

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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

FACTUM

(Motion by retirees re: Deemed Trust, returnable August 28, 2009)

August 20, 2009

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Richard Smith, Robert Leckie, Neil Fraser
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Retirement Plan for Executive Employees of
Indalex Canada and Associated Companies

TO: ATTACHED SERVICE LIST

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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.

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PART I – OVERVIEW

1. The moving parties, Keith Carruthers, Leon Kozierok, Bertram McBride, Max Degen, Eugene D'Iorio, Richard Smith, Robert Leckie, Neil Fraser, Richard Benson, John Faveri, John (Jack) Rooney, Ken Waldron and Fred Granville (the "Pensioners") are pensioners who earned entitlements to pension benefits from pension plans administered by the Applicants.

Affidavit of Keith B. Carruthers, sworn June 23, 2009 ("Carruthers June 23 Affidavit"), at para. 14.

Affidavit of Keith B. Carruthers, sworn August 15, 2009 ("Carruthers August 15 Affidavit"), at para. 3.

2. The Pensioners seek a Declaration that the amount of \$3.2 million, which represents the wind up liability owing by the Applicants to the Retirement Plan for Executive Employees of Indalex Canada and Associated Companies (the "Executive Plan") and which is currently held in reserve by the Monitor is subject to the deemed trust for the benefit of the beneficiaries of the Executive Plan under section 57(4) of the Ontario *Pension Benefits Act*, R.S.O. c. P. 8 ("PBA"). The Pensioners further seek an order that such amounts are not distributable to other creditors of the Applicants and are to be paid into the fund of the Executive Plan and that such orders and declarations survive any subsequent bankruptcy of the Applicants.

Carruthers August 15 Affidavit, at paras. 3, 17, 18.

3. There are no active employees remaining in the Executive Plan. The latest actuarial valuation report prepared by the Applicants' actuary (Mercer) indicates that as at January 1, 2008, there were 18 members of the Executive Plan, consisting of 14 pensioners and survivors, two deferred pensioners, one transferred member with frozen service and one disabled member.

Carruthers August 15 Affidavit – Exhibit D – Report on the Actuarial Valuation for Funding Purposes as at January 1, 2008 ("Mercer Actuarial Report") at p. 32.

4. The former Vice-President, Corporate Controller of Indalex Limited, has deposed that there are sixteen individuals with benefit entitlements under the Executive Plan who were last employed by Indalex in Ontario and two individuals with benefit entitlements under the Executive Plan who were last employed by Indalex in Alberta. One individual of the Executive Plan is on long-term disability.

Affidavit of Bob Kavanaugh, sworn August 12, 2009, at paras. 18, 19, Responding Motion Record.

5. The payment of the \$3.2 million into the Executive Plan would benefit not only the moving parties but all members of the Executive Plan and their beneficiaries.

PART II – THE FACTS

6. The Pensioners have been very badly affected by the Applicants' activities while under CCAA protection. First, the Applicants permanently stopped paying the Pensioners supplemental pension benefits. Second, the Pensioners are facing further losses to their retirement pension benefits due to the wind up of the Executive Plan in its underfunded state. If the latter occurs, the Pensioners will lose 1/2 to two-thirds of their retirement pension benefits.

Supplemental Pension Benefits have been permanently stopped

7. Aside from the Executive Plan, the Pensioners are entitled to receive benefits from the Supplemental Retirement Plan for Executive Employees of Indalex Limited and Associated Companies (the "Supplemental Plan"). The purpose of the Supplemental Plan is to provide pension income which was earned by the Pensioners during their employment and which exceeds the maximum limits imposed on the Executive Plan by the *Income Tax Act* (Canada) ("ITA"). The pension benefits under the Supplemental Plan are to be paid out of the general revenues of the Applicants.

Carruthers June 23 Affidavit, at para. 14.

8. The Applicants stopped paying pension benefits under the Supplemental Plan immediately after obtaining protection from creditors under the CCAA. The Pensioners have not received such pension benefits since March, 2009. The purchaser of the Applicants' assets did not adopt the Supplemental Plan. These pension benefits have been totally lost.

Carruthers June 23 Affidavit, at paras. 5, 6, 18, 19, 40-46.

Carruthers August 15 Affidavit, at para. 8.

9. The Pensioners brought a motion before this Honourable Court on July 2, 2009 requesting an order to require the Applicants to reinstate payment of the supplemental pension benefits owing to the Pensioners from the Supplemental Plan, given that the company was liquidating and not restructuring. This motion was dismissed.

