Court of Appeal File No. M38599
Court of Appeal File No. M38582
Superior Court File No. CV-09-8122-00CL

COURT OF APPEAL FOR ONTARIO

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 OF THE SUPERINTENDENT OF FINANCIAL SERVICES

September 8, 2010

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FACTUM INDEX

FACTUM

1. This factum is filed by the Superintendent of Financial Services (the "Superintendent") in the appeal brought by Keith Carruthers, Leon Kozierok, Bertram McBride, Max Degen, Eugene D'Iorio, Richard Smith, Robert Leckie, Neil Fraser, Ken Waldron, Fred Granville, John Faveri, John Rooney and Richard Benson (the "Retirees") in Court of Appeal File Number M38599 relating to the Retirement Plan for Executive Employees of Indalex Canada and Associated Companies (the "Executive Plan") and the appeal brought by the United Steelworkers (the "USW") in Court of Appeal File Number M38582 relating to the Retirement Plan for Salaried Employees of Indalex and Associated Companies (the "Salaried Plan").

PART I – OVERVIEW

2. Although this factum is limited to the issue of the appropriate interpretation of the deemed trust provisions of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the "*PBA*"), the Superintendent supports the Appeals except for the Appellants' requests for costs to be paid from the Executive Plan and the Salaried Plan.

3. The central issue in this appeal as it relates to the interpretation of the *PBA* is the scope of the deemed trust under section 57(4) of the *PBA* which applies to employer contributions where a pension plan is wound up. The scope of the deemed trust under section 57(4), in turn, turns on the appropriate interpretation of the words "employer contributions accrued to the date of the wind up but not yet due...".

4. The Respondents, FTI Consulting Canada ULC and Sun Indalex Finance, LLC, argue for a narrow interpretation of section 57(4) which limits the scope of the deemed trust to only payments (including special payments) which are due as of the effective date of the wind up despite the fact that section 57(4) speaks to "employer contributions **accrued to the date of wind up but not yet due**" (emphasis added).

5. The Superintendent submits that the scope of section 57(4) is wider. Section 57(4) must be interpreted in light of the objects and scheme of the *PBA* which focus on the protection of pension plan members, generally, and, specifically, on ensuring the solvency of pension plans so that the pension promise will be fulfilled.

6. The concept of an accrued obligation, such as the accrued employer contribution obligation, denotes an obligation which has been incurred or an obligation arising from an enforceable right or claim to a future benefit or entitlement even if that benefit, entitlement or corresponding obligation is not required to be paid (or is not due) until some point in the future. In a sense, an accrued right and corresponding obligation is a right or obligation for which all pre-requisites have been met and the right or obligation can be said to be fully constituted although amounts may not actually have to be paid in respect of the right or obligation until some point in the future.

7. In light of the scheme and objects of the *PBA*, the concept of accrued employer contributions may be understood as simply employer contributions necessary to

provide for the accrued benefits of members. Because all benefit accruals cease at the point of wind up, all benefits under a pension plan have accrued and the full amount of the employer contributions necessary to fund those benefits (i.e.: the full wind up deficit) can also be said to have accrued and falls within the scope of the deemed trust.

8. The concept of employer contribution obligations accruing as member benefits accrue benefits is supported by the proposition (as confirmed in numerous recent cases) that special payments (including special payments in respect of a wind up deficit as in this case) are contributions in respect of past service. This concept has been accepted by courts in a number of recent cases as the basis to treat special payments as pre-filing debts. If special payments are intended entirely to fund benefits accrued in respect of periods of past service it is difficult to see how such contribution obligations cannot be said to have accrued once the corresponding service has been performed.

