29 B.F.L.R. 185

Banking & Finance Law Review
November, 2013

Case Note and Comment

Aftermath--in the Wake of the Indalex Decision

Edward A. Sellers, Michael De Lellis, Caitlin Fell [a1]

Copyright © 2013 by Thomson Reuters Canada Limited; Edward A. Sellers, Michael De Lellis, Caitlin Fell

On February 1, 2013, the Supreme Court of Canada released its highly anticipated decision in *Indalex Ltd., Re.* [1] The Supreme Court addressed the priority dispute between a court ordered super-priority charge granted to a lender to secure interim financing (a "DIP Loan") under the *Companies*' *Creditors Arrangement Act* (Canada) (*"CCAA"*) [2] and: (i) adeemed trust under the Ontario *Pension Benefits Act* (*"OPBA"*); [3] and (ii) a constructive trust imposed by the Ontario Court of Appeal in respect of wind-up deficiencies in defined benefit pension plans.

The Supreme Court's decision included *inter alia* the following:

> 1. Unanimous confirmation of the priority of a court ordered super-priority charge granted pursuant to federal insolvency legislation over the interests of pension claims protected by a statutory deemed trust under provincial pension legislation;
>
> 2. Affirmation of the breadth of a provincial statutory deemed trust over the full value of a pension wind-up deficiency if the defined benefit plan has been wound up prior to the time of determination of the priorities; and
>
> 3. Commentary regarding pension plan governance.

In the wake of the Supreme Court's decision in *Indalex*, we are beginning to see certain developments, trends and implications from the decision on lending practices and insolvency proceedings generally. This paper will: (i) provide a brief discussion to elaborate on those key points of the Supreme Court's decision in *Indalex* noted above, (ii) provide an analysis of some of the 2009 legislative amendments to the *Bankruptcy and Insolvency Act* (Canada) (*"BIA"*) [4] and the *CCAA* in conjunction with the *Indalex* decision and (iii) discuss some of those developments, trends and ***186** practical implications in the wake of *Indalex* on lending practices and insolvency proceedings generally in Canada.

1. BACKGROUND

In *Indalex*, beneficiaries of two underfunded defined benefit pension plans sponsored and administered by Indalex Limited ("Indalex") opposed a motion to distribute proceeds of sale from the company's assets to satisfy a court ordered super-priority secured claim granted in Indalex's *CCAA* proceedings. Only one of the two pension plans had been wound-up at the time Indalex commenced its *CCAA* proceedings. The secured claim was held by Indalex's U.S. based parent after it satisfied a guarantee obligation to an arm's length lender that had advanced a DIP Loan directly to Indalex relying on the court ordered super-priority charge. There were no pre-filing secured claims in competition with the pension deficiency claims and no bankruptcy proceedings had been initiated in respect of Indalex.

The pension beneficiaries argued that the assets of Indalex with value equal to the full funding deficiencies (not just unpaid amortized "special payment" amounts due to be paid) of both plans were deemed to be held in trust pursuant to

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

provisions of the *OPBA*, and equivalent proceeds of sale should be remitted to the plans on a priority basis, regardless of the court ordered super-priority of the DIP Loan. The beneficiaries also argued that the governance, fiduciary duty and notice issues inherent in Indalex's *CCAA* process and the treatment of pension interests therein justified the imposition of the equitable remedy of a constructive trust for the plan beneficiaries over the proceeds of sale. The *CCAA* court nevertheless approved the distribution to satisfy the DIP Loan secured claim.