Affidavit of Andrea McKinnon, sworn July 17, 2009 ("McKinnon Affidavit"), at paras. 3, 4.

Carruthers August 15 Affidavit – Exhibit B – Endorsement of Morawetz J., dated July 24, 2009.

The Executive Plan is underfunded - the Pensioners are facing further benefit cuts

10. The Executive Plan is underfunded by \$3.2 million on a wind up basis. According to the Actuarial Valuation Report prepared by the plan's actuary, Mercer, as at January 1, 2008, the Executive Plan had a funding deficiency on an ongoing basis of \$2,535,100, on a solvency basis of \$1,082,800 and on a wind-up basis of \$2,996,400.

Carruthers August 15 Affidavit, at para. 15.

Carruthers August 15 Affidavit – Exhibit D - Mercer Actuarial Report at p. 1.

11. However, a recent valuation estimate prepared by the actuarial firm of Morneau Sobeco indicates that the funded status of the Executive Plan has worsened since January 1, 2008, and now has a deficit of approximately \$3.2 million on a wind up basis.

Carruthers August 15 Affidavit, at para. 17.

Carruthers August 15 Affidavit – Exhibit E - Letter from Morneau Sobeco to Andrew Hatnay of Koskie Minsky LLP, dated July 16, 2009.

12. If the Executive Plan is wound up in its current underfunded state, the Pensioners will have cuts to their pension benefits for the Executive Plan in the range of approximately 30-40%. Compounded with the Pensioners' loss of their pension benefits from the Supplemental Plan, this will result in an overall total loss in monthly pension benefits in the range of 1/2 to two-thirds for the Pensioners. This is a dramatic loss which will create financial hardship for the Pensioners and their surviving spouses who are entitled to survivor benefits on the death of the Pensioner.

McKinnon Affidavit, at para. 5.

Carruthers August 15 Affidavit, at para. 9.

Indalex's CCAA Proceedings

13. On April 3, 2009, the Applicants obtained protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"). FTI Consulting was appointed as Monitor.

Eighth Report of the Monitor, dated July 28, 2009 (the "Monitor's Eighth Report") at paras. 1, 2.

Carruthers June 23 Affidavit, at para. 23.

Once under CCAA protection the Applicants rapidly commenced a marketing and sale process. There was no attempt at restructuring.

On June 26, 2009, Pensioners put company and Service List on notice of deemed trust claim

14. In a letter dated June 26, 2009, counsel for the Pensioners informed counsel to the Applicants and the Monitor and copied to the Service List that the Pensioners assert the deemed trust in accordance with section 57 of the PBA in respect of amounts owing to

the Executive Plan, in the event the company did not adequately fund the Executive Plan, or if the Executive Plan were to be wound up in an underfunded state.

Carruthers August 15 Affidavit, at para. 18.

Carruthers August 15 Affidavit – Exhibit F – Letter from Koskie Minsky LLP to counsel for the Monitor and counsel for the Applicants, dated June 26, 2009.

15. There was no response or objection to this letter from any party.

Carruthers August 15 Affidavit, at para. 19.

16. In a letter dated July 13, 2009, the Monitor confirmed that the Executive Plan is expected to be wound up:

Following the completion of the asset sale, there will no longer be any active members of the Executive Plan. As discussed at the July 2, 2009 court hearing, it is unlikely that any bidder will elect to absorb obligations owing by Indalex that provides no corresponding benefit to such bidder. Accordingly it is expected that the Executive Plan will be fully wound up in accordance with the requirements of the Pension Benefits Act (Ontario). [emphasis added]

Carruthers August 15 Affidavit, at para. 6 – Exhibit A – Letter from Stikeman Elliott LLP to Koskie Minsky LLP, dated July 13, 2009.

17. One of the terms of the sale approved by the Court on July 20, 2009 was that SAPA would not take on the Applicants' liabilities under the Executive Plan and the Supplemental Plan.

Monitor's Eighth Report, at para. 7.

Carruthers August 15 Affidavit, at para. 8.

18. At the motion for court approval of the asset sale to SAPA on July 20, 2009, the Pensioners again asserted their claim to a deemed trust in respect of the Executive Plan in accordance with section 57(4) of the PBA in opposition to a request by the Applicants to

distribute the proceeds of sale, as the Applicants had made no recognition to give effect to the deemed trust.

19. The Honourable Justice Campbell approved the sale of the Applicants' assets to SAPA, but endorsed that a sufficient reserve be set aside with the Monitor for the \$3.2 million pending a motion by the Pensioners for a declaration recognizing the deemed trust claim.

