SUPERIOR COURT

(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-048114-157

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

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.

Petitioners

-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-

FTI CONSULTING CANADA INC.

Monitor

-and-

MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON

REPRESENTATIVES-Mis-en-cause

UNITED STEELWORKERS, LOCAL 6254, UNITED STEELWORKERS, LOCAL 6285

MORNEAU SHEPELL

HER MAJESTY IN RIGHT OF NEWFOUNDLAND & LABRADOR, AS REPRESENTED BY THE SUPERINTENDENT OF PENSIONS

THE ATTORNEY GENERAL OF CANADA, ACTING ON BEHALF OF THE OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS

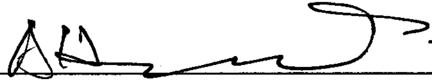
RÉGIE DES RENTES DU QUÉBEC

Mis-en-cause

BOOK OF AUTHORITIES in support of the
REPLY ARGUMENTATION OUTLINE OF REPRESENTATIVES OF THE SALARIED/NON-UNION EMPLOYEES AND RETIREES
(Sections 11 and 23(k) of the Companies' Creditors Arrangement Act)

1.	*Ontario Dairy Cow Leasing Ltd. v. Ontario Milk Marketing Board,* [1993] O.J. No. 464 (Ont. C.A.)
2.	*Loeb Canada Inc. v. Caisse Populaire Alexandria Ltée* 2004 CarswellOnt 4973, 7 P.P.S.A.C. (3d) 19 (Ont. S.C.J.)
3.	*Indalex Ltd., Re,* 2011 ONCA 265

Montreal and Toronto, this 21st day of June, 2017



KOSKIE MINSKY LLP

per: Andrew J. Hatnay and Amy Tang

Court-appointed Representative Counsel to the Applicants/Objecting Parties, Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson as Court-appointed Representatives of all non-union employees and retirees of the Wabush CCAA Parties

TAB 1

1993 CarswellOnt 655
Ontario Court of Appeal

Ontario Dairy Cow Leasing Ltd. v. Ontario (Milk Marketing Board)

1993 CarswellOnt 655, [1993] O.J. No. 464, 38 A.C.W.S. (3d) 807, 4 P.P.S.A.C. (2d) 269

ONTARIO DAIRY COW LEASING LTD. v. ONTARIO MILK MARKETING BOARD

Brooke, Galligan and Osborne JJ.A.

Heard: February 18, 1993
Judgment: February 22, 1993
Docket: Doc. No. CA C10171

Counsel: *A.G. Van Klink*, for appellant.
G.D. Walkden, for respondent.

Subject: Insolvency; Property; Corporate and Commercial

***The Court*:**

1 In our opinion this appeal must succeed.

2 1. We do not agree with the Motions Court Judge [whose decision is reported at (1990), 1 P.P.S.A.C. (2d) 149 (Ont. Gen. Div.)] that the documents signed on June 4, 1986 created an absolute assignment of the proceeds of the sale of the milk quota in favour of Mr. Makowski. In the circumstances in which the assignment was given equity would always have granted a right of redemption. These documents did, however, in our opinion, create a valid security interest in the proceeds of the sale of the milk quota, but the security interest was not perfected because of defective registration.

3 2. The documents executed on April 18, 1988, on their face, did not create a security interest in the proceeds of the sale of the milk quota. Therefore, whether or not there was proper registration is immaterial.

4 3. The documents executed on March 1, 1989, created a valid security interest in the proceeds of the sale of the milk quota. That security interest, however, was not perfected because of defective registration.

5 4. The priority issue between the parties must be resolved as of the time when their respective security interests came into conflict. On the facts of this case, it is our opinion that those interests came into conflict prior to April 1990 and probably during the month of December 1989.

6 5. At the time that the security interests came into conflict there were no perfected security interests. Therefore priority must be determined pursuant to s. 30(1) para. 4 of the Personal Property Security Act, R.S.O. 1990, c. P.10. The respective security interests attached at the same time because both security interests were in existence at the time the debtor obtained rights to the proceeds of the sale of the quota.

7 6. It is our opinion, therefore, that the parties are entitled to share rateably in the funds held by the stakeholder. The calculation of the *pro rata* shares would be somewhat complicated. In order to avoid further litigation or argument the parties agreed before this Court that the fair *pro rata* sharing should be on the basis of two-thirds to the appellant and one-third to the respondent.

Disposition

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8 The appeal is allowed and the judgment below is set aside. In its place judgment will issue declaring that the appellant is entitled to two-thirds of the proceeds of the sale of the milk quota and that the respondent is entitled to one-third of those proceeds. Success has been divided in this Court and in the ultimate result. Therefore each party should bear their own costs. There will be no order of costs here or in the court below.

Appeal allowed.

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TAB 2

2004 CarswellOnt 4973
Ontario Superior Court of Justice

Loeb Canada Inc. v. Caisse Populaire Alexandria Ltée

2004 CarswellOnt 4973, [2004] O.J. No. 4862, [2004] O.T.C. 1057, 135 A.C.W.S. (3d) 505, 7 P.P.S.A.C. (3d) 194

LOEB CANADA INC. and METRO RICHELIEU INC. (Plaintiffs) and LA CAISSE POPULAIRE ALEXANDRIA LTÉE (Defendant)

CAISSE POPULAIRE ALEXANDRIA LTÉE (Plaintiff by Counterclaim) and LOEB CANADA INC., METRO RICHELIEU INC. and METRO INC. (Defendants by Counterclaim)

R. Smith J.

Heard: June 14-18,21-24, 2004
Judgment: November 23, 2004
Docket: 03-CV-23358

Counsel: Marc C. Doucet, Percy Ostroff, for Plaintiffs / Defendants by Counterclaim
J. Michel Mazerolle, Denis Cadieux, for Defendant / Plaintiff by Counterclaim

Subject: Insolvency; Corporate and Commercial; Property

DETERMINATION of priority interests among secured creditors and valuation of assets of bankrupt.

***R. Smith J.*:**

Overview

1 This case raises a number of interesting legal issues, including;

(a) Determining the priorities between competing secured parties, one holding a GSA and one holding a PMSI, in the inventory and equipment of a newly renovated grocery store, which is operated for several months by an interim receiver;

(b) Determining whether a party holding a security interest can be held liable in damages for refusing a commercially reasonable offer from a secured creditor with a competing security interest for an assignment of its security interest.

2 In the summer of 2002, Vankleek Hills Grocers Ltd. ("VKHG") contracted with Vergo Construction ("Vergo") to substantially expand the size of its grocery store from approximately 13,000 square feet to 20,000 square feet, at a cost of approximately $1.2 million dollars. As part of the expansion the principal shareholder of the VKHG, Charles Lamoureux, had arranged to transfer the grocery store franchise from a "Metro" franchise to a "Loeb" franchise. VKHG also purchased approximately $850,000 worth of new equipment for the expanded grocery store, such as freezers and cash registers, from the Plaintiff ("Metro/Loeb").

3 VKHG also borrowed the sum of $650,000 as a first mortgage on the expanded store from the Defendant (the "Caisse"), which funds were intended to be used to pay the balance of the existing mortgage and then to pay for the cost of the renovations to the grocery store. The Caisse also agreed to loan a further sum of $450,000 to VKHG, which was intended to be used to pay for the existing loans in favour of the Caisse and the balance was to be used to pay for the newly acquired equipment for the renovated store.

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4 Metro/Loeb (the new franchisee) also supplied the new inventory required for the expanded store commencing in late October of 2002 and weekly thereafter, as required until the grocery store ceased its operations on February 27, 2003.

5 Unfortunately, several days after the new grocery store opened in November of 2002, several cheques were returned NSF to various creditors and the main creditors, including Metro/Loeb and the Caisse became aware that VKHG was missing approximately $1.3 million dollars in order to pay for the construction of the new store, to purchase the new equipment, and to pay for the new inventory for the grocery store.

6 On November 15, 2002, Ginsberg Gingras was named as a court appointed receiver by order of Pedlar J. Ginsberg Gingras continued to carry on business as a grocery store until February 27, 2003, initially as an interim receiver, and after January 23, 2003, as a Trustee in Bankruptcy. The Caisse appointed KPMG Inc., as a receiver under its general security agreement and during the night of February 27, 2003, the Caisse changed the locks on the grocery store and took possession of the store, the inventory and the equipment.

7 On March 5, 2003, Ratushny J. issued an order allowing Metro/Loeb to take possession and sell the remaining inventory in the grocery store and to pay the sum of $200,000 into court. Metro/Loeb was also permitted to take possession of certain equipment, namely the electronic cash registers in the store.

8 In this case, the major issue the court must determine is which creditor's security interest has priority over the inventory and equipment supplied to a newly expanded grocery store. Metro/Loeb supplied the inventory to stock the newly expanded store and also supplied $850,000 of new equipment for the renovated grocery store. Metro/Loeb claims priority under a purchase money security interest ("PMSI") against the inventory supplied to VKHG after November 8, 2002, and the equipment supplied after October 5th, 2002. The Caisse claims priority under a general security agreement ("GSA") against all of the assets of VKHG, including both the inventory and equipment of VKHG. The Caisse's GSA was registered and perfected before Metro/Loeb's PMSI was registered and perfected.

9 The second major issue is to decide if the Caisse should be ordered to pay damages for failing to act in a commercially reasonable manner by refusing an offer to assign all of its security interest for $750,000.

Issues

10 In this case, the court must decide the following issues:

(1) Does Metro/Loeb's PMSI or does the Caisse's GSA have a first security interest in the inventory of VKHG and to what extent?

(2) Does Metro/Loeb's PMSI or does the Caisse's GSA have a first security interest in the equipment supplied by Metro/Loeb to VKHG and to what extent?

(3) Should the Caisse be ordered to pay damages to Metro/Loeb caused by the Caisse's failure to act in a commercially reasonable manner by refusing to accept an offer from Vergo for $750,000 for an assignment of all of the Caisse's security interests?

(4) Who is entitled to receive the balance of the GST rebate in the amount of $42,709.52, which was received before VKHG was petitioned into bankruptcy?

(5) Is the Caisse entitled to a security interest in the $50,000 bonus, which VKHG was to receive for changing to a Loeb franchise and, which was set off against amounts owing to Metro/Loeb?

(6) Is Metro/Loeb required to pay the Caisse the amount of $25,968.09, which was the amount of cash on hand on November 15, 2002, when the interim receiver took possession?

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(7) Is Metro/Loeb required to pay the Caisse the sum of $11,831.66 for salary paid to the employees of VKHG for the period before November 15, 2002?

Background Facts

The Parties

11 VKHG operated a grocery store in the Town of Vankleek Hill, located in eastern Ontario from the late 1980's until February 27, 2003, when it ceased operations. The Director and President of VKHG at the relevant time was Charles Lamoureux. Mr. Lamoureux was the controlling shareholder of VKHG, as he owned all of the shares of 160267 Canada Ltd., which owned all of the shares of B.A. Brunet Construction Inc., which owned all of the shares of VKHG.

12 On August 30, 1993, VKHG changed its name from Dalkeith Feed Centre Ltd. to VKHG. Dalkeith Feed Centre Ltd. was the name of the company, which entered into the first franchise agreement with Metro Richelieu Inc.

13 Metro Inc. ("Metro") now owns 100% of the shares of Metro Richelieu Inc. ("Metro Richelieu"). Metro Inc. also now owns 100% of the shares of Loeb Canada Inc. ("Loeb"). The Plaintiffs and Defendants to the Third Party claim are referred to herein as Metro/Loeb.

14 The Loeb grocery stores were located in Ontario and most of the Metro Richelieu grocery stores were located in the Province of Quebec. The VKHG store located in Vankleek Hill, Ontario, was an exception and operated under the Metro Richelieu franchise from 1988 until October 21, 2002, when it commenced operating under the Loeb franchise. A new internal number was assigned to VKHG on or about October 21, 2002, when it was changed from M-1604 to L-3913.

History of Franchise and Security Agreements

15 The initial franchise agreement was signed by Metro Richelieu Inc. (now "Metro Inc.") and Dalkeith Feed Centre Ltd. ("Dalkeith") in 1988. Subsequently, Dalkeith Feed Centre Ltd. changed its name to VKHG.

16 The initial franchise agreement provided that Dalkeith (now VKHG) would acquire a minimum of 2700 Class "B" shares in Metro Inc. By agreement these shares were exchanged for Class "A" shares in 1998, which were pledged by agreement in replacement of the Class "B" shares. All of the shares of Metro, owned by VKHG, were physically held in Montreal, Quebec and were pledged as security to guarantee payment by VKHG to Metro Richelieu (now Metro) or, any of its subsidiaries, for the payment of all amounts owed to Metro Richelieu.

17 In addition to having physical possession of the pledged shares in Montreal, Quebec, Metro and Metro Richelieu registered a financing statement in Ontario on February 22, 1996, claiming a first ranking security interest in all shares owned by VKHG in Metro Inc. and Metro Richelieu 2000 Inc.

18 On May 19, 1996, the Caisse signed an acknowledgement of priority (Désistement de Priorité) in which it agreed that Metro Richelieu would have priority over the Caisse's security in any shares owned by VKHG in Metro or Metro Richelieu. In return, Metro and Metro Richelieu acknowledged the priority of the Caisse's GSA security interest in the inventory of VKHG.

19 The acknowledgements of priority were signed with respect to a loan of $500,000, made by the Caisse to VKHG in 1996. In consideration for the loan it received, VKHG had signed a general security agreement in favour of the Caisse pledging all of its present and future assets as security for any amounts owing to the Caisse. The Caisse's security interest was perfected by registering a financing statement, which had previously been registered in 1992 and which was renewed by subsequent registrations as required until the present date.

20 On November 16, 2002, VKHG owned 14,310 Class "A" shares in Metro Inc. and on that date these shares were sold with the written consent of Charles Lamoureux, and the amount of approximately $252,706.01 was received and applied

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to the amounts owing to Metro Inc. On November 12, 2002, Metro Richelieu Inc. was owed the sum of $538,979.39 by VKHG. . The Caisse did not object to Metro's right to receive the proceeds from the sale of the Class "A" shares of Metro Inc. owned by VKHG.

Expansion Project

21 During the month of June 2002, Mr. Lamoureux commenced studying a plan to expand the size of the VKHG store from approximately 13,000 square feet to approximately 20,000 square feet. He was assisted by Ingénierie et Construction Metro Richelieu 2000 Inc. who prepared a project analysis for Mr. Lamoureux.

22 VKHG obtained an offer of financing for the expansion project from the Caisse on June 3, 2002. The financing included a loan of $450,000 to repay existing loans of $101,559.56 and to purchase new equipment for the expanded grocery store. The Caisse required a general security agreement in first position on the equipment of VKHG, as security for this loan.

23 The offer of financing also provided for a loan of $650,000 to repay the existing first mortgage of $241,711.45 and to finance the renovations to expand the grocery store. The Caisse required a first mortgage on the grocery store and a personal guarantee of $500,000 from Mr. Lamoureux and a postponement of his advances to VKHG in the amount of $900,000, as security for this loan. As a condition of the loan for the purchase of new equipment, the Caisse required VKHG to furnish a copy of firm estimates for the cost to purchase new equipment in the amount of $700,000.

Cheque for $700,000 shown to the Caisse

24 The evidence of the Caisse is that Mr. Lamoureux showed Ms. Rouleau, the account manager, a cheque for the sum of $700,000, dated November 27, 2001, which was made payable to Metro Richelieu 2000 Inc.

25 The evidence of Ms. Rouleau is that Mr. Lamoureux advised her that he had paid Metro Richelieu the $700,000 towards the purchase of the new equipment, as evidenced by the cheque. However, the cheque for $700,000 was never delivered to Metro Richelieu by Mr. Lamoureux. The Caisse was misled into believing that the sum of $700,000 had already been paid by Mr. Lamoureux towards the cost of new equipment, and this was not accurate.

26 Mr. Lamoureux also presented a personal financial statement to the Caisse showing that he had personal equity of approximately $4 million dollars. The Caisse sent a copy of their offer of financing for the expansion of the grocery store to Metro on or about June 6, 2002. Mr. Lamoureux also applied for credit from Metro to purchase new equipment in the amount of $750,000, which was also approved by Metro.

Financing Arrangements

27 In the new offer of financing made in June of 2002, the Caisse did not specifically include the inventory of VKHG as an asset over which it required security. However, the offer of financing did indirectly indicate that inventory would be secured, as a general security agreement was required to be given to the Caisse, however, the offer of financing referred to specifically equipment.

28 The estimate provided to VKHG by the engineering consultants for the cost of new equipment was $1,353,099. This amount included a ten percent contingency, a five percent engineering administration fee and transportation costs of $10,000. The cost to build the additional 8,187 square feet was estimated at $780,000.

29 The Caisse obtained an appraisal from Enns MacEachern Pace and Maloney, which stated that the market value of the completed grocery store would have a fair market value of $1 million dollars in the summer of 2002.

30 On August 26, 2002, Metro/Loeb agreed to pay the sum of $35 per square foot for 6,564 square feet to subsidize the expansion of the store provided that the operator was not in default under any of its obligations. This subsidy was never paid by Metro/Loeb to VKHG, as VKHG defaulted under its agreement.

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31 VKHG signed a new agreement with Loeb, Metro and Metro Richelieu on August 29, 2002, and signed a new franchise agreement with Loeb on September 26, 2002.

32 Commencing on October 20, 2002, VKHG was added as a Loeb franchise store and Loeb commenced supplying inventory to VKHG on that date. The existing inventory, which had been supplied by Metro to VKHG prior to October 20, 2002, remained in the store. The store was closed from approximately October 20, 2002, until it reopened on November 1, 2002, during which time the additional inventory required to fill the shelves of the expanded store was supplied by Loeb.

33 Metro/Loeb registered a financing statement giving notice of its security interest in the inventory, equipment and other assets of VKHG on October 15, 2002. Metro/Loeb asserts a security interest as a purchase money security interest (PMSI) against the equipment delivered to VKHG after October 15, 2002.

Financial Problems

34 On October 22, 2002, a cheque made payable to Metro Richelieu from VKHG for $39,132.20 was returned NSF (non sufficient funds). At that time, Mr. Lamoureux assured Metro Richelieu that arrangements would be made to ensure that payment was made.

35 On or about November 1, 2002, Metro Richelieu received notice from Vergo Construction, the contractors who were building the addition to the grocery store, that it had received notice that a stop payment order had been made on a cheque for $36,077 by VKHG to it on October 10, 2002 and that on October 18, 2002, a cheque for $100,000 from VKHG was returned NSF. At that time Vergo was still owed approximately $386,077 by VKHG and Vergo had already received payment of $550,124 from VKHG.

36 On November 4, 2002, Ms. Beaulieu, the representative for Metro/Loeb contacted the Caisse concerning VKHG's financial problems and at that time both Metro/Loeb and the Caisse became aware that Mr. Lamoureux had misrepresented to the Caisse that he had paid the sum of $700,000 to Metro Richelieu for new equipment.