The Ontario Court of Appeal overturned the *CCAA* court's decision and held that the deemed trust provisions of the *OPBA* applied to all amounts required to liquidate the wind-up liabilities for the plan being wound-up, even if those amounts were not yet due under the plan or applicable regulations. The Ontario Court of Appeal also held that the deemed trust amount should be paid in priority to the holder of the super-priority DIP Loan charge despite the *CCAA* court order creating the charge specifying that it ranked in priority over trusts “statutory or otherwise”. The Ontario Court of Appeal further held that there was an intention to wind-up the pension plan that had not been wound-up at the time Indalex commenced its *CCAA* proceedings (the “Executive Plan”) and awarded priority to that plan (even though the *OPBA* deemed trust provisions did not apply) by imposing a constructive trust for the plan beneficiaries over the proceeds of sale on the basis that Indalex had breached its fiduciary obligations in the course of acting as administrator of the plans (in part through steps taken within the *CCAA* proceedings).

2. THE SUPREME COURT OF CANADA DECISION

(a) A DIP Loan Charge Supersedes a Statutory Deemed Trust Under Provincial Legislation

The Supreme Court unanimously affirmed the ability of a court exercising authority under a federal insolvency statute (in this case, the *CCAA*) to order a super-priority charge over a debtor's assets to secure a DIP Loan in priority to interests protected by a statutory deemed trust under provincial pension legislation (in this case, the *OPBA*). The decision was based upon the application of the doctrine of ***187** paramountcy to resolve conflicts between the application of valid and overlapping provincial and federal legislation in insolvency matters in favour of the federal legislation. Since it was impossible to comply with the priority of both the *OPBA* deemed trust and that of the DIP Loan charge, the Supreme Court held that the DIP Loan charge granted pursuant to the federal *CCAA* was paramount and superseded the provincial deemed trust. The Supreme Court also held that it was not necessary as a procedural matter that the paramountcy of applicable federal legislation be expressly invoked and determined when an order is made under the *CCAA.* Those aspects of the decision appear to be all that were required to dispose of the appeal before the Supreme Court.

(b) Potential Scope and Timing of the OPBA Deemed Trust

Beyond the priority ruling discussed above, the Supreme Court (by a majority of 4-3 in split decisions) affirmed the expansion of the scope of the statutory deemed trust contained in the *OPBA* in respect of a pension plan being wound-up to include the entire wind-up deficiency of the pension plan--not just unpaid amortized special payments due to be paid at the time of winding-up. In Justice Deschamps' reasons, this finding was based upon statutory interpretation, the broadening scope of the deemed trust protection in the legislative history of the *OPBA* and the remedial purpose of the *OPBA* deemed trust provisions--to protect the interests of plan beneficiaries. However, the Supreme Court did not comment on its prior decisions requiring that there be a “trust in fact” to support the enforceability of such provincial statutory deemed trusts (see, for example: *British Columbia v. Henfrey Samson Belair Ltd.* [5]). It therefore remains to be seen how the courts will reconcile such prior decisions with the decision in *Indalex.*

In addition, a majority of the Supreme Court in *Indalex* was clear that the *OPBA* deemed trust for a wind-up deficiency did not apply to the Executive Plan as it had not actually been wound-up at the time of commencement of the *CCAA* proceedings. However, there is some uncertainty regarding when a plan must be wound-up in order for the *OPBA* deemed trust to become relevant in the context of *CCAA* proceedings. Pension regulators can order a pension plan to be wound-up with an effective date that is months (if not years) prior to the date that a winding-up order is made. One can imagine the contest in a “lift of stay” motion in that regard where the pre-filing priorities of creditors are potentially affected

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

by a deemed trust for a plan wind-up deficiency resulting from a winding-up sought to be completed subsequent to the commencement of a *CCAA* proceeding and prior to the application of *BIA* proceedings. Such a contest is likely to become more complex if a winding-up order is alleged to be a “regulatory order” exempt from the stay of proceedings imposed in *CCAA* proceedings (as more particularly discussed below). Since the timing of plan wind-up can impact the scale of any plan deficiency and the priority of payments in respect of that deficiency, we anticipate further debates in *CCAA* proceedings until these issues are clarified.