July 20, 2009 Endorsement and Orders of Justice Campbell.

Monitor's Eighth Report, at paras. 21, 22, 24, 25.

20. On July 27, 2009, the parties attended before Justice Campbell and set down a timetable on consent regarding the delivery of material and the within motion date.

July 27, 2009 Endorsement of Justice Campbell.

21. On July 30, 2009, the Applicants moved for and were granted two further orders by Justice Morawetz extending the CCAA stay to October 30, 2009, and approving the implementation of a claims process with a claims bar date of August 28, 2009.

PART III – THE ISSUE

22. Does the deemed trust in section 57(4) of the PBA apply to the \$3.2 million currently held in reserve by the Monitor and rendering such funds not distributable to other creditors, should that amount be paid to the Executive Plan and should such orders and declarations survive any bankruptcy of the Applicants?

Answer: Yes to all.

PART IV – THE LAW

23. The purpose of the PBA is to protect members and pensioners of pension plans. The Supreme Court of Canada recently re-affirmed this purpose.

[28] The purpose of the PBA was explained at para. 13 of *Monsanto*, citing *GenCorp Canada Inc. v. Ontario (Superintendent, Pensions)* (1998), 158 D.L.R. (4th) 497 (Ont. C.A.), at para. 16:

[T]he *Pension Benefits Act* is clearly public policy legislation establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Ontario. It is intended to benefit and protect the interests of members and former members of pension plans, and “evinces a special solicitude for employees affected by plant closures”.

Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services), 2009 SCC 39, at para. 28.

24. The Ontario Court of Appeal has also confirmed that the purpose of the PBA is to protect members and pensioners of pension plans:

[25] I start with this observation: pension plans are for the benefit of the employees, not the companies which create them. They are a particularly important component of the compensation employees receive in return for their labour. They are not a gift from the employer; they are earned by the employees. Indeed, in addition to their labour, employees usually agree to other trade-offs in order to obtain a pension. As explained by Cory J. in *Schmidt v. Air Products Canada Ltd.*, 1994 CanLII 104 (S.C.C.), [1994] 2 S.C.R. 611 at 646:

In the case of pension plans, employees not only contribute to the fund, in addition they almost invariably agree to accept lower wages and fewer employment benefits in exchange for the employer’s agreeing to set up the pension trust in their favour.

[26] Similar statements have been expressed by this court in several cases. In *Gencorp Canada Inc. v. Ontario (Superintendent of Pensions)* 1998 CanLII 2947 (ON C.A.), (1998), 39 O.R. (3d) 38 at 43 (C.A.), Robins J.A. said:

[T]he *Pension Benefit Act* is clearly public policy legislation establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Ontario. It is intended to benefit and protect the interests of members and former members of pension plans

Huus v. Ontario (Superintendent of Pensions), 2002 CanLII 23593 (Ont. C.A.) 58 O.R. (3d) 380, at paras. 25-26

Winding up a pension plan under the PBA

25. The PBA comprehensively regulates all aspects of registered pension plans in Ontario, including their wind up. The PBA provides a complete scheme setting out what is required to wind up a pension plan including the provision of notice to plan members, benefit entitlements and funding requirements.

26. The wind up of a pension plan is a process and not a single event. It is commenced by an event that triggers the commencement of the wind up and continues until the last dollar is liquidated from the pension fund.

Ari N. Kaplan, *Pension Law (2006: Irwin Law, Toronto)* ("Pension Law") at p. 503.

27. Under the PBA, there are two ways a pension plan may be wound up. First, the employer who is sponsoring the plan (and who is the administrator) may wind up the plan. Second, the Superintendent of Financial Services may order a pension plan to be wound up.

PBA, s. 68, 69.

28. The relevant wind up sections in the PBA for a single employer pension plan such as the Executive Plan are set out below:

WINDING UP

Winding up

68. (1) The employer or, in the case of a multi-employer pension plan, the administrator may wind up the pension plan in whole or in part. R.S.O. 1990, c. P.8, s. 68 (1).

...

Notice

(2) The administrator shall give written notice of proposal to wind up the pension plan to,

(a) the Superintendent;

- (b) each member of the pension plan;
- (c) each former member of the pension plan;
- (d) each trade union that represents members of the pension plan;
- (e) the advisory committee of the pension plan; and
- (f) any other person entitled to a payment from the pension fund. R.S.O. 1990, c. P.8, s. 68 (2).

...

Information

(4) The notice of proposal to wind up shall contain the information prescribed by the regulations. R.S.O. 1990, c. P.8, s. 68 (4).