37 On November 6, 2002, a meeting was held with Mr. Lamoureux, representatives of Metro/Loeb and the Caisse to discuss VKHG's financial situation. Following this meeting, Mr. Monfils, the manager of a Loeb store in Ottawa, commenced acting as the store manager of the VKHG store, initially to assist Mr. Lamoureux with the management of the Vankleek Hill store. The Caisse did not object to Mr. Monfils' presence at the November 6, 2002 meeting. Mr. Lamoureux advised the parties that he had lost $3.5 million dollars in one of his other corporations and now had nominal equity in his name.

38 On November 8, 2002, Metro/Loeb sent a notice to the Caisse and other creditors under the *Personal Property Security Act* ("PPSA") claiming a purchase money security interest in all inventory purchased or distributed by Loeb or Metro Richelieu, including fruits and vegetables, dairy products, meats, poultry, fish and other and all such food products, whether raw, base, manufactured or processed.

39 On November 15, 2002, Pedlar J. appointed Ginsberg Gingras as an interim receiver for the VKHG store pursuant to a motion made by Metro/Loeb. No agreement was reached between the Metro/Loeb and the Caisse on how the store would be operated.

40 The inventory of VKHG was calculated by "Bordereau D'Inventaire" dated November 16, 2002. The value of the inventory at cost was determined to be $415,498.11 plus the sum of $25,968.09 in cash, or cash equivalent, for a total of $441,466.20 as of November 16, 2002.

41 On November 18, 2002, Metro/Loeb entered into an agreement with the interim receiver, Ginsberg Gingras, to pay for the receiver's expenses and agreed with Ginsberg Gingras to maintain inventory at the VKHG store at not less than $441,466.20.

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42 The interim receiver opened a new bank account at the National Bank and thereafter the proceeds received from all sales of inventory were deposited into this account in the name of VKHG and the interim receiver. After November 6, 2002, Loeb delivered replacement inventory only when it was first satisfied that sufficient funds were available in VKHG's bank account to pay for the inventory to be delivered.

43 Loeb and other suppliers of inventory to VKHG were paid in full for all inventory delivered after November 6, 2002, until the grocery store ceased its operations.

44 On December 3, 2002, a cheque for $47,709.52 made payable to VKHG for a GST rebate was received and deposited in trust with the firm of Doucet McBride until it was decided who should receive the funds. The January 23, 2003 Receiving Order in bankruptcy of Chadwick J. ordered that $5,000 of these funds was to be paid to the legal counsel acting for VKHG by way of retainer, leaving a balance of $42,709.52 plus any accrued interest.

45 On January 23, 2003, a Receiving Order in bankruptcy was made by Chadwick J. and Ginsberg Gingras was appointed as Trustee in Bankruptcy of the estate of VKHG.

46 Ginsberg Gingras agreed to act as Trustee in Bankruptcy and entered into an agreement with Metro Richelieu and Loeb similar to the agreement it had made to act as an interim receiver on November 18, 2002. In this agreement Metro/Loeb agreed to pay all of the expenses incurred by Ginsberg Gingras and also agreed to maintain inventory of $441,466.20 at the VKHG store.

47 On January 30, 2003, Metro/Loeb gave notice to the Caisse and other creditors of their intention to enforce their security interest in the inventory and equipment of VKHG.

48 On February 11, 2003, the Trustee in Bankruptcy prepared a preliminary report to the creditors and outlined the competing claims to the security of Metro/Loeb and the Caisse in both equipment and inventory. On February 14, 2003, the Trustee in Bankruptcy advised the Caisse and Metro/Loeb that the Trustee was not claiming any interest in the inventory and equipment of VKHG.

49 On February 20, 2003, the solicitors for Metro/Loeb gave notice to the Caisse that the VKHG store would cease operations on March 1, 2003, and that Loeb would remove all the remaining inventory and equipment on which it claimed a PMSI. On the same day, February 20, 2003, the Caisse also gave notice to Metro/Loeb of its intention to dispose of the inventory and equipment in which it claimed to have a first security interest pursuant to its GSA's signed on February 23, 1996, December 9, 1999, June 21, 2000, and July 10, 2002, pursuant to s. 63 of the PPSA.

Offer to Purchase by Vergo

50 On the afternoon of February 27, 2003, Vergo made an offer to purchase all of the Caisse's security held against VKHG and its assets and against Charles Lamoureux personally for the sum of $750,000. The offer was open for acceptance until February 28, 2003, at 10 a.m.

51 The Credit Manager of the Caisse, Mr. Paradis, had advised Vergo that he would recommend acceptance of the offer to the Board of Directors of the Caisse. Mr. Paradis prepared an analysis of the various options open to the Caisse at that time. According to his analysis, the most favourable option for the Caisse would have been to accept Vergo's offer of $750,000. If Vergo's offer was accepted, the Caisse's loss would have been substantially less than under any of the other scenarios analyzed by Mr. Paradis and Vergo and Metro/Loeb's losses would also have been substantially reduced if the Caisse had accepted Vergo's offer.

52 According to Mr. Paradis' analysis, if the Caisse had sold its security interests to Vergo for $750,000, it would have suffered a loss of $255,000, and if it had proceeded with a liquidation of VKHG's assets it would have lost $465,000.

Taking of Possession of Security by the Caisse

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53 The Caisse did not reply to Vergo's offer to purchase and on February 27, 2003, and instead appointed KPMG Inc., as its agent for the purpose of taking possession of the inventory and equipment and enforcing its security in the collateral located at VKHG store.

54 The Caisse proceeded without giving notice to Ginsberg Gingras, the Trustee in Bankruptcy, who was operating the grocery store or to Metro/Loeb the other secured creditor. The Caisse was aware that Ginsberg Gingras had continued to operate this grocery store since its appointment as interim receiver on November 15, 2002, and had actual possession of the premises, the inventory and the equipment. The Caisse also proceeded to retake possession of the grocery store at night after the store had closed.

ISSUE NUMBER 1 — Does Metro/Loeb's PMSI or Does the Caisse's GSA Have a First Security Interest in the Inventory, and to What Extent?

55 The Caisse had entered into several GSA's with VKHG and had perfected its security interest by registering the required financing statements under the PPSA, before Metro/Loeb was granted a security interest by VKHG and before Metro/Loeb perfected its PMSI.

56 Metro/Loeb registered a financing statement under the PPSA giving notice of its security interest on October 15, 2002. Metro/Loeb perfected its PMSI in the inventory purchased or distributed by it to VKHG, including fruits and vegetables, dairy products, meats, poultry, fish and all other such food products, by giving written notice to other secured creditors of VKHG on November 8, 2002.

57 The inventory in the VKHG store was supplied by Metro Richelieu for many years until approximately October 20, 2002, when the grocery store was closed to complete the renovations and to change over to the Loeb franchise. After October 20, 2002, the inventory required to fully stock the expanded store was supplied by Loeb, rather than Metro Richelieu.

58 On November 1, 2002, when the grocery store opened under the Loeb franchise the inventory in the VKHG store had been partially supplied by Metro Richelieu (until October 20, 2002), and partially supplied by Loeb from October 20, 2002, onwards. Loeb could not identify the inventory supplied by it or distinguish it from the inventory previously supplied by Metro Richelieu, except for the logical inference that the fruits, vegetables, and meats and other perishables would have been supplied by Loeb, as the store was closed from October 20 to November 1, 2002. Loeb's evidence was also that an inference should be drawn that the inventory in the store on October 20, 2002, would have been reduced, as the owner knew that the store would be closed for ten to eleven days while the final renovations were completed and the new equipment was installed and that it would be restocking the store with inventory to be supplied by Loeb.

59 Ms. Beaulieu estimated that the inventory supplied by Metro Richelieu remaining in the store on November 1, 2002, would have been approximately $100,000 to $150,000, but she did not know the exact amount. She had previously stated in discovery that there could have been up to $200,000's worth of inventory supplied by Metro Richelieu.

60 No evidence of the exact items or the exact value of inventory supplied by Metro and Loeb respectively was presented to the court. The evidence is not contested that the Caisse had priority in the value of the inventory supplied by Metro Richelieu to VKHG and by Loeb until November 8, 2002. Metro Richelieu had agreed to subordinate its security interest in the inventory in favour of the security interest held by the Caisse, by agreement with the Caisse.

61 While VKHG purchased inventory from Metro Richelieu, the Caisse was loaning money to VKHG based on the value of inventory located in the VKHG store. When VKHG entered a new financing agreement with the Caisse, to finance the expansion and the continued operation of VKHG, in June of 2002, the Caisse did not grant a separate loan to be secured by the inventory in the store. However, the Caisse did take a GSA on all of the assets of VKHG and did not agree to release any previous GSA security it had already obtained from VKHG.

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62 The parties agreed that the Caisse had a prior security interest in the inventory delivered to VKHG prior to November 8, 2002, as Loeb only gave notice to other secured creditors of its PMSI on November 8, 2002. The evidence of both the Caisse and Metro/Loeb was that Loeb was paid in full for all inventory supplied to VKHG after November 6, 2002, as VKHG was put on a COD basis as of that date. The Caisse certified a cheque for $35,000 to Loeb for delivery of inventory made after November 6, 2002, from VKHG's bank account with the Caisse.

Analysis

63 Section 33 of the *Personal Property Security Act*, ("PPSA") R.S.O. 1990 c. P.10 reads as follows:

> 33.(1) Purchase -money security interests, inventory -A purchase-money security interest in inventory or its proceeds has priority over any other security interest in the same collateral given by the same debtor, if
>
> (a) the purchase-money security interest was perfected at the time,
>
> (i) the debtor obtained possession of the inventory, or
>
> (ii) a third party, at the request of the debtor, obtained or held possession of the inventory, whichever is earlier;
>
> **(a) before the debtor receives possession of the inventory, the purchase-money secured party gives notice in writing to every other secured party ...**

64 Metro/Loeb's PMSI was perfected on October 15, 2002, by registering a financing statement and the notice was sent to other secured creditors by Metro/Loeb on November 8, 2002, as required by s. 33(1)(b) of the PPSA. I therefore find that Loeb's PMSI has priority over the Caisse's GSA in all of the inventory supplied after November 8, 2002.

65 Section 1 of the PPSA defines a purchase money security (PMSI) as

> (1) a security interest taken or reserved in collateral to secure payment of all or part of its price; or
>
> (2) ...

66 In this case, Metro/Loeb's PMSI in VKHG's inventory gives it priority over the Caisse to secure payment of all or part of the price of the inventory supplied by Metro/Loeb to VKHG after November 8, 2002, when it gave notice to subsequent secured parties as required by s. 33(1)(b) of the PPSA.

67 I have found that Metro/Loeb had a first priority security interest in the inventory supplied by it to VKHG after November 8, 2002, however I also find and the evidence is uncontradicted that Loeb has been paid in full for all inventory delivered to VKHG after November 6, 2002. Therefore the evidence is uncontradicted that Loeb is not owed any money for inventory supplied to VKHG after November 6, 2002, as VKHG was placed on C.O.D terms on November 6th, 2002. Metro/Loeb is not entitled to obtain retroactive priority over the Caisse's previously perfected GSA, in inventory supplied by either Metro/Loeb or by Metro Richelieu, to VKHG before November 8, 2002. Metro/Loeb would have a first security interest in any inventory supplied by Metro/Loeb to VKHG after November 8, 2002, for which it was not paid. In this case, Loeb was paid in full for all inventory supplied after November 8, 2002, and therefore has is not owed any money against which it can claim security in this collateral.

What is the value of the inventory in which the Caisse has a prior security interest?

68 The first issue I must decide is the date on which the value of the inventory is determined. The first possible date to value the inventory is on November 6, 2002, when Mr. Monfils attended at the VKHG store with the consent of Mr. Lamoureux and began to assist with the management of the store. The second possible date is on November 15, 2002, when Pedlar J. granted Metro/Loeb's motion to appoint Ginsberg Gingras, as an interim receiver to continue to

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operate the store; the third possible date is on January 23, 2003, when the VKHG was petitioned into bankruptcy by Metro/Loeb; and the fourth possible date is February 20, 2003 when Metro/Loeb and the Caisse each gave notice of their intention to enforce their security interest in the inventory and equipment and claimed priority over each other's security, and the final possible date is on February 27, 2003, when the Caisse appointed its own receiver and took possession of the inventory. I find that the value of the inventory on February 27, 2003 and the value on February 20, 2003 would have been the same and the only evidence was available from the valuation conducted on March 3, 2003.

69 The Caisse argues that its rights under its GSA crystallized on November 6, 2002, when Mr. Monfils commenced assisting Mr. Lamoureux with the management of the store. Metro/Loeb argues that the inventory should be valued on the date of bankruptcy namely, January 23, 2003, or alternatively, the date when creditors' security interests actually came into conflict, namely on February 27, 2003, when the Caisse took steps to realize on its security interest by taking possession of the inventory and equipment.

70 In the case of *Sperry Inc. v. Canadian Imperial Bank of Commerce* (1985), 50 O.R. (2d) 267 (Ont. C.A.), the Court of Appeal for Ontario held that priorities between creditors should be resolved when the creditor's security interest come into conflict. At p. 9, the Court of Appeal stated as follows:

> ... I think that it would be reasonable to conclude that the priority issue between the parties should be resolved as of the time when their respective security interest came into conflict. This would appear to be March 14, 1980, when the bank sought to enforce its interest against collateral in which Sperry claimed a superior interest. The issue arose at that time — what right did the bank have against Sperry to enforce its security? ...

71 Loeb/Metro also refers to the Annotated PPSA Commentary to s. 30 written by Richard McLaren concerning the date when priorities will be determined, wherein he states as follows:

> ... Generally, this will be the date where a secured party acts to realize upon its security. A distinction must be drawn between circumstances in which the secured party is acting to realize, and those in which the secured party is merely acting to protect its security. Only the former, and not the latter, will constitute the date upon which priorities will be determined. ...

The commentary goes on to indicate that in a bankruptcy situation the date of bankruptcy may also be the date to determine priorities between competing perfected security interests. The date of bankruptcy is the date to determine priorities between unperfected security interests. In this case, both the Caisse and Metro/Loeb have a perfected security interest therefore the date of bankruptcy does not necessarily apply.

72 In this case, no steps were taken by either the Caisse or by Metro/Loeb or by the Trustee in Bankruptcy or by the interim receiver to realize on the security of either party until February 20, 2003, when both parties sent notices claiming priority and on February 27, 2003, when the Caisse took action by appointing an interim receiver who took possession of the inventory and equipment.

73 Metro/Loeb did take steps to protect its security by obtaining a court order to appoint an interim receiver to continue to operate the grocery store. However, Metro/Loeb took no steps to realize on its security until it gave notice on February 20, 2003 where it advised the Caisse of its intention to realize on its security on March 1, 2003.

74 The value of the inventory in the VKHG store was not determined on the date of bankruptcy as the trustee continued to operate the store without objection by either the Caisse or by Loeb until February 27, 2003. Inventory values were determined on November 15, 2002, when the interim receiver was appointed and again on or about March 3, 2003, before the inventory was disposed of in accordance with the order of Ratushny J.

75 Both parties were aware that the store continued to be operated and that inventory was being sold on a daily basis and the proceeds were being used to pay ongoing operational expenses, including the VKHG's loan payments to the Caisse.

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76 In the *Sperry Inc.* decision, the Court of Appeal held that the date to determine priorities was the date when the security interest came into conflict. A conflict between the parties became directly manifest at the earliest on February 20, 2003, when notices were sent and certainly when the Caisse took possession of the inventory, under cover of darkness, on February 27, 2003. February 27, 2003 is also the date where the secured party acted to realize on its security as described in the commentary by Richard McLaren and as this is the first date either party acted to realize on its security. I find that the date of February 27, 2003, is the date on which the parties' respective security interests in the inventory should be determined, and the inventory value on February 20, 2003, would be virtually the same as on February 27, 2003.

Is the Caisse responsible for the value of inventory lost due to spoilage when it took possession of the inventory on February 27, 2003?

77 The evidence of Mr. Monfils is that the inventory was ordered as needed by VKHG store. The inventory was taken on March 3, 2003, after the store ceased operations, and when Metro/Loeb was authorized by Order of Ratushny J. to retake possession and dispose of the inventory on the condition that it pay the sum of $200,000 into court, until the respective interests of the parties were determined. The value of the inventory on March 3, 2003, would have been the same as the inventory on February 27, 2003, except for the spoilage of certain perishables between February 27, 2003 and March 4, 2003, when the remaining inventory was sold by Loeb, as the store did not operate after February 27, 2003.

78 Mr. Monfils gave evidence that the inventory in the VKHG store on March 4, 2003 at cost price was $263,320.92 after deducting the value of the unusable inventory. His evidence was that Loeb was forced to destroy approximately $10,502 worth of goods and was unable to use a further $8,782.65 of products in its other stores, which were donated to food banks.

79 I accept the evidence of Mr. Monfils that the value of the inventory, at cost, on March 3, 2003, was $263,320.92.

80 Mr. Monfils and Ms. Beaulieu gave evidence that the market value of the remaining inventory was valued at 50% of the initial cost price. Their evidence was that the reduction was justified because the inventory was the remaining unsold inventory and to account for the cost of labour for loading, sorting, and packing the inventory and the cost of transportation to transfer the products and restock them in other stores.

81 Ms. Gingras, the interim receiver appointed by Loeb and also the Trustee in Bankruptcy, appointed by Chadwick J., had ten years of experience acting as a trustee in receivership situations. Ms. Gingras gave evidence that in her experience the amount realized for inventory, when a company is placed in receivership or bankruptcy, was usually in the order of 30 to 35 cents on the dollar. This evidence was not contradicted by any other evidence called by the Caisse. This amount is less than the amount of 50% of the cost price allocated by Loeb to the value of the remaining inventory.

82 I accept Metro/Loeb's evidence that the market value of the inventory should be fixed at 50% of the cost price of the inventory remaining in the store on March 3, 2003, (50% of $263,320.92) which is $131,660. If Metro/Loeb had priority in the inventory, it claims that the Caisse should be responsible for the loss of perishables caused by failure of the Caisse to make any plan to dispose of the perishables in a commercially reasonable manner, when they took possession on February 27, 2003. As I have found that the Caisse has priority in the remaining inventory it is not necessary to decide if the Caisse would have been liable for the loss of perishables.

83 The Caisse also argued that Metro/Loeb should pay it the full sum of $441,466, which represented the inventory of $415,498 plus cash of $25,968 which was on hand on November 16, 2002, when Ginsberg Gingras was appointed to act as interim receiver of VKHG by Pedlar J., regardless of the value of the inventory remaining on February 27, 2003.

84 The Caisse argued that when Loeb initiated court proceedings to appoint an interim receiver to continue to operate the grocery store in Vankleek Hill, that it became responsible to pay the Caisse the value of the inventory in the VKHG store at that date.

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85 The basis of the Caisse's argument is that the agreement between Ginsberg Gingras and Metro/Loeb contained a term that Metro/Loeb would maintain inventory of $441,466 at the VKHG store and would pay all of the interim receiver's expenses and salary incurred in operating the grocery store in the normal course of business.

86 After its appointment the interim receiver opened a new bank account at the National Bank and deposited all proceeds of sales into the account and paid some expenses, including the purchase of all replacement inventory, and also made payments on all loans, which were outstanding and owing by VKHG to the Caisse.

