Court agrees with the Secured Lenders first position that their security was created before any deemed trust for the $2.8 million could have existed. Since the assets were already charged, any deemed trust under Section (8)(2) P.B.S.A. is at best subordinate to the security of the Secured Lenders.[60]
>
> [Emphasis added]

[122] As a result, when one of the triggering events in Section 8(2) PBSA occurs, the deemed trust attaches to the debtor's current property, with effect retroactive to the date that the contributions became due. However, it attaches subject to other security which attached to the assets before the contributions were due.[61]

[123] Finally, the Supreme Court in *Sparrow Electric* emphasized that it was open to Parliament to give absolute priority to the deemed trust through appropriate language:

> 112 Finally, I wish to emphasize that it is open to Parliament to step in and assign absolute priority to the deemed trust. A clear illustration of how this might be done is afforded by s. 224(1.2) ITA, which vests certain moneys in the Crown "notwithstanding any security interest in those moneys" and provides that they "shall be paid to the Receiver General in priority to any such security interest". All that is needed to effect the desired result is clear language of that kind. In the absence of such clear language, judicial innovation is undesirable, both because the issue is policy charged and because a legislative mandate is apt to be clearer than a rule whose precise bounds will become fixed only as a result of expensive and lengthy litigation.

[124] The so-called *Sparrow Electric* language was not added to Section 8 PBSA, with the result that it does not have priority over pre-existing secured creditors with a fixed charge.[62]

[125] The Court assumes that these priority rules also apply to the deemed trust under Section 32(2) NLPBA.

[126] As for the lien and charge under Section 32(4) NLPBA, the Court assumes that it is a valid fixed charge under the law of Newfoundland and Labrador. Its priority relative to other secured claims is not clear because it is not registered and because nothing in the NLPBA or the Newfoundland and Labrador *Personal Property Security Act*[63] provides for its priority.

[127] The Ville de Sept-Îles argues that its claim for property and water taxes predates the liquidation of the Wabush CCAA Parties and any default in payment of the contributions, and therefore takes priority even if the deemed trust is valid.

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60 *Aveos*, *supra* note 50, par. 66-67.
61 *First Vancouver*, *supra* note 58, par. 46.
62 See also *Aveos*, *supra* note 50, par. 64-66.
63 S.N.L. 1998, c. P-7.1.

[128] However, for the reasons set out below, it is not necessary for the Court to decide those priority issues.

c. Liabilities covered

i. SPPA[64]

[129] The liabilities covered by Section 49 SPPA are limited:

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

[130] It covers only "contributions" and "accrued interest". In the ordinary course, "contributions" would include regular and special contributions, but not the wind-up deficit. The wind-up deficit is dealt with in Sections 228-229 SPPA, where it is a debt of the employer. There is no deemed trust language in Sections 228-229 SPPA.

[131] The Court therefore concludes that the Québec deemed trust, if it is effective, covers only the regular payments, special payments and catch-up special payments, to the extent that they relate to non-railway employees who reported for work in Québec.

ii. PBSA

[132] There is not much dispute as to the scope of the protection afforded by the PBSA.

[133] Subsection 8(1) PBSA provides that the employer is deemed to hold the following amounts in trust:

> **(a)** the moneys in the pension fund,
>
> **(b)** an amount equal to the aggregate of the following payments that have accrued to date:
>
> **(i)** the prescribed payments, and
>
> **(ii)** the payments that are required to be made under a workout agreement; and
>
> **(c)** all of the following amounts that have not been remitted to the pension fund:
>
> **(i)** amounts deducted by the employer from members' remuneration, and
>
> **(ii)** other amounts due to the pension fund from the employer, including any amounts that are required to be paid under subsection 9.14(2) or 29(6).

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[64] The Court has already concluded that Section 49 SPPA does not create a valid deemed trust and therefore this analysis is not necessary. It is included for the benefit of the parties in the event of an appeal.

[134] Section 9.14(2) PBSA deals with the situation where the employer has given a letter of credit to guarantee certain pension related obligations and is not relevant here.

[135] Subsection 29(6) PBSA deals with the obligations of the employer on termination of a pension plan:

> **29** (6) If the whole of a pension plan is terminated, the employer shall, without delay, pay into the pension fund all amounts that would otherwise have been required to be paid to meet the prescribed tests and standards for solvency referred to in subsection 9(1) and, without limiting the generality of the foregoing, the employer shall pay into the pension fund
>
> > **(a)** an amount equal to the normal cost that has accrued to the date of the termination;
> >
> > **(b)** the amounts of any prescribed special payments that are due on termination or would otherwise have become due between the date of the termination and the end of the plan year in which the pension plan is terminated;
> >
> > **(c)** the amounts of payments that are required to be made under a workout agreement that are due on termination or would otherwise have become due between the date of the termination and the end of the plan year in which the pension plan is terminated;
> >
> > **(d)** all of the following amounts that have not been remitted to the pension fund at the date of the termination:
> >
> > > **(i)** the amounts deducted by the employer from members' remuneration, and
> > >
> > > **(ii)** other amounts due to the pension fund from the employer; and
> >
> > **(e)** the amounts of all of the payments that are required to be made under subsection 9.14(2).

