



No Priority for Pension Claims in Wabush CCAA

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On September 11, 2017, the Quebec Superior Court released a [decision](#) in the *Wabush Companies' Creditors Arrangement Act* (CCAA) proceedings that may affect how pension plan liabilities are dealt with in insolvency proceedings in Quebec and the rest of Canada. The Court made four significant findings, each of which is discussed in detail below:

1. The deemed trust under the Quebec *Supplemental Pension Plans Act* (SPPA) is defective;
2. The deemed trusts under the Newfoundland and Labrador (NL) *Pension Benefits Act* (PBA) and federal *Pension Benefits Standards Act, 1985* (PBSA) are ineffective in a “liquidating CCAA”;
3. The distribution scheme under the CCAA should be the same as that under the *Bankruptcy and Insolvency Act* (Canada) (BIA); and
4. A priority created under an extra-provincial statute does not apply to assets located in Quebec.

On items 2 and 3, the reasoning and results in *Wabush* are consistent with the Supreme Court of Canada (SCC) decision in [Century Services](#), but diverge from the SCC’s later reasoning in [Indalex](#). We expect *Wabush* to be appealed. This is a case to watch in an evolving area of law.

Background

Wabush Mines Inc. and certain of its affiliates (the Company) filed for protection from its creditors under the CCAA in 2015. At the time of filing, the Company sponsored two on-going defined benefit pension plans (the Plans), both of which were registered in NL, and both included employees located in NL, Quebec, and federally regulated employees. Following the filing, the Company stopped paying special payments to the Plans, and the Plans were terminated with combined deficits of nearly \$55 million, and special payment arrears of nearly \$9 million. All normal cost contributions had been paid.

The Company held a sales process and liquidated its assets. It also held a claims process in which various claimants asserted a priority over some or all of the proceeds available for distribution to the Company’s creditors. Priority claims were filed in respect of the Plans and their members. The Monitor sought directions from the Court as to what priority to give unpaid special payments and the deficits in the Plans.

The “pension interests” were represented by the NL, Quebec, and federal pension regulators (the Regulators), the relevant unions, representative counsel appointed to represent the non-unionized Plan members and retirees, and the replacement plan administrator (Plan Members). The Plan Members argued that the NL deemed trust covers the unpaid special payments and the wind-up deficits in both

Plans, for all Plan members, and that the deemed trust is operative in the CCAA proceedings. The Regulators argued that each jurisdiction's deemed trust covers the members subject to that jurisdiction, and also that the deemed trust remains operative in the CCAA proceedings.

In the tangled web of very complex CCAA proceedings, the pension interests also successfully requested that the NL government refer questions of the scope and effect of the NL deemed trust to the NL Court of Appeal (NL Reference). The NL Reference is scheduled to be heard on September 21 and 22, 2017.

The Decision

In the context of the NL Reference, dueling deemed trusts, dueling pension priority regimes, and divergent arguments from the Regulators and Plan Members, the decision, written by Justice Stephen Hamilton^[1], masterfully cuts to the chase. After agreeing with the Regulators that the deemed trust provisions under each of the NL PBA, Quebec SPPA and federal PBSA applies with respect to each Plans' members subject to that jurisdiction, the Court turned to whether each deemed trust is valid, what amounts are subject to each deemed trust, and whether each is effective in the context of the Wabush CCAA. The Court's four key findings are as follows.

Deemed trust under Quebec SPPA is defective

The Court, citing *Sparrow Electric*, established that two elements are necessary in order to create a statutory deemed trust with an effective priority:

1. The statute must declare that the debtor is deemed to hold an amount in trust; and
2. If the amount is not actually held separate and apart from the debtor's other assets, the statute must deem the amount to be held separate and apart from the debtor's other assets.

When examined against these two criteria, the Court determined that the NL PBA and federal PBSA deemed trusts do create an effective priority, but that the Quebec SPPA deemed trust contained in s. 49 of the SPPA does not. Specifically, the court determined that the second critical ingredient necessary to make an effective deemed trust is missing from the SPPA, thus rendering the deemed trust ineffective to create a priority. The decision appears to be the tie-breaking vote between two previous Quebec Superior Court decisions, both written by Justice Mongeau^[2] that had, on the one hand, determined the SPPA deemed trust to be ineffective for the same reasons as did Justice Hamilton^[3] and on the other, determined it to create an effective priority.^[4]

Deemed trust under the NL PBA and federal PBSA are ineffective in a "liquidating CCAA"

Having established against the two-part test noted above that the NL PBA and PBSA deemed trusts create an effective priority, the Court then turned to the matter of what amounts owing to the Plans were covered by the various deemed trusts, and whether each of the NL PBA and federal PBSA deemed trusts were effective in the context of the Company's "liquidating CCAA".