87 The Caisse took no action and gave no notice to any party that it objected to the continued operation of the grocery store. The Caisse never objected to the proceeds of sale of inventory being used to pay for replacement inventory and for other expenses.

88 The GSA entered into between VKHG and the Caisse allowed VKHG to continue to operate the grocery store and to sell and purchase inventory until default occurred. The Caisse elected not to exercise any remedy to enforce its security against any of the assets of VKHG until February 27, 2003. The Caisse was fully aware that an interim receiver was appointed and that this receiver was continuing to operate the grocery store and it took no action and gave no notice to any party that it objected to the continued operation of the grocery store. The Caisse even certified a cheque from funds on deposit in VKHG's bank account with the Caisse to Metro/Loeb in the amount of $35,000 to pay for inventory previously supplied by Loeb before the appointment of the interim receiver.

89 Metro/Loeb relies on the decision of the Court of Appeal for Ontario in *Credit Suisse Canada v. 1133 Yonge Street Holdings* (1998), 41 O.R. (3d) 632 (Ont. C.A.). In that case the Court quoted with approval statements that the concept of crystallization had no bearing in the PPSA regime.

90 In *Credit Suisse Canada* , *supra*, the Court of Appeal stated as follows:

> ... Where, as here, however, the debtor is entitled to the collateral itself, subject to certain events occurring, and where the parties conduct themselves over the period of the loan transaction in a fashion which acknowledges the debtor's right to use the funds representing the collateral on its own account, circumstances of great commercial ambivalence would exist if the lender were able at the end of the day to undo what had been done. At the very least, Credit Suisse is estopped from taking such a position in the circumstances of this case: PPSA, s. 72.

91 Here, the Caisse has conducted itself in a manner, which implied that it agreed with the right of VKHG to continue to carry on business under the supervision of the court appointed interim receiver and to continue to buy and sell inventory and to pay ongoing business expenses, which included payments on the loans to the Caisse.

92 The interim receiver continued to operate the grocery store on behalf of VKHG, even though the appointment of the interim receiver was made pursuant to a motion brought by Metro/Loeb. The interim receiver ensured that the continued operation of the grocery store would be carried on in the normal course of business. I rely on the reasoning of the Court of Appeal in *Credit Suisse Canada* , supra, and conclude that if a secured creditor takes no action to realize on its security in inventory and allows the business to continue to operate and as a result the inventory is reduced, when the store is operated in the normal course of business, the secured party cannot then insist on receiving the value of inventory, which was present at some previous point in time.

93 The Caisse also argued that the interim receiver breached its fiduciary duty to the Caisse, however the breach of fiduciary relationship was not pleaded and the interim receiver was not a party to this proceeding and Metro/Loeb objected to this argument. I find that these allegations against the receiver are not properly before this Court.

94 The party having the security interest in the inventory is entitled to receive the value of the inventory when it realized on its security, namely on Feb. 27th , 2003. In this case, the inventory existing on February 27, 2003, had a cost value of $263,320.92, and a market value of 50% of this amount or $131,660.

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95 The Caisse presented no evidence that it was aware of the terms of the agreement between Metro/Loeb and Ginsberg Gingras under which Ginsberg Gingras agreed to act as interim receiver or that the Caisse relied, in any way, on the terms of this agreement. The inventory at the Vankleek Hill store was replaced using the proceeds of sale and the proceeds of sale were also used to pay expenses associated with the continued operation of the store, including the payments of interest and capital due on the loans to the Caisse.

96 In these circumstances, the Caisse took no action to object to the continued operation of the grocery store, and failed to object to the ongoing sale of inventory and took no steps to realize on its security in the inventory and therefore is estopped from seeking the value of the inventory on November 15, 2003, following the principles set out in *Credit Suisse Canada* , supra. The Caisse was fully aware that the grocery store was continuing to operate and its failure to object, leads me to conclude that it consented to the continued operation of the grocery store until it took action to realize on its security interest on February 27, 2003.

97 Given my finding that Loeb had been fully paid for all inventory over which it held a valid PMSI and since it is not possible for Loeb to obtain retroactive priority over the inventory supplied by Metro/Loeb prior to November 8, 2002, I find that the Caisse's GSA had priority in the remaining inventory located in the VKHG store on March 3, 2003. Since the Caisse had a prior security interest in the inventory, any loss caused by the failure of the Caisse to take steps to preserve the perishables, simply reduced the value of the inventory it is entitled to receive.

Is the Caisse responsible for extra costs incurred by Metro/Loeb as a result of their taking possession by cover of darkness?

98 Metro/Loeb claims that the Caisse should be ordered to reimburse it for the additional expenses incurred as a result of the manner in which the Caisse retook possession, without giving notice and doing so during the night of February 27, 2003, and without obtaining prior court approval for their actions. I have found that the Caisse had priority in the remaining inventory on February 27, 2003, and while the preferable course of action would have been to have given notice and obtained directions from the court, I am not prepared to order the Caisse to pay the additional expenses, as I have found that it had a first security interest in the inventory.

99 I therefore find that the Caisse is entitled to receive the value realized for the inventory in the VKHG store on March 3, 2003, in the amount of $131,660 (50% of $263,320.92).

ISSUE NUMBER 2 — Does Metro/Loeb's PMSI or Does the Caisse's GSA Have a First Security Interest in the Equipment Supplied by Metro/Loeb to VKHG, and to What Extent?

When Was Metro/Loeb's PMSI Perfected and What Equipment Was Covered by Its Security Interest?

100 Metro/Loeb invoiced VKHG for the sum of $850,332 for new equipment which included transportation and installation costs, which was delivered to the VKHG store before November 1, 2002.

101 Loeb attached Annex "A" to their submissions separating the cost of transportation and installation from the cost of the equipment supplied to VKHG. The Caisse objects to Annex "A" being relied on by the court and argues it constitutes new evidence, which Metro/Loeb is attempting to introduce following the completion of the trial. Absent the consent of the parties, I am not permitted to consider new evidence introduced by either party following completion of the trial.

102 Metro/Loeb claims a PMSI on all the equipment delivered within then days before it registered its PMSI. Metro/Loeb registered a financing statement perfecting its security interest on October 15, 2002. Loeb therefore claims priority in all equipment delivered after October 5, 2002. In its submissions the Caisse agreed Metro/Loeb's PMSI was perfected in all of the equipment it sold and delivered to VKHG after October 5, 2002.

103 The evidence is not disputed that Metro/Loeb supplied $850,332.45 worth of equipment to VKHG. This amount was not separated out between equipment, transportation and installation costs. As previously indicated, I am unable

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to accept new evidence following the completion of the trial and I must make my decision on the evidence presented at trial. Since I have no evidence of the transportation and installation costs, I will proceed on the evidence before me and find that the amount invoiced by Metro was all for equipment and that the installation and transportation costs are proportionate to the value of the equipment supplied.

104 The Caisse agreed in its submissions that Metro/Loeb invoiced VKHG the amount of $850,332.45 for equipment and it also agreed with Metro/Loeb's evidence that $236,278 worth of equipment had been supplied by Metro/Loeb after October 5, 2002 and that Metro had priority over this amount of equipment. This represents 27.79% of the cost price of all of the equipment supplied ($236,278 ÷ $850,332).

What was the value of the equipment repossessed by Metro/Loeb?

105 Metro was permitted to remove its electronic cashier system pursuant to the order of Ratushny J., dated March 3, 2003. Metro values the equipment removed by it at $57,033.71 however, the evidence presented at trial was that this equipment was worth $61,200 at cost price.

106 Two evaluations were prepared for the equipment purchased by VKHG, including the equipment repossessed by Metro/Loeb. The Geresco estimate placed the market value of the equipment at $185,000 and the estimate prepared by Des-Mar Installation was $223,850. The other evidence before the court was that the remaining equipment, excluding the equipment repossessed by Metro Richelieu, was valued at $150,000 by the third party purchaser and the Caisse, when it was subsequently sold. However, neither party argued that this amount should be used as the value of the equipment as this amount was a negotiated division of the total purchase price, which was reached with the third party purchaser. Neither party called the business evaluators as witnesses, however both parties agreed that the reports filed would be relied on as evidence to prove the value of the equipment.

107 I find that on a balance of probabilities it is reasonable to use the average of the two estimates and that on a balance of probabilities the best estimate of the market value of all of the equipment purchased by VKHG from Metro/ Loeb is therefore $204,425.

108 I find that the equipment repossessed by Metro/Loeb had a cost value of $61,200. The total equipment sold by Metro to VKHG had a cost value of $850,332, but an appraised fair market value of $204,425. The fair market value of all the equipment expressed as a percentage of all the equipment sold to VKHG is therefore ($204,425 ÷ $850,332 × 100%) or 24.04%. The fair market value of the equipment repossessed by Metro/Loeb is therefore 24.04% of $61,200 or $14,712.48.

Metro/Loeb's share of the equipment sale proceeds

109 Metro/Loeb had a prior PMSI in equipment, which cost $236,278.75 of a total cost price for equipment of $850,332.45. Metro/Loeb was therefore entitled to a prior security interest in 27.79% of the total value of the equipment purchased by VKHG ($236,278.75 ÷ $850,332.45 × 100%). Metro/Loeb was therefore entitled to receive 27.79% of the sum of $204,425, the fair market value of all of the equipment or $56,809.71. Metro/Loeb has already repossessed equipment worth $14,712.48 and therefore is entitled to receive a further sum of $42,097.23 ($56,809.71 minus $14,712.48) from the proceeds of sale of the equipment plus interest on the proportionate share of these funds.

Was the Equipment Supplied by Metro/Loeb Delivered to a Third Party When It Was Held by the Manufacturer in Storage, Prior to Being Delivered to the Grocery Store in Vankleek Hill, within the Meaning of s. 33(2)(a)(II) of the PPSA?

110 The Caisse argued that when Metro/Loeb ordered the equipment from the third party manufacturers for VKHG, the equipment was delivered to a third party when the equipment was manufactured and ready for delivery and was stored in the manufacturer's storage area. The Caisse argues that the delivery occurred to a third party at the request of the debtor, VKHG, when the equipment was stored at the manufacturer's site, while awaiting delivery to VKHG, according to s. 33(2)(a)(ii) of the PPSA.

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111 Section 33(2)(a)(ii) of the *Personal Property Security Act* reads as follows:

> (2) Purchase-money security interest other than inventory — Except where the collateral or its proceeds is inventory or its proceeds, a purchase-money security interest in collateral or its proceeds has priority over any other security interest in the same collateral given by the same debtor if the purchase-money security interest,
>
> (a) in the case of collateral, other than an intangible, was perfected before or within ten days after,
>
> . . . . .
>
> (ii) a third party, at the request of the debtor, obtained or held possession of the collateral, whichever is earlier; or
>
> . . . . .

112 I find that VKHG obtained possession of the equipment, when the newly manufactured equipment was delivered to VKHG at its grocery store located in Vankleek Hill. No evidence was called to show that VKHG (the debtor) had requested a third party to hold possession of the equipment on its behalf at some other location. The Caisse's position that VKHG requested some third party to hold possession of the equipment was not supported by any evidence. I find that the ordinary meaning "holding possession" must be applied and that no evidence was presented that the manufacturer was a third party who held possession of the equipment, at the request of the debtor.

113 There was no evidence that the debtor VKHG requested anyone to take possession of the collateral or that the manufacturer did give possession of the collateral to some third party. The manufacturer, by delaying the delivery of the collateral until the renovations of the store were completed, cannot be deemed to have delivered or held possession of the collateral as a third party at the request of the debtor, when no transfer of possession was ever made to any third party and no evidence of any request being made by the debtor was presented to the court.

Subrogation Agreement between Metro and the Caisse

114 I find that the subrogation agreement initially signed by the Caisse and Metro in 1996 was unambiguous. The agreement only referred to the inventory supplied to VKHG by Metro Richelieu and not to inventory supplied by Loeb. I also find that the subrogation agreement was restricted to the existing equipment of VKHG when the subrogation agreement was signed in 1996, which predated the expansion project. The Caisse did not require any subrogation agreement from Metro or Loeb, when it agreed to make a new loan to VKHG in 2002. The Caisse paid off all previously existing loans to it by making advances on the new loan agreement with VKHG, in 2002.

What Is the Value of Loeb's Claim to the Return of All Goods Delivered within Thirty Days of Notice of Bankruptcy Pursuant to s. 81.1 of the BIA?

115 Section 81.1 of the Bankruptcy and Insolvency Act, ("BIA") reads as follows:

> 81.1(1) Subject to this section, where a person (in this section referred to as the "supplier") has sold and delivered goods to another person (in this section referred to as the "purchaser") for use in relation to the purchaser's business, and the purchaser has not fully paid for the goods, the supplier may have access to and repossess the goods at the supplier's own expense, and the purchaser, trustee or receiver shall release the goods, if
>
> (a) the supplier presents a written demand for repossession to the purchaser, trustee or receiver, in prescribed form and containing the details of the transaction, within a period of thirty days after the delivery of the goods to the purchaser;
>
> (b) at the time when the demand referred to in paragraph (a) is presented,

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(i) the purchaser is bankrupt, or

(ii) there is a receiver, within the meaning of subsection 243(2), in relation to the purchaser;

(c) at the time when the demand referred to in paragraph (a) is presented, the goods

(i) are in the possession of the purchaser, trustee or receiver,

(ii) are identifiable as the goods delivered by the supplier and not fully paid for,

(iii) are in the same state as they were on delivery,

(iv) have not been resold at arms' length, and

(v) are not subject to any agreement for sale at arms' length; and

(d) the purchaser, trustee or receiver does not, forthwith after the demand referred to in paragraph (a) is presented, pay to the supplier the entire balance owing.

116 Metro/Loeb was a supplier of inventory to the bankrupt VKHG, but Metro/Loeb was paid in full for all goods (inventory) supplied by it to VKHG after November 6, 2002, and therefore cannot have any claim for money owing for goods delivered to VKHG within thirty days of the bankruptcy when these goods (the inventory) were paid for in full. The value of Metro/Loeb's claim for money owing for goods delivered within thirty days of the bankruptcy is therefore nil, as no money was owing to Metro/Loeb for the inventory delivered within thirty days. Section 81.1(1) of the BIA clearly states that the section only applies when "the purchaser has not fully paid for the goods". This was not the case, and therefore Metro/Loeb has no claim to inventory delivered to VKHG within thirty (30) days of the bankruptcy of VKHG.

ISSUE NUMBER 3 — Should the Caisse Be Ordered to Pay Damages to Metro/Loeb Caused by the Caisse's Failure to Act in a Commercially Reasonable Manner, by Refusing to Accept an Offer from Vergo of $750,000 for an Assignment of All of Its Security Interests?

117 Metro/Loeb argues that at common law a secured creditor has a duty to act in good faith and in a manner that is commercially reasonable. Counsel refers to s. 63(2) of the PPSA and to the decision of *Lanee Construction Ltd. v. Friedman*, [2001] O.J. No. 5054 (Ont. S.C.J.) and *Copp v. Medi-Dent Service* (1991), 3 O.R. (3d) 570 (Ont. Gen. Div.) (1111). The law is correctly stated as it applies to a secured party selling, either real property or moveable property, under the power of sale provisions of their respective security agreement. The secured creditor who sells assets pledged as collateral security under power of sale has a duty to act in good faith and in a manner that is commercially reasonable. This ensures fairness to the debtor and owner of the assets and any other party having a subsequent security interest in the collateral or in the balance of the proceeds of sale, after the secured party in first position has been paid in full.

118 The issue before me in this case is not whether a secured creditor acting under power of sale provisions must act in good faith and in a commercially reasonable manner, but whether a secured creditor owes a duty of good faith or a duty to act in a commercially reasonable manner when selling or assigning its security interest in the collateral to another secured creditor with a competing security interest.

119 In this case, if the Caisse had accepted Vergo's offer of $750,000 for the assignment of all of its security agreements and security interest against VKHG and Charles Lamoureux, then Vergo would have sold the grocery store to Metro/Loeb. In that situation, Metro/Loeb and Vergo would each have lost approximately $300,000, instead of $600,000 to $700,000. Metro/Loeb is claiming the additional losses of $300,000 it has suffered, because the Caisse refused to accept Vergo's offer.

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120 If the Caisse had accepted Vergo's offer of $750,000, the Caisse would have lost approximately $255,000. The other options analyzed by the Caisse would have resulted in even greater losses, with liquidation resulting in an estimated loss of $465,000 in accordance with Mr. Paradis' estimate. The Caisse estimates its actual losses to date to be in the range of $650,000 to $700,000, subject to the results of this lawsuit, after refusing Vego's offer. The best option available to the Caisse, based on the analysis prepared by Mr. Paradis, was to accept Vergo's offer for $750,000. With the benefit of hindsight this was the best option available to the Caisse at that time.

121 Does a secured creditor owe a duty of care or duty of good faith or a duty to act in a commercially reasonable manner to other competing secured creditors, other than when exercising its rights under the power of sale provisions in the security agreement?

122 In this case, the Caisse did not have all of the information available to it to assess the value of its security interest at the time it received Vergo's offer. Vergo's offer was not an offer to purchase the assets, which were subject to the Caisse's GSA, after the required notices were sent and the required appraisals of secured assets were made. Vergo offered to purchase the Caisse's security interest in the assets of VKHG and its personal guarantee from Charles Lamoureux. The offer did include an assignment of the Caisse's first mortgage on the grocery store. The expanded grocery store had recently been appraised at $1 million dollars, however it was subsequently sold, six months later, for $650,000. When Vergo's offer was received, the Caisse did not know how much it could reasonably expect to receive for the equipment located in the store, which had been purchased at cost of $850,000.

123 The Caisse had also not been able to assess the value of the personal guarantee, which it held from Charles Lamoureux. Mr. Lamoureux had previously provided a statement of net worth to the Caisse showing equity of approximately $4 million dollars. However, at the meeting on November 6, 2002, Mr. Lamoureux had indicated that he no longer had any personal net worth. An exact determination of what had happened and a full inquiry would have been reasonably justified by a secured creditor to assess the value of the personal guarantee.

124 Even if the Caisse made a poor commercial decision when it refused to accept the offer from Vergo, did the Caisse owe any duty whatsoever to the other secured creditors to sell its security interest? The Caisse chose to attempt to realize on its security and to pursue litigation to determine its entitlement to the equipment and the inventory, and other possible assets.

125 Section 63 of the PPSA and the cases of *Lanee Construction Ltd.*, *supra* and *Copp* , *supra* stand for the principle that a secured creditor when realizing on its security under power of sale provisions, must act in a commercially reasonable manner and must act in good faith. To fulfill these obligations a secured creditor is generally required to obtain appraisals of the assets being sold and to ensure that the sale procedure adopted was commercially reasonable in the circumstances. This requirement is fair and reasonable because the secured party will in all likelihood pursue the debtor for any deficiency and if the sale proceeds exceed the amount owing to the secured creditor any balance will be paid to any subsequent secured creditor or to the original owner/debtor.