[136] The language of Section 29(6.4) and (6.5) PBSA expressly provides that the deemed trust does not extend to the solvency deficit on termination of the plan:

> (6.4) On the winding-up of the pension plan or the liquidation, assignment or bankruptcy of the employer, the amount required to permit the plan to satisfy any obligations with respect to pension benefits as they are determined on the date of termination is payable immediately.
>
> (6.5) Subsection 8(1) does not apply in respect of the amount that the employer is required to pay into the pension fund under subsection (6.4). However, it applies in respect of any payments that have accrued before the date of the winding-up, liquidation, assignment or bankruptcy and that have not been remitted to the fund in accordance with the regulations made for the purposes of subsection (6.1).
>
> [Emphasis added]

[137] The combined effect of these provisions is that the deemed trust under the PBSA covers the following amounts:

- The moneys in the pension fund;
- The normal cost that has accrued to the date of termination;
- The prescribed special payments that are due on termination or before the end of the plan year;
- The payments under a workout agreement that are due on termination or before the end of the plan year; and
- The unremitted deductions at source.

[138] There is no issue in the present matter with respect to the pension fund itself. It is clear that it is held separate and apart from the assets of the Wabush CCAA Parties.

[139] Further, there do not appear to be any accrued normal costs or unremitted deductions.

[140] There are special payments and catch-up special payments owing, some pre-filing but mostly post-filing because the Court suspended the Wabush CCAA Parties' obligation to make the special payments on June 26, 2015. To the extent that the special payments and catch-up special payments relate to federal employees or retirees, they are in principle protected by the federal deemed trust.

iii. NLPBA

[141] Essentially, Section 32(1) and (2) NLPBA are very similar to Section 8(1) and (2) PBSA. However, there is no equivalent in the PBSA to Section 32(4) NLPBA, and Section 61 NLPBA does not include the equivalent to Section 29(6.5) PBSA.

[142] The NL Superintendent pleads that the deemed trust and the lien and charge under the NLPBA cover the wind-up deficit.

[143] For the reasons described above, the Court will assume for the purposes of the present decision that the deemed trust and the lien and charge under the NLPBA cover the wind-up deficit.

d. Property covered

[144] The issue is whether the deemed trust and the lien and charge under the NLPBA extend to assets beyond the province. More specifically, there are significant proceeds held by the Monitor resulting from the sale of assets in Québec which the Pension Parties argue should be subject to the deemed trust and lien and charge under the NLPBA.

[145] The Court will assume that the NLPBA, as a matter of Newfoundland and Labrador law, extends to assets outside the province. The issue is whether Québec law recognizes the deemed trust and the lien and charge created by Newfoundland and Labrador law as applying to assets in Québec.

[146] The Pension Parties argue that the deemed trust created under the NLPBA is a trust established by law, and that as a result it is a valid trust in Québec under Article 1262 C.C.Q. This is not a proper analysis under principles of private international law. It assumes that "created by law" in Article 1262 C.C.Q. includes foreign laws. Followed to its logical conclusion, it would mean that any trust created by law anywhere in the world can validly charge assets in Québec and that the Québec courts must recognize any such trust. The Court does not agree. Rather, the Court reads Article 1262 C.C.Q. as being limited to trusts created under Québec law.[65] A trust created under a foreign law will only be recognized in Québec under the relevant rules of private international law.

[147] There are several ways to characterize the issue under the rules of private international law in Québec.

[148] If it is viewed as a property issue, the rules of private international law in Québec provide that matters of real rights and their publication are governed by the law of the place where the property concerned is situated (Article 3097 C.C.Q.). This suggests that, if the province of Newfoundland and Labrador seeks to create a deemed trust over property in Québec, Québec will not recognize that the deemed trust extends to property in Québec.

[149] Similarly, the rules on movable securities provide that the validity of a movable security is governed by the law of the state in which the property charged with it is situated at the time of creation of the security (Article 3102 C.C.Q.).

[150] Finally, if it is viewed as a matter of employment law, Article 3118 C.C.Q. provides that the law of the state where the worker habitually carries out his work applies to the contract of employment.

[151] The Pension Parties invoke Article 3079 C.C.Q.:

> **3079.** Where legitimate and manifestly preponderant interests so require, effect may be given to a mandatory provision of the law of another State with which the situation is closely connected.
>
> In deciding whether to do so, consideration is given to the purpose of the provision and the consequences of its application.

[152] They argue that the NLPBA is such a mandatory law, and that the Québec courts should therefore give effect to it.

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[65] Similarly, Article 1262 C.C.Q. provides that a trust may be established by judgment, but in *Gareau (Faillite de)*, REJB 1997-03315 (C.S.), par. 33-35, Justice Dalphond held that a constructive trust created under an Ontario judgment did not create a valid interest against an immoveable in Québec.

[153] However, the NLPBA only applies to the workers who report to work in the province of Newfoundland and Labrador, while the SPPA applies to workers who report for work in the province of Québec. If the NLPBA extended to property in Québec, this would be to the prejudice of the Québec workers who would see a deemed trust for the benefit of their co-workers applied to the assets to which the Québec workers report for work. The Court cannot conclude in these circumstances that the interests of the foreign workers are "manifestly preponderant" over the interests of the Québec workers.

[154] As a result, the Court concludes that the deemed trust under the NLPBA does not apply to assets within the province of Québec.