***188 (c) Pension Plan Governance in Insolvency**

The Supreme Court of Canada was unanimous in holding that Indalex had breached its fiduciary duties to the pension plan beneficiaries. A majority of the Supreme Court also recognized that the dual role of an employer as plan sponsor and plan administrator, while entrenched under pension legislation, creates the potential for conflicts of interest to arise during the course of an employer discharging its specific, and sometimes contemporaneous, duties in respect of each role. That said, the Supreme Court appears to have struggled somewhat with identifying which conflicts led to breaches of duty and the time when those conflicts arose, the extent to which the legislative regime permitted conflicts and the steps that would need to be taken (and when) to avoid, obviate or eliminate the conflicts. Nonetheless, a majority of the Supreme Court held that Indalex's failure to provide plan beneficiaries with reasonable notice of its motion to apply for the DIP Loan was a clear moment when there was a breach of fiduciary duty. A majority of the Supreme Court also suggested finding a replacement administrator as one option that could be pursued, among others, to address the conflict. It is unclear whether the Supreme Court was suggesting this in addition to providing affected beneficiaries with notice or in the alternative.

In the aftermath of the Supreme Court's decision in *Indalex*, we expect that the law relating to conflicts of interest as well as steps that can be taken to mitigate such conflicts will be developed on a case by case basis and will be dependent on the particular underlying facts of any such decision.

3. THE INDALEX DECISION AND THE 2009 BIA AND CCAA AMENDMENTS

(a) Impact on the Nature of Restructuring Plans

It is worth noting that Indalex commenced *CCAA* proceedings before the proclamation of numerous amendments to the *CCAA* and the *BIA* in September, 2009 (the “2009 Amendments”). Accordingly, Parliament's most recent enactments aimed at giving protection to pension claims did not bear directly on the decision by the Supreme Court. This has resulted in some uncertainty regarding how the Supreme Court's decision in *Indalex* will be interpreted in conjunction with the 2009 Amendments.

The 2009 Amendments prohibit the court from sanctioning a compromise or arrangement or approving a disposition of assets under either the *CCAA* or the *BIA* unless such plan or sale provides for the payment of specific unpaid amounts owing in respect of a pension plan. For defined benefit pension plans, these amounts include contributions deducted from employees' remuneration but not remitted to the pension fund and contributions owed by an employer for the normal cost of benefits offered under the pension plan, but do not include payment of the entire windup deficiency of the pension plan. Because underfunded amounts afforded priority are limited to unpaid normal cost contributions, the effective priority under the 2009 Amendments given to pension claims in the context of a plan of compromise or arrangement or on a disposition of assets is far narrower in scope than the priority under the *OPBA* deemed trust, which now covers all unfunded liabilities including the entire wind-up deficiency of wound-up pension plans. It will be interesting to see whether plans of compromise or arrangement and proposed asset sales that ***189** involve large underfunded defined benefit pension plans will contemplate payment to the plan beneficiaries in the minimum amounts that are now prescribed by statute or whether the courts will require something more and akin to the statutory deemed trust under the *OPBA.* As alluded to by Justice Deschamps in *Indalex*, it is likely that when considering the nature of a restructuring plan to be presented to its creditors, a debtor will simply adhere to the minimum statutorily prescribed pension plan payments that must be included in any restructuring plan and “bargain in the shadow of its creditors' bankruptcy entitlements.” [6]

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(b) Is a Winding-up Order a Regulatory Order?

The 2009 Amendments also included provisions to confirm that "regulatory bodies", as defined in the *CCAA*, are not subject to any stay of proceedings granted by a court in a *CCAA* proceeding if such a stay would affect a regulatory body's investigation in respect of the debtor or an action, suit or proceeding that is taken in respect of the debtor by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court. It will be interesting to see if the making of a winding-up order in respect of a pension plan is "in respect of the debtor" and whether it is an "enforcement of a payment ordered by the regulatory body".