126 In conducting a sale under power of sale the secured party's actions directly affect the interest of subsequent secured creditors and the original debtor or owner's interest. In this case, the construction company was owed a substantial sum of money by VKHG. The grocery store could either be sold as a going concern or the secured assets could be liquidated. The Caisse had a first mortgage registered against the building, which had been recently appraised at approximately $1 million dollars and the Caisse also held personal guarantees against Charles Lamoureux, which Mr. Lamoureux had represented were initially worth $4 million dollars, as well as a GSA against all of the assets of VKHG.

127 The Vergo offer was open for a short period of time (less than 24 hours) until 10:00 a.m. of the following day. The length of time given to the Caisse to evaluate its security was not reasonable in the circumstances. The Caisse was entitled to refuse the offer to sell its security in the assets of VKHG and to pursue its remedies against the building, against Mr. Lamoureux personally, and against the inventory and equipment and other assets of VKHG. The fact that

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by pursuing its other remedies and deciding not to accept the offer from Vergo, the Caisse has, in fact, lost much more than it would have lost if it had accepted the offer from Vergo and also that other competing secured creditors have also suffered increased losses as a result of the Caisse's decision, is not recoverable as damages.

128 A secured creditor is entitled to realize on its security agreement, provided it acts in accordance with the agreement and all applicable legislation and acts in a commercially reasonable manner and in good faith. A secured creditor is not required to sell its security interest to any other party. In order for the Caisse to properly assess the value of its security interest, the issue of which party had a prior security interest in the inventory and equipment and to what extent, required the court to make its findings in this case. A secured party has no duty or obligation to sell its security interest to any third party, whether or not they are secured creditors. A secured party can choose to exercise the remedies it has acquired by agreement with the debtor under its security agreements, provided it acts in a reasonably commercial manner and in good faith, when selling the secured assets.

129 Where a secured party, has a security interest in the assets of an ongoing business (a grocery store), which defaults on its loan agreement, then the secured party is entitled to pursue its remedies under the security agreements, which it decides are in its best interest. The secured party's course of action need not be in the best interest of other creditors. A secured party owes a duty to act in good faith and to act in a commercially reasonable manner, when exercising its remedies under the security agreements signed by the secured party and the debtor. A secured party does not owe a duty to other competing secured creditors to sell or assign the secured party's security to any other creditor and is entitled to exercise its rights under its security agreements.

130 Would a court have ordered the Caisse to accept an offer, which included an assignment of its first mortgage interest in a building, without obtaining at least two updated appraisals and possibly to exposing the property to the market in order to obtain the best market price? In addition, would a court have ordered the Caisse to assign the personal guarantees and to assign its interest in the inventory and equipment where its interest in both assets was not known at the time without an updated appraisals of the equipment and a detailed inventory and a determination of the Caisse's interest in both the equipment and the inventory?

131 What authority would a court have to order a secured creditor to sell or assign its security interest to any third party? I find that a court would not have made such an order without the detailed information, and even if all the appraisals and financial information were available, the secured creditor could elect not to sell and to proceed with its remedies in the manner it believed to be in its best interest. Therefore, I find that the Caisse is not liable for the increased losses suffered by Metro/Loeb by reason of its failure to accept the offer from Vergo for $750,000 for an assignment of all of its security interest against VKHG and Charles Lamoureux personally, received on February 27, 2003.

ISSUE NUMBER 4 — Who Is Entitled to Receive the Balance of the GST Rebate in the Amount of $42,709.52?

132 A GST rebate of $47,709.52, made payable to VKHG, was received by the interim receiver on December 6, 2002. Justice Chadwick ordered that $5,000 from this amount be paid towards VKHG's legal costs in the bankruptcy proceedings. The balance of $42,709.52 has been held in trust by the interim receiver since it was received.

133 The Caisse argues that the GST refund is the property of VKHG as it was received before VKHG was petitioned into bankruptcy and should be treated as if it were cash in a bank account of VKHG. The Caisse had a validly perfected GSA over all of the assets of VKHG. The Caisse's GSA security interest gave it as a first priority claim against any cash held in the possession of VKHG, at this time or on February 27, 2003, when the secured parties' interest came into conflict. Metro/Loeb does not assert a claim to the rebate.

134 VKHG was owed money for the GST rebate by a third party namely, the Canadian Customs and Revenue Agency (CCRA). In this case CCRA paid the amount owing to VKHG in full on December 6, 2002. The cheque was cashed and the funds were held in a separate trust account. The debt owed by CCRA to VKHG was extinguished when

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the cheque was cashed by the receiver. The GST rebate funds were advanced by CCRA to the credit of VKHG, when its cheque was cashed.

135 I find that when the GST refund cheque was sent to VKHG, was received and cashed by the interim receiver on or about December 6, 2002, that the Crown ceased at that point in time to be indebted to VKHG. The fact that the proceeds of the cheque were held in trust and not distributed until a later date does not change the fact that the debt owed by CCRA to VKHG had been paid prior to the date of bankruptcy. If the refund cheque had been received after January 23, 2003, the date of the bankruptcy, then the amount owed by CCRA to VKHG would have vested in the Trustee in Bankruptcy, pursuant to s. 67 and 71 of the *Bankruptcy and Insolvency* Act ("BIA").

136 The evidence given by the Caisse was that it was still owed approximately $700,000 by VKHG and therefore the Caisse is still owed a substantial sum of money even after the value of the inventory and the Caisse's share of the value of the equipment is paid to it. Therefore the amount of $42,709.52 plus any accrued interest is ordered to be paid to the Caisse. The court also notes that the Trustee in Bankruptcy has not made any claim in this proceeding to the funds received as a GST rebate prior to the date of bankruptcy. .

ISSUE NUMBER 5 — Is the Caisse Entitled to a Security Interest in the $50,000 Bonus Which VKHG Was to Receive for Changing to a Loeb Franchise, and Which Was Set Off Against Amounts Owing to Metro/Loeb?

137 Section 3.3 of the agreement between Metro Richelieu Inc., Loeb Canada Inc., and VKHG provided that Metro was entitled to set off the subsidy of $50,000 plus GST against amounts otherwise owed to it. I accept Metro/Loeb's argument that Metro/Loeb was entitled to set off the amounts owing under this item against other amounts owing by VKHG to Metro/Loeb in accordance with the plain reading of s. 3.3 of the franchise agreement.

138 The Caisse therefore is not entitled to a security interest in the $53,500 subsidy, which was never paid to VKHG and was set off against other debts owing by VKHG to Metro prior to the date of bankruptcy.

ISSUE NUMBER 6 — Is Metro/Loeb Required to Pay $25,968.09 to the Caisse, Being the Amount of Cash on Hand on November 15, 2002, When the Interim Receiver Took Possession?

139 The Caisse took no steps to realize on its security against the inventory or other assets of VKHG until February 20, 2003, when it sent a letter claiming a prior security interest over Metro/Loeb and, finally on February 27, 2003, when it seized the remaining assets in the Vankleek Hill store. I have previously found that by taking no action the Caisse gave its implied consent to the continued operation of the grocery store until February 27, 2003. The cash on hand on November 15, 2002, was used to carry on the business of the grocery store and was not in existence on the date of bankruptcy or when the Caisse realized on its security on February 27, 2003, and therefore was no longer an asset in the possession of VKHG, when the Caisse acted to realize on its security.

140 Therefore, the Caisse is not entitled to seek payment of $25,968.09 from Metro/Loeb, as the cash did not exist when the Caisse acted to realize on its security.

ISSUE NUMBER 7 — Is Meto/Loeb Required to Pay the Caisse the Sum of $11,831.66 for Salary Paid to the Employees of VKHG for the Period Before November 15, 2002?

141 The Caisse allowed cheques to be cashed by employees of VKHG in the amount of $11,831.66 for the period before November 15, 2002. The cheques were made between VKHG and employees of VKHG and were drawn on the VKHG's bank account with the Caisse. The Caisse cashed the cheques from funds in VKHG's bank account. The Caisse did not take any steps to realize on its security until February 27, 2003, and allowed the cheques to be cashed by employees of VKHG.

142 No evidence was given of any agreement by Loeb or Metro to reimburse the Caisse for the salary paid to employees of VKHG before November 15, 2003. Absent any contract or agreement, Metro/Loeb has no obligation to pay the Caisse

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the sum of $11,831.66 for salary paid by VKHG to its employees for the period prior to November 15, 2002, a period prior to the appointment of the interim receiver.

Disposition

143 The Caisse is entitled to receive:

(a) The sum of $131,660 for its interest in VKHG's inventory plus any accrued interest thereon from the funds held as security for the inventory;

(b) The sum of $42,709.52 for the GST rebate plus accrued interest thereon;

(c) The balance of any funds held from the proceeds of sale of the equipment plus any accrued interest thereon, which were held as security, except for the sum to be paid to Metro/Loeb as set out below;

(d) The Caisse is not required to pay damages to Metro/Loeb caused as a result of its failure to accept Vergo's offer of $750,000 for an assignment of all of its security interests against VKHG and Charles Lamoureux.

144 Metro/Loeb is entitled to the following:

(a) To receive the sum of $42,097.23 from the funds held as security from the sale of VKHG's equipment plus any accrued interest thereon;

(b) To keep the items of equipment previously repossessed by it pursuant to the Order of Ratushny J.;

(c) Metro/Loeb is not entitled to receive the value of the goods delivered within thirty days of the bankruptcy of VKHG, as they were paid for in full;

(d) The Caisse is not entitled to a security interest in the bonus of $53,500 for changing to a Loeb franchise, which was set off by Metro/Loeb against money owing to it;

(e) Metro/Loeb is not required to pay the Caisse the cash on hand on November 15, 2002, or to pay the Caisse the sum of $11,831.66, which VKHG paid as salary to its employees prior to November 15, 2002.

Costs

145 Counsel for the Caisse shall have fifteen (15) days to make brief written submissions on costs and Counsel for Metro/Loeb shall have fifteen (15) days to respond and both parties shall have five (5) days to reply to the other's submissions following the submissions by Metro/Loeb.

Order accordingly.

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TAB 3

2011 ONCA 265
Ontario Court of Appeal

Indalex Ltd., Re

2011 CarswellOnt 2458, 2011 C.E.B. & P.G.R. 8433 (headnote only), 2011 ONCA 265, [2011] W.D.F.L. 2503, [2011] W.D.F.L. 2504, [2011] O.J. No. 1621, 104 O.R. (3d) 641, 17 P.P.S.A.C. (3d) 194, 201 A.C.W.S. (3d) 553, 276 O.A.C. 347, 331 D.L.R. (4th) 352, 75 C.B.R. (5th) 19, 89 C.C.P.B. 39

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

And In the Matter of a Plan of Compromise or Arrangement of Indalex Limited, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc. (Applicants / Respondents)

J.C. MacPherson, E.E. Gillese, R.G. Juriansz JJ.A.

Heard: November 23-24, 2010
Judgment: April 7, 2011
Docket: CA C52187, CA C52346

Proceedings: reversing *Indalex Ltd., Re* (2010), 2010 CarswellOnt 893, 2010 ONSC 1114, 79 C.C.P.B. 301 (Ont. S.C.J. [Commercial List])

Counsel: Andrew J. Hatnay, Demetrios Yiokaris for Appellants, Former Executives
Darrell L. Brown for Appellants, United Steelworkers
Mark Bailey for Superintendent of Financial Services
Hugh O'Reilly, Adam Beatty for Intervenor, Morneau Sobeco Limited Partnership
Fred Myers, Brian Empey for Sun Indalex Finance, LLC
Ashley Taylor, Lesley Mercer for Monitor, FTI Consulting Canada ULC
Harvey Chaiton, George Benchetrit for George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the US Indalex Debtors

Subject: Insolvency; Estates and Trusts; Family; Property; Corporate and Commercial; Civil Practice and Procedure; International

APPEALS by pension claimants from judgment reported at *Indalex Ltd., Re* (2010), 2010 CarswellOnt 893, 2010 ONSC 1114, 79 C.C.P.B. 301 (Ont. S.C.J. [Commercial List]), dismissing pension claimants' motions for declaration that sale proceeds were subject to deemed trusts in favour of pension plan beneficiaries.

***E E. Gillese J.A.*:**

1 A Canadian company is insolvent. Its pension plans are underfunded and in the process of being wound up. The company is the administrator of the pension plans.

2 The company obtains protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (*CCAA*). A court order enables it to borrow funds pursuant to a debtor-in-possession (DIP) credit agreement. The order creates a "super-priority" charge in favour of the DIP lenders. The obligation to repay the DIP lenders is guaranteed by the company's U.S. parent company (the Guarantee).

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3 The company is sold through the *CCAA* proceedings but the sale proceeds are insufficient to repay the DIP lenders. The U.S. parent company covers the shortfall, in accordance with its obligations under the Guarantee.

4 The *CCAA* monitor holds some of the sale proceeds in a reserve fund. The pension plan beneficiaries claim the money based on the deemed trust provisions in the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (*PBA*). The U.S. parent company claims the money based on its payment under the Guarantee.

5 Must the money in the reserve fund be used to pay the deficiencies in the pension plans in preference to the secured creditor? What fiduciary obligations, if any, does the company have in respect of its underfunded pension plans during the *CCAA* proceeding? These appeals wrestle with these difficult questions.

Overview

6 Indalex Limited was the sponsor and administrator of two registered pension plans: the Retirement Plan for Salaried Employees of Indalex Limited and Associated Companies (the Salaried Plan) and the Retirement Plan for Executive Employees of Indalex Limited and Associated Companies (the Executive Plan) (collectively, the Plans).

7 On March 20, 2009, Indalex's parent company and its U.S. based affiliates (collectively, Indalex U.S.) sought Chapter 11 protection in the United States.

8 On April 3, 2009, Indalex Limited, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc. (Indalex or the Applicants) obtained protection from their creditors under the *CCAA*. At that time, the Salaried Plan was in the process of being wound up. Both Plans were underfunded. FTI Consulting Canada ULC (the Monitor) was appointed as monitor.

9 On April 8, 2009, the court authorized Indalex to borrow funds pursuant to a DIP credit agreement. The court order gave the DIP lenders a super-priority charge on Indalex's property. Indalex U.S. guaranteed Indalex's obligation to repay the DIP lenders.

10 On July 20, 2009, Indalex moved for approval of the sale of its assets on a going-concern basis. It also moved for approval to distribute the sale proceeds to the DIP lenders, with the result that there would be nothing to fund the deficiencies in the Plans. Without further payments, the underfunded status of the Plans will translate into significant cuts to the retirees' pension benefits.

11 At the sale approval hearing, the United Steelworkers appeared on behalf of its members who had been employed by Indalex and are the beneficiaries of the Salaried Plan (the USW). In addition, a group of retired executives appeared on behalf of the beneficiaries of the Executive Plan (the Former Executives).

12 Both the USW and the Former Executives objected to the planned distribution of the sale proceeds. They asked that an amount representing the total underfunding of the Plans (the Deficiencies) be retained by the Monitor as undistributed proceeds, pending further court order. Their position was based on, among other things, the deemed trust provisions in the *PBA* that apply to unpaid amounts owing to a pension plan by an employer.

13 The court approved the sale. However, as a result of the USW and Former Executives' reservation of rights, the Monitor retained an additional $6.75 million of the sale proceeds in reserve (the Reserve Fund), an amount approximating the Deficiencies. [1]

14 The sale closed on July 31, 2009. The sale proceeds were insufficient to repay the DIP lenders. Indalex U.S. paid the shortfall of approximately US$10.75 million, pursuant to its obligations under the Guarantee.

15 In accordance with a process designed by the *CCAA* court, the USW and the Former Executives brought motions returnable on August 28, 2009, based on their deemed trust claims. They claimed the Reserve Fund was subject to deemed

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trusts in favour of the Plans' beneficiaries and should be paid into the Plans in priority to Indalex U.S. They also claimed that during the *CCAA* proceedings, Indalex breached its fiduciary obligations to the Plans' beneficiaries.

16 Indalex then brought a motion in which it sought to lift the stay and assign itself into bankruptcy (the Indalex bankruptcy motion). This motion was directed to be heard on August 28, 2009, along with the USW and Former Executives' motions.

17 By orders dated February 18, 2010, (the Orders under Appeal), the *CCAA* judge dismissed the USW and Former Executives' motions on the basis that, at the date of sale, no deemed trust under the *PBA* had arisen in respect of either plan. He found it unnecessary to decide the Indalex bankruptcy motion.

18 The USW and the Former Executives (together, the appellants) appeal. They ask this court to order the Monitor to pay the Reserve Fund to the Plans.

19 On November 5, 2009, the Superintendent of Financial Services (Superintendent) appointed the actuarial firm of Morneau Sobeco Limited Partnership (Morneau) as administrator of the Plans.

20 Morneau was granted intervenor status. It supports the appellants.

21 The Superintendent also appeared. He, too, supports the appellants.

22 Sun Indalex, as the principal secured creditor of Indalex U.S., asks that the appeals be dismissed and the Reserve Fund be paid to it. As a result of its payment under the Guarantee, Indalex U.S. is subrogated to the rights of the DIP lenders. Its claim to the Reserve Fund is based on the super-priority charge.

23 The Monitor appeared. It supports Sun Indalex and asks that the appeals be dismissed. The Monitor and Sun Indalex will be referred to collectively as the respondents.

24 George L. Miller, the trustee of the bankruptcy estates of Indalex U.S., appointed under Chapter 7 of Title 11 of the United States Bankruptcy Code (the U.S. Trustee), was given leave to intervene. He joins with the Monitor and Sun Indalex in opposing these appeals.

25 For the reasons that follow, I would allow the appeals and order the Monitor to pay, from the Reserve Fund, amounts sufficient to satisfy the deficiencies in the Plans. For ease of reference, the various statutory provisions to which I make reference can be found in the schedules at the end of these reasons.

Background

26 Indalex Limited is a Canadian corporation. It is the entity through which the Indalex group of companies operates in Canada. It is a direct wholly-owned subsidiary of its U.S. parent, Indalex Holding Corp., which in turn is a wholly-owned subsidiary of Indalex Finance.

27 Together, the group of companies referred to as Indalex and Indalex U.S. were the second largest manufacturer of aluminum extrusions in the United States and Canada. Aluminum is a durable, light weight metal that can be strengthened through the extrusion process, which involves pushing aluminum through a die and forming it into strips, which can then be customized for a wide array of end-user markets.

28 Indalex Limited produced a portion of the raw material used in the extrusion process, called aluminum extrusion billets, through its casting division located in Toronto. It also processed the raw extrusion billets into extruded product at its Canadian extrusion plants, for sale to end users. In 2008, Indalex Limited accounted for approximately 32% of the Indalex group of companies total sales to third parties.

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29 Indalex Limited provided separate pension plans for its executives and salaried employees. The Plans were designed to pay pension benefits for the lives of the retirees and those of their designated beneficiaries. Indalex Limited was the sponsor and administrator of both Plans. The Plans were registered with the Financial Services Commission of Ontario (FSCO) and the Canadian Revenue Agency.

The Salaried Plan

30 The USW has several locals certified as bargaining agents on behalf of members employed with Indalex, including members who are beneficiaries of the Salaried Plan. It was certified to represent certain Indalex employees, seven of whom were members of the Salaried Plan and have deferred vested entitlements under that plan.