4. Has there been a "liquidation" to trigger the deemed trusts under the PBSA and the NLPBA ?

[155] The deemed trust under Section 8(2) of the PBSA becomes effective only "[i]n the event of any liquidation, assignment or bankruptcy" of the employer. The exact same language is found in Section 32(2) NLPBA and the Court assumes that the words are to be interpreted in the same way.

[156] The key issue here is whether the CCAA proceedings themselves, or some event within the CCAA proceedings, constitute a "liquidation, assignment or bankruptcy" of the employer.

[157] The term "bankruptcy" is the clearest. It must mean a formal bankruptcy under the *Bankruptcy and Insolvency Act*,[66] following an assignment in bankruptcy by the debtor or a bankruptcy order issued by the court following a petition in bankruptcy by a creditor. There are also deemed assignments in bankruptcy on the failure to file a proposal within the delays or the refusal of a proposal. It is clear in the present matter that there has not been a bankruptcy in any of these senses.

[158] The term "assignment" likely refers to an assignment in bankruptcy, even though that creates an overlap between "bankruptcy" and "assignment". The alternative is to read "assignment" more broadly to refer to any assignment of property by the employer. However, Sections 8(2) PBSA and 32(2) NLPBA go on to refer to "the estate in liquidation, assignment or bankruptcy", which suggests that all of the employer's property has been assigned to a third party and is being administered by the third party. This brings us back to the notion of an assignment in bankruptcy as opposed to contractual assignments of property by the employer. Further, how could the deemed trust attach each time the employer assigns any property? Or if the deemed trust attaches only once, which assignment of property causes it to attach?

[159] That leaves the third term, "liquidation". The Monitor, the Wabush CCAA Parties and the Ville de Sept-Îles argue that the term "liquidation" should be limited to formal liquidation proceedings under a statute such Part XVIII of the *Canada Business Corporations Act.*[67] The Pension Parties invite the Court not to give the term

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[66] R.S.C. 1985, c. B-3.
[67] R.S.C. 1985, c. C-44.

"liquidation" the narrow technical sense of a formal liquidation. Rather, they suggest that in the present matter, the Wabush CCAA Parties used the CCAA process in order to liquidate their assets and that this should be sufficient to trigger the deemed trust provisions. They argue that this liberal interpretation is in accordance with the presumed intention of the legislator to protect pension plans and in accordance with a functional analysis since there has clearly been a liquidation in the present matter.

[160] It is clear in the present matter that the Wabush CCAA parties have liquidated their assets. With the sale of the Wabush mine in June, the Wabush CCAA parties have now sold all or substantially all of their assets. However, they did not institute formal liquidation proceedings. They proceeded instead under the CCAA with what has come to be known as a "liquidating CCAA":

> *Liquidating CCAA*: As discussed above, this is a relatively new type of proceeding in which the debtor's assets are sold either piecemeal or on a going concern basis under the CCAA court's supervision. The sales may occur pursuant to a plan that has been approved by the creditors, or they may occur in the absence of a plan. Notably, many recent CCAA proceedings have been liquidating CCAAs from the outset. That is, the debtor never intended to present a reorganization plan to its creditors, and merely applied for CCAA protection so that it could begin a marketing process to sell substantially all of its assets. In such cases, the debtor might present a post-sale plan to its creditors that is essentially a plan of distribution of the sale proceeds, or the debtor may simply enter bankruptcy proceedings. For reasons that will be discussed further below, liquidating CCAAs are controversial and may not be consistent with the corporate rescue purpose of the CCAA.[68]

[161] The Court agrees that it is not relevant that the liquidation was done outside the BIA and the CBCA.

[162] First, the Court notes that the liquidation regime under Part XVIII of the CBCA is only available to corporations that are solvent (Section 208 CBCA). As a result, liquidation under the CBCA was never an option for the Wabush CCAA Parties. Moreover, the deemed trusts under the PBSA and the NLPBA are of limited value in the case when the employer is solvent.

[163] Further, although the debtor in a CCAA proceeding remains in possession of his assets, there is a court-appointed monitor and the process is under the supervision of the court. This is sufficient to meet the requirement of "the estate in liquidation, assignment or bankruptcy".

[164] Finally, the conclusion that the deemed trust is triggered by a liquidation under the BIA but not a liquidation under the CCAA seems to run counter to the idea that creditors should have analogous entitlements under the CCAA and the BIA.[69] It would

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[68] Alfonso NOCILLA, « Is 'Corporate Rescue' Working in Canada? » (2012), 53 Can. Bus. L.J. 382, p. 385. See also *Re Puratone et al*, 2013 MBQB 171, par. 20.

[69] *Sun Indalex Finance, LLC* v. *United Steelworkers*, 2013 SCC 6, par. 51.

also allow the employer to avoid the deemed trust by choosing to proceed under the CCAA rather than the BIA. The Supreme Court addressed a similar concern in different circumstances in *Indalex* in the following way:

> [47] The Court of Appeal declined to decide whether a deemed trust arose in relation to the Executive Plan, stating that it was unnecessary to decide this issue. However, the court expressed concern that a reasoning that deprived the Executive Plan's members of the benefit of a deemed trust would mean that a company under *CCAA* protection could avoid the priority of the *PBA* deemed trust simply by not winding up an underfunded pension plan. The fear was that Indalex could have relied on its own inaction to avoid the consequences that flow from a wind up. I am not convinced that the Court of Appeal's concern has any impact on the question whether a deemed trust exists, and I doubt that an employer could avoid the consequences of such a security interest simply by refusing to wind up a pension plan. The Superintendent may take a number of steps, including ordering the wind up of a pension plan under s. 69(1) of the *PBA* in a variety of circumstances (see s. 69(1)(d) *PBA*). The Superintendent did not choose to order that the plan be wound up in this case.[70]
>
> [Emphasis added]

[165] Similarly, the employer should not be allowed to avoid the priority of the deemed trust by choosing to liquidate under the CCAA rather than the BIA.