Effective date

(5) The effective date of the wind up shall not be earlier than the date member contributions, if any, cease to be deducted, in the case of contributory pension benefits, or, in any other case, on the date notice is given to members. R.S.O. 1990, c. P.8, s. 68 (5).

Order by Superintendent

(6) The Superintendent by order may change the effective date of the wind up if the Superintendent is of the opinion that there are reasonable grounds for the change. R.S.O. 1990, c. P.8, s. 68 (6).

PBA, at s. 68.

29. The Superintendent of Financial Services has published a detailed policy explaining the wind up process.

Filing Requirements and Procedure on Full or Partial Wind Up of a Pension Plan, FSCO Policy Bulletin W100-102, December 9, 2004 ("FSCO Bulletin W100-102).

Winding up by order of the Superintendent

30. A pension plan may also be ordered to be wound up by the Superintendent. The PBA provides:

Winding up order by Superintendent

69.(1)The Superintendent by order may require the wind up of a pension plan in whole or in part if,

- (a) there is a cessation or suspension of employer contributions to the pension fund;

- (b) the employer fails to make contributions to the pension fund as required by this Act or the regulations;
- (c) the employer is bankrupt within the meaning of the *Bankruptcy and Insolvency Act* (Canada);
- (d) a significant number of members of the pension plan cease to be employed by the employer as a result of the discontinuance of all or part of the business of the employer or as a result of the reorganization of the business of the employer;
- (e) all or a significant portion of the business carried on by the employer at a specific location is discontinued;**
- (f) all or part of the employer's business or all or part of the assets of the employer's business are sold, assigned or otherwise disposed of and the person who acquires the business or assets does not provide a pension plan for the members of the employer's pension plan who become employees of the person;**
- (g) the liability of the Guarantee Fund is likely to be substantially increased unless the pension plan is wound up in whole or in part;
- (h) in the case of a multi-employer pension plan,
 - (i) there is a significant reduction in the number of members, or
 - (ii) there is a cessation of contributions under the pension plan or a significant reduction in such contributions; or
- (i) any other prescribed event or prescribed circumstance occurs. R.S.O. 1990, c. P.8, s. 69 (1); 2002, c. 18, Sched. H, s. 5 (1).

Date and notice

(2)In an order under subsection (1), the Superintendent shall specify the effective date of the wind up, the persons or class or classes of persons to whom the administrator shall give notice of the order and the information that shall be given in the notice. R.S.O. 1990, c. P.8, s. 69 (2).

[emphasis added]

31. Under section 71(1) of the PBA, where a plan that is to be wound up does not have an administrator or the administrator fails to act, the Superintendent may act as the administrator or appoint an administrator.

PBA, s. 71(1).

The Wind Up Date

32. As noted above, when an employer is in the course of the wind up process, a wind up date will need to be selected. FSCO Bulletin W100-102 describes how the wind up date is to be selected within the parameters of section 68(5) of the PBA:

1.2 Legislative Requirements and Current FSCO Practice

1.2.1 Effective Date of Wind Up

Subsection 68(5) of the PBA provides that the effective date of wind up cannot be earlier than the date member contributions, if any, cease to be deducted, in the case of contributory pension plans, or in any other case, on the date the notice of wind up is given to members. Where a wind up results from a specific event such as plant closure, bankruptcy or purchase and sale, the effective date may not be earlier than the date of the specific event precipitating the wind up unless the requirements of subsection 68(5) of the PBA have been met prior to that date.

The Superintendent may change the effective date of the wind up by order, if in the Superintendent's view there are reasonable grounds for such a change (subsection 68(6) of the PBA). The effective date of wind up may not be obvious in some circumstances, such as where there are a series of terminations of employment related to a downsizing. In such situations, the administrator or agent is encouraged to submit a written proposal supporting the selection of both the effective date of wind up and the time period during which the termination of a member will result in the member being included in the wind up. FSCO staff will consider the proposal in light of legislative requirements.

FSCO Bulletin W100-102, *supra.*, paras. 1,2.

33. The Executive Plan is not contributory and in any case there are no active employees. Thus, according to section 68(5) of the PBA, the wind up date should be the date that the notice of wind up is given to plan members by the Applicants, if they do so.

34. However, under section 68(6), the Superintendent has discretion to change the wind up date if the Superintendent is of the opinion that there are reasonable grounds for the change. FSCO Bulletin W100-102 states that where a wind up stems from a specific event such as a purchase and sale of the business, the wind up date cannot be earlier than the date of the specific event that precipitates the wind up.