31 The Salaried Plan contains a defined benefit and defined contribution component.

32 Unlike the Executive Plan, the Salaried Plan was in the process of being wound up when Indalex began *CCAA* proceedings. The effective date of wind up is December 31, 2006. Special wind up payments were made in 2007 ($709,013), 2008 ($875,313) and 2009 ($601,000). As of December 31, 2008, the wind up deficiency was $1,795,600.

33 All current service contributions have been made to the Salaried Plan.

34 Article 4.02 of the Salaried Plan obligates Indalex to make sufficient contributions to the Salaried Plan. Article 14.03 of the Salaried Plan requires Indalex to remit "amounts due or that have accrued up to the effective date of the wind-up and which have not been paid into the Fund, as required by the Plan and Applicable Pension Legislation".

The Executive Plan

35 The Executive Plan is a defined benefit plan. Effective September 1, 2005, Indalex closed the Executive Plan to new members.

36 As of January 1, 2008, there were eighteen members of the Executive Plan, none of whom were active employees.

37 The Executive Plan is underfunded.

38 As of January 1, 2008, the Executive Plan had an estimated funding deficiency, on an ongoing basis, of $2,535,100. On a solvency basis, the funding deficiency was $1,102,800 and on a windup basis, the deficiency was $2,996,400. An actuarial review indicated that as of July 15, 2009, the wind up deficiency had increased to an estimated $3,200,000.

39 In 2008, Indalex made total special payments of $897,000 to the Executive Plan. No further special payments were due to be made to the Executive Plan until 2011. All current service contributions had been made.

40 Due to its underfunded status, the Former Executives' monthly pension benefits have already been cut by 30-40%. Unless money is paid into the Executive Plan, these cuts will become permanent. The Former Executives have also lost their supplemental pension benefits which were unfunded and terminated by Indalex after it obtained *CCAA* protection. Between the two cuts, the Former Executives have lost between one half and two-thirds of their pension benefits.

41 On June 26, 2009, counsel for the Former Executives sent a letter to counsel to Indalex and the Monitor, advising that the Former Executives reserved all rights to the deemed trust under s. 57(4) of the *PBA* in the *CCAA* proceedings. There was no response or objection to that letter from Indalex, the Monitor or any other party.

42 At the time the Orders under Appeal were made, the Executive Plan had not been wound up. However, a letter from counsel for the Monitor dated July 13, 2009, indicated that it was expected that the Executive Plan would be wound up.

43 On March 10, 2010, the Superintendent issued a Notice of Proposal to wind up the Executive Plan effective as of September 30, 2009. The wind up process is currently underway.

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Pension and Corporate Governance During the CCAA Proceedings

44 Keith Cooper, the Senior Managing Director of FTI Consulting Inc., was a key advisor to the Indalex group of companies prior to and during the *CCAA* proceedings. On March 19, 2009, he was appointed the Chief Restructuring Officer for all of the Indalex U.S. based companies. However, he was responsible not only for Indalex U.S. but for the entire Indalex group of companies and subsidiaries, including the Applicants. Mr. Cooper described his role as being to maximize recovery for Indalex as a whole.

45 Mr. Cooper was the primary negotiator of the DIP credit agreement on behalf of Indalex. He does not recall discussing Indalex's pension obligations in respect of the Salaried and Executive Plans during the negotiation of the DIP credit agreement. He was aware that the Plans were underfunded and that pensions would be reduced if the shortfalls were not met.

46 FTI Consulting Inc., the company for which Mr. Cooper works, and the Monitor are affiliated entities. The Monitor (FTI Consulting Canada ULC) is a wholly-owned subsidiary of FTI Consulting Inc.

47 On July 31, 2009, all of the directors of Indalex resigned. On that same day, Indalex Holding Corp. (part of Indalex U.S.) became the management of Indalex. Thus, as of July 31, 2009, Indalex and Indalex U.S. formally had the same management.

48 On August 12, 2009, a Unanimous Shareholder Declaration was executed in which Mr. Cooper was appointed to direct the affairs of all Indalex entities.

49 On August 13, 2009, Indalex (which was now under the management of Indalex U.S.) announced its intention to bring a motion to bankrupt the Canadian company.

The CCAA Proceedings

The Initial Order, as amended (April 3 and 8, 2009)

50 On April 3, 2009, pursuant to the order of Morawetz J. [2009 CarswellOnt 9396 (Ont. S.C.J. [Commercial List])], Indalex obtained protection from its creditors under the *CCAA* (the Initial Order). A stay of proceedings against Indalex was ordered.

51 On April 8, 2009 [2009 CarswellOnt 1998 (Ont. S.C.J. [Commercial List])], the Initial Order was amended to authorize Indalex to borrow funds pursuant to a DIP credit agreement among Indalex, Indalex U.S. and a syndicate of lenders (the DIP lenders). JP Morgan Chase Bank, N.A. was the administrative agent (the DIP Agent). The DIP credit agreement contemplated that the DIP loan would be repaid from the proceeds derived from a going-concern sale of Indalex's assets on or before August 1, 2009.

52 Indalex's obligation to repay the DIP borrowings was guaranteed by Indalex U.S. The Guarantee was a condition to the extension of credit by the DIP lenders.

53 Paragraph 45 of the Initial Order, as amended, is the super-priority charge. It provides that the DIP lenders' charge "shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise", other than the Administration Charge and the Directors' Charge, as those terms are defined in the Initial Order.

The Initial Order is Further Amended (June 12, 2009)

54 On June 12, 2010, Morawetz J. heard and granted a motion by the Applicants for approval of an amendment to the DIP credit agreement to increase the borrowings by about $5 million, from US$24.36 million to US$29.5 million. This resulted in an order dated June 12, 2009, further amending the Initial Order (the June 12, 2009 order).

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55 Counsel for the Former Executives was served with motion material on June 11, 2009, at 8:27 p.m. In response to an email from the Former Executives' counsel questioning the urgency of the motion, the Monitor's counsel responded that the motion was simply directed at obtaining more money under the DIP credit agreement.

56 At the hearing of the motion on June 12, 2010, the Former Executives initially sought to reserve their rights to confirm that the motion was about an increase to the DIP and nothing more. When that was confirmed, the Former Executives withdrew their reservation and the motion proceeded later that afternoon.

The Sale Approval Order (July 20, 2009)

57 Indalex brought two motions that were heard on July 20, 2009 [2009 CarswellOnt 9397 (Ont. S.C.J. [Commercial List])], by Campbell J. (the *CCAA* judge).

58 First, Indalex sought approval of a sale of its assets, as a going concern, to SAPA Holdings AB (SAPA). Total consideration for the sale of Indalex and Indalex U.S. was approximately US$151,183,000.00. The Canadian sale proceeds were to be paid to the Monitor.

59 As a term of the sale, SAPA assumed no responsibility or liability for the Plans.

60 Second, Indalex moved for approval of an interim distribution of the sale proceeds to the DIP lenders.

61 Both the Former Executives and the USW objected to the planned distribution of the sale proceeds. They asserted statutory deemed trust claims in respect of the underfunded pension liabilities in the Plans, arguing that preference was to be given for amounts owing to the Plans pursuant to ss. 57 and 75 of the *PBA*. They also relied on s. 30(7) of the Ontario *Personal Property Security Act*, R.S.O. 1990, c. P.10 (*PPSA)*, which expressly gives priority to the deemed trust in the *PBA* over secured creditors.

62 The Former Executives and the USW further argued that Indalex had breached its fiduciary duty to the Plans' beneficiaries by failing to adequately meet its obligations under the Plans and by abdicating its responsibilities as administrator once *CCAA* proceedings had been undertaken.

63 The court approved the sale in an order dated July 20, 2009 (the Sale Approval order). However, as a result of the USW and Former Executives' reservation of rights, the Monitor retained an additional $6.75 million of the sale proceeds in reserve, an amount approximating the Deficiencies.

64 It was agreed that an expedited hearing process would be undertaken in respect of the USW and Former Executives' deemed trust claims and that the Reserve Fund held by the Monitor would be sufficient, if required, to satisfy the deemed trust claims.

The Guarantee is Called on

65 On July 31, 2009, the sale to SAPA closed. The sale proceeds available for distribution were insufficient to repay the DIP loan in full. The Monitor made a payment of US$17,041,391.80 to the DIP Agent. This resulted in a shortfall of US$10,751,247.22 in respect of the DIP borrowings. The DIP Agent called on the Guarantee for the amount of the shortfall, which Indalex U.S. paid.

The Orders under Appeal (August 28, 2009)

66 The USW and Former Executives brought motions to determine their deemed trust claims. The motions were set for hearing on August 28, 2009. Indalex then filed its bankruptcy motion, in which it sought to file a voluntary assignment in bankruptcy.

67 By orders dated February 18, 2010, the *CCAA* judge dismissed the USW and Former Executives' motions.

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68 The *CCAA* judge found it unnecessary to deal with Indalex's bankruptcy motion.

The Reasons of the CCAA Judge

The Former Executives' Motion

69 The CCAA judge dismissed the Former Executives' motion on the basis that since the wind up of the Executive Plan had not yet taken place, there were no deficiencies in payments to that plan as of July 20, 2009. As there were no deficiencies in payments, there was no basis for a deemed trust.

The USW Motion

70 Because the Salaried Plan was in the process of being wound up, the CCAA judge dismissed the USW motion for different reasons.

71 The CCAA judge saw the issue raised on the USW motion to be whether the *PBA* required Indalex to pay the windup deficiency in the Salaried Plan as at the date of closing of the sale and transfer of assets, namely, July 20, 2009. In resolving the issue, the *CCAA* judge considered ss. 57 and 75 of the *PBA*. He called attention to the words "accrued to the date of the wind up but not yet due" in s. 57(4).

72 The *CCAA* judge also considered ss. 31(1) and (2) of R.R.O. 1990, Reg. 909 (the Regulations). He concluded that because s. 31 of the Regulations permitted Indalex to make up the deficiency in the Salaried Plan over a period of years, the amount of the yearly payments did not become due until it was required to be paid. Were it not for s. 31 of the Regulations, the *CCAA* judge stated that Indalex would have had an obligation under the *PBA* to pay in any deficiency as of the date of wind up.

73 The CCAA judge concluded:

> [49] ... I find that as of the date of closing and transfer of assets there were no amounts that were "due" or "accruing due" on July 20, 2010. On that date, Indalex was not required under the *PBA* or the Regulations thereunder to pay any amount into the [Salaried] Plan. There was an annual payment that would have become payable as at December 31, 2009 but for the stay provided for in the Initial Order under the CCAA.
>
> [50] Since as of July 20, 2009, there was no amount due or payable, no deemed trust arose in respect of the remaining deficiency arising as at the date of wind-up.
>
> [51] Since under the initial order priority was given to the DIP Lenders, they are entitled to be repaid the amounts currently held in escrow. Those entitled to windup deficiency remain as of that date unsecured creditors.

The Indalex Bankruptcy Motion

74 Having found that the deemed trust claims failed, the *CCAA* judge considered that the question of Indalex's assignment into bankruptcy might be moot. He went on, in para. 55 of his reasons for decision, to state:

> [55] ... In my view, **a voluntary assignment under the *BIA* should not be used to defeat a secured claim under valid Provincial legislation**, unless the Provincial legislation is in direct conflict with the provisions of Federal Insolvency Legislation such as the *CCAA* or the *BIA*. For that reason I did not entertain the bankruptcy assignment motion first.
>
> [Emphasis added.]

75 He found no conflict between the federal and provincial legislative regimes and allowed the Applicants to renew their request for bankruptcy relief in a further motion.

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The Issues

76 The central issue raised on these appeals is whether the *CCAA* judge erred in his interpretation of s. 57(4) of the *PBA* and, specifically, in finding that no deemed trust existed with respect to the Deficiencies as at July 20, 2009.

77 The USW and the Former Executives ask the court to decide a second issue: whether during the *CCAA* proceedings Indalex breached the fiduciary obligations that it owed to the Plans' beneficiaries by virtue of being the Plans' administrator. [2]

78 The U.S. Trustee's submission raises two additional issues. Does the collateral attack rule bar the appellants' deemed trust motions? Do the principles of cross-border insolvencies apply to these appeals?

79 The final issue that arises is that of remedy: how is the Reserve Fund to be distributed?

80 Given the centrality of the wind up process to these appeals, I will briefly outline the salient aspects of the wind up process before turning to a consideration of each of these issues.

Winding UP a Pension Plan

81 To understand the wind up process, one must first understand how the pension plan operates while it is ongoing.

82 A pension plan to which the employees contribute is called a contributory plan. In the case of contributory plans, the employer is obliged to remit the employee contributions, including payroll deductions, within a specified time frame. This aspect of an employer's obligations does not arise in these appeals.

83 In addition to remitting the employee contributions, if any, while a defined benefit pension plan is ongoing, the employer must make two types of contributions to ensure that the plan is adequately funded and capable of paying the promised pension benefits.

> 1. *Current service or "normal cost" contributions* — the employer contributions necessary to pay for current service costs in respect of benefits that are currently accruing to members as a result of their ongoing participation in the plan as active employees. These must be made in monthly instalments within 30 days after the month to which they relate.
>
> 2. *Special payments* — a plan administrator must file an actuarial report annually in which the pension plan is valued on two different bases: a "going-concern" basis, where it is assumed the plan will continue to operate indefinitely; and a "solvency" basis, where it is assumed that the employer will discontinue its business and wind up its plan. If the actuarial report discloses a going-concern liability, the employer is required to make monthly special payments over a 15 year period to fund the unfunded liability. If the actuarial report discloses a solvency deficiency, the employer is required to make monthly special payments over a 5 year period to fund the deficiency.

84 It is important to understand that the solvency valuation is not the same thing as a wind up report. To repeat, the solvency valuation is prepared while the pension plan is ongoing. A solvency valuation is required while the plan is ongoing because it is crucial that there be adequate funds with which to pay pensions if the company becomes insolvent and the plan is wound up.

85 The wind up of a pension plan is defined in the *PBA* as "the termination of the pension plan and the distribution of the assets of the pension fund" (s. 1(1)). At the effective date of wind up, the plan members cease to accrue further entitlements under the plan. Naturally, no new members may join the plan after the wind up date. The pension fund of a plan that is wound up continues to be subject to the *PBA* and the Regulations until all of the assets of the fund have been disbursed (s. 76).

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86 Winding up a pension plan must be distinguished from closing the plan, which simply means that no new entrants are permitted to join the plan.

87 Under the *PBA*, there are two ways that a pension plan can be wound up. First, s. 68(1) recognizes that an employer [3] can voluntarily wind up the pension plan. Second, under s. 69(1), in certain circumstances, the Superintendent may order the wind up of the plan.

88 The *PBA* contains a detailed statutory scheme that must be followed when a pension plan is to be wound up. This scheme imposes obligations on the employer and plan administrator, including the following:

- The administrator has to give written notice of proposal to wind up to various people, including the Superintendent, and the notice must contain specified information (s. 68(2) and (4));

- A wind up date must be chosen and the administrator must file a wind up report showing, among other things, the plan's assets and liabilities as at that date (s. 70(1));

- No payments can be made out of the pension fund until the Superintendent has approved the wind up report (s. 70(4));

- Plan members with a certain combination of age and years of service or membership in the plan are entitled to additional benefits on wind up (grow-ins) (s. 74).

89 Importantly, s. 75 requires an employer to make two different categories of payment on plan wind up. Sections 75(1)(a) and (b) read as follows:

Liability of employer on wind up

75. (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

90 Section 75(1)(a) requires the employer to make all payments that are due immediately or that have accrued and not been paid into the pension fund. Any unpaid current service costs and unpaid special payments are caught by this subsection. In other words, by virtue of this subsection, any payments that the employer had to make while the plan was ongoing must be paid. It will be recalled that while the plan was ongoing, some special payments could be made over time.

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91 Section 75(1)(b) requires the employer to pay additional amounts into the pension fund if there are insufficient assets to cover the value of the pension benefits in the three categories set out in s. 75(1)(b).

92 It will be apparent that on wind up, an employer will often be faced with having to make significant additional contributions under s. 75(1)(b), in addition to being required to bring all contributions up to date because of s. 75(1)(a). Section 75(2) stipulates that "the employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times." Section 31 of the Regulations prescribes the manner and timing for the s. 75 wind up payments. It provides that the amounts an employer is to contribute under section 75 shall be by annual special payments, commencing at the effective date of the wind up, over not more than five years.

The PBA Deemed Trust

93 The central issue in these appeals is whether the *CCAA* judge erred in his interpretation of s. 57(4) of the *PBA*. Section 57(4) reads as follows:

> **57.** (4) **Where a pension plan is wound up** in whole or in part, **an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust** for the beneficiaries of the pension plan **an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.**
>
> [emphasis added]

94 The modern approach to statutory construction dictates that in interpreting s. 57(4), the words must be read

> in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. [4]

95 Section 57(4) deems an employer to hold in trust an amount equal to the contributions "accrued to the date of wind up but not yet due under the plan or regulations". The question is: what employer contributions are caught by s. 57(4) and, thus, are subject to the deemed trust?

96 The introductory words of s. 57(4) refer to where a pension plan is "wound up". Therefore, to answer this question, one must refer to the wind up regime created by the *PBA* and Regulations, a summary of which is set out above.

97 It will be recalled that when a pension plan is wound up, an actuarial calculation is made of the assets and liabilities, as of the wind up date. Because the plan liabilities relate to service that was provided up to the wind up date and not beyond, it is clear that all plan liabilities are accrued as of the wind up date. Put another way, no additional liability can accrue following the wind up because all events crystallize on the windup date — all pension benefit accruals by members cease and all amounts that an employer is required to pay into a pension plan are calculated as of the wind up date. For the same reason, the amounts that s. 75 requires an employer to contribute to the pension fund, on wind up, are accrued to the date of wind up. The required contributions are the amounts that an employer must make to the pension fund so that the accrued pension benefits of the plan members can be paid.

98 It will be further recalled that s. 31 of the Regulations gives the employer up to five years in which to make all of the required s. 75 contributions. However, the fact that an employer is given time in which to pay the requisite contributions into the pension fund does not change the fact that the liabilities accrued by the wind up date.

99 This point is reinforced when one distinguishes amounts that are "accrued" from amounts that are "not yet due". In *Ontario Hydro-Electric Power Commission v. Albright* (1922), 64 S.C.R. 306 (S.C.C.), at para. 23, the Supreme Court of Canada explains that money is "due" when there is a legal obligation to pay it, whereas payments are "accrued" when the rights or obligations are constituted and the liability to pay exists, even if the payment does not need to be made until a later date (*i.e.* is not "due" until a later date).

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100 Thus, just as s. 57(4) contemplates, while the amounts that the employer must contribute to the pension fund pursuant to s. 75 "accrued to the date of wind up", because of s. 31 those contributions are "not yet due under the ... regulations".

