How will the Superior Court of Québec deal with pension laws from Newfoundland and Labrador, Québec and the Parliament?

August 11, 2017

On January 30, 2017, Justice Stephen W. Hamilton issued an interlocutory decision[1] in the context of a motion for directions, the outcome of which will be most interesting.

On May 19, 2015, the debtors, Wabush Iron Co. Limited, Wabush Resources Inc., Wabush Mines, Arnaud Railway Company and Wabush Lake Railway Company, Limited (the "**Wabush CCAA Parties**") filed a motion for the issuance of an initial order under the *Companies' Creditors Arrangement Act*, which was granted the following day by the Superior Court of Québec.

The Wabush CCAA Parties had two pension plans for their employees, which included defined benefits. The first one was a hybrid pension plan for salaried employees (the "**Salaried Plan**") registered with the Newfoundland and Labrador ("**NL**") pension regulatory authority. The second one was for unionized hourly employees
(the "**Union Plan**") and was registered with both the NL and federal pension regulatory authorities.

The Wabush CCAA Parties employed workers in NL as well as in Québec. Moreover, some of the Wabush CCAA Parties' facilities fell under federal jurisdiction and therefore federal laws applied to the employees of these facilities. As a result, the Salaried Plan was governed by the Newfoundland and Labrador *Pension Benefits Act* (the "**NLPBA**") and the Québec *Supplemental Pension Plans Act* (the "**SPPA**"), while the Union Plan was governed by the NLPBA, the SPPA and the federal *Pension Benefits Standards Act* (the "**PBSA**").

On December 16, 2015, the NL pension regulator terminated both the Salaried Plan and the Union Plan (the "**Plans**") on the basis that:

> The Plans failed to meet applicable solvency requirements;
> The Wabush CCAA Parties had discontinued or were in the process of discontinuing all of their business operations; and
> It was highly unlikely that any potential buyer would accept to assume the Plans.

On the same date, the federal pension regulator terminated the Union Plan for similar reasons.

In their termination notices, both the NL and federal pension regulators indicated that the Wabush CCAA Parties were required to pay to the pension funds all amounts that would have been required to be paid to meet the prescribed solvency requirements, as well as the amounts necessary to fund the benefits provided for in the Plans. Both pension regulators also took the position that a deemed trust had been created in respect of such amounts.

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While the Wabush CCAA Parties paid the monthly normal cost payments for both Plans up to the wind-up date
(i.e. December 16, 2015), both Plans had unpaid special payments and were underfunded (i.e. had wind-up deficiencies) as of the wind-up date.

The Plans administrator filed proof of claim for the following amounts:

Salaried Plan	Union Plan
Secured claim: $24,000,000	Secured claim: $29,000,000
Restructuring claim: $1,932,940	Restructuring claim: $6,059,238

In that context, the monitor moved for directions to the Superior Court of Québec with respect to the priority of these pension claims, and the applicability and scope of deemed trusts, if any, under the NLPBA, the PBSA and the SPPA. More specifically, the monitor sought an order to determine the priority of the various components of the pension claims to be as follows:

> That special payments outstanding as of the date of the initial order were subject to a limited deemed trust;
> That special payments payable after the date of the initial order constituted unsecured claims;
> That the wind-up deficiencies constituted unsecured claims; and
> That any deemed trust created pursuant to the NLPBA may only charge property located in Newfoundland and Labrador.

The January 30 decision dealt with a preliminary matter. Although all parties agreed that the Superior Court of Québec had jurisdiction to deal with all the issues at bar, the Plans administrator, the NL pension regulator and the representatives of the salaried employees and retirees asked the Superior Court of Québec to seek the assistance of the Supreme Court of Newfoundland and Labrador (the "**NL Court**") with respect to several questions, including the following:

> 1. The Supreme Court of Canada has confirmed in Indalex that provincial laws apply in CCAA proceedings, subject only to the doctrine of paramountcy. Assuming there is no issue of paramountcy, what is the scope of section 32 in the NPBA [NLPBA] deemed trusts in respect of:
>
> (…)
> b) unpaid special payments; and,
> c) unpaid wind-up liability.
>
> 2. The Salaried Plan is registered in Newfoundland and regulated by the NPBA.
>
> a) (i) Does the PBSA 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 NPBA and PBSA if so, how is the conflict resolved?
>
> b) (i) Does the SPPA also apply to those members of the Salaried Plan who reported for work in
> Québec?
>
> (ii) If yes, is there a conflict with the NPBA and SPPA and if so, how is the conflict resolved?
>
> (iii) Do the Québec SPPA deemed trusts also apply to Québec Salaried Plan members?

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For various legal, factual and practical reasons, Justice Hamilton decided not to exercise the Court's discretion to seek the assistance of the NL Court.

More particularly, Justice Hamilton was of the opinion that the deemed trust provision contained in section 32 of the NLPBA is not particularly unique, considering that there are similar deemed trust provisions in the PBSA and other provincial pension laws. He also noted that there is no jurisprudence interpreting section 32 of the NLPBA.

While acknowledging that the NL Court has greater expertise in interpreting the NLPBA as a whole, Justice Hamilton stated that such was not the case with respect to the relevant deemed trust provision, i.e. section 32. He also added that because of the similarities between the NLPBA, the PBSA and other provincial pension laws, the judge interpreting the NLPBA will likely refer to decisions of the courts of other provinces interpreting their legislation or the PBSA. In this context, the Superior Court of Québec is in as good a position as the NL Court.

Moreover, since this case also raises issues respecting the PBSA and the SPPA, Justice Hamilton did not see on what basis he should conclude that the NL Court would be in a better position to decide on these issues. He stated the following:

> The Court will not refer issues of Québec law or federal law to the NL Court, and if those issues are too closely interrelated to the NLPBA issues, or if in the interests of simplicity and expediency they should all be decided by the same court, then the solution is not to refer any issues to the NL Court.

Furthermore, although there were significant factual links between the issues and NL, it was equally true that strong factual links existed with Québec. Indeed, one of the Wabush CCAA Parties' facility and most of the organizations' railways are in Québec. Also, Justice Hamilton, stated that there were almost as many employees and retirees in Québec as there were in NL. Finally, he was also concerned that requesting the aid of the NL Court could result in additional delay.

Comment

The Superior Court of Québec will therefore review the pension plans' deemed trust issues and will likely analyze the deemed trust provisions contained in the NLPBA, the PBSA and the SPPA. For the first time, it appears that such provisions will be compared and interpreted in one case. The hearing on these issues was held on June 28 and 29, 2017.

Be on the lookout for the next newsletter to find out how this story unfolds.

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1. *Arrangement of Bloom Lake*, 2017 QCCS 284.

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