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1 *CCAA*, R.S.C. 1985, c C-36.
2 *Re Nortel Networks Corp.*, [2015] O.J. No. 2440, 2015 ONSC 2987.
3 R.S.C. 1985, c. B-3.
4 *Re Nortel Networks Corporation*, [2015] O.J. No. 5277, 2015 ONCA 681.
5 *Bankruptcy Code* (U.S.), 11 USC §§ 1101–1174.
6 *Insolvency Act 1986* (UK), 1986 c. 45.
7 *Re Nortel Networks Corporation et al.*, [2014] O.J. No. 3843, 2014 ONSC 4777, para. 5.
8 See *Shoppers Trust Co. (Liquidator of) v. Shoppers Trust Co.*, [2005] O.J. No. 1081 (Ont. C.A.); *Re Indalex*, [2009] O.J. No. 3165, 55 C.B.R. (5th) 64 (Ont. S.C.); and *Canada (Attorney General) v. Confederation Life Insurance Co.*, [2001] O.J. No. 2610, [2001] O.T.C. 486 (Ont. S.C.J.) [*Confederation Life*].
9 [2006] S.C.J. No. 24, 2006 SCC 24 [*Canada 3000*].
10 [2007] O.J. No. 2533, 2007 ONCA 483 [*Stelco*].
11 *Supra* note 7, para. 12.
12 *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] S.C.J. No. 6, 2013 SCC 6.
13 [2010] S.C.J. No. 60, 2010 SCC 60.
14 *Supra* note 7, para. 33.
15 *Supra* note 4, para. 17.
16 *Ibid.*, para. 20.
17 *Ibid.*, para. 21.
18 *Ibid.*, para. 23, citing *Confederation Life* at para. 20.
19 *Ibid.*, para. 34.
20 *Ibid.*, para. 35.
21 *Ibid.*, para. 37, citing *Century Services* at para. 47.
22 *Ibid.*, para. 39.
23 *Ibid.*, para. 41.
24 *Ibid.*, para. 43. While accrued interest on the Crossover Bonds was estimated to be $US1.6 billion as of December 31, 2013, some commentators have estimated that accrued interest had swelled to over US$2.5 billion at around the time of the Court of Appeal's ruling.
25 *Ibid.*, para. 48.
26 *Supra* note 9, para. 96.
27 *Supra* note 4, para. 67.
28 *CANSCA*, S.C. 1996, c. 20.
29 R.S.O. 1990, c. A.15.
30 *Supra* note 10, para. 67.
31 *Supra* note 4, para. 82.
32 *Ibid.*, para. 98.

• THE ONTARIO COURT OF APPEAL WEIGHS IN ON DEEMED TRUSTS IN THE POST-*INDALEX* ERA •

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Background: *Indalex* and the *CCAA* Court's Decision in *Grant Forest*

Sun Indalex Finance, LLC v. United Steelworkers [*Indalex*][1] was one of the most widely anticipated and highly publicized insolvency decisions to be released in recent memory. The case dealt with a priority dispute under the *Companies' Creditors Arrangement Act* [*CCAA*][2] between the secured claim of a lender that had provided debtor-in-possession ("DIP") financing to the debtor and the statutory deemed trust under the Ontario *Pension Benefits Act* [*PBA*],[3] which applies to an employer's normal cost and special contributions to a pension plan prior to the wind-up of the plan and the entire wind-up deficiency. In *Indalex*, the Supreme Court of Canada held that the provincial deemed trust under the *PBA* continues to apply in *CCAA* proceedings, subject to the doctrine of federal paramountcy. In other words, the act of filing for *CCAA* protection does not automatically alter priorities, but a *CCAA* filing does allow a judge to issue orders that, because they are issued under a federal statute, can trump provincial laws.[4] While it was hoped that *Indalex* would ultimately bring clarity to the relative priorities of secured creditors and pension claimants in

the insolvency context, it left many (including secured creditors who are not also DIP lenders) uncertain as to the circumstances in which their claims might be subordinated to deemed trust pension claims in *CCAA* proceedings.

The Ontario Court of Appeal had the opportunity to revisit this issue in *Grant Forest Products Inc. v. The Toronto-Dominion Bank* [*Grant Forest (C.A.)*].[5] In 2009, Grant Forest Products Inc. ("Grant Forest" or the "Company") and certain of its subsidiaries, which had carried on an oriented strand board manufacturing business, filed for and were granted protection under the *CCAA*. Unlike *Indalex*, no order was made authorizing DIP financing or other "super priority" lending arrangement.