101 There is nothing in the wording of s. 57(4) to suggest that its scope is confined to the amounts payable under only s. 75(1)(a), as the respondents contend. On the contrary, the words of s. 57(4), given their grammatical and ordinary meaning, contemplate that all amounts owing to the pension plan on wind up are subject to the deemed trust, even if those amounts are not yet due under the plan or regulations. Therefore, the deemed trust in s. 57(4) applies to all employer contributions that are required to be made pursuant to s. 75. In short, the words "employer contributions accrued to the date of wind up but not yet due" in s. 57(4) include all amounts owed by the employer on the wind up of its pension plan.

102 This interpretation accords with a contextual analysis of s. 57(4).

103 As these appeals demonstrate, during the five-year "grace" period permitted by s. 31 of the Regulations, the rights of plan beneficiaries are at risk. Sections 57(4) and (5) provide some protection to the plan beneficiaries during that period. The employees' interest is in receiving their full pension entitlements. For that to happen, all s. 75 employer contributions must be made into the pension fund. The employer, on the other hand, has an interest in having a reasonable period of time within which to make the requisite s. 75 contributions. Section 31 of the Regulations gives the employer up to five years to make the contributions, during which time the deemed trust in s. 57(4) and the lien and charge in s. 57(5) provide a measure of protection for the employees over the amount of the unpaid employer contributions, contributions that had *accrued* to the date of wind up *but [were] not yet due under the regulations*.

104 Further, this interpretation is consistent with the overall purpose of the *PBA*, which is to establish minimum standards,[5] safeguard the rights of pension plan beneficiaries,[6] and ensure the solvency of pension plans so that pension promises will be fulfilled.[7] As the Supreme Court of Canada said in *Monsanto*, at para. 38:

> The Act is public policy legislation that recognizes the vital importance of long-term income security. As a legislative intervention in the administration of voluntary pension plans, its purpose is to establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans (citations omitted).

105 Much reference has been made to the two cases in which s. 57(4) has been discussed: *Ivaco Inc., Re* (2005), 12 C.B.R. (5th) 213 (Ont. S.C.J. [Commercial List]), aff'd (2006), 83 O.R. (3d) 108 (Ont. C.A.), and *Toronto Dominion Bank v. Usarco Ltd.* (1991), 42 E.T.R. 235 (Ont. Gen. Div.). In my view, these decisions are of little assistance in deciding this issue.

106 Factually, *Ivaco* and *Usarco* differ from the present case. In *Ivaco* and *Usarco*, the prospect of bankruptcy was firmly before the court whereas in this case, at its highest, there is a motion to lift the stay and file for bankruptcy.

107 Moreover, there are conflicting statements in *Ivaco* and *Usarco* regarding the applicability of the deemed trust to wind up deficiencies. In *Usarco*, a bankruptcy petition had been filed but no steps had been taken to proceed with the petition. The company was not under *CCAA* protection. In that context, Farley J., the motion judge, held that the deemed trust provision referred only to the regular contributions together with special contributions that were to have been made but had not been.[8] In *Ivaco*, the major financers and creditors wished to have the *CCAA* proceeding, which was functioning as a liquidation, transformed into a bankruptcy proceeding. The case was focused primarily on whether there was a reason to defeat the bankruptcy petition. In *Ivaco*, Farley J. took a different view of the scope of the s. 57(4) deemed trust, stating that in a non-bankruptcy situation, the company's assets were subject to a deemed trust on account of unpaid contributions and wind up liabilities.[9] On appeal, although this court indicated that it thought that Farley J.'s statement in *Usarco* was correct, it found it unnecessary to decide the matter. Accordingly, these decisions are not determinative of the scope of the deemed trust created by s. 57(4) of the *PBA*.

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108 The *CCAA* judge concluded that because Indalex had made the going-concern and special payments to the Salaried Plan at the date of closing, there were no amounts due to the Salaried Plan. Therefore, there could be no deemed trust. Respectfully, I disagree. As I have explained, the deemed trust in s. 57(4) is not limited to the payment of amounts contemplated by s. 75(1)(a). It applies to all payments required by s. 75(1), including payments mandated by s. 75(1)(b).

109 Accordingly, the deficiency in the Salaried Plan had accrued as of the date of wind up (December 31, 2006) and, pursuant to s. 57(4) of the *PBA*, was subject to a deemed trust. The *CCAA* judge erred in holding that no deemed trust existed with respect to that deficiency as at July 20, 2009. The consequences that flow from this conclusion are explored in the section below on how the Reserve Fund is to be distributed.

110 Are the unpaid liability payments owing to the Executive Plan also subject to the s. 57(4) deemed trust? The Former Executives, Superintendent and Morneau all contend that they are. On the plain wording of s. 57(4), I find it difficult to accept this argument — the introductory words of the provision speak to "where a pension plan is wound up". In other words, wind up of the pension plan appears to be a requirement for s. 57(4) to apply. If that is so, no deemed trust could arise unless and until a plan wind up occurred. As has been noted, the Executive Plan had not been wound up at the relevant time.

111 Having said this, I am troubled by the notion that Indalex can rely on its own inaction to avoid the consequences that flow from wind up. In its letter of July 13, 2009, counsel for the Monitor confirmed that the Executive Plan would be wound up. Indeed, the *CCAA* judge acknowledged that the material filed with the court showed an intention on the part of the Applicants to wind up the plan. If the deemed trust does not extend to the Executive Plan, in the circumstances of this case, it appears that the result would be a triumph of form over substance.

112 In the end, however, the question that drives these appeals is whether the Monitor should be directed to distribute the Reserve Fund to the Plans. As I explain below in the section on how the Reserve Fund should be distributed, in my view, such an order should be made. Consequently, it becomes unnecessary to decide whether the deemed trust applies to the deficiency in the Executive Plan and I decline to do so. It is a question that is best decided in a case where the result depends on it and a fuller record would enable the court to appreciate the broader implications of such a determination.

Did Indalex Breach Its Fiduciary Obligation?

113 The appellants say that Indalex, as administrator of the Plans, owed a fiduciary duty to the Plans' members and beneficiaries. Both appellants list a number of actions that Indalex took or failed to take during the *CCAA* proceedings that they say amounted to breaches of its fiduciary obligation. They contend that the appropriate remedy for those breaches is an order requiring the Reserve Fund to be paid into the Plans.

114 The Monitor acknowledges that pension plan administrators have both a statutory and common law duty to act in the best interests of the plan beneficiaries and to avoid conflicts of interest, and that these duties are "fiduciary in nature". However, the Monitor contends that Indalex took all of the impugned actions in its role as employer and, therefore, could not have breached the fiduciary duties it owed to the Plans' beneficiaries as administrator. In any event, the Monitor adds, the issue is moot because any such breaches would merely give rise to an unsecured claim outside the ambit of the deemed trusts created by the *PBA*.

115 Sun Indalex echoes the Monitor's latter argument and says that the allegations of breach of fiduciary duty are irrelevant in these appeals. Its submission on this issue is summarized in para. 79 of its factum:

> [79] There is no provision in the PBA that creates a deemed trust in respect of any claim for damages based on an alleged breach of fiduciary duty by an employer and there is no basis in the PBA for conferring a priority with respect to such a claim. If a claim for breach of fiduciary duty on the part of Indalex exists, it is merely an unsecured claim outside the ambit of the deemed trusts created by the PBA that does not have priority over Sun's secured claim or the super-priority DIP Lenders Charge.

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116 For the reasons that follow, I accept the appellants' submission that Indalex breached its fiduciary obligations as administrator during the *CCAA* proceedings. I deal with the question of what flows from that finding when deciding the issue of remedy.

117 It is clear that the administrator of a pension plan is subject to fiduciary obligations in respect of the plan members and beneficiaries. [10] These obligations arise both at common law and by virtue of s. 22 of the *PBA*.

118 The common law governing fiduciary relationships is well known. A fiduciary relationship will be held to exist where, given all the surrounding circumstances, one person could reasonably have expected that the other person in the relationship would act in the former's best interests. [11] The key factual characteristics of a fiduciary relationship are: the scope for the exercise of discretion or power; the ability to exercise that power unilaterally so as to affect the beneficiary's legal or practical interests; and, a peculiar vulnerability on the part of the beneficiary to the exercise of that discretion or power. [12]

119 It is readily apparent that these characteristics exist in the relationship between the pension plan administrator and the plan members and beneficiaries. The administrator has the power to unilaterally make decisions that affect the interests of plan members and beneficiaries as a result of its responsibility for the administration of the plan and management of the fund. Those decisions affect the beneficiaries' interests. The plan members and beneficiaries reasonably rely on the administrator to ensure that the plan and fund are properly administered. And, as these appeals demonstrate, they are peculiarly vulnerable to the administrator's exercise of its powers. Thus, at common law, Indalex as the Plans' administrator owed a fiduciary duty to the Plans' members and beneficiaries to act in their best interests.

120 Section 22 of the *PBA* also imposes a fiduciary duty on the administrator in the administration of the plan and fund. As well, it expressly prohibits the administrator from knowingly permitting its interest to conflict with its duties in respect of the pension fund. The relevant provisions in s. 22 read as follows:

> **Care, diligence and skill**
>
> **22.** (1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.
>
> **Special knowledge and skill**
>
> (2) The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.
>
> . . .
>
> **Conflict of interest**
>
> (4) An administrator ... shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

121 In Ontario, an employer is expressly permitted to act as the administrator of its pension plan: see ss. 1 and 8 of the *PBA*. [13] It is self-evident that the two roles can conflict from time to time. In *Imperial Oil Ltd. v. Ontario (Superintendent of Pensions)* (1995), 18 C.C.P.B. 198 (Ont. Pension Comm.) (*Imperial Oil*), the Pension Commission of Ontario grappled with this statutorily sanctioned conflict in roles.

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122 In that case, the employer Imperial Oil was the administrator of two employee pension plans. Imperial Oil sought to file amendments to the pension plans with the PCO. Prior to the amendments, a plan member with 10 or more years of service with Imperial Oil whose employment was terminated for efficiency reasons was entitled to an enhanced early retirement annuity (the enhanced benefit). The effect of the amendments was to deny such an employee the enhanced benefit unless the employee would have been able to retire within five years of termination. Put another way, after the amendments, in addition to the other requirements, an employee had to be 50 years of age or older at the time his or her employment was terminated for efficiency reasons in order to receive the enhanced benefit.

123 The Superintendent accepted the amendments for registration.

124 Some six months after the amendments were passed, Imperial Oil terminated the employment of a large number of employees for efficiency reasons. A number of the affected employees had 10 or more years of service but, because they had not reached the age of 50, they were denied the enhanced benefit.

125 A group of former employees (the Entitlement 55 Group) objected to the registration of the amendments. They brought an application to the PCO, seeking a declaration that the amendments were void and an order compelling Imperial Oil to administer the pension plans according to the terms of the plans in place before the amendments were passed.

126 Among other things, the Entitlement 55 Group argued that when Imperial Oil amended the plans, it was acting in both its capacity as employer and its capacity as administrator of the plans. Thus, they contended, Imperial Oil placed itself in a conflict of interest situation prohibited by s. 22(4) of the *PBA* because in its role as employer it wished to reduce pension fund liabilities but in its role as administrator it had a duty to protect the interests of the beneficiaries who had reached the 10 year service qualification and thereby "qualified" for the enhanced benefit.

127 The PCO dismissed the application. In so doing, it rejected the submission that Imperial Oil had contravened s. 22(4) by passing the amendments. It held that Imperial Oil had acted solely in its capacity as employer when it passed the amendments.

128 The PCO acknowledged that the *PBA* allows an employer to wear "two hats" — one as employer and the other as administrator. However, at para. 33 of its reasons, the PCO explained that an employer plays a role in respect of the pension plan that is distinct from its role as administrator:

> Its role as employer permits it to make the decision to create a pension plan, to amend it and to wind it up. Once the plan and fund are in place, it becomes an administrator for the purposes of management of the fund and administration of the plan. If we were to hold that an employer was an administrator for all purposes once a plan was established, of what use would a power of amendment be? An employer could never use the power to amend the plan in a way that was to its benefit, as opposed to the benefit of the employees. Section 14 presupposes this power is with an employer as it created parameters around the exercise of a power of amendment.

129 The "two hats" analogy in *Imperial Oil* assists in understanding the parameters of the dual roles of an employer who is also the administrator of its pension plan. The employer, when managing its business, wears its corporate hat. Although the employer *qua* corporation must treat all stakeholders fairly when their interests conflict, the directors' ultimate duty is to act in the best interests of the corporation: see *BCE Inc., Re*, [2008] 3 S.C.R. 560 (S.C.C.), at paras. 81-84. On the other hand, when acting as the pension plan administrator, the employer wears its fiduciary hat and must act in the best interests of the plan's members and beneficiaries.

130 The question raised by these appeals is whether, as the respondents contend, Indalex wore only its corporate hat during the *CCAA* proceedings. In my view, it did not. As I will explain, during the *CCAA* proceedings, in the unique circumstances of this case, Indalex wore both its corporate and its administrator's hats.

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131 I begin from the position that Indalex had the right to make the decision to commence *CCAA* proceedings wearing solely its corporate hat. That decision is not part of the administration of the pension plan or fund nor does it necessarily engage the rights of the beneficiaries of the pension plan. For example, an employer might sell its business under *CCAA* protection, with the purchaser agreeing to continue the pension plan. In that situation, there should be no effect on the payment of pension benefits. Similarly, if the pension plan were fully funded, *CCAA* proceedings should have no effect on pension entitlements.

132 However, just because the initial decision to commence *CCAA* proceedings is solely a corporate one that does not mean that all subsequent decisions made during the proceedings are also solely corporate ones. In the circumstances of this case, Indalex could not simply ignore its obligations as the Plans' administrator once it decided to seek *CCAA* protection. Shortly after initiating *CCAA* proceedings, Indalex moved to obtain DIP financing, in which it agreed to give the DIP lenders a super-priority charge. At the same time, Indalex knew that the Plans were underfunded and that unless more funds were put into the Plans, pensions would have to be reduced. The decisions that Indalex was unilaterally making had the potential to affect the Plans beneficiaries' rights, at a time when they were particularly vulnerable. The peculiar vulnerability of pension plan beneficiaries was even greater than in the ordinary course because they were given no notice of the *CCAA* proceedings, had no real knowledge of what was transpiring and had no power to ensure that their interests were even considered — much less protected — during the DIP negotiations.

133 In concluding that Indalex was subject to its fiduciary duties as administrator as well as its corporate obligations during the *CCAA* proceedings, two points need to be made.

134 First, it is significant that Indalex is unclear as to what it thinks happened to its role as administrator during the *CCAA* proceedings. When cross-examined on this matter, Mr. Cooper gave various responses as to whom he believed filled that role: Indalex, a combination of him and the Monitor, and a combination of him and his staff. This confusion is understandable, given the number of roles that Mr. Cooper played in these proceedings. It will be recalled that prior to the commencement of the *CCAA* proceedings, he became the Chief Restructuring Officer for Indalex U.S., a position which included responsibility for the Canadian group of Indalex companies. In this position, he served as Indalex's primary negotiator of the DIP credit agreement. But, at the same time, he worked for FTI Consulting Inc. The Monitor is a wholly-owned subsidiary of FTI Consulting Inc. This blending of roles no doubt contributed to the apparent disregard for the obligations owed by the Plans' administrator.

135 In any event, it is not apparent to me that Indalex could ignore its role as administrator or divest itself of those obligations without taking formal steps through the Superintendent, plan amendment, the courts, or some combination thereof, to transfer that role to a suitable person. However, I will not consider this particular question further because it was not squarely raised and argued by the parties and, in any event, even if Mr. Cooper became the administrator, through his various roles, including as Chief Restructuring Officer for Indalex U.S., he is so clearly allied in interest with Indalex that the following analysis remains applicable.

136 Second, the respondents' submission that Indalex wore only its corporate hat during the proceedings is implicitly premised on the notion that an employer will wear its corporate hat or its administrator's hat, but never both. I do not accept this premise. Nor do I accept that the reasoning in *Imperial Oil*, which the respondents rely on, supports this submission.

137 In *Imperial Oil*, the PCO had to decide whether certain acts taken in respect of a pension plan were those of the employer or the administrator. Because the provision of pension plans is voluntary in Canada, the employer has the right to decide questions of plan design, including whether to offer a pension plan and, if it does, whether to end it. In part because of the wording of s. 14 of the *PBA* and in part because the amendments at issue in *Imperial Oil* were a matter of plan design, the PCO concluded that the employer was found to be acting solely in its corporate role when it passed the amendments. There is nothing in *Imperial Oil* to suggest that an employer cannot find itself in a position where it is wearing both hats at the same time.

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138 I turn next to the question of breach.

139 As previously noted, when Indalex commenced *CCAA* proceedings, it knew that the Plans were underfunded and that unless additional funds were put into the Plans, pensions would be reduced. Indalex did nothing in the *CCAA* proceedings to fund the deficit in the underfunded Plans. It took no steps to protect the vested rights of the Plans' beneficiaries to continue to receive their full pension entitlements. In fact, Indalex took active steps which undermined the possibility of additional funding to the Plans. It applied for *CCAA* protection without notice to the Plans' beneficiaries. It obtained a *CCAA* order that gave priority to the DIP lenders over "statutory trusts" without notice to the Plans' beneficiaries. It sold its assets without making any provision for the Plans. It knew the purchaser was not taking over the Plans. [14] It moved to obtain orders approving the sale and distributing the sale proceeds to the DIP lenders, knowing that no payment would be made to the underfunded Plans. And, Indalex U.S. directed Indalex to bring its bankruptcy motion with the intention of defeating the deemed trust claims and ensuring that the Reserve Fund was transferred to it. In short, Indalex did nothing to protect the best interests of the Plans' beneficiaries and, accordingly, was in breach of its fiduciary obligations as administrator.

140 Further, in my view, Indalex was in a conflict of interest position. As has been mentioned, Indalex's corporate duty was to treat all stakeholders fairly when their interests conflicted, but its ultimate duty was to act in the best interests of the corporation. Indalex's duty as administrator was to act in the Plans' beneficiaries best interests. It is apparent that in the circumstances of this case, these duties were in conflict.

141 The common law prohibition against conflict of interest is not confined to situations where the fiduciary's personal interest conflicts with those of the beneficiaries. It also precludes the fiduciary from placing itself in a position where it acts for two parties who are adverse in interest: *Davey v. Woolley, Hames, Dale & Dingwall* (1982), 35 O.R. (2d) 599 (Ont. C.A.), at para. 8. In *Davey*, a solicitor who acted for both sides of a business transaction was found to be in breach of his fiduciary obligations. Wilson J.A., writing for this court, explained that the conflict arose because the solicitor could not fulfill his duties in respect of both clients at the same time. At para. 18, she concluded that the solicitor was bound to refuse to act for the plaintiff in the circumstances.

142 The prohibition against a fiduciary being in a position of conflicting duties governs the situation in which Indalex found itself in during the *CCAA* proceedings.

143 Indalex was not at liberty to resolve the conflict in its duties by simply ignoring its role as administrator. A fiduciary relationship does not end simply because it becomes impossible of performance. At the point where its duty to the corporation conflicted with its duties as administrator, it was incumbent on Indalex to take steps to address the conflict.