[166] The Court therefore concludes that there has been a liquidation in the present matter triggering the application of the deemed trusts under the PBSA and the NLPBA.[71]

[167] The next question is when did it occur? Because the deemed trust attaches to the employer's assets at the time of the triggering event, it is important to know exactly when it occurred. It cannot be a vague date or a range of dates.

[168] In moving away from requiring a filing under the BIA or the CBCA to taking a more practical view, the Court recognizes that the date of the liquidation may prove to be a difficult determination and may inject some uncertainty into the process. However, the Court considers that some uncertainly is a small price to pay for greater protection of the rights of the pensioners.

[169] In the present matter, the date that the liquidation began is fairly clear.

[170] The Wabush CCAA Parties initiated proceedings under the CCAA on May 19, 2015. Prior to the filing of the CCAA motion, operations at the Wabush Mine had been permanently shut down. The employees had been terminated or laid off. The Wabush CCAA Parties had tried unsuccessfully to find buyers and/or investors for the Wabush mine operations and/or assets.

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[70] *Id.*, par. 47.

[71] See also *Dauphin Plains Credit Union Ltd.* v. *Xyloid Industries Ltd.*, [1980] 1 S.C.R. 1182.

[171] Moreover, when the Wabush CCAA proceedings were initiated, the Bloom Lake parties were already subject to CCAA proceedings and they had obtained an order approving a sale and investor solicitation process ("SISP") for their assets. The SISP already covered the Wabush mine assets and included the possibility of soliciting "liquidation proposals".

[172] With the benefit of hindsight, the Court notes that the Wabush CCAA Parties did not receive any proposals for investments but only offers to purchase assets. Ultimately, the Wabush CCAA Parties sold off all or essentially all of their assets in piecemeal fashion. That was always the likely outcome of the CCAA process.

[173] In these circumstances, the Court concludes that this was a liquidating CCAA from the outset. The Court therefore concludes that the liquidation started on May 19, 2015 and that the deemed trusts under Section 8(2) PBSA and Section 32(2) NLPBA came into effect on that date.

[174] The Court notes that there is nothing in any way pejorative about qualifying the CCAA as a liquidating CCAA. That is a legitimate and increasingly frequent use of CCAA proceedings. However, a liquidating CCAA should be more analogous to a BIA proceeding. One of the consequences is that the deemed trusts should be triggered.

[175] Because the Court has concluded that the triggering event occurred when the CCAA motion was filed, the Court need not decide whether the triggering event must occur prior to the initial CCAA order, or whether it can occur after the initial CCAA order but prior to the sale of the assets.[72]

5. Are the deemed trusts and other charges valid in the CCAA context?

[176] Given that the PBSA and the NLPBA operate in much the same manner, the analysis of whether they are applicable in the CCAA context is quite similar. However, there is one very important distinction: the PBSA is federal legislation and the NLPBA is provincial legislation. Because both the PBSA and the CCAA are federal legislation, the issue of how they operate together is a matter of determining Parliament's intent. With respect to a provincial deemed trust, the Supreme Court in *Indalex* stated that:

> The provincial deemed trust under the PBA continues to apply in CCAA proceedings, subject to the doctrine of federal paramountcy.[73]

a. the NLPBA and the doctrine of federal paramountcy

[177] The Court will consider first the operation of the NLPBA and the doctrine of federal paramountcy.

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[72] In *Indalex*, *supra* note 69, Justice Deschamps seems to suggest that the triggering event must occur before the sale (par. 46) while Justices Cromwell (par. 92 and 118) and LeBel (par. 265) state that the triggering event must occur prior to the CCAA filing. See also *Grant Forest Products Inc. (Re)*, 2013 ONSC 5933, par. 25 and 71, appeal dismissed 2015 ONCA 570, par. 130.

[73] *Indalex*, *supra* note 69, par. 52.

[178] The Supreme Court recently summarized the doctrine of federal paramountcy in *Lemare Lake*:[74]

- A provincial law will be deemed to be inoperative to the extent that it conflicts with or is inconsistent with a federal law;
- The first step in the analysis is to determine whether the federal and provincial laws are validly enacted;
- The second step requires consideration of whether any overlap between the two laws constitutes a conflict sufficient to render the provincial law inoperative;
- Two kinds of conflict are at play: (1) an *operational conflict*, where compliance with both the federal and provincial law is impossible; and (2) *frustration of purpose*, where the provincial law thwarts the purpose of the federal law;
- Operational conflict arises where one enactment says "yes" and the other says "no", such that compliance with one is defiance of the other;
- To prove that provincial legislation frustrates the purpose of a federal enactment, the party relying on the doctrine must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose;
- Paramountcy must be narrowly construed: when a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.