9. Conceptually, a special payment (including special payments in respect of a wind up deficit as in this case) arises from an actuarially identified shortfall in a pension plan in respect of benefits accrued up to the effective date of the actuarial calculation. A specific lump sum dollar amount is calculated. The obligation has been identified, calculated and it relates to prior service. All requirements giving rise to the obligation have been met. It is fully constituted. The obligation has “accrued” in every sense of the word. The *PBA* then permits the accrued obligation to be amortized over a period

of time such that it can be said that the actual payments in respect of the accrued contribution obligation do not come due until some point in the future. As such, special payments (including special payments in respect of a wind up deficit) are an employer contribution which has accrued but is not yet due and, therefore, fall squarely within the ambit of the deemed trust in section 57(4) of the *PBA*.

PART II - FACTS

10. The Superintendent agrees with the facts set out the Retirees' Factum and the Factum of the United Steelworkers (the "USW's Factum").

PART III – ISSUES AND ARGUMENT

11. Other than the relief sought by the USW relating to the payment of its costs from the Salaried Plan, the Superintendent supports the relief sought by the Appellants in the Appeals. However, these submissions are limited to the issues of statutory interpretation (Retirees issue 3 and the USW's issues (b) and (c)).

SCOPE OF SECTION 57(4) - RETIREES ISSUE 3 AND USW'S ISSUES (B) AND (C)

12. Section 57(4) states:

> **Wind up**
> (4) Where a pension plan is wound up in whole or in part, and 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 to the date of the wind up but not yet due under the plan or regulations.
>
> *Pension Benefits Act,* R.S.O. 1990, c. P.8, Section 57(4) *Factum "Schedule B"*

13. At issue in these Appeals is the scope of section 57(4) and whether or not the deemed trust in section 57(4) covers the wind up deficit. The resolution of this issue, in turn, turns on the appropriate meaning of the words "employer contributions accrued to the date of the wind up but not yet due under the plan or regulations."

Pension Benefits Act, R.S.O. 1990, c. P.8, Section 57(4) *Factum "Schedule B"*

14. The appropriate approach to the interpretation of a statutory provision is well established. As stated by the Supreme Court of Canada,

> "Today there is only one principle or approach, namely, the words of an Act are to 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."
>
> *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26 *Superintendent's Authorities Tab 1*

15. This approach was specifically employed in respect of the *PBA* by the Supreme Court of Canada in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*.

> *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)* [2004] 3 S.C.R. 152 at para. 19. *Superintendent's Authorities Tab 2*

OBJECTS OF THE *PBA*

16. In *Monsanto*, the Court set out the objects of the *PBA* as follows:

> "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** (see GenCorp, supra; Firestone Canada Inc. v. Ontario

> (Pension Commission) (1990), 1 O.R. (3d) 122 (C.A.), at p. 127). This is especially important when, as recognized by this Court in Schmidt v. Air Products Canada Ltd., [1994] 2 S.C.R. 611, at p. 646, it is remembered that pensions are now generally given for consideration rather than being merely gratuitous rewards. At the same time, the voluntary nature of the private pension system requires the interventions in this area to be carefully calibrated. This is necessary to avoid discouraging employers from making plan decisions advantageous to their employees. The Act thus seeks, in some measure, to ensure a balance between employee and employer interests that will be beneficial for both groups and for the greater public interest in established pension standards." [emphasis added]
>
> *Monsanto*, *supra*, at para. 38. *Superintendent's Authorities Tab 2*

17. The focus of the *PBA* is on minimum standards and regulatory supervision to protect and safeguard the entitlements of pension plan members. The Supreme Court of Canada further characterized this protective function, in *Bourdon v. Stelco Inc*. as "primarily to ensure the continued solvency of the plans so that their members will receive the anticipated benefits when they retire." Finally, in *Buschau v. Rogers Communications Inc*., the Supreme Court of Canada stated that the Superintendent's role under the federal pension standards legislation centres on the protection of beneficiaries through interventions mostly related "to supervision of solvency requirements."