35. In either scenario, whether a wind up is effected by the employer or by order of the Superintendent, the employer is responsible to pay any amounts that remain owing to the pension plan:

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. R.S.O. 1990, c. P.8, s. 75 (1); 1997, c. 28, s. 200.

Payment

(2) The employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times. R.S.O. 1990, c. P.8, s. 75 (2).

PBA, s. 75.

36. Section 31 of Regulation 909 under the PBA states that the amounts to be paid to a pension plan on its wind up by an employer must be paid within a five year period starting from the date of the wind up:

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.

(4) Subsection (5) applies to a qualifying plan or to a plan with the following history:

1. An election was made in respect of the plan under subsection 5.1(1) or (2).
2. The election was rescinded in accordance with subsection 5.1(12).
3. After the date of the election but within five years after the date on which the election was rescinded, the plan was wound up.

(5) For a qualifying plan or a plan with the history described in subsection (4), the liability to be funded under section 75 of the Act shall be funded by monthly special payments by the employer to the pension fund over a period of not more than one year beginning on the effective date of the wind up. [emphasis added]

PBA Regulation 909, R.R.O. 1990, Amended to O. Reg. 570/06.

The PBA Deemed Trust

37. Section 57(4) of the PBA states that where a pension plan is wound up, an employer who is required to pay contributions to the fund of the pension plan shall be deemed to hold an amount equal to employer contributions in trust, even if those amounts are not yet due under the pension plan terms or the PBA:

Trust property

...

Wind up

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.

PBA, s. 57.

38. Article 14 of the Executive Plan text states that upon wind up of the plan, the Company shall make contributions to the fund "as required by the Plan and Applicable Pension Legislation". Article 14 states:

Article 14 – Right to Amend or Termination the Plan

...

14.3 Termination of the Plan

...

b) If the Plan is wound up, in whole or in part, the Employer will not make further contributions to the Fund in respect of the Plan or the portion of the Plan being wound up, as applicable, *except for 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.* [emphasis added]

Carruthers August 15 Affidavit, at para. 13.

39. In *Abraham v. Coopers & Lybrand* the court held that the purpose of the deemed trust in the PBA is protect the members of the pension plan.

(a) What are the features of the provincial legislation in question? The legislation involves laws of general application applicable to all employees in the province without distinction. It is agreed that the relevant statutory provisions are intra vires of the province. They were enacted pursuant to the provincial constitutional authority of property and civil rights. Looking at s. 15 of the *Employment Standards Act* and s. 23(3) of the *Pension Benefits Act*, *it is clear that there is both a trust and a separate lien created to protect the employees. The provincial statutory provisions elevate the employees' entitlement beyond simple debt in a creditor/debtor relationship.* This provincial legislation creates a lien against assets in the amount of the trust claim. [emphasis added]

Abraham v. Coopers & Lybrand (1993) 13 O.R. (3d) 649 (Gen. Div.), at para. 57.

40. In *Ivaco*, Farley J. considered section 57 of the PBA and concluded that in a non-bankruptcy situation, the assets of the company are subject to a deemed trust on account of both unpaid contributions and wind up liabilities in favour of the pension beneficiaries:

[11] While in a non-bankruptcy situation, *the Ivaco Companies' assets are subject to a deemed trust on account of unpaid contributions and wind up liabilities* in favour of the pension beneficiaries by s. 57(3) of the *Pension Benefits Act* (Ontario), [emphasis added]

Re Ivaco Inc., 2005 CanLII 27605 (Ont.S.C.), at para. 11.

The PBA Deemed Trust has priority over secured creditors

41. Section 30(7) of the PPSA expressly gives priority to the deemed trust in the PBA over secured creditors. The section states:

Priorities

30. (1) If no other provision of this Act is applicable, the following priority rules apply to security interests in the same collateral:

...

Deemed trusts

(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*.

Personal Property Security Act, R.S.O. 1990, c. P. 10, s. 30.

42. In *Usarco*, Farley, J. first gave effect to the deemed trust in section 57 of the PBA and then applied the priority rule in section 30(1) of the PPSA and ordered the receiver to pay an amount of money equal to the regular and special payments required to have been made but not yet paid into the pension plan:

13 Therefore, since the bankruptcy petition has not been dealt with, we are presently dealing with a claim by the administrator for certain trust funds held by the receiver. *The security interest of the bank is subordinate to the interest of the beneficiaries of the deemed trust* (represented by the administrator) (see: s. 30(7), *PPSA*).