[179] In *Indalex*, the Supreme Court held that the charge in favour of the interim lender superseded the provincial deemed trust because of the doctrine of federal paramountcy. The Supreme Court used the language of operational conflict:

> [60] In this case, compliance with the provincial law necessarily entails defiance of the order made under federal law. On the one hand, s. 30(7) of the *PPSA* required a part of the proceeds from the sale related to assets described in the provincial statute to be paid to the plan's administrator before other secured creditors were paid. On the other hand, the Amended Initial Order provided that the DIP charge ranked in priority to "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise" (para. 45). Granting priority to the DIP lenders subordinates the claims of other stakeholders, including the Plan Members. This court-ordered priority based on the *CCAA* has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of

[74] *Saskatchewan (Attorney General)* v. *Lemare Lake Logging Ltd.*, 2015 SCC 419, par. 15-27.

> priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.[75]

[180] The Court followed *Indalex* when it granted priority to the Interim Lender Charge over the deemed trust under the NLPBA in June 2015.[76]

[181] The issue now is a broader one, whether the deemed trusts under the NLPBA have any effect in the context of CCAA proceedings.

[182] No one argues that the CCAA and the NLPBA are not validly enacted.

[183] Nothing in the CCAA expressly invalidates deemed trusts under pension legislation. Section 37(1) CCAA, which was added to the CCAA in 2007, invalidates in the CCAA context most deemed trusts in favour of the Crown. However, it does not invalidate deemed trusts in favour of other persons, such as the deemed trust under the NLPBA. The Court emphasized in its June 2015 decision that certain statements in *Century Services*[77] and *Aveos*[78] about deemed trusts should be limited to deemed trusts in favour of the Crown and should not be applied to all deemed trusts.[79]

[184] The CCAA provides specific protection for certain pension-related liabilities. Section 6(6) and (7) CCAA require that the employer provide for certain pension payments before the court can sanction the compromise or arrangement:

> **6** (6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if
>
> > (a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:
> >
> > > (i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,
> > >
> > > (ii) if the prescribed pension plan is regulated by an Act of Parliament,
> > >
> > > > (A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund, and
> > > >
> > > > (B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of

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75 *Indalex*, *supra* note 69, par. 60.
76 Suspension Order, *supra* note 9.
77 *Century Services Inc.* v. *Canada (Attorney General)*, 2010 SCC 60, par. 45 and 95.
78 *Aveos*, *supra* note 50, par. 74-75.
79 Suspension Order, *supra* note 9, par. 72.

> subsection 2(1) of the Pension Benefits Standards Act, 1985,
>
> (C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the Pooled Registered Pension Plans Act, and
>
> (iii) in the case of any other prescribed pension plan,
>
> (A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and
>
> (B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament,
>
> (C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the Pooled Registered Pension Plans Act; and
>
> (b) the court is satisfied that the company can and will make the payments as required under paragraph (a).
>
> (7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

[185] Section 36(7) CCAA provides a similar limitation on the court's power to authorize a sale of assets:

> **36** (7) The court may grant the authorization [to sell or otherwise dispose of assets outside the ordinary course of business] only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

[186] These provisions are limited in scope. They protect the employee contributions deducted at source by the employer and not yet remitted to the pension fund as well as the normal cost payments due by the employer. They do not protect the special payments due or the wind-up deficiency.

[187] There is no operational conflict between these provisions and the deemed trust under the NLPBA in the sense that the deemed trust under the NLPBA protects additional amounts that are not protected by the CCAA.

[188] The question is whether the NLPBA frustrates Parliament's purpose by protecting additional amounts. Did Parliament intend that only the employee contributions and the normal cost payments be protected or did Parliament provide a minimum level of protection, leaving it to the provincial legislatures to extend the protection to additional amounts if they thought it appropriate to do so?

[189] This is not a matter of, as the NL Superintendent puts it in his outline of argument, "relying on the largely discredited and marginalized doctrine of 'negative implication' or 'covering the field'."[80] The Court will not assume that Parliament intended to occupy the field. There is a substantial body of written evidence as to Parliament's intent in adopting Sections 6(6) and 36(7) CCAA. There are the submissions made to Parliament in relation to the protection of pension plans in insolvency, the deliberations of the committees and of Parliament, and the final decision reached by Parliament. Justice Deschamps cited the report of the Standing Senate Committee on Banking, Trade and Commerce in her judgment in *Indalex*:

> [81] There are good reasons for giving special protection to members of pension plans in insolvency proceedings. Parliament considered doing so before enacting the most recent amendments to the *CCAA*, but chose not to (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act , the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36, in force September 18, 2009, SI/2009-68; see also Bill C-501, *An Act to amend the Bankruptcy and Insolvency Act and other Acts (pension protection)*, 3rd Sess., 40th Parl., March 24, 2010 (subsequently amended by the Standing Committee on Industry, Science and Technology, March 1, 2011)). A report of the Standing Senate Committee on Banking, Trade and Commerce gave the following reasons for this choice:
>
> > Although the Committee recognizes the vulnerability of current pensioners, we do not believe that changes to the BIA regarding pension claims should be made at this time. Current pensioners can also access retirement benefits from the Canada/Quebec Pension Plan, and the Old Age Security and Guaranteed Income Supplement programs, and may have private savings and Registered Retirement Savings Plans that can provide income for them in retirement. The desire expressed by some of our witnesses for greater protection for pensioners and for employees currently participating in an occupational pension plan must be balanced against the interests of others. As we noted earlier, insolvency – at its essence – is characterized by insufficient assets to satisfy everyone, and choices must be made.
> >
> > The Committee believes that granting the pension protection sought by some of the witnesses would be sufficiently unfair to other stakeholders that we cannot recommend the changes requested. For example, we feel that super priority status could unnecessarily reduce the moneys available for distribution to

[80] *Supra* note 39, par. 68.