> *Bourdon v. Stelco Inc*., 2005 SCC 64, [2005] 3 S.C.R. 279 at para. 24. *Superintendent's Authorities Tab 3*
>
> *Buschau v. Rogers Communications Inc*., 2006 SCC 28, [2006] 1 S.C.R. 973 at para. 20. *Superintendent's Authorities Tab 4*

18. While the Court in *Monsanto* does caution that interventions in the pension standards area are to be carefully calibrated "to avoid discouraging employers from making plan decisions advantageous to their employees", there is nothing in the

Supreme Court of Canada jurisprudence or the jurisprudence of this Court that suggests that the *PBA* has as its objects the priority of claims of secured creditors in the event of an insolvency of a sponsoring employer in order to give expression to policy concerns related to the ability of corporations to access capital. Indeed, the scheme of priorities as between various categories of creditors is a matter of federal and provincial laws which govern the bankruptcy and insolvency field and the various economic and policy arguments which factor in the determination of those priorities may inform the object of the statutes in that field but they do not impact on the objects of the *PBA*.

19. Thus, the objects of the *PBA* (which centre on the protection of plan members, generally, and the solvency of pension plans, specifically) favour a wide interpretation of the deemed trust in section 57(4) of the *PBA*.

GRAMATICAL AND ORDINARY SENSE

20. The grammatical and ordinary sense of the words “employer contributions accrued to the date of wind up but not yet due” supports the conclusion that the deemed trust in section 57(4) covers the wind up deficit.

21. The concept of an accrued right or obligation has a well established meaning. Black’s Law Dictionary defines the term “accrue” as “to come into existence as an enforceable claim or right; to arise” and as “to accumulate periodically.”

Garner, Brian A. editor, *Black’s Law Dictionary*, 9th ed. (West Group 2009), page 23

22. Moreover, the use of the phrase “employer contributions accrued ... but not yet due” suggests that the legislature viewed the concept of an accrued contribution as distinct from the concept of a contribution that is due.

23. A similar phrase characterized by the juxtaposition of the concepts of an accrued but not due obligation and an obligation which is due was considered by the Supreme Court of Canada in *Ontario (Hydro Electric Power Commission) v. Albright* (“*Albright*”). In *Albright*, the Court was required to consider whether certain interest and sinking fund payments on certain bonds and debentures were payments “which shall have accrued but shall not be due at the time for completion.” The reasons of Duff J. state as follows

> “The word “due” in relation to moneys in respect of which there is a legal obligation to pay them may mean either that the facts making the obligation operative have come into existence with the exception that the day of payment has not yet arrived, or it may mean that the obligation has not only been completely constituted but is also presently exigible. That it is used in the latter sense in the present instance is perfectly clear – otherwise the contrast expressed between payments “accrued” and payments “due” would, especially in the case of interest, be patent nonsense. The most natural meaning of such a phrase as “accrued payments” would be, and standing alone it would prima facie receive that reading, moneys presently payable; but the word “accrued” according to well recognized usage has, as applied to rights or liabilities the meaning simply of completely constituted is one which is only exercisable or enforceable in futuro – a debt for example which is debitum in praesenti solvenum in future. It is in this sense that it has been widely applied to express the fact that such a liability has been created in relation to a sum of money, part of a whole (made up of an accumulation of such parts) which is not to be payable until a later date, and it is in this sense that it seems to be used in the clause before us.”
>
> *Ontario (Hydro Electric Power Commission) v. Albright* (1922), 64 S.C.R. 306, paragraph 23 *Superintendent’s Authorities Tab 6*

24. Accordingly, an obligation which is accrued but not yet due is an obligation for which the "facts making the obligation operative have come into existence" or which is "completely constituted" although it is not enforceable until sometime in the future. As indicated in the above passage, the concepts of "accrued" and "due" may take on a different meaning when they are not juxtaposed against one another. In such cases, "due" could mean either a completely constituted obligation where the day of payment has not yet arrived or an obligation is completely constituted and immediately payable.

25. The motions judge relied on *Re Ganong Estate; Ganong v. Belyea* in which the Supreme Court of Canada considered the meaning of the term "accruing due". However, the phrase "accruing due" conflates the concepts of an obligation which has accrued with an obligation which is due. The wording of section 57(4) of the *PBA* requires that these two concepts be kept separate. This conceptual error by the motions judge is further evidenced by his comment that "the word 'due' connotes that it is payable whether or not the time for payment has arrived." This conclusion stands in contrast to the holding in *Albright* made in light of language where the concepts of "accrued" and "due" are separated as they are in section 57(4).