The Supreme Court recently addressed somewhat similar aspects to this issue in *AbitibiBowater Inc., Re*[7] in the context of provincial environmental clean-up orders against a debtor in *CCAA* proceedings. Although the *AbitibiBowater* proceedings commenced before the proclamation of the 2009 Amendments, the Supreme Court's decision in *AbitibiBowater* may be instructive in understanding how this issue will be addressed in cases subject to the 2009 Amendments.

In *AbitibiBowater*, both the majority and two dissenting judgments in the Supreme Court ultimately agreed that in some circumstances provincial environmental clean-up orders can be treated as monetary claims that are subject to a stay of proceedings and can be compromised in a *CCAA* plan. This decision appears to turn on an analysis of the specific findings of fact made by the *CCAA* court with respect to the substance of the order, as the majority in the Supreme Court held that even when an order is not framed in monetary terms, it can still be a "monetary" order for purposes of the *CCAA* if the facts warrant the characterization. *AbitibiBowater* was decided in the context of provincial environmental clean-up orders made against the debtor that would ultimately ripen into a financial liability of the debtor. Given the importance placed on the underlying facts by the Supreme Court in *AbitibiBowater*, whether or not a winding-up order is a regulatory order is likely to depend on the underlying facts that characterize the substance of the winding-up order.

*190 4. AFTERMATH--IMPLICATIONS OF THE INDALEX DECISION ON LENDING PRACTICES AND ON RESTRUCTURING PROCEEDINGS GENERALLY IN CANADA

(a) Implications of Indalex on Lending Practices

(i) Structuring Lending Agreements

Subsequent to the *Indalex* decision, lenders to businesses with defined benefit pension plans in Ontario have taken protective measures on a case by case basis. In some cases, these measures include greater due diligence, including an analysis of the credit profile of the borrower, the quantum of assets exposed to potential pension claims, the type of pension plan in place, whether there are multiple pension plans and whether any steps to wind-up any pension plans have been commenced or are contemplated. Lenders have also remained vigilant in monitoring the borrower's defined benefit pension plan. In this regard, some lenders have taken steps to supplement prior due diligence and to negotiate terms in lending agreements that facilitate appropriate and frequent reporting, such as the requirement of the borrower to submit to the lender annual and bi-annual pension plan reports. Such reports allow a lender to calculate a rough estimate of the quantum of any deficiency on an ongoing basis.

Some lenders are also seeking stricter contractual terms from borrowers who have defined benefit pension plans, including imposing restrictions on the ability of a borrower to (i) undertake new defined benefit pension plans or (ii) acquire companies that are subject to a defined benefit pension plan. Further, in some areas such as asset-based lending, we have seen lenders reserving amounts in respect of the plan funding deficiencies against the availability under the applicable credit facilities. Reserved amounts may be layered by lenders with triggers to establish such reserves upon the occurrence of specific indications of a wind-up. In this respect, lenders have used triggers that would increase the size of such reserves taken upon the occurrence of specified events that are typically regarded as pre-cursors of a wind-up, such as resolutions passed by the board of directors of the borrower to wind-up a pension plan, steps taken by a government

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

authority to commence a wind-up of a pension plan, the suspension of payment by the borrower of contributions to the pension plan, or an outright wind-up of the pension plan.

In addition to the foregoing, given that there is no suggestion in *Indalex* that a provincial statutory deemed trust under the *OPBA* would or could prime federal *Bank Act* security, previous case law in this regard should continue to apply. Accordingly, lenders have continued to take federal *Bank Act* security wherever possible.

(ii) Lift of Stay for Bankruptcy

The Supreme Court in *Indalex* did not deal expressly with the ability of a secured creditor to bring a motion to initiate bankruptcy proceedings. Rather, the Supreme Court addressed whether a motion brought by the debtor, Indalex, to permit an assignment in bankruptcy (in part for the purpose of reversing priorities) amounted to a breach of fiduciary duty by Indalex in respect of the plan beneficiaries. The judgment of Justice Cromwell (supported by Chief Justice McLachlin ***191** and Justice Rothstein) determined that it was not. The judgment of Justice LeBel (supported by Justice Abella) determined that it was. Justice Deschamps (supported by Justice Moldaver) did not specifically discuss the point, seemingly preferring instead to determine that failure to address a potential conflict on the point was a breach of fiduciary duty. So the result on the point in *Indalex* appears to be mixed. It therefore remains to be seen how the courts will address a request to lift a stay in *CCAA* proceedings when the primary purpose of the request is to “reverse the priorities”.