144 Even if I am in error in concluding that Indalex was in breach of its common law fiduciary obligations, I would find that its actions amounted to a breach of s. 22(4) of the *PBA*. Section 22(4) prohibits an administrator from knowingly permitting its interest to conflict with its duties and powers in respect of the pension fund. Under s. 57(5) of the *PBA*, as administrator, Indalex had a lien and charge on its assets for the amount of the deemed trust. Any steps that it might have taken pursuant to s. 57(5), as administrator, would have been in respect of the pension fund. Thus, if nothing else, Indalex's actions during the *CCAA* proceedings demonstrate that it permitted its corporate interests to conflict with the administrator's duties and powers that flow from the lien and charge.

145 Having found that Indalex breached its fiduciary obligations to the Plans' beneficiaries, the question becomes: what flows from such a finding? I address that question below when considering the issue of how to distribute the Reserve Fund. At that time I will return to the arguments of the Monitor and Sun Indalex to the effect that such a finding is largely irrelevant in these proceedings.

Does the Collateral Attack Rule Bar the Deemed Trust Motions?

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146 The U.S. Trustee submits that even if the *PBA* creates a deemed trust for any wind up deficiencies in the Plans, the appeals should be dismissed because the underlying motions are an impermissible collateral attack on previous orders made in the *CCAA* proceedings. His argument runs as follows.

147 The Initial Order, the June 12, 2009 order and the Sale Approval order (the "Court Orders") are all valid, enforceable court orders. The Court Orders gave super-priority rights to the DIP lenders and Indalex U.S. is subrogated to those rights. None of the Court Orders were appealed and no party sought to have them set aside or varied. As the appellants' motions seek to alter the priorities established by the Court Orders, they should be barred because they are an impermissible collateral attack on those orders.

148 I do not accept this submission for three reasons, the first two of which can be shortly stated.

149 First, this submission is an attack on the underlying motions. As such, it ought to have been raised below. The Former Executives say that the collateral attack doctrine was raised for the first time on appeal. Certainly, if it was raised below, the *CCAA* judge makes no reference to it. As a general rule, it is not appropriate to raise an issue for the first time on appeal. The exceptions to this general rule are very limited and do not apply in this case: see *Cusson v. Quan*, [2009] 3 S.C.R. 712 (S.C.C.), at paras. 36-37.

150 Second, the USW and the Former Executives raised the matter of the deemed trusts in the *CCAA* proceedings. The *CCAA* judge designed a process by which their claims would be resolved. They followed that process. The USW and Former Executives can scarcely be faulted for complying with a court-designed process. Further, the Sale Approval order acknowledged the deemed trust issue in that it required the Monitor to hold funds in reserve that were sufficient to satisfy the deemed trust claims. That acknowledgment is inconsistent with a subsequent claim of impermissible collateral attack.

151 Third, as I will now explain, an appreciation of the *CCAA* regime makes it apparent that the collateral attack rule does not apply in the circumstances of this case.

152 The collateral attack rule rests on the need for court orders to be treated as binding and conclusive unless they are set aside on appeal or lawfully quashed. Court orders may not be attacked collaterally. That is, a court order may not be attacked in proceedings other than those whose specific object is the reversal, variation, or nullification of the order. See *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.), at para. 8.

153 The fundamental policy behind the rule against collateral attacks is "to maintain the rule of law and to preserve the repute of the administration of justice": see *R. v. Litchfield*, [1993] 4 S.C.R. 333 (S.C.C.), at para. 22. If a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it: see *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629 (S.C.C.), at para. 72.

154 The *CCAA* regime is designed to deal with all matters during an insolvent company's attempt to reorganize. The court-ordered stay of proceedings ensures that there is only one forum where parties can put forth their arguments and claims. By pre-empting other legal proceedings, the stay gives a corporation breathing space, which promotes the opportunity for reorganization.

155 The *CCAA* regime is a flexible, judicially supervised reorganization process that allows for creative and effective decisions: see *Ted Leroy Trucking Ltd., Re*, [2010] 3 S.C.R. 379 (S.C.C.), at para. 21. The *CCAA* judge is accorded broad discretion because the proceedings are a fact-based exercise that requires ongoing monitoring and because there is often a need for the court to act quickly. There is an underlying assumption, however, that the *CCAA* proceedings will provide an opportunity for affected persons to participate in the proceedings.

156 This assumption finds voice in para. 56 of the Initial Order, as amended, which permits any interested party to apply to the *CCAA* court to vary or amend the Initial Order (the come-back clause). That is precisely what the appellants

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did. As interested parties, they went to the *CCAA* court to ask that the super-priority charge be varied or amended so that their claims could be properly recognised.

157 Moreover, I do not accept that the appellants failed to act promptly in asserting their claims. It was only when Indalex brought a motion for approval of the sale of its assets to SAPA and for a distribution of the sale proceeds to the DIP lenders that it became clear that Indalex intended to abandon the Plans in their underfunded states. The appellants immediately took steps to assert their claims in the very forum in which all of the Court Orders had been made, namely, the *CCAA* court.

158 The U.S. Trustee's argument that the Court Orders were never appealed is not persuasive. In *Algoma Steel Inc., Re* (2001), 147 O.A.C. 291 (Ont. C.A.), at paras. 7-9, this court stated that it is premature to grant leave to appeal from an initial order — brought on an urgent basis to deal with seemingly desperate circumstances — when the order specifically opens the proceeding to all interested parties and invites dissatisfied parties to bring their concerns to the court on a timely basis using a come-back provision.

159 As the Former Executives point out, had the appellants sought to advance their deemed trust claims by bringing a motion challenging the paragraph of the Initial Order that established the DIP super-priority charge, it is likely that they would have been met by a response that their motions were premature. Depending on the amount paid for the company and/or the arrangements made in respect of the Plans, the interests of the Plans' beneficiaries might not have been affected by a sale. Indeed, on July 2, 2009, when Indalex brought a motion to have the bidding procedures approved for the asset sale and the Former Executives objected because of concerns that the Plans were underfunded, the *CCAA* judge endorsed the record as follows: "The issues can be raised by the retirees on any application to approve a transaction — but that is for another day."

160 The appellants followed that direction. When Indalex moved to have the sale transaction approved and the jeopardy to the appellants' interests became apparent, they went to the *CCAA* court and raised the deemed trust issue. [15]

161 Thus, as I have said, I do not view the deemed trust motions as collateral attacks on the Court Orders. The motions were raised in a timely manner in the same court in which the orders were made. They can scarcely be termed attempts to circumvent decisions rendered against the USW and the Former Executives when no decision had ever been rendered in which their claims had been squarely raised and addressed. The process the USW and the Former Executives followed is exactly that which is contemplated in *CCAA* proceedings and, specifically, the come-back clause.

162 Even if the collateral attack rule were applicable, however, this is not a case for its strict application.

163 In *Litchfield*, the Supreme Court of Canada recognized that there will be situations in which the collateral attack rule should not be strictly applied. In that case, a physician had been charged with a number of counts of sexual assault on his patients. On motion, a judge (not the trial judge) ordered that the counts be severed and divided and three different trials be held. After one trial, the physician was acquitted. The Crown appealed. One of the grounds of appeal related to the pre-trial severance order. The question arose as to whether the Crown's challenge to the validity of the severance order violated the collateral attack rule.

164 At paras. 16-19 of *Litchfield*, Iacobucci J., writing for the majority, explains that "some flexibility" is needed in the application of the rule against collateral attacks. Strictly applied, the rule would prevent the trial judge from reviewing the severance order because the trial was not a proceeding whose specific object was the reversal, variation or nullification of the severance order. However, Iacobucci J. noted, the rule is not intended to immunize court orders from review. He reiterated the powerful rationale behind the rule: to maintain the rule of law and preserve the repute of the administration of justice. This promotes certainty and finality, key aspects of the orderly and functional administration of justice. However, he concluded that flexibility was warranted because permitting a collateral attack on the severance order did not offend the underlying rationale for the rule.

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165 Similarly, in *R. v. Domm* (1996), 31 O.R. (3d) 540 (Ont. C.A.), at para. 31, Doherty J.A., writing for this court, states that if a collateral attack can be taken without harm to the interests of the rule of law and the repute of the administration of justice, the rule should be relaxed. At para. 36 of *Domm*, he says that the rule must yield where a person has "no other effective means" of challenging the order in question.

166 I acknowledge that certainty and finality are necessary to the proper functioning of the legal system. And, I recognize that permitting the appellants' motions to proceed has generated some degree of uncertainty as to the priorities established by the Court Orders. However, in the circumstances of this case, there was no other effective means by which the appellants could assert their claims to a deemed trust. As has been mentioned, it was only when Indalex brought a motion for approval of the sale of its assets to SAPA and for a distribution of the sale proceeds to the DIP lenders that it became clear that Indalex intended to abandon the Plans in their underfunded states. The appellants immediately took steps to assert their claims in the very forum in which all of the Court Orders had been made, namely, the *CCAA* court. By permitting their motions to be heard, the *CCAA* judge did not damage the repute of the administration of justice. On the contrary, he strengthened it. He enabled the sale to proceed while ensuring that the competing claims to the Reserve Fund would be decided on the merits and expeditiously.

167 Nor can it be said, for the reasons already given about the nature of *CCAA* proceedings, that the deemed trust motions jeopardize the rule of law. Given the nature of a *CCAA* proceeding, the court must often make orders on an urgent and expedited basis, with little or no notice to creditors and other interested parties. Its processes are sufficiently flexible that it can accommodate situations such as the one that arose here. A strict application of the rule would preclude the appellants from having the opportunity to meaningfully challenge the super-priority charge in the Initial Order, as amended. In my view, that result would be a fundamental flaw in the *CCAA* process, one in which procedure triumphed over substance. As Iacobucci J. said in *Litchfield*, at para. 18, such a result cannot be accepted.

168 Accordingly, in my view, while the collateral attack rule does not apply, even if it did, there are compelling reasons in this case to relax its strict application.

Do The Principles of Cross-Border Insolvencies Apply?

169 The U.S. Trustee also submits that the principles of cross-border insolvencies should be applied when deciding these appeals. He contends that notwithstanding that separate proceedings were commenced in Canada and the U.S., those principles apply because the Applicants were direct and indirect subsidiaries of certain of the U.S. debtors, who commenced proceedings under Chapter 11 of Title 11 of the United States Bankruptcy Code in March 2009. Further, the U.S. Trustee contends that if the appellants' claims were to succeed, it would seriously undermine the basic principles underlying cross-border insolvencies and the confidence of foreign creditors and courts in the Canadian insolvency system.

170 While this argument provides context for the U.S. Trustee's collateral attack submission, I do not see it as disclosing any legal grounds relevant to these appeals. By order dated May 12, 2009, Morawetz J. approved a cross-border protocol in these proceedings that stipulates that the U.S. and Canadian courts retain exclusive jurisdiction over the proceedings in their respective jurisdictions. Furthermore, there is no evidence to support the U.S. Trustee's claim that allowing these appeals would impair future lending practices by U.S. companies. Finally, nothing has been raised which supports the notion that upholding valid provincial law in the circumstances of these appeals will undermine the principles of cross-border insolvencies.

How Is the Reserve Fund to Be Distributed?

The Salaried Plan

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171 Having concluded that a deemed trust exists with respect to the deficiency in the Salaried Plan as at July 20, 2009, the question becomes whether the Monitor should be ordered to pay the amount of that deficiency, from the Reserve Fund, into the Salaried Plan.

172 The USW argues, on behalf of the beneficiaries of the Salaried Plan, that the deemed trust ranks in priority to all secured creditors and, therefore, the order should be made. Its argument rests on s. 30(7) of the *PPSA*, which reads as follows:

> **30. (7) A security interest** in an account or inventory and its proceeds **is subordinate to the interest of a person who is the beneficiary of a deemed trust** arising under the Employment *Standards Act* or **under the *Pension Benefits Act*.** [emphasis added]

173 The USW contends that as s. 30(7) gives priority to the *PBA* deemed trust and no finding of paramountcy was made in these proceedings, it must be given effect.

174 The respondents argue that the super-priority charge has priority over any deemed trusts and, therefore, the Reserve Fund should be paid to Sun Indalex, as the principal secured creditor of Indalex U.S. They point to well-established law that authorizes the court to grant super-priority to DIP lenders in *CCAA* proceedings and argue that without such a charge, DIP lenders will no longer provide financing to companies under *CCAA* protection. Without DIP funding they say, many companies under *CCAA* protection will be unable to continue in business until a compromise or arrangement has been worked out. Consequently, companies will file for bankruptcy where deemed trusts have no priority. This, they say, will frustrate the very purpose of the *CCAA*, which is to facilitate the making of compromises or arrangements between insolvent debtor companies and their creditors.

175 There is a great deal of force to the respondents' submissions. Indeed, in general, I agree with them. It is important that the courts not address the interests of pension plan beneficiaries in a manner that thwarts or even discourages DIP funding in future *CCAA* proceedings. Nonetheless, in the circumstances of this case, it is my view that the Monitor should be ordered to pay the amount of the deficiency, from the Reserve Fund, into the Salaried Plan.

176 The *CCAA* court has the authority to grant a super-priority charge to DIP lenders in *CCAA* proceedings. [16] I fully accept that the *CCAA* judge can make an order granting a super-priority charge that has the effect of overriding provincial legislation, including the *PBA*. I also accept that without such a charge, DIP lenders may be unwilling to provide financing to companies under *CCAA* protection. However, this does not mean that the super-priority charge in question has the effect of overriding the deemed trust. To decide whether it does, one must turn to the doctrine of paramountcy.

177 Valid provincial laws continue to apply in federally regulated bankruptcy and insolvency proceedings absent an express finding of federal paramountcy. The onus is on the party relying on the doctrine of paramountcy to demonstrate that the federal and provincial laws are incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law: see *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 (S.C.C.), at para. 75 and *Nortel Networks Corp., Re* (2009), 99 O.R. (3d) 708 (Ont. C.A.), at para. 38, leave to appeal to S.C.C. refused, (S.C.C.).

178 In this case, there is nothing in the record to suggest that the issue of paramountcy was invoked on April 8, 2009, when Morawetz J. amended the Initial Order to include the super-priority charge. The documents before the court at that time did not alert the court to the issue or suggest that the *PBA* deemed trust would have to be overridden in order for Indalex to proceed with its DIP financing efforts while under *CCAA* protection. To the contrary, the affidavit of Timothy Stubbs, the then CEO of Indalex, sworn April 3, 2009, was the primary source of information before the court. In para. 74 of his affidavit, Mr. Stubbs deposes that Indalex intended to comply with all applicable laws including "regulatory deemed trust requirements".

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179 While the super-priority charge provides that it ranks in priority over trusts, "statutory or otherwise", I do not read it as taking priority over the deemed trust in this case because the deemed trust was not identified by the court at the time the charge was granted and the affidavit evidence suggested such a priority was unnecessary. As no finding of paramountcy was made, valid provincial laws continue to operate: the super-priority charge does not override the *PBA* deemed trust. The two operate sequentially, with the deemed trust being satisfied first from the Reserve Fund.

180 Does this conclusion thwart the purpose of the *CCAA* regime, which is to facilitate the restructuring of failing businesses to avoid bankruptcy and liquidation? It does not appear that would have happened in the present case. The granting of a stay in a *CCAA* proceeding provides a company with breathing space so that it can restructure. In this case, the stay of proceedings gave Indalex the breathing space it needed to effect a sale of its business. Recall that this was a "liquidating CCAA" from the outset. There was no restructuring of the company. There was no plan of compromise or arrangement prepared and presented to creditors. Within days of obtaining *CCAA* protection, Indalex began a marketing process to sell itself. Very shortly thereafter, it sold its business as a going-concern. There is nothing in the record to suggest that giving the deemed trust priority would have frustrated Indalex's efforts to sell itself as a going-concern business.

181 What of the contention that recognition of the deemed trust will cause DIP lenders to be unwilling to advance funds in *CCAA* proceedings? It is important to recognize that the conclusion I have reached does not mean that a finding of paramountcy will never be made. That determination must be made on a case by case basis. There may well be situations in which paramountcy is invoked and the record satisfies the *CCAA* judge that application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy. But, this depends on the applicant clearly raising the issue of paramountcy, which will alert affected parties to the risks to their interests and put them in a position where they can take steps to protect their rights. That, however, is not this case.

182 Nor am I persuaded by the argument that if the deemed trust is given effect in the unique circumstances of this case, companies will file for bankruptcy instead of moving for *CCAA* protection. This argument suggests that companies will act based on the desire to avoid their pension obligations. That motivation does not conform with the obligations that directors owe to the corporation. The obligation to act in the best interests of the corporation suggests that companies will choose the route that maximizes recovery for creditors. As the respondents point out, Indalex sought a going-concern sale for exactly that reason. In addition, by selling its business as a going concern, Indalex preserved value for suppliers and customers who can continue to do business with the purchaser and preserved approximately 950 jobs for its former employees. Surely the desire to maximize recovery for their creditors — along with those other considerations — would have prevailed had Indalex known it would have to satisfy the deemed trust when considering whether to pursue bankruptcy or *CCAA* proceedings. In this regard, it is worth recalling that consideration for the sale exceeded $151 million, all DIP lenders were repaid in full, the Reserve Fund consists of undistributed proceeds, and the total deficiencies in the Plans appear to be approximately $6.75 million.

183 As for the suggestion that Indalex will pursue its bankruptcy motion in order to defeat the deemed trust, I would simply echo the comments of the *CCAA* judge that a voluntary assignment into bankruptcy should not be used to defeat a secured claim under valid provincial legislation. I would add this additional consideration: it is inappropriate for a *CCAA* applicant with a fiduciary duty to pension plan beneficiaries to seek to avoid those obligations to the benefit of a related party by invoking bankruptcy proceedings when no other creditor seeks to do so.

184 There is also the matter of Indalex U.S.'s apparent reliance on the super-priority charge when it gave the Guarantee. As explained more fully above, Indalex U.S. was fully aware of Indalex's obligations to the Plans when it entered into the Guarantee. Again as explained more fully above, there were a number of different steps that Indalex could have taken to deal with these obligations. It chose not to. This is not a case in which the secured creditor is an arm's length third party taken by surprise by the claims of the Plans' beneficiaries.

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185 A final consideration that must be addressed at this stage arises from the recent decision of the Supreme Court of Canada in *Century Services*, which was released after the oral hearing of the appeals. The parties were invited to make written submissions on the impact of *Century Services*, if any, on these appeals. I am grateful for the excellence of those submissions, which mirrors the quality of the original submissions.

186 *Century Services* deals with conflicting provisions in two pieces of federal legislation: s. 222(3) of the *Excise Tax Act*, R.S.C. 1985, c. E-15, which gives the federal Crown a deemed trust for unpaid GST, and s. 18.3(1) (now s. 37) of the *CCAA*, which expressly excludes deemed trusts in favour of the Crown from applying in *CCAA* proceedings. Deschamps J., for the majority, conducted a comprehensive analysis of the two conflicting sections and held that s. 18.3(1) of the *CCAA* prevails. In sum, *Century Services* stands for the proposition that s. 18.3(1) of the *CCAA* excludes the deemed trust for unpaid GST created by s. 222 of the *Excise Tax Act* from applying in a *CCAA* proceeding.