Re Usarco Limited (1991) 42 E.T.R. 235 (Ont. Gen. Div.), at para. 29 (“*Usarco*”).

The deemed trust in the PBA also creates a fiduciary duty on the Applicants

43. A plan administrator owes a fiduciary duty to pension plan members and pensioners in respect of all activities administering a pension plan both under section 22 of the PBA and the common law.

Pension Law, supra, at pp. 330-345.

44. The administrator's fiduciary duty continues through the wind up of a pension plan and extends to any discretionary decisions made by an administrator during the wind up process. The exercise of discretion by an administrator during the wind up process must be discharged in a manner that avoids any conflicts of interest in respect of its role as both administrator and employer.

Pension Law, supra, at pp. 522-523.

45. In *Usarco*, Justice Farley also held that the deemed trust provisions themselves in the PBA imply a fiduciary obligation on the company.

Usarco, supra, at para. 16.

46. The Applicants are required to act in the best interests of the Pensioners. For the subject of this motion, this means that the Applicants should be required to give effect to the deemed trust and direct the payment of the \$3.2 million into the fund of the Executive Plan.

47. If the deemed trust is not given effect and paid to the fund of the Executive Plan, then the \$3.2 million being held by the Monitor will be used to pay other creditors. The British Columbia Court of Appeal recently held that the section 11 stay powers in the CCAA do not permit the CCAA court to authorize a breach of the deemed trust for the benefit of another creditor.

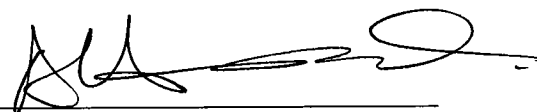
Re Ted Leroy Trucking Ltd., 2009 BCCA 205, at para. 30.

PART V - ORDERS REQUESTED

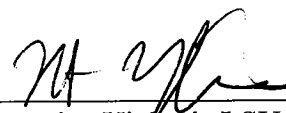
48. The Pensioners respectfully request:

- a) A declaration that the \$3.2 million held in reserve by the Monitor is subject to a deemed trust for the beneficiaries of the Executive Plan and not distributable to other creditors and that such orders and declarations survive any bankruptcy of the Applicants; and
- b) An order for costs.

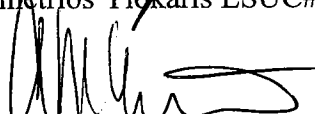
ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of August, 2009.



Andrew J. Hatnay LSUC#: 31885W



Demetrios Yiokaris LSUC#: 45852L



Andrea McKinnon LSUC#: 55900A

TAB A

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)*, 2009 SCC 39.
2. *Huus v. Ontario (Superintendent of Pensions)*, 2002 CanLII 23593 (Ont. C.A.); 58 O.R. (3d) 380.
3. Ari N. Kaplan, *Pension Law* (2006: Irwin Law, Toronto).
4. *Filing Requirements and Procedure on Full or Partial Wind Up of a Pension Plan*, FSCO Policy Bulletin W100-102, December 9, 2004.
5. *Abraham v. Coopers & Lybrand* (1993), 13 O.R. (3d) 649 (Gen. Div.).
6. *Re Ivaco Inc.*, 2005 CanLII 27605 (Ont.S.C.).
7. *Re Usarco Limited.* (1991), 42 E.T.R. 235 (Ont. Gen. Div.).
8. *Re Ted Leroy Trucking Ltd.*, 2009 BCCA 205.

TAB B

SCHEDULE "B"
RELEVANT STATUTES

1. *Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.*

Powers of court

11. (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

Initial application

(2) An application made for the first time under this section in respect of a company, in this section referred to as an "initial application", shall be accompanied by a statement indicating the projected cash flow of the company and copies of all financial statements, audited or unaudited, prepared during the year prior to the application, or where no such statements were prepared in the prior year, a copy of the most recent such statement.

Initial application court orders

(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Other than initial application court orders

(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

2. Pension Benefits Act, R.S.O. 1990, c. P.8.

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.

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).

Benefit by administrator

(9)The administrator of a pension plan is not entitled to any benefit from the pension plan other than pension benefits, ancillary benefits, a refund of contributions and fees and expenses related to the administration of the pension plan and permitted by the common law or provided for in the pension plan.

Member of pension committee, etc.

(10)Subsection (9) 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.

Payment to agent

(11)An agent of the administrator of a pension plan is not entitled to payment from the pension fund other than the usual and reasonable fees and expenses for the services provided by the agent in respect of the pension plan. R.S.O. 1990, c. P.8, s. 22.