In this regard, the decision in the Ontario Court of Appeal in *Ivaco Inc., Re*,[8] standing for the proposition that a creditor may seek to place a *CCAA* debtor in bankruptcy following a failed restructuring in order to reverse priorities, appears to remain good law. Accordingly, a motion by a secured creditor to initiate bankruptcy proceedings near the outset of *CCAA* proceedings (which would be stayed pending resolution of the *CCAA* proceeding) or following a failed attempt to restructure or complete a liquidation under the *CCAA* may still be a successful tactic used in insolvencies by secured creditors looking to “reverse the priorities” with court approval. However, we note that a “lift of stay” order is a discretionary order of the court. We also note that the practice of seeking an early “lift of stay” within *CCAA* proceedings to bring a bankruptcy petition to ensure the applicability of *BIA* priority, transaction review and relation back periods declined markedly after the proclamation of the 2009 Amendments, as the transaction review and relation back aspects were addressed in the 2009 Amendments to harmonize their application across both statutes. As a result, it will be more evident in future “lift of stay” motions that the primary (if not, sole) purpose for seeking such relief is to “reverse the priorities” with court approval.

(iii) Default BIA Proceedings

In addition to the foregoing, following the Supreme Court's decision in *Indalex*, lenders and parties offering interim financing may look to insist on “prepackaged” or pre-arranged restructuring plans for employers with defined benefit pension plans framed under *BIA* proposal proceedings as another viable option because the default for a failed restructuring attempt is bankruptcy (and the likelihood of *BIA* priorities applying). This approach is likely to minimize contested “lift of stay” motions within a *CCAA* proceeding to cause (or permit): (i) winding-up orders to be made or winding-up proceedings to continue; (ii) interim distributions to be made based on *“CCAA* priorities” in advance of implementing a *CCAA* plan; or (iii) to permit a bankruptcy to ensue to bring *BIA* priorities into play. However, *BIA* proceedings may not pose a practical option for complex, large value cases where it may take more than six months of formal proceedings to resolve matters.

***192 (b) Implications of Indalex on Insolvency Proceedings Generally**

As mentioned above, the Supreme Court held that Indalex had breached its fiduciary duties to its pension plan beneficiaries as a result of Indalex's failure to provide plan beneficiaries with reasonable notice of its motion to apply for the DIP Loan. The Supreme Court also noted that the dual role of employer as plan sponsor and plan administrator under a pension plan creates a potential for conflicts of interest to arise. This holding has implications for both debtors

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

in restructuring proceedings and for insolvency administrators appointed over the property, assets and undertakings of a debtor.

(i) When does a Conflict of Interest Arise?

A decision by a debtor to commence *CCAA* proceedings and to seek an initial stay under the *CCAA* does not in and of itself give rise to a conflict of interest. The majority of the Supreme Court in *Indalex* recognized that an initial application under the *CCAA* constitutes an "emergency situation" requiring immediate action. [9] However, once a debtor begins to take action within a *CCAA* proceeding that could impact its ability to fund a pension plan (*e.g.*, in the case of *Indalex*, seeking authorization for the DIP Loan), the potential for plan beneficiaries to be adversely affected arises and the debtor's corporate interests will come into conflict with its duties as a plan administrator. This potential conflict of interest does not appear to be limited to a debtor in *CCAA* or *BIA* restructuring proceedings and may be equally applicable to actions taken by an insolvency administrator in other insolvency proceedings.