At the time of the *CCAA* filing, Grant Forest administered two defined benefit pension plans that had not been wound up. In August and September 2011, the Ontario Superior Court of Justice (the "*CCAA* Court") granted orders authorizing Grant Forest to take steps to initiate the wind-up of the plans and directing the Monitor to hold back from any distribution to creditors an amount sufficient to satisfy the anticipated wind-up deficit of the plans.[6] Following the provision of the holdback, there were sufficient funds to pay the Company's first-ranking secured creditors in full, and such payment was ordered to be made in January 2012.[7] However, the Company's second lien secured creditors were still owed approximately $150 million.

In February 2012, the Ontario Superintendent of Financial Services (the "Superintendent") ordered that the pension plans be wound up effective June 10, 2010, and March 31, 2011, respectively. Each of the effective dates for the wind-up of the plans was after the commencement of the *CCAA*. Grant Forest continued to make all required contributions to the plans until June 2012, when it brought a motion to suspend the payment of current and special contributions to the plans. After several adjournments in order to provide the second lien lenders with adequate notice to respond to certain submissions, the court granted the relief sought, and ordered that payments to the pension plans could be suspended.[8]

Grant Forest also brought a motion for directions with respect to the payment of the remaining funds held by the Company (approximately US$2.1 million) and the Monitor (approximately CDN$6.6 million and US$0.3 million) (collectively, the "Remaining Funds"). Through a separate motion, West Face Capital Inc. ("West Face"), one of the second lien lenders, sought an order lifting the stay under the *CCAA* to permit it to petition the Company into bankruptcy. Both of these motions were heard in November 2012, and the court reserved its decision. Following the issuance of the Supreme Court's decision in *Indalex*, the parties were invited to, and did in fact, make further submissions.

Ultimately, Justice Campbell granted West Face's bankruptcy motion and ruled that none of the Remaining Funds were subject to the deemed trust that arises pursuant to ss. 57(3) and (4) of the *PBA* [*Grant Forest (S.C.)*].[9] Importantly, Campbell J. ruled that a *PBA* deemed trust will prevail when a wind-up occurs before insolvency but not when a wind-up is ordered after the initial *CCAA* order is issued. Justice Campbell found that this approach provides predictability and certainty for the stakeholders of the insolvent company and enables secured creditors to decide whether they are willing to pursue a *CCAA* plan or immediately apply for a bankruptcy order.[10]

Justice Campbell rejected the argument that the *CCAA* court, in authorizing the wind-up of the

pension plans, had given the *PBA* deemed trusts priority in the insolvency regime. In fact, the orders authorizing the wind-ups explicitly stated that they did not affect or determine the priority or security of the claims against those funds. On the basis of this analysis, a lifting of the stay was not necessary to defeat the *PBA* deemed trusts that were said to have arisen after the initial order.[11]

With respect to the issue of whether a bankruptcy order should be granted, Campbell J. stated that this was a discretionary matter and, in the absence of provisions in a plan of compromise under the *CCAA* or a specific court order, any creditor is at liberty to request that the *CCAA* proceedings be terminated if its position might be better advanced under the *BIA*. The question was whether it was fair and reasonable, bearing in mind the interests of all creditors, that the interests of the creditor seeking preference under the *BIA* should be allowed to proceed.[12]

In this case, there was no evidence of a lack of good faith on the part of West Face in seeking to lift the stay, beyond certain allegations relating to a delay by West Face, which was found not to have prejudiced any party. Justice Campbell accepted West Face's submission that its interests should prevail because, otherwise, a *PBA* deemed trust that did not exist at the time of the initial order would *de facto* be given priority, which would be contrary to the priorities established under the *BIA*. Specifically, Campbell J. relied on the Supreme Court's ruling in *Indalex*, where the *PBA* deemed trust was limited to obligations arising prior to insolvency, to find in West Face's favour.[13]

The Appeal

The Superintendent appealed the *CCAA* court's ruling, and, shortly after the oral hearing of the appeal, representative counsel to the salaried active and retired employees of U.S. Steel Canada Inc. ("USSC") in USSC's unrelated proceedings under the *CCAA* sought and was granted leave to intervene.[14] While the amounts at issue in the *Grant Forest* case were relatively small, any ruling by the Court of Appeal was expected to have a significant impact on the rights of secured creditors and pension plan members in future restructuring proceedings (including USSC's proceedings under the *CCAA*). Accordingly, the court granted leave to intervene but limited such right to addressing only those issues already raised in the appeal.

Not surprisingly, the parties could not agree on the issues to be decided on the appeal and made a multitude of arguments in support of their positions.