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

(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).

Application of subss. (1, 3, 4)

(6) Subsections (1), (3) and (4) apply whether or not the money has been kept separate and apart from other money or property of the employer.

Money to be paid to insurance company

(7) Subsections (1) to (6) apply with necessary modifications in respect of money to be paid to an insurance company that guarantees pension benefits under a pension plan. R.S.O. 1990, c. P.8, s. 57.

WINDING UP

Winding up

68. (1) The employer or, in the case of a multi-employer pension plan, the administrator may wind up the pension plan in whole or in part. R.S.O. 1990, c. P.8, s. 68 (1).

Same, jointly sponsored pension plans

(1.1) The following rules apply, and subsection (1) does not apply, with respect to jointly sponsored pension plans:

1. If a jointly sponsored pension plan is also a multi-employer pension plan, the administrator may wind up the plan in whole or in part unless the documents that create and support the plan authorize another person or entity to do so. In that case, the authorized person or entity may wind up the plan in whole or in part.
2. If a jointly sponsored pension plan is not a multi-employer pension plan, the administrator or another person or entity may wind up the plan in whole or in part if the documents that create and support the plan authorize the administrator, person or entity to do so. 2005, c. 31, Sched. 18, s. 8.

Notice

- (2) The administrator shall give written notice of proposal to wind up the pension plan to,
- (a) the Superintendent;
 - (b) each member of the pension plan;
 - (c) each former member of the pension plan;
 - (d) each trade union that represents members of the pension plan;
 - (e) the advisory committee of the pension plan; and
 - (f) any other person entitled to a payment from the pension fund. R.S.O. 1990, c. P.8, s. 68 (2).

Notice of partial wind up

(3) In the case of a proposal to wind up only part of a pension plan, the administrator is not required to give written notice of the proposal to members, former members or other persons entitled to payment from the pension fund if they will not be affected by the proposed partial wind up. R.S.O. 1990, c. P.8, s. 68 (3).

Information

(4) The notice of proposal to wind up shall contain the information prescribed by the regulations. R.S.O. 1990, c. P.8, s. 68 (4).

Effective date

(5) The effective date of the wind up shall not be earlier than the date member contributions, if any, cease to be deducted, in the case of contributory pension benefits, or, in any other case, on the date notice is given to members. R.S.O. 1990, c. P.8, s. 68 (5).

Order by Superintendent

(6) The Superintendent by order may change the effective date of the wind up if the Superintendent is of the opinion that there are reasonable grounds for the change. R.S.O. 1990, c. P.8, s. 68 (6).

Winding up order by Superintendent

69.(1)The Superintendent by order may require the wind up of a pension plan in whole or in part if,

- (a) there is a cessation or suspension of employer contributions to the pension fund;
- (b) the employer fails to make contributions to the pension fund as required by this Act or the regulations;
- (c) the employer is bankrupt within the meaning of the *Bankruptcy and Insolvency Act* (Canada);
- (d) a significant number of members of the pension plan cease to be employed by the employer as a result of the discontinuance of all or part of the business of the employer or as a result of the reorganization of the business of the employer;
- (e) all or a significant portion of the business carried on by the employer at a specific location is discontinued;
- (f) all or part of the employer's business or all or part of the assets of the employer's business are sold, assigned or otherwise disposed of and the person who acquires the business or assets does not provide a pension plan for the members of the employer's pension plan who become employees of the person;

- (g) the liability of the Guarantee Fund is likely to be substantially increased unless the pension plan is wound up in whole or in part;
- (h) in the case of a multi-employer pension plan,
 - (i) there is a significant reduction in the number of members, or
 - (ii) there is a cessation of contributions under the pension plan or a significant reduction in such contributions; or
- (i) any other prescribed event or prescribed circumstance occurs. R.S.O. 1990, c. P.8, s. 69 (1); 2002, c. 18, Sched. H, s. 5 (1).

Date and notice

(2) In an order under subsection (1), the Superintendent shall specify the effective date of the wind up, the persons or class or classes of persons to whom the administrator shall give notice of the order and the information that shall be given in the notice. R.S.O. 1990, c. P.8, s. 69 (2).

Appointment of administrator to wind up

71.(1) If a pension plan that is to be wound up in whole or in part does not have an administrator or the administrator fails to act, the Superintendent may act as or may appoint an administrator.

Costs of administration on winding up

(2) The reasonable administration costs of the Superintendent or of the administrator appointed by the Superintendent may be paid out of the pension fund. R.S.O. 1990, c. P.8, s. 71.