> creditors. In turn, credit availability and the cost of credit could be negatively affected, and all those seeking credit in Canada would be disadvantaged.
>
> (*Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at p. 98; see also p. 88.)
>
> [82] In an insolvency process, a CCAA court must consider the employer's fiduciary obligations to plan members as their plan administrator. It must grant a remedy where appropriate. However, courts should not use equity to do what they wish Parliament had done through legislation.[81]
>
> [Emphasis added]

[190] The Monitor cites a number of other reports, summaries and bills in his outline of arguments.

[191] The Pension Parties argue that extrinsic evidence is inadmissible to establish Parliament's purpose in a paramountcy analysis. They argue that Parliament's intention must be stated in the statute which is said to be paramount. However, in *Lemare Lake*, Justice Gascon, speaking for the majority, considered extrinsic evidence of Parliament's intention but found it to be insufficient:

> [45] This is, in our respectful view, insufficient evidence for casting s. 243's purpose so widely. As the Court explained in *COPA*, at para. 68, "clear proof of purpose" is required to successfully invoke federal paramountcy on the basis of frustration of federal purpose. The totality of the evidence presented by *amicus* does not meet this high burden. While cases and secondary sources can obviously be helpful in identifying a provision's purpose, the sources cited by *amicus* merely establish promptness and timeliness as general considerations in bankruptcy and receivership processes. The absence of sufficient evidence supporting *amicus*'s claim about the broad purpose of s. 243 is fatal to his claim. What the evidence shows instead is a simple and narrow purpose: the establishment of a regime allowing for the appointment of a national receiver, thereby eliminating the need to apply for the appointment of a receiver in multiple jurisdictions.[82]
>
> [Emphasis added]

[192] In the present matter, the evidence is clear and the conclusion is inescapable. Parliament was not setting minimum requirements or a floor that must be respected, while leaving it to the provinces to decide whether in their jurisdictions to protect additional amounts owing to pension funds. It is clear that Parliament had weighed the competing interests and decided that this was the protection that all pension plan members across Canada would receive. It left no room for the provinces.

[193] It is also important to consider the BIA.

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81 *Indalex*, *supra* note 69, par. 81-82.
82 *Lemare Lake*, *supra* note 74, par. 45.

[194] The BIA provides a scheme for distribution of the bankrupt's assets: it excludes property that the debtor holds in trust for any other person (Section 67(1)(a)), it recognizes the rights of secured creditors (Sections 127-134), it provides for the priority of certain claims (Section 136), it postpones the claims of non-arm's length parties (Section 137) and it pays all other claims rateably (Section 141).

[195] There is a substantial body of Supreme Court jurisprudence standing for the proposition that provinces cannot change this scheme of distribution. The principles were summarized by Justice Gonthier in *Husky Oil*:

> (1) provinces cannot create priorities between creditors or change the scheme of distribution on bankruptcy under s. 136(1) of the Bankruptcy Act;
>
> (2) while provincial legislation may validly affect priorities in a non-bankruptcy situation, once bankruptcy has occurred section 136(1) of the Bankruptcy Act determines the status and priority of the claims specifically dealt with in that section;
>
> (3) if the provinces could create their own priorities or affect priorities under the Bankruptcy Act this would invite a different scheme of distribution on bankruptcy from province to province, an unacceptable situation; and
>
> (4) the definition of terms such as "secured creditor", if defined under the Bankruptcy Act, must be interpreted in bankruptcy cases as defined by the federal Parliament, not the provincial legislatures. Provinces cannot affect how such terms are defined for purposes of the Bankruptcy Act.
>
> […]
>
> (5) in determining the relationship between provincial legislation and the Bankruptcy Act, the form of the provincial interest created must not be allowed to triumph over its substance. The provinces are not entitled to do indirectly what they are prohibited from doing directly;
>
> (6) there need not be any provincial intention to intrude into the exclusive federal sphere of bankruptcy and to conflict with the order of priorities of the Bankruptcy Act in order to render the provincial law inapplicable. It is sufficient that the effect of provincial legislation is to do so.[83]

[196] These principles have been applied by the Supreme Court to invalidate a number of attempts by the provinces to give the Crown priority for certain claims.[84] The argument was that the predecessors of the current Section 136(1)(j) BIA gave the federal and provincial Crown a limited priority, and that any attempt by the province to improve that ranking was inoperative. The argument extended not only to deemed trusts

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[83] *Husky Oil Operations Ltd.* v. *Minister of National Revenue*, [1995] 3 SCR 453, par. 32 and 39.