> *Indalex Ltd. (Re),* [2010] O.J. No. 974; Reasons for Decision of Justice Campbell, dated February 18, 2010, at paragraphs 35 and 36.
>
> *Superintendent's Authorities Tab 7*

26. Indeed, the motions judge's central grounds for dismissing the motion were that,

> "I find that as of the date of the closing [of the sale] and transfer of assets there were no amounts which were 'due' or 'accruing due' on July 20, 2010 [sic]. On that date, Indalex was not required under the *PBA* or the

> Regulation thereunder to pay any amount into the Plan. There was an annual payment that would have become payable as at December 31, 2009 but for the stay period for [sic] in the Initial Order under the CCAA."
>
> *Indalex Ltd. (Re),* [2010] O.J. No. 974; Reasons for Decision of Justice Campbell, dated February 18, 2010, at paragraph 49. *Superintendent's Authorities Tab 7*

27. It appears that motions judge failed to keep the concept of an accrued obligation separate from an obligation that is due. In fact, the motions judge dismissed the motions because there were no payments that were required to be made or that were payable as of the date of the sale. In other words, there were no payments which were due as of the date of the sale which were not paid. The scope of section 57(4) is much wider and focuses on payments which have accrued but are not yet due. The motions judge erred in not appreciating the distinction between these concepts and his reasons fail to consider what contributions were accrued (even if none were due) at the time of the sale as is required by the wording of section 57(4) of the *PBA*.

SCHEME OF THE *PBA*

28. A determination of whether or not payments in respect of the windup deficit in a pension plan which is to be wound up fall within this scope of the deemed trust in section 57(4) requires a review of the scheme of *PBA* as it relates to the nature and timing of employer contributions.

29. The employer contribution regime in the *PBA*, involves different types of contributions (whether they be contributions owing for current service costs or special payments) while a pension plan is in operation (i.e.: prior to the effective date of the

wind up) in contradistinction to the employer contributions required to be made after the effective date of the wind up.

Employer Contributions While a Plan Is In Operation

30. Section 55(2) of the *PBA* states broadly that an employer who is required to make contributions to a pension plan while it is operating shall make the contributions in accordance with the prescribed requirements for funding and in the prescribed manner and at the prescribed times.

Pension Benefits Act, R.S.O. 1990, c. P.8, section 55(2). *Factum "Schedule B"*

31. Section 4(2) of Ontario Regulation 909, R.R.O. 1990 to the *PBA* (the "Regulation") states that an employer who is required to make contributions to a pension plan shall make payments to the pension fund that are not less than the sum of all required contributions, including

i. special payments in respect of any going concern unfunded liability and solvency deficiency;

ii. all contributions to pay the current service cost (or "normal cost" as it is referred to in the Regulation); and

iii. all employee contributions.

O. Reg. 909, R.R.O. 1990, section 4(2) *Factum "Schedule B"*

<u>Employee Contributions</u>

32. Section 4(4)1 of the Regulation deals with the timing of the remittance of employee contributions to a pension plan, if a plan requires employee contributions. Employee contributions, to the extent that they are required to be paid under the

pension plans in this appeal, have been paid. Accordingly, employee contributions are not at issue in the Appeals.

O. Reg. 909, R.R.O. 1990, section 4(4)(1). *Factum "Schedule B"*

O. Reg. 909, R.R.O. 1990, section 14. *Factum "Schedule B"*

Employer Contributions

Current Service Costs

33. Section 4(4) of the Regulation deals with the timing of remittances for current service costs by an employer. Current service costs are the costs of the benefits that accrue during the time period of plan operation to which the contribution relates. For instance, the current service contribution in respect of May 2010 is equal to the amount calculated by an actuary for all benefits accrued because of services performed by employees who are plan members during the month of May 2010. Section 4(4) states that employer contributions in respect of current service costs shall be made by an employer in monthly instalments within thirty days after the month in respect of which the contributions are payable.