187 It will be readily apparent that *Century Services* is distinguishable from the present case in a number of ways. Three significant differences between it and the present appeals are worthy of note.

188 First, in *Century Services*, reorganization efforts had failed and the company sought leave to make an assignment into bankruptcy. Liquidation on a piecemeal basis through bankruptcy was inevitable. The *CCAA* proceedings in the present case, on the other hand, were successful — they resulted in the sale of Indalex's assets and the continuation of the business, albeit through another entity. It is not a situation in which transition to the bankruptcy regime was inevitable because efforts under the *CCAA* had failed.

189 Second, *Century Services* deals with competing provisions in two federal statutes. The conflict between the two provisions was patent: one or the other had to prevail. They could not be read together. Section 18.3(1) was found to prevail, in part because of its wording, which expressly excludes a deemed trust in favour of the Crown. The present appeals involve a consideration of the doctrine of federal paramountcy and whether a deemed trust under provincial legislation applies to a charge granted in a *CCAA* proceeding. Significantly, unlike the situation in *Century Services*, there is nothing in the *CCAA* that expressly excludes the provincial deemed trust for unpaid pension contributions from applying in *CCAA* proceedings. In these appeals, exclusion of the provincial deemed trust is dependent on the *CCAA* judge engaging in a factual examination and a determination that preservation of pension rights through the deemed trust would frustrate the purpose of the *CCAA* proceeding. Moreover, it is difficult to see how a finding of paramountcy would have been made on the record at the time the super-priority charge was made, given the evidence that Indalex intended to comply with all regulatory deemed trust requirements. [17]

190 Third, no issue of fiduciary duty arose in *Century Services*. In the present case, as discussed previously and again below, the impact of fiduciary duties during the *CCAA* proceeding plays a significant role.

191 The respondents contend that *Century Services* is crucial in the disposition of these appeals because it stands for the proposition that federal priorities under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*) apply in *CCAA* proceedings. If *Century Services* stood for that proposition, I would agree. In a series of cases, the Supreme Court of Canada has repeatedly said that a province cannot, by legislating a deemed trust, alter the scheme of priorities under the *BIA*: see, for example, *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 (S.C.C.).

192 However, in my view, *Century Services* does not stand for that unqualified proposition. In *Century Services*, Deschamps J. explains that the *CCAA* and *BIA* are to be read in an integrated fashion but she is at pains to say that the *BIA* scheme of liquidation and distribution is the backdrop for what happens *if a CCAA reorganization is unsuccessful*. [18] Here, as I have noted, the *CCAA* proceedings were successful.

193 Moreover, Deschamps J. repeatedly distinguishes the two regimes on the basis that the *BIA* is "characterized by a rules-based approach" [19] whereas the *CCAA* "offers a more flexible mechanism with greater judicial discretion". [20] Permitting the *PBA* deemed trust to survive, absent an express finding of paramountcy, is consistent with both those key

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features of the *CCAA* proceedings — greater flexibility and greater judicial discretion on the part of the *CCAA* court. This flexibility and discretion on the part of the *CCAA* court enables it to meaningfully assess the baseline considerations of appropriateness, good faith and due diligence, referred to by Deschamps J. at para. 70 of *Century Services*.

194 The respondents point to paras. 47, 48 and 76 of *Century Services*, in which Deschamps J. notes the "strange asymmetry" that would occur if the *ETA* Crown priority were interpreted differently in *CCAA* proceedings than in *BIA* proceedings. She says this would encourage forum shopping in cases where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims. No "strange asymmetry" would occur in cases such as the present appeals. If the *CCAA* judge found that recognition of the *PBA* deemed trust would frustrate the purpose of the *CCAA* proceeding and paramountcy had been invoked, the *CCAA* judge would be free to make a super-priority charge that overrode the deemed trust. This approach leaves the *CCAA* court with greater flexibility and the ability to be "cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees".[21]

195 In para. 70 of her reasons, Deschamps J. exhorts the *CCAA* courts to be "mindful that chances for successful reorganizations are enhanced where participants achieve common ground and *all stakeholders are treated as advantageously and fairly as the circumstances permit*" [emphasis added]. The Plans' beneficiaries are stakeholders. And, once the deemed trust claims are recognized, they are not to be treated as mere unsecured creditors. If, as the respondents contend based on *Century Services*, the deemed trusts are automatically overridden, there will be no incentive for companies that are similarly situated to Indalex to attempt to deal with their underfunded pension plans. There will be no incentive to treat pension plan beneficiaries "as advantageously and fairly as the circumstances permit". The incentive will be to do as Indalex did — go to court without notice to the affected pension plan beneficiaries and negotiate as if the pension obligations did not exist.

196 Justice Deschamps also says that no "gap" should exist between the *BIA* and the *CCAA* and approves of Laskin J.A.'s reasoning to that effect at paras. 62-63 of *Ivaco*.[22] She explains that the gap is a situation "which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy". When the facts of the present case are considered carefully, it can be seen that a gap of this sort will not occur should the appeals be allowed. As I see it, the deemed trusts continued to exist during the *CCAA* proceedings although no steps could be taken to enforce them during the proceedings because of the stay. By the time of the Sale Approval Order, the *CCAA* court had become aware of the deemed trust claims. It dealt with the deemed trust claims as part of the *CCAA* proceedings, by deciding whether the undistributed sales proceeds held by the Monitor should go to Indalex U.S. or to the Plans' beneficiaries. Thus, rather than being a situation in which property interests that would be lost in bankruptcy were enforced at the conclusion of the *CCAA* proceedings, the property interests were dealt with as part of the *CCAA* proceedings.

197 However, even if I am wrong in concluding that the deemed trust has priority over the secured creditor in this case, I would make the order on the basis that it is the appropriate remedy for the breaches of fiduciary obligation.

198 It is important to keep in mind that the contest over the Reserve Fund is not a fight between the DIP lenders and the pensioners. The DIP lenders have been paid in full. The dispute is between the pensioners and Sun Indalex, the principal secured creditor of Indalex U.S. It is in that context that the court must consider the competing equities.

199 The *CCAA* was not designed to allow a company to avoid its pension obligations. To give effect to Indalex U.S.'s claim would be to sanction Indalex's breaches of fiduciary obligation. In the circumstances of this case, such a result would work an injustice. The equities are not equal. The Plans' beneficiaries were vulnerable to the exercise of power by Indalex. They were not part of the negotiations for the DIP financing nor were they involved in the sale negotiations. They had no opportunity to protect their interests and, as a result of Indalex's actions, there was no one who fulfilled the administrator's role. Indalex, on the other hand, was fully aware of the Plans' underfunding and the result to the pensioners of a failure to inject additional funds. It was Indalex who advised the *CCAA* court that it intended to comply

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with "regulatory deemed trust requirements". To permit Sun Indalex to recover on behalf of Indalex U.S. would be to effectively permit the party who breached its fiduciary obligations to take the benefit of those breaches, to the detriment of those to whom the fiduciary obligations were owed.

200 I do not accept the respondents' argument that a finding that Indalex breached its fiduciary obligation is irrelevant because it would merely give rise to an unsecured claim and there is no basis for conferring a priority for such a claim. This view fundamentally misunderstands the rights of the pension plan beneficiaries. Even if there is no deemed trust, the Plans' beneficiaries are not mere unsecured creditors. They are unsecured creditors to whom Indalex owed a fiduciary duty by virtue of its role as the Plans' administrator. There is a significant difference, in my view, between being a mere unsecured creditor and being an unsecured creditor to whom a fiduciary duty is owed.

201 Further, the Supreme Court has repeatedly stated that equitable remedies are sufficiently flexible that they can be molded to meet the requirements of fairness and justice: see, for example, *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 (S.C.C.), at para. 86 and *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.), at para. 34.

202 In *Soulos*, at para. 36, McLachlin J. (as she then was) writing for the majority, held that constructive trusts may be imposed where "good conscience requires" it. She went on to identify two different types of cases in which constructive trusts may be ordered: 1) those in which property is obtained by a wrongful act of the defendant, notably breach of fiduciary duty or breach of the duty of loyalty; and, 2) those in which there may not have been a wrongful act, but where there has been unjust enrichment. While the second type of case — one in which there is unjust enrichment — is not relevant to these appeals, the first is.

203 At para. 45 of *Soulos*, McLachin J. sets out four conditions that should "generally be satisfied" if a constructive trust based on wrongful conduct is to be ordered:

> (1) the defendant must have been under an equitable obligation in relation to the activities giving rise to the assets in his or her hands;
>
> (2) the assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his or her equitable obligation to the plaintiff;
>
> (3) the plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and
>
> (4) there must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

204 As I have already explained, in the circumstances of this case, Indalex's fiduciary obligations as administrator were engaged in relation to the *CCAA* proceedings and it is those proceedings that gave rise to the asset (*i.e.* the Reserve Fund) (condition 1). The assets that would flow to Indalex U.S., absent the constructive trust, are directly connected to the process in which Indalex committed its breaches of fiduciary obligation (condition 2). Without the proprietary remedy, the Plans' beneficiaries have no meaningful remedy. Moreover, there must be some incentive to require employers who are also the administrators of their pension plans to remain faithful to their duties (condition 3). And, because Indalex U.S. is not an arm's length innocent third party, imposing a constructive trust in favour of the Plans' beneficiaries is not unjust (condition 4).

The Executive Plan

205 As I explained above, it is not clear to me that a deemed trust arose in respect of the underfunded amounts in the Executive Plan because it had not been wound up at the time of sale. However, based on the breaches of fiduciary duty, the court is entitled to consider the equities of the parties competing for the Reserve Fund. For the reasons given in respect of the Salaried Plan in respect of those equities, I would make the same order in respect of the Executive Plan,

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namely, that the Monitor pay the deficiency from the Reserve Fund to the Executive Plan in priority to those entitled under the super-priority charge.

206 In light of this conclusion, I find it unnecessary to deal with the Former Executives' submission that the doctrine of equitable subordination applies to remedy Indalex's breaches of fiduciary duty. In any event, I would decline to decide that issue as it was not argued below. It offends the general rule that appellate courts are not to entertain new issues on appeal.

Disposition

207 Accordingly, I would allow the appeals and declare that the claims of the USW and the Former Executives take priority over the claim asserted by Indalex U.S./Sun Indalex. I would order the Monitor to pay from the Reserve Fund into each of the Salaried Plan and the Executive Plan an amount sufficient to satisfy the deficiencies in each plan. I understand that the Reserve Fund is sufficient to satisfy the Deficiencies but if this proves problematic, the parties may return to the court for direction on that matter.

208 If the parties are unable to agree on costs, they may make brief written submissions on that matter. The appellants, Morneau and the Superintendent shall file their submissions within fifteen days of the date of release of these reasons. The respondents shall have a further seven days within which to file their submissions.

***J.C. MacPherson J.A.*:**

I agree.

***R.G. Juriansz J.A.*:**

I agree.

Schedule "A"

Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 1(1), 8, 14(1), 22, 57(1) - (5), 70(1), 74(1), 75(1), (2), 76

Definitions

1. (1) In this Act, ...

"administrator" means the person or persons that administer the pension plan; ...

"wind up" means the termination of a pension plan and the distribution of the assets of the pension fund;

Administrator

Requirement

8. (0.1) A pension plan must be administered by a person or entity described in subsection (1).

Prohibition

(0.2) No person or entity other than a person or entity described in subsection (1) shall administer a pension plan.

Administrator

(1) A pension plan is not eligible for registration unless it is administered by an administrator who is,

(a) the employer or, if there is more than one employer, one or more of the employers;

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(b) a pension committee composed of one or more representatives of,

(i) the employer or employers, or any person, other than the employer or employers, required to make contributions under the pension plan, and

(ii) members of the pension plan;

(c) a pension committee composed of representatives of members of the pension plan;

(d) the insurance company that provides the pension benefits under the pension plan, if all the pension benefits under the pension plan are guaranteed by the insurance company;

(e) if the pension plan is a multi-employer pension plan established pursuant to a collective agreement or a trust agreement, a board of trustees appointed pursuant to the pension plan or a trust agreement establishing the pension plan of whom at least one-half are representatives of members of the multi-employer pension plan, and a majority of such representatives of the members shall be Canadian citizens or landed immigrants;

(f) a corporation, board, agency or commission made responsible by an Act of the Legislature for the administration of the pension plan;

(g) a person appointed as administrator by the Superintendent under section 71; or

(h) such other person or entity as may be prescribed.

Additional members

(2) A pension committee, or a board of trustees, that is the administrator of a pension plan may include a representative or representatives of persons who are receiving pensions under the pension plan.

Interpretation

(3) For the purposes of clause (1) (b), "employer" includes the following persons and entities:

1. Affiliates within the meaning of the *Business Corporations Act* of the employer.

2. Such other persons or entities, or classes of persons or entities, as may be prescribed.

Reduction of benefits

14. (1) An amendment to a pension plan is void if the amendment purports to reduce,

(a) the amount or the commuted value of a pension benefit accrued under the pension plan with respect to employment before the effective date of the amendment;

(b) the amount or the commuted value of a pension or a deferred pension accrued under the pension plan; or

(c) the amount or the commuted value of an ancillary benefit for which a member or former member has met all eligibility requirements under the pension plan necessary to exercise the right to receive payment of the benefit.

Care, diligence and skill

22. (1)The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

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Special knowledge and skill

(2)The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.

Member of pension committee, etc.

(3)Subsection (2) applies with necessary modifications to a member of a pension committee or board of trustees that is the administrator of a pension plan and to a member of a board, agency or commission made responsible by an Act of the Legislature for the administration of a pension plan.

Conflict of interest

(4)An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

Employment of agent

(5)Where it is reasonable and prudent in the circumstances so to do, the administrator of a pension plan may employ one or more agents to carry out any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund.

Trustee of pension fund

(6)No person other than a prescribed person shall be a trustee of a pension fund.

Responsibility for agent

(7)An administrator of a pension plan who employs an agent shall personally select the agent and be satisfied of the agent's suitability to perform the act for which the agent is employed, and the administrator shall carry out such supervision of the agent as is prudent and reasonable.

Employee or agent

(8)An employee or agent of an administrator is also subject to the standards that apply to the administrator under subsections (1), (2) and (4).

Trust property

57. (1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.

Money withheld

(2) For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from money payable to an employee shall be deemed to be money received by the employer from the employee.

Accrued contributions

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(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

Wind Up

(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

Lien and charge

(5) The administrator of the pension plan has a lien and charge on the assets of the employer in an amount equal to the amounts deemed to be held in trust under subsections (1), (3) and (4).

Wind up report

70. (1) The administrator of a pension plan that is to be wound up in whole or in part shall file a wind up report that sets out,

(a) the assets and liabilities of the pension plan;

(b) the benefits to be provided under the pension plan to members, former members and other persons;

(c) the methods of allocating and distributing the assets of the pension plan and determining the priorities for payment of benefits; and

(d) such other information as is prescribed.

Combination of age and years of employment

74. (1) A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least fifty-five, at the effective date of the wind up of the pension plan in whole or in part, has the right to receive,

(a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;

(b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,

(i) the normal retirement date under the pension plan, or

(ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date; or

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date.

Liability of employer on wind up

75. (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

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(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

Payment

(2) The employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times.

Pension fund continues subject to Act and regulations

76. The pension fund of a pension plan that is wound up continues to be subject to this Act and the regulations until all the assets of the pension fund have been disbursed.

Schedule "B"

Pension Benefits Act, *Regulation 909, R.R.O. 1990, s. 31(1), (2) and (3)*

31. (1) The liability to be funded under section 75 of the Act shall be funded by annual special payments commencing at the effective date of the wind up and made by the employer to the pension fund.

(2) The special payments under subsection (1) for each year shall be at least equal to the greater of,

(a) the amount required in the year to fund the employer's liabilities under section 75 of the Act in equal payments, payable annually in advance, over not more than five years; and

(b) the minimum special payments required for the year in which the plan is wound up, as determined in the reports filed or submitted under sections 3, 4, 5.3, 13 and 14, multiplied by the ratio of the basic Ontario liabilities of the plan to the total of the liabilities and increased liabilities of the plan as determined under clauses 30(2)(b) and (c).

(3) The special payments referred to in subsections (1) and (2) shall continue until the liability is funded.

Appeals allowed.

Footnotes

1 The Monitor retained the Reserve Fund as part of the Undistributed Proceeds. The Undistributed Proceeds also include amounts for the payment of cure costs, other costs associated with the completion of the SAPA transaction, legal and professional fees, and amounts owing under the DIP charge.

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2 The appellants had raised this issue below but it had not been dealt with by the *CCAA* judge.

3 Or, in the case of a multi-employer plan, the administrator.

4 *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.), at para. 26.

5 *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152 (S.C.C.), at para. 13, relying on *GenCorp Canada Inc. v. Ontario (Superintendent of Pensions)* (1998), 158 D.L.R. (4th) 497 (Ont. C.A.), at p. 503.

6 *Ibid*.

7 *Boucher c. Stelco Inc.*, [2005] 3 S.C.R. 279 (S.C.C.), at para. 24.

8 At para. 26.

9 At para. 11.

10 *Burke v. Hudson's Bay Co.*, [2010] 2 S.C.R. 273 (S.C.C.), at paras. 39-41.

11 *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.), at para. 32.

12 *Ibid*., at para. 30; *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.), at p. 646.

13 In contrast, Quebec legislation requires that plan administration be entrusted to a pension committee of at least three persons, including a representative of each of the active and inactive members of the plan and an independent member. See *Supplemental Pension Plans Act*, R.S.Q. c. R-15.1, s. 147.

14 On advice of counsel, Mr. Cooper refused to answer questions about what, if any, steps were taken to have the purchaser take over the Plans.

15 To the extent that the U.S. Trustee suggests that the Former Executives raised the deemed trust issue at the motion heard on June 12, 2010, I reject this submission. As explained in the background portion of these reasons, the Former Executives' reservation of rights on June 12, 2010, was to obtain time to confirm that the motion related solely to an increase in the DIP loan amount.

16 See, for example, *Intertan Canada Ltd., Re* (2009), 49 C.B.R. (5th) 232 (Ont. S.C.J. [Commercial List]). And, the granting of super-priority charges is referred to with approval in *Century Services*, at para. 62.

17 See para. 178 of these reasons.

18 See, for example, para. 23.

19 At para. 13, for example.

20 See, for example, para. 14.

21 *Century Services*, at para. 60.

22 At para. 78.

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Nº / No.: 500-11-048114-157

SUPERIOR COURT
(COMMERCIAL DIVISION)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED 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.,

Petitioners

- 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 -

FTI CONSULTING CANADA INC.

Monitor

- and -

MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL & NEIL JOHNSON

OBJECTING PARTIES-Mises-en-cause

- and -

UNITED STEELWORKERS, LOCAL 6254, UNITED STEELWORKERS, LOCAL 6285

Mises-en-cause

- and -

MORNEAU SHEPELL

Mise-en-cause

BOOK OF AUTHORITIES in support of
Argumentation Outline of Representatives of the Salaried/Non-Union Employees and Retirees
(In response to the Monitor's Amended Motion for Direction with respect to the Pension Claim)

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