Termination

(3) The Superintendent may terminate the appointment of an administrator appointed by him or her if the Superintendent considers it reasonable to do so. 1999, c. 15, s. 13.

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. R.S.O. 1990, c. P.8, s. 75 (1); 1997, c. 28, s. 200.

Payment

(2) The employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times. R.S.O. 1990, c. P.8, s. 75 (2).

Exception, jointly sponsored pension plans

(3) This section does not apply with respect to jointly sponsored pension plans. 2005, c. 31, Sched. 18, s. 10.

3. ***Pension Benefits Act, R.R.O. 1990, Regulation 909.***

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. O. Reg. 712/92, s. 19.

(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). O. Reg. 712/92, s. 19.

(3) The special payments referred to in subsections (1) and (2) shall continue until the liability is funded. O. Reg. 712/92, s. 19.

(4) Subsection (5) applies to a qualifying plan or to a plan with the following history:

1. An election was made in respect of the plan under subsection 5.1 (1) or (2).

2. The election was rescinded in accordance with subsection 5.1 (12).

3. After the date of the election but within five years after the date on which the election was rescinded, the plan was wound up. O. Reg. 712/92, s. 19.

(5) For a qualifying plan or a plan with the history described in subsection (4), the liability to be funded under section 75 of the Act shall be funded by monthly special payments by the employer to the pension fund over a period of not more than one year beginning on the effective date of the wind up. O. Reg. 712/92, s. 19.

4. ***Personal Property Security Act, R.S.O. 1990, c. P.10.***

Priorities

30. (1) If no other provision of this Act is applicable, the following priority rules apply to security interests in the same collateral:

1. Where priority is to be determined between security interests perfected by registration, priority shall be determined by the order of registration regardless of the order of perfection.
2. Where priority is to be determined between a security interest perfected by registration and a security interest perfected otherwise than by registration,
 - i. the security interest perfected by registration has priority over the other security interest if the registration occurred before the perfection of the other security interest, and
 - ii. the security interest perfected otherwise than by registration has priority over the other security interest, if the security interest perfected otherwise than by registration was perfected before the registration of a financing statement related to the other security interest.
3. Where priority is to be determined between security interests perfected otherwise than by registration, priority shall be determined by the order of perfection.
4. Where priority is to be determined between unperfected security interests, priority shall be determined by the order of attachment.

Idem

(2) For the purpose of subsection (1), a continuously perfected security interest shall be treated at all times as if perfected by registration, if it was originally so perfected, and it shall be treated at all times as if perfected otherwise than by registration if it was originally perfected otherwise than by registration.

Future advances

(3) Subject to subsection (4), where future advances are made while a security interest is perfected, the security interest has the same priority with respect to each future advance as it has with respect to the first advance.

Exception

(4) A future advance under a perfected security interest is subordinate to the rights of persons mentioned in subclauses 20 (1) (a) (ii) and (iii) if the advance was made after the secured party received written notification of the interest of any such person unless,

- (a) the secured party makes the advance for the purpose of paying reasonable expenses, including the cost of insurance and payment of taxes or other charges incurred in obtaining and maintaining possession of the collateral and its preservation; or
- (b) the secured party is bound to make the advance, whether or not a subsequent event of default or other event not within the secured party's control has relieved or may relieve the secured party from the obligation.

Proceeds

(5) For the purpose of subsection (1), the date for registration or perfection as to collateral is also the date for registration or perfection as to proceeds.

Reperfected security interests

(6) Where a security interest that is perfected by registration becomes unperfected and is again perfected by registration, the security interest shall be deemed to have been continuously perfected from the time of first perfection except that if a person acquired rights in all or part of the collateral during the period when the security interest was unperfected, the registration shall not be effective as against the person who acquired the rights during such period. R.S.O. 1990, c. P.10, s. 30 (1-6).

Same, extended time

(6.1) Despite subsection (6), where a security interest that is perfected by registration becomes unperfected between February 26, 1996 and April 3, 1996, the security interest shall be deemed to have been continuously perfected from the time of first perfection if the security interest is again perfected by registration by April 12, 1996. 1996, c. 5, s. 2.

Deemed trusts

(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*.

Exception

(8) Subsection (7) does not apply to a perfected purchase-money security interest in inventory or its proceeds. R.S.O. 1990, c. P.10, s. 30 (7, 8).

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, 1985,
R.S.C. 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

Court File No: CV-09-8122-00CL

ONTARIO

**SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

FACTUM

(Motion by retirees re: Deemed Trust, returnable
August 28, 2009)

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