The Superintendent argued that where a pension plan is wound up after an initial order is made under the *CCAA* but before distributions are completed, unpaid contributions to a pension plan constitute a wind-up deemed trust under the *PBA* that should take precedence over the claims of secured creditors. In addition, the Superintendent distinguished this case from *Indalex* and argued that the *PBA* deemed trusts in this instance were not rendered inoperative by the doctrine of federal paramountcy because there was no DIP loan or charge. Finally, the Superintendent argued that because of the procedural history of the matter, the *CCAA* judge should have required payment of the full wind-up deficits prior to lifting the stay to permit Grant Forest to be placed into bankruptcy.[15]

By contrast, West Face maintained that the core issue to be decided on the appeal was whether it was necessary or appropriate for the pension claims to be paid as a "pre-condition" to ordering Grant Forest into bankruptcy. It stated that if the court accepted that the *CCAA* judge made no

error in ordering Grant Forest into bankruptcy without first requiring payment of the pension claims, the issues raised by the Superintendent became moot. West Face also argued that bankruptcy proceedings are the appropriate forum to resolve wind-up deemed trust claims at the close of *CCAA* proceedings and that it would have been improper for the *CCAA* judge to order payment of the pension wind-up deficits before putting Grant Forest into bankruptcy, as such an order would have usurped the bankruptcy regime chosen by Parliament.[16]

For its part, the intervener made several arguments with respect to the effect of a *CCAA* filing on a deemed trust under the *PBA*, including that a pension plan does not have to be wound up as of the *CCAA* filing date for the wind-up deemed trust to be effective and that the beneficiaries of the wind-up deemed trust have priority in *CCAA* proceedings ahead of all other secured creditors over certain assets. The intervener also argued that the *CCAA* judge erred in ordering Grant Forest into bankruptcy, as the bankruptcy motion was brought to defeat the wind-up deemed trust priority regime.[17]

The Court of Appeal's Ruling

In response to the parties' disagreement as to the issues to be decided in this case, the Court of Appeal found that the only question at the heart of the appeal was whether the *CCAA* judge erred in lifting the stay and ordering Grant Forest into bankruptcy, without first requiring that the pension wind-up deficits be paid in priority to the second lien lenders (including West Face). To answer this question, the court addressed the following issues, among others:

- What standard of review applies to the *CCAA* judge's decision to lift the *CCAA* stay of proceedings and order Grant Forest into bankruptcy?
- Did the *CCAA* judge err in principle, or act unreasonably, in lifting the stay and ordering Grant Forest into bankruptcy?[18]

Standard of Review

The court confirmed prior appellate rulings holding that deference is owed to discretionary decisions of the *CCAA* judge and that appellate intervention is justified only if the *CCAA* judge erred in principle or exercised his or her discretion unreasonably. The decision to lift the stay and order Grant Forest into bankruptcy was discretionary, and therefore the question was whether the *CCAA* judge erred in principle or exercised his discretion unreasonably in so doing.[19]

Ordering Grant Forest into Bankruptcy

Ultimately, the court found that *CCAA* judge did not err in principle or exercise his discretion unreasonably by lifting the stay and ordering Grant Forest into bankruptcy. In this regard, the court considered, among other issues, whether the *CCAA* judge erred in failing to properly take into consideration West Face's conduct in bringing the bankruptcy motion and failing to recognize, and require payment of, the wind-up deemed trusts that arose during the *CCAA* proceeding before ordering Grant Forest into bankruptcy.[20]

With respect to West Face's conduct, the court found that West Face was not dilatory in bringing the bankruptcy motion. The court also confirmed the long-standing principle that it is not improper for a creditor to seek a bankruptcy order in order to alter priorities in its favour.[21]

On the issue of the wind-up deemed trusts that arose during the *CCAA* proceeding, the Superintendent argued that unlike bankruptcy where *PBA* deemed trusts are rendered inoperative by

virtue of the doctrine of federal paramountcy, the wind-up deemed trusts in this case were not rendered inoperative because they did not conflict with a provision of the *CCAA* or an order made under the *CCAA*. In addition, the Superintendent argued that *Indalex* required that the wind-up deemed trusts be given priority in this case. The court rejected both submissions.[22]

With respect to the first argument, the court found that it was open to the *CCAA* judge to order Grant Forest into bankruptcy, and, once the *CCAA* judge exercised his discretion to do so, the priorities established by the *BIA* applied to the Remaining Funds and rendered the wind-up deemed trust claims inoperative.[23]

With respect to the second argument, the court distinguished *Indalex* on the basis that the wind-up deemed trust under consideration in that case arose before the *CCAA* proceeding commenced (and not after the time the initial order was made, as in this case). The court also noted that the *BIA* played no part in *Indalex*. As a result, given the legal and factual differences between the two cases, the court did not find *Indalex* to be of assistance in the resolution of this dispute.[24]

Concluding Comments

On its face, the Court of Appeal's ruling in *Grant Forest* should give comfort to secured creditors in Ontario, who now know that the holding in *Indalex* is limited to cases where a pension plan wind-up is commenced before a *CCAA* filing. In addition, secured creditors can take comfort in the fact that the court confirmed the long-standing principle that it is permissible for a creditor to seek a bankruptcy order for the purpose of altering priorities in its favour in the *PBA* deemed trust context.