[84] See *Deputy Minister of Revenue* v. *Rainville*, [1980] 1 S.C.R. 35**;** *Deloitte Haskins and Sells Ltd.* v. *Workers' Compensation Board*, [1985] 1 S.C.R. 785; *Federal Business Development Bank* v. *Quebec (Commission de la santé et de la sécurité du travail),* [1988] 1 S.C.R. 1061; *British Columbia* v. *Samson Bélair Ltd.*, [1989] 2 S.C.R. 24.

but also to other priorities established by the provinces in favour of the Crown which were not published and were not available generally to other creditors.

[197] The Monitor argues that this same argument applies in the present matter to invalidate the deemed trust and the lien and charge under the NLPBA as provincial attempts to change the scheme of distribution in the CCAA.

[198] For the argument to apply in the present matter, there must be two extensions:

(1) the argument must be extended from Crown claims to pension claims, and

(2) the argument must be extended from the BIA to the CCAA.

[199] As for extending the argument from Crown claims to pension claims, there are two important differences between a Crown claim and a pension claim: (1) the priority of Crown claims is expressly provided by Section 136(1)(j) BIA, whereas there is a pension charge created by Sections 81.5 and 81.6 BIA, and (2) the BIA was amended in 1992 to expressly provide that deemed trusts (Section 67(2)) and security (Section 86(1)) in favour of the Crown (whether federal or provincial) are generally not effective in bankruptcy, subject to a number of exceptions which are not relevant in this matter.

[200] Neither difference is fatal to the extension of the argument. Pension claims are not mentioned in Section 136 BIA because they are not preferred claims: some pension claims are secured claims under Sections 81.5 and 81.6 BIA and in principle the rest are ordinary unsecured claims in a bankruptcy. It is not necessary that they be mentioned specifically in Section 136 BIA.

[201] The provisions dealing expressly with Crown claims clearly have no application to pension claims. However, those provisions were not necessary to conclude that a provincial priority conflicts with the BIA scheme of distribution. Even though pension claims are treated differently from Crown claims, they are part of the scheme of distribution under the BIA and any attempt by the province to change that scheme of distribution is inoperative.

[202] The argument that the BIA scheme of distribution applies in CCAA proceedings is more difficult.

[203] There is no statutory scheme of distribution under the CCAA because the CCAA is not intended to be the vehicle for a liquidation of assets and distribution of the proceeds. The CCAA is intended as a vehicle for the restructuring of the debtor. In principle, a plan will be submitted to the creditors and they will have the right to vote on it. For that reason, there is no need to provide a scheme of distribution.

[204] However, as we have already discussed, the present matter involves a liquidating CCAA.

[205] In that context, it is clear that the scheme of distribution under the BIA is very relevant. If the creditors are offered a plan in the context of a liquidating CCAA, it will be limited to distributing the proceeds of the sale of the debtor’s assets. The creditors will inevitably compare what they are getting under the plan to what they would get under

the BIA. If any creditor is offered less under the plan, he will likely vote against the plan or oppose its approval by the court, with a view to petitioning the debtor into bankruptcy. Justice Deschamps referred to this in *Indalex* as the creditors "bargain[ing] in the shadow of their bankruptcy entitlements"[85]. As Justice Deschamps wrote in *Century Services*:

> [47] Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA* , creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.[86]

[206] In the same way, if the Court concludes that the NLPBA deemed trusts are valid in a liquidating CCAA but not in a BIA proceeding, then the creditors affected by the deemed trust will simply put the Wabush CCAA Parties into bankruptcy.

[207] Alternatively, it is frequently the outcome of a liquidating CCAA that no plan is submitted and the debtor slips into a bankruptcy under the BIA for the purpose of distributing its assets.

[208] The bottom line is that a liquidating CCAA requires a scheme of distribution and the only one which makes sense is the scheme of distribution under the BIA. As a result, and unless there is a contradiction between the CCAA and the BIA, the BIA scheme of distribution should apply in a liquidating CCAA.

[209] Under Section 81.6 BIA, the same amounts which are protected by Sections 6(6) and 36(7) CCAA are secured by security on all of the bankrupt's assets. There is no asymmetry. There is no security for the unpaid special payments and wind-up deficit and those are treated as unsecured claims.[87]

[210] In light of all of these circumstances, the Court concludes that it would frustrate the purpose of Parliament if the deemed trust under the NLPBA operated in the context of a CCAA proceeding. The doctrine of federal paramountcy therefore renders the deemed trust under the NLPBA inoperable.

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85 *Indalex*, *supra* note 69, par. 51.

86 *Century Services*, *supra* note 77, par. 47.

87 Moreover, there is the argument that the pension administrator cannot be a « secured creditor » as a result of the lien and charge created by Section 32(4) NLPBA because the amounts owing by the employer are not due to the pension administrator. As a result, it cannot be a « secured creditor » as that term is defined in the BIA: *Harbert Distressed Investment Fund, L.P.* v. *General Chemical Canada Ltd.*, 2007 ONCA 600, par. 32, leave to appeal to Supreme Court refused, 2008 CanLII 6391.

b. the PBSA and Parliament's intent

[211] The same conflict exists between the CCAA and the PBSA: the PBSA creates a deemed trust for the special payments due to the pension fund whereas the special payments are not protected under the CCAA.

[212] Because the CCAA and the PBSA are both federal statutes enacted by the same legislator, it is not an issue of paramountcy but rather a question of the determination of the legislator's intention.