In order to avoid this conflict of interest, potential solutions were suggested by the Supreme Court in *Indalex.* Justice Deschamps indicated that any solution had "to fit the problem" and may differ in every case. [10] This will require debtors and insolvency administrators to consider various options. While the *Indalex* decision does not make clear what approach should be taken that would effectively address conflicts of interest that may arise in insolvency proceedings for plan sponsors that are also plan administrators, the Supreme Court identified a number of options that might be pursued, including providing notice of the conflict to plan beneficiaries thereby facilitating the appointment of representative counsel, appointing a replacement administrator, or bringing the conflict to the attention of the *CCAA* judge to take advantage of the expertise and knowledge of *CCAA* judges in determining how best to ensure that the interests of the plan beneficiaries are fully represented. Similarly, while Justice Cromwell referred to the possibility of the *CCAA* judge appointing a replacement administrator, he seemed to accept that it could be sufficient if the employer/administrator conducted itself as if they are an independent administrator.

193** ***(ii) Mitigating Conflicts of Interest by Providing Notice to Plan Beneficiaries

Since *Indalex*, the courts appear to be taking a conservative view on the notice requirement to plan beneficiaries by requiring that notice be given to pension plan beneficiaries on motions which *may* affect the rights of plan beneficiaries even though at the time of such motion the rights of such plan beneficiaries may not formally exist and may never crystallize to constitute rights protected by a statutory deemed trust. This became evident in *Bank of America, NA (as Administrative Agent) v. CPI Corp.*, [11] where a receiver was appointed over the assets, properties and undertakings of CPI Corp ("CPI"). CPI was the sponsor and administrator of a "frozen" defined pension plan, meaning that benefits were no longer accruing to plan members. At the time of the receivership, the pension plan had a going concern and solvency deficiency and as such, CPI had an obligation to make special payments in respect of the deficiency on a monthly basis. At the time of the appointment of the receiver, CPI was current in respect of its monthly special payment obligations, the pension plan was not in wind-up and no statutory deemed trust was in existence. In order to ensure that the business of CPI would continue in the ordinary course until the appointment of a receiver, the applicant brought an *ex parte* application for the appointment of a receiver. Given that the receivership application was brought without notice to, *inter alia*, the Superintendent of Financial Services of Ontario and plan beneficiaries, all court-ordered charges, including the receiver's charge, were granted in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise (an "Encumbrance") in favour of any person, *except* for any Encumbrance in favour of any person who was not given notice of the application, including beneficiaries of a statutory deemed trust under the *OPBA*.

In addition to the requirement that sufficient notice be provided when seeking court ordered charges which will affect the priority of beneficiaries of a statutory deemed trust, the court in *CPI* required that sufficient notice also be given when requesting approval of pre-filing payments, including payments to government taxing authorities and payments in the ordinary course for the preservation of CPI as a going concern enterprise. Arguably, this represents a stricter interpretation of the notice requirement than the manner in which such notice requirement was discussed by the Supreme

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Court in *Indalex*; while Indalex was seeking to override the plan member's priority resulting from the statutory deemed trust, the plan members in *CPI* did not have any such priority status as there was no statutory deemed trust in effect on the filing date.

Accordingly, debtors and insolvency administrators must not only provide sufficient notice when seeking the approval of a court to prime plan beneficiaries who are entitled to a statutory deemed trust but may also be required to provide sufficient notice to plan beneficiaries if the priming has the potential for the rights of plan beneficiaries who may become entitled to a statutory deemed trust to be adversely affected, even if those rights do not exist at the time and may never crystallize. The crux of this conservative approach means that debtors commencing restructuring ***194** proceedings and secured creditors seeking the appointment of an insolvency administrator must be cognizant of providing sufficient notice at the outset of insolvency proceedings to pension plan beneficiaries if the relief being sought may be viewed as either giving rise, or potentially giving rise, to a conflict of interest or adversely, or potentially adversely, affecting the rights of pension plan beneficiaries.