O. Reg. 909, R.R.O. 1990, section 4(4). *Factum "Schedule B"*

34. Applying the concept of "accrued ... but not due" to current service cost contributions it is clear that such contributions accrue once pension plan members perform the services to which the pension benefit accruals relate although the contributions are not due until 30 days after the month in which that service occurred. If this concept is applied to the example set out in the preceding paragraph, all the

current service contributions for the month of May 2010 would have accrued by the end of May although they would not be payable until June 30, 2010. Accordingly, the current service cost payment for the month of June 2010 is accrued but not due until the end of June 2010. On this point, there appears to be common ground as between the parties based on the positions asserted at the motion level.

Special Payments

35. Special payments are required where the actual plan experience or investment experience differs from that assumed by the actuary when the actuary calculated the amount of the current service costs. As such, special payments are required to cover benefit accruals for periods of past service.

36. Section 4(4) of the Regulation states that all special payments shall be made in accordance with section 5 of the Regulation. There are three types of special payments:

1) special payments an employer is required to make to liquidate any going concern unfunded liability ("Going Concern Special Payments");
2) special payments an employer is required to make to liquidate any solvency deficiency ("Solvency Special Payments"); and
3) a third type of special payment, special payments required to be made to address the wind up deficit, that arise where a plan is to be wound up and that are the focus of the Appeals.

O. Reg. 909, R.R.O. 1990, section 4(4). *Factum "Schedule B"*

37. Section 5(1)(b) of the Regulation deals with timing of the Going Concern Special Payments an employer is required to make. A going concern unfunded liability is a measure of the funding shortfall in a pension plan based on an actuarial valuation of the pension plan that assumes the pension plan will operate indefinitely. It is calculated by the actuary at the time the valuation report is prepared. It is a quantified and identified sum of money and relates to the benefits already accrued in the pension plan. Section 5(1)(b) states that the Going Concern Special Payments necessary to pay off a going concern unfunded liability shall be made by an employer in equal monthly instalments over a period of 15 years beginning on the valuation date of the report in which the going concern liability was identified, plus interest at the going concern unfunded valuation interest rate. Accordingly, the actuary then performs a further calculation which computes the monthly payment necessary to pay off the principal amount of the going concern unfunded liability plus interest over a period of 15 years.

O. Reg. 909, R.R.O. 1990, section 5(1)(b).	*Factum "Schedule B"*
O. Reg. 909, R.R.O. 1990, section 14.	*Factum "Schedule B"*

38. Again, applying the concept of "accrued ... but not due" to the Going Concern Special Payments, it can be seen that the full amount of all of the Going Concern Special Payments are accrued because the going concern unfunded liability is in respect of benefits already earned based on past service. The amount is calculated and is wholly based on factors in existence at the time of the calculation. The contributions are, in every sense of the term, "completely constituted". The actual

payments in respect of the accrued obligation are only due as the monthly payments become due under section 5(1)(b) of the Regulation. Therefore, the Going Concern Special Payments are accrued but not yet due.

39. The Respondents take a different view. The Respondents argue that only the special payment for the month which includes the effective date of the wind up is accrued but not yet due within the meaning of section 57(4) of the *PBA*. Using the above example and assuming that the pension plan is wound up effective May 15, 2010, the Respondents submit that only the Going Concern Special Payment due at the end of May 2010 is accrued but not yet due and that Going Concern Special Payments due starting June 2010 have not accrued at the point of wind up. Yet this position is difficult to reconcile with the nature of special payments and in light of the appropriate interpretation of the phrase “accrued ... but not yet due”. Because each Going Concern Special Payment is based on past service and other factors present at the previous valuation date, it is difficult to see what occurs in May 2010 which would cause this payment to accrue. Indeed, the only thing that occurs is the passage of time which causes the contribution to shift from *accrued but not yet due* to both *accrued and due*.