[213] As the Court wrote in its June 2015 judgment:

> [74] It is difficult to reconcile Sections 6(6) and 36(7) CCAA with a broad interpretation of Section 8(2) PBSA. Why would the legislator give specific protection to the normal payments by amending the CCAA in 2009 if the deemed trust protecting not only the normal payments but also the special payments was effective in the CCAA context? Why would the legislator not protect the special payments under Sections 6(6) and 36(7) CCAA if they were already protected under a deemed trust? What happens to the deemed trust for the special payments if there is an arrangement or an asset sale? Because both statutes were adopted by the same legislator, we must try to determine the legislator's intent.[88]

[214] In *Century Services*, the Supreme Court was faced with a similar conflict between the deemed trust for GST under the *Excise Tax Act* and the CCAA. The language of the *Excise Tax Act*[89] provided that the deemed trust was effective notwithstanding any law of Canada other than the BIA. Justice Deschamps adopted "a purposive and contextual analysis to determine Parliament's true intent" (par. 44) and examined the "internal logic of the *CCAA*" (par. 46), before concluding that the deemed trust for GST was not effective in a CCAA proceeding.

[215] The Court adopts the following reasoning to resolve the conflict:

> Given that the pension provisions of the *BIA* and *CCAA* came into force much later than s. 8 of the *PBSA*, normal interpretation would require that the later legislation be deemed to be remedial in nature. Likewise, since those provisions of the *BIA* and *CCAA* are the more specific provisions, normal interpretation would take them to have precedence over the general. Finally, the limited scope of the protection given to pension claims in the *BIA* and the *CCAA* would, by application of the doctrine of implied exclusion, suggest that Parliament did not intend there to be any additional protection. In enacting *BIA* subs. 60(1.5) and 65.13(8) and ss. 81.5 and 81.6 and *CCAA* subs. 6(6) and 37(6), while not amending subs. 8(2) of the *PBSA* (by adding explicit priority language or by removing the insolvency trigger), Parliament demonstrated the intent that

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88 Suspension Order, *supra* note 9, par. 74.

89 R.S.C. 1985, c. E-15.

> pension claims would have protection in insolvency and restructurings only to the limited extent set out in the *BIA* and the *CCAA*.[90]
>
> [Emphasis added]

[216] The Court therefore concludes that the PBSA deemed trust is not effective in the context of the present CCAA proceedings.

6. Conclusions

[217] As a result of the foregoing, the Court comes to the following conclusions:

1. The trusts created under the SPPA, PBSA and NLPBA are not enforceable in CCAA proceedings;
2. However, the employee contributions and the normal cost payments are protected to the extent provided for by Sections 6(6) and 37(6) of the CCAA.

[218] To provide greater clarity, the Court responds as follows to the questions raised by the Monitor in paragraph 76 of his Motion for Directions:

a) "Liquidation" under Sections 8(2) PBSA and 32(2) NLPBA includes a liquidating plan under the CCAA;

b) A "liquidation" within the meaning of Sections 8(2) PBSA and 32(2) NLPBA commenced when the Wabush CCAA Parties made a motion seeking CCAA protection on May 20, 2015;

c) Not answered.

d) The wind-up deficit is not covered by the PBSA deemed trust. The Court has assumed that it is covered by the deemed trust under the NLPBA, but has not come to any conclusion on the question;

e) Not answered.

f) Nothing in the NLPBA limits the assets covered by the deemed trust to assets located in the province of Newfoundland and Labrador;

g) The Court would not recognize or enforce the deemed trust under the NLPBA against assets located in the province of Québec.

[219] Finally, with respect to the orders sought by the Representative Employees in their Argumentation Outline, the Court adds that the Plans are governed by the PBSA for the railway employees, by the SPPA for the non-railway employees who reported for work in Québec, and by the NLPBA for the non-railway employees who reported for work in NL.

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[90] Sam Babe, "What About Federal Pension Claims? The Status of *Pension Benefits Standards Act, 1985* and *Pooled Registered Pension Plans Act* Deemed Trust Claims in Insolvency" (2013), 28 N.C.D.Rev. 25, p. 30. See also *Aveos*, *supra* note 50, par. 76-77, 84.

[220] At the outset, the Court said it would reserve the rights of the parties to ask the Court to revise the conclusions of the present judgment if: (1) the NLCA decides that the interpretation of the NLPBA is different from the interpretation that the Court assumed, and (2) that difference is material to the Court's conclusions.

[221] However, based on its analysis and conclusions in the present judgment, the Court can now remove that reserve, because the interpretation of the NLPBA was not material to the Court's conclusions.

[222] If the NLCA disagrees with the Court on any issue other than the interpretation of the NLPBA, that will be a matter that the parties can raise on appeal.

FOR THESE REASONS, THE COURT:

[223] **GRANTS** the Motion by the Monitor for Directions with respect to Pension Claims;

[224] **DECLARES** that the trusts created under the SPPA, PBSA and NLPBA are not enforceable in CCAA proceedings;

[225] **DECLARES** that the employee contributions and the normal cost payments are protected to the extent provided for by Sections 6(6) and 37(6) of the CCAA;

[226] **THE WHOLE WITHOUT COSTS.**

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Dates of hearing: June 28 and 29, 2017

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