(iii) Mitigating Conflict of Interest by Appointing a Replacement Administrator

In addition to putting pension plan beneficiaries on notice, the Supreme Court in *Indalex* also suggested that a replacement administrator could be appointed as a solution for any conflicts of interest that an employer/administrator has to deal with in properly managing its dual role under the pension plan. While this consideration seems to be a reasonable option in theory, there are a number of legal and practical considerations to be addressed in assessing the merits of this option. In this regard, pension legislation sets specific limits on who is eligible to be a plan administrator and, in the context of most single employer private sector pension plans, the employer sponsor is the plan administrator. While a plan administrator is permitted to delegate administrative tasks and decisions to qualified committees, individuals and third parties, neither provincial nor federal pension legislation allow a plan administrator to simply appoint an independent company to replace the employer as administrator under the statute. In theory, it might be possible for the employer to amend the pension plan to provide that the plan administrator is a committee of representatives of plan members (and possibly representatives of the employer), but such an approach raises practical problems, not the least of which will be finding individuals willing to take on the responsibility.

Provincial and federal pension legislation does permit pension regulators to appoint a replacement third party administrator in certain circumstances (*e.g.*, in Ontario following a plan wind-up declaration or federally under the regulator's considerably broader powers to do so where an employer is insolvent or such action is otherwise justified in the best interests of members). However, at least in Ontario, such legislation does not yet allow for replacement administrators to be appointed by the regulator in other circumstances, such as when potential conflicts of interest arise, whether in the context of *CCAA* proceedings or otherwise. While the *OPBA* has provisions that allow the regulator to appoint a replacement administrator in “prescribed circumstances”, these provisions have yet to be proclaimed in force and there are as a result no regulations which set out any applicable prescribed circumstances. Even for federally regulated pension plans the regulator has, to date, been reluctant to appoint a replacement administrator where the current administrator is a going concern.

The decision in *CPI* illustrates one potential avenue for receivers when managing the business of a debtor with a defined benefit pension plan. In *CPI*, the court approved an order which provided that CPI continue to carry out and comply with its responsibilities as administrator of the pension plan in accordance with the *OPBA* and consistent with its past practices, policies and procedures, subject however, to the power of the Superintendant of Financial Services to appoint a replacement administrator in accordance with the *OPBA.* This solution facilitated the ongoing and routine administration duties to be continued by the debtor (rather than ***195** the receiver) with the overriding ability of the Superintendent of Financial Services to appoint a plan administrator should it be required.

(iv) The Two Hats Doctrine

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Prior to the decision in *Indalex*, the "two hats" doctrine was generally applied when reviewing the dual roles of an employer in respect of a pension plan--essentially identifying the role the employer is performing at a particular time as a plan sponsor or plan administrator role--and then recognizing that the duties and responsibilities applicable to that role govern the employer's actions while performing that role. This "two hats" doctrine appears to have been refined by the Supreme Court in *Indalex.* A majority of the Supreme Court appeared to take the approach that the existence of a conflict did not preclude the company from exercising rights it had outside its role as pension plan administrator. Rather, the key issue for the majority was identifying what actions the company should take to address and ameliorate identified conflicts.

While some guidance has been provided in the context of insolvency proceedings on what situations might lead to a conflict of interest where a company is both employer and plan administrator, less guidance was provided on what a company must do if faced with a potential conflict of interest outside of insolvency proceedings. Although the *Indalex* decision recognizes that the *OPBA* permits the continuation of dual roles, the decision appears to require: i) a substantive analysis by the employer or insolvency administrator in every case of the potential effect of any decision making on plan beneficiaries; and ii) measures be taken to avoid any conflicted decision making or at least independent representation of the beneficiaries' interests. Apparently it's not what hat the decision maker is wearing or when it is wearing that hat, but what the decision-maker is looking at doing that matters in determining the existence of a conflict. When a conflict arises, steps must be taken to address and resolve the conflict: essentially, an analysis based on impact rather than function. What remains to be seen is what steps can be taken in a timely manner that practically address any given conflict.