Interestingly, however, in the concluding paragraphs of the decision, the court made certain remarks in *obiter dictum*, which highlighted the value of *CCAA* proceedings over a bankruptcy when it comes to the interests of pensioners. Among other things, the court pointed out that all pension contributions in this case continued to be made until June 2012 and that this would not have occurred in the bankruptcy context. The court also noted that the *CCAA* proceeding gave Grant Forest sufficient "breathing space" to enable it to take steps to ensure that the plans continued to be properly administered, leading the parties to work cooperatively with the result that more funds were ultimately available for plan beneficiaries.[25]

The interplay between pension and insolvency law necessarily leaves courts with tough decisions to make. As Campbell J. noted in the lower court decision in this case, virtually all judges who have had to deal with this difficult issue of pensions and insolvency have commented that ultimately these are matters to be dealt with by the Federal and Provincial governments. Whether and when they will do so still remains an open question. Until then, we are left looking to the courts for clarity on these difficult issues. With its decision in *Grant Forest*, the Court of Appeal has shed light on one such issue, obviating the need for this issue to be litigated in the future. We can only hope that the next decision rendered in the pension and insolvency context will be equally as helpful.

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1 *Indalex*, [2013] S.C.J. No. 6, 2013 SCC 6, [2013] 1 SCR 271.
2 *CCAA*, R.S.C. 1985, c. C-36.
3 *PBA*, R.S.O. 1990, c. P.8.
4 *Indalex*, *supra* note 1, paras. 48–60.

5 *Grant Forest (C.A.)*, [2015] O.J. No. 4147, 2015 ONCA 570.
6 Orders of Justice Campbell dated August 26, 2011, and September 21, 2011, Court File No. CV-09-8247-00CL, available at <http://documentcentre.eycan.com/Pages/Main.aspx?SID=114&Redirect=1>.
7 Order of Justice Campbell signed January 31, 2013, Court File No. CV-09-8247-00CL, available at <http://documentcentre.eycan.com/Pages/Main.aspx?SID=114&Redirect=1>.
8 Order of Justice Campbell dated September 30, 2011, Court File No. CV-09-8247-00CL, available at <http://documentcentre.eycan.com/Pages/Main.aspx?SID=114&Redirect=1>.
9 *Grant Forest (S.C.)*, [2013] O.J. No. 4599, 2013 ONSC 5933 (Commercial List).
10 *Ibid.*, paras. 71–72.
11 *Ibid.*, paras. 88–101.
12 *Ibid.*, paras. 101–122.
13 *Ibid.*, paras. 119–128.
14 [2015] O.J. No. 1366, 2015 ONCA 192.
15 *Grant Forest (C.A.)*, *supra* note 5, paras. 73–75. Mercer (Canada) Ltd., the administrator of the two pension plans in question, adopted the submissions of the Superintendent and made certain additional but related arguments that are summarized at paras. 76–81 of the Court of Appeal's decision.
16 *Ibid.*, paras. 83–84.
17 *Ibid.*, para. 87. While the Monitor took no position on the appeal, it did make certain submissions that are summarized at paras. 85–86 of the decision.
18 *Ibid.*, paras. 88–94.
19 *Ibid.*, paras. 95–100.
20 *Ibid.*, para. 114.
21 *Ibid.*, paras. 115–118.
22 *Ibid.*, paras. 119–120.
23 *Ibid.*, paras. 121–123.
24 *Ibid.*, paras. 124–134.
25 *Ibid.*, paras. 142–146.

LEXISNEXIS CANADA WELCOMES DINA MILIVOJEVIC AND MICHAEL SHAKRA NEW NATIONAL EDITORS *COMMERCIAL INSOLVENCY REPORTER*


Greetings, *Commercial Insolvency Reporter* ("CIR") subscribers! We would like to take this opportunity to introduce ourselves as the new national co-editors of the CIR. We are excited to continue to provide you with timely insights into, and analysis of, developments in the law and other matters affecting commercial insolvency in Canada. We have taken the liberty of drafting the articles for the CIR's inaugural issue under our direction. We hope that you will find this issue as informative and relevant as all of you have come to expect from the CIR. Our vision for the CIR is to consistently deliver articles on commercial insolvency matters of national importance that are relevant to our subscribers' everyday practices. In that regard, we intend to reach out to insolvency professionals across the country for future submissions. If you would like to contribute an article to the CIR, or if you have any comments or suggestions, we encourage you to contact us.