40. Indeed, the Respondents’ position really amounts to reading section 57(4) as if it stated that the deemed trust covered employer contributions due to the date of wind up and reading out the concept of accrued but not yet due altogether.

41. Section 5(1)(e) of the Regulation deals with the timing of Solvency Special Payments an employer is required to make to liquidate a solvency deficiency. A solvency deficiency is a measure of the funding shortfall in a pension plan based on an actuarial valuation of the pension plan that assumes the pension plan will terminate as of the valuation date used for the valuation. Again, it is calculated by the actuary at the time the valuation report is prepared. It is a quantified and identified sum of money and relates to the benefits already accrued in the pension plan. Section 5(1)(e) states that Solvency Special Payments that an employer is required to make to liquidate any solvency deficiency shall be made by equal monthly instalments over a 5-year period beginning on the valuation date of the report that identified the solvency deficiency. Accordingly, the actuary then performs a further calculation which computes the monthly payment necessary to pay off the principal solvency deficiency plus interest over a period of 5 years.

O. Reg. 909, R.R.O. 1990, section 5(1)(e). *Factum "Schedule B"*

O. Reg. 909, R.R.O. 1990, section 14. *Factum "Schedule B"*

42. Applying the concept of "accrued...but not yet due" to Solvency Special Payments it can likewise be seen that the full amount of all of the Special Payments are accrued because the solvency deficit is in respect of benefits already earned based on past service, the amount is calculated and known and is in every sense of the term "completely constituted". The actual payments in respect of the accrued obligation are only due as the monthly payments become due under section 5(1)(b) of the Regulation. Thus, solvency special payments are "accrued...but not yet due".

43. Again, the Respondents' interpretation of the section 57(4) deemed trust as it applies to solvency special payments also amounts to the result that the deemed trust only applies to the payments which are due to the date of wind up. This position also suffers equally from the conceptual difficulty inherent in the Respondents' approach because there is nothing that occurs during the month of the wind up on which the calculation of the Solvency Special Payment is dependant such that it can be said that the Solvency Special Payment for that month accrues during the course of that month. Indeed, the only thing that occurs is the passage of time which causes the contribution to shift from accrued but not yet due to both accrued and due by the end of the month.

Employer Contributions on Plan Wind Up

44. The *PBA* sets out a detailed process governing how an Ontario pension plan is to be wound-up. Section 75 of the *PBA* imposes comprehensive liability on an employer to pay into the pension fund on its wind up all amounts that are required to be paid into the fund to provide the pension benefits that the plan is required to pay to its members. Section 75 states:

> 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. [emphasis added]

Pension Benefits Act, R.S.O. 1990, c. P.8, section 75(1). *Factum "Schedule B"*

45. The contribution obligations under section 75 are triggered "where a pension plan is wound up in whole or in part". Section 75(1)(b) requires a calculation to determine an amount to be paid into the pension plan by an employer comprised of the amounts described in three additional categories in subsections 75(1)(b)(i)(ii) and (iii) that is based on a comparison of the benefits the plan is to provide to the amount of assets actually in the fund. Section 75(1)(b) calculates the difference, and if there is a shortfall (i.e., the wind up deficit) then that shortfall is added to the liability calculated in section 75(1)(a) to arrive at the total employer wind up liability.

Pension Benefits Act, R.S.O. 1990, c. P.8, section 75(1). *Factum "Schedule B"*

46. The calculation of the wind up deficit is performed by an actuary and is set out in the wind up report. As with the going concern unfunded liability and the solvency deficit, the wind up deficit is a defined amount of money which is calculated as of the

effective date of the wind up. It is wholly based on benefits which accrued based on service prior to the wind up date and other factors which are in existence as of the effective date of the wind up.