With respect to the NL PBA deemed trust, the Court concluded that it covers missed special payments and the wind-up deficits in the Plans, as they relate to NL Plan members; however, the Court ultimately determined that the Company's CCAA filing rendered the NL PBA deemed trust ineffective as a result of the doctrine of federal paramountcy. Specifically, the Court reasoned that because the CCAA provides for certain limited protections for normal cost contributions only,^[5] it would frustrate Parliament's purpose to also recognize a provincial pension priority for special payments and the wind-up deficit.

With respect to the PBSA deemed trust, the Court concluded that the deemed trust covers missed special payments, and special payments due in the year of plan termination; however, the Court resolved the

different priorities created in the CCAA and PBSA, both federal statutes, in favour of the CCAA regime, again for the reasons that Parliament's purpose in adopting certain changes to the CCAA in 2009 was to protect normal cost contributions only, and that the CCAA reflects Parliament's intent in the matter.

Distribution scheme under the CCAA should be the same as that under the BIA

In coming to its conclusion that the NL PBA deemed trust is ineffective in a liquidating CCAA for reasons of federal paramountcy, the Court confirmed that pension claims are part of the scheme of distribution under the BIA and any attempt by the provinces to change that scheme of distribution is inoperative. In so doing, the Court followed *Century Services* which provided that the scheme of distribution in a liquidating CCAA ought to be the same as that which is provided for under the BIA, unless there is a contradiction in the CCAA. That proposition was revisited by the SCC in *Indalex*, where the SCC wrote that "courts will favour an interpretation of the CCAA that affords creditors analogous entitlements. Yet this does not mean that courts may read bankruptcy priorities into the CCAA at will."^[6] In *Indalex*, pensioner groups sought to assert the Ontario PBA deemed trust ahead of a debtor-in-possession (DIP) lender's priority granted to it in a court order made pursuant to the CCAA. Although the pensioners were ultimately unsuccessful in defeating the DIP priority, the SCC did not rule that the Ontario PBA deemed trust was ineffective in the liquidating CCAA of Indalex Ltd. If *Wabush* is appealed, we expect this issue to be central to the appeal.

Deemed trust created under an extra-provincial statute does not apply to assets located in Quebec.

In coming to a conclusion on the scope of the NL PBA deemed trust, the Court determined that the NL PBA deemed trust, and accompanying lien and charge, cannot attach to assets located in Quebec. This issue is somewhat obvious, but important as the vast majority of the proceeds available for distribution in the Wabush CCAA relate to assets located in Quebec.

Commentary

We expect *Wabush* to be appealed and for any such appeal to focus on the effectiveness of the pension deemed trusts, and appropriate distribution scheme applicable in a "liquidating CCAA". Because the reasoning for rendering ineffective the NL PBA deemed trust is easily applicable to pension deemed trusts in any other Canadian jurisdiction, and any other liquidating CCAA, we expect this decision to be of great interest to pension stakeholders and lenders across the country. It is unclear whether the reasoning would equally apply in a restructuring CCAA.

In any event, *Wabush* is a welcome decision for third-party lenders to companies with defined benefit pension plans, and employers who sponsor defined benefit pension plans who may have had issues in accessing capital as a result of the SCC decision in *Indalex*. For obvious reasons, it will also be met with fierce opposition by pensioner groups and pension regulators. The case, like the many cases before it involving the intersection of pensions and insolvency law, highlights the need for Parliament to provide clear statutory guidance on the priority afforded to pension obligations.

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^[1] Justice Hamilton is a former partner of Stikeman Elliott LLP.

^[2] Justice Mongeau is currently a justice of the Quebec Court of Appeal.

^[3] *White Birch Paper Holding Company (Arrangement relatif à)*, 2014 QCCS 4709 (CanLII) (*White Birch*).

[4] *Timminco ltée (Arrangement relatif à)*, 2014 QCCS 174 (*Timminco*). In *Timminco*, Justice Mongeau determined that s. 264 of the SPPA, which renders certain amounts payable to a pension fund to be “unseizable” as effectively providing for the necessary second ingredient.

[5] See sections 6(6) and 36(7), which were added to the CCAA in 2009.

[6] *Indalex*, at para. 51.

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