5. CONCLUSION

While the decision of the Supreme Court in *Indalex* provided important clarification on the priority of DIP loans and the scope and timing of a specific provincial statutory deemed trust, some uncertainty and ambiguity remains in reconciling the Supreme Court's decision in *Indalex* with prior case law, the 2009 Amendments and the dual roles of plan sponsor and plan administrator held by many employers. Legislative action to clarify such ambiguity, including with respect to the application of insolvency priorities across the entire federal legislative scheme, would reduce the cost to stakeholders of resolving these matters through litigation. There is a mandatory "five year review" of the federal legislation in process right now but that will not likely be completed until September, 2014. It would be advantageous for the uncertainty and ambiguity to be addressed through that legislative process.

Footnotes

a1 Of Osler, Hoskin & Harcourt LLP. Edward A. Sellers and Michael De Lellis are partners, and Caitlin Fell is an associate in the Insolvency & Restructuring Group in Osler, Hoskin & Harcourt LLP's Toronto office.

1 *Indalex Ltd., Re*, 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, 8 B.L.R. (5th) 1, 96 C.B.R. (5th) 171, 2 C.C.P.B. (2nd) 1, 354 D.L.R. (4th) 581, D.T.E. 2013T97, 439 N.R. 235, 301 O.A.C. 1, 20 P.P.S.A.C. (3d) 1 (S.C.C.) [*Indalex*].

2 *Companies' Creditors Arrangement Act*, RSC 1985, c C-36.

3 *Pension Benefits Act*, RSO 1990, c P-8.

4 *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.

5 *British Columbia v. Henfrey Samson Belair Ltd.*, 1989 CarswellBC 711, 1989 CarswellBC 351, EYB 1989-66987, [1989] 2 S.C.R. 24, 38 B.C.L.R. (2d) 145, 75 C.B.R. (N.S.) 1, 59 D.L.R. (4th) 726, 34 E.T.R. 1, [1989] 5 W.W.R. 577, 97 N.R. 61, 2 T.C.T. 4263, [1989] 1 T.S.T. 2164, [1989] S.C.J. No. 78 (S.C.C.).

6 *Indalex*, *supra*, n. 1 at para. 51.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

7 *AbitibiBowater Inc., Re*, 2012 SCC 67, 2012 CarswellQue 12490, 2012 CarswellQue 12491, (sub nom. *Newfoundland and Labrador v. AbitibiBowater Inc.)* [2012] 3 S.C.R. 443, 95 C.B.R. (5th) 200, 71 C.E.L.R. (3d) 1, 352 D.L.R. (4th) 399, 438 N.R. 134, [2012] A.C.S. No. 67, [2012] S.C.J. No. 67 (S.C.C.) [*AbitibiBowater*].

8 *Ivaco Inc., Re*, 2006 CarswellOnt 6292, 83 O.R. (3d) 108, 26 B.L.R. (4th) 43, 25 C.B.R. (5th) 176, 56 C.C.P.B. 1, 275 D.L.R. (4th) 132, 2006 C.E.B. & P.G.R. 8218, [2006] O.J. No. 4152 (Ont. C.A.); leave to appeal allowed (2007), 2007 CarswellOnt 2855, 2007 CarswellOnt 2856, (sub nom. *Superintendent of Financial Services v. National Bank of Canada)* 370 N.R. 395 (note), 238 O.A.C. 400 (note), [2006] S.C.C.A. No. 490 (S.C.C.).

9 *Indalex*, *supra*, n. 1 at para. 70.

10 *Ibid.*, at para. 66.

11 *Bank of America, NA (as Administrative Agent) v. CPI Corp.* (30 April 2013), Doc. Toronto CV13-10069-00CL (Ont. S.C. (Civ. Div.)) [*CPI*].

29 BFLR-CAN 185

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.