O. Reg. 909, R.R.O. 1990, sections 30 and 32. *Factum "Schedule B"*

47. In fact, there is no additional liability that accrues "following" a wind up. The wind up liability of a plan is determined as of the effective date of the wind up. All events crystallize on the wind up date. All pension benefit accruals by members cease and all amounts that an employer is required to pay into an underfunded plan are calculated as of the wind up date. There is no additional or separate wind up liability that develops over time "following" the wind up.

48. Once the wind up liability amount has been calculated under section 75, the employer is required to pay that amount into the pension plan. Section 75(2) states that "the employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times."

Pension Benefits Act, R.S.O. 1990, c. P.8, section 75(2). *Factum "Schedule B"*

49. Section 31 of the Regulation prescribes the manner and timing for the section 75 wind up liability payment. Section 31 states that 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." These are the third type of special payments referred to above (the "Wind Up Special

Payments”). Section 31(2)(a) of the Regulation states that the annual Wind Up Special Payment shall at least be equal to “the amount required in the year to fund the employer’s liabilities under section 75 in equal payments, payable annually in advance, over not more than five years”. As with the Going Concern and Solvency Special Payments, the actuary is thus required to perform an additional calculation to compute the annual payment necessary to retire the principal wind up deficit plus interest over a period of five years.

O. Reg. 909, R.R.O. 1990, section 31. *Factum “Schedule B”*

50. As such, it is clear that the full amount of the wind up deficit is an employer contribution which is “accrued ... but not yet due”. The full amount of the contributions to retire the wind up deficit are accrued because the wind up deficit is in respect of benefits already earned or accrued under the pension plan, the amount is calculated and known based on information as at the effective date of the wind up. The wind up deficit is in every sense of the term “completely constituted”. The actual payments in respect of the accrued obligation are only due as the monthly payments become due under section 5(1)(b) of the Regulation. The wind up special payments are “accrued...but not yet due”.

Special Payments Under the *CCAA*

51. The conclusion that special payments (whether they be while a pension plan is ongoing or in respect of a wind up deficit) are accrued obligations is supported by the characterization of special payments as pre-filing debts in *Companies’ Creditors*

Arrangement Act, R.S.C.1985,c.C.36 (the "*CCAA*") proceedings. In a number of recent cases, courts have granted orders permitting employers who are under the protection of the *CCAA* to suspend the obligation to make special payments. The basis for these rulings is that special payments are in respect of past services performed prior to the *CCAA* filing date and, therefore, are appropriately characterized as pre-filing debts.

> *Fraser Papers Inc. (Re)* (2009), 55 C.B.R. (5th) 217, [2009] O.J. No. 3188 at paragraph 20. *Superintendent's Authorities Tab 8*
>
> *AbitibiBowater Inc.(Re)* (2009), 74 C.C.P.B. 254 at paragraphs 37 to 54. *Superintendent's Authorities Tab 9*
>
> *Collins & Aikman Automotive Canada Inc.* (Re), [2007] O.J. No. 4186, 37 C.B.R. (5th) 282 at paragraphs 64 and 103. *Superintendent's Authorities Tab 10*

52. In a passage quoted with approval in *Abitibi*, the Court in *Collins & Aikman*, characterized special payments in the following manner:

> "The amount of the outstanding special payments in the present case appears to have been determined prior to the Initial Order based on information relating to the pre-filing period. It is not apparent that the continuation of the operations of the Applicant in the post-filing period has given rise to an increase in the amount of the special payments from the amount that would otherwise have been applicable by reason of the pre-filing experience. Consequently, it seems tendentious to characterize the outstanding special payments as the costs of operating in the post-filing period."
>
> *Collins & Aikman Automotive Canada Inc. (Re)*, supra at paragraph 103. *Superintendent's Authorities Tab 10*
>
> *AbitibiBowater Inc. (Re)* (2009), supra at paragraphs 41 and 42. *Superintendent's Authorities Tab 9*

53. It is difficult to reconcile the conclusion that a special payment is calculated wholly in respect of service and other factors which occurred entirely in the past (i.e.:

at the time the amount of the special payment is calculated) with the notion that employer contributions in respect of special payments (including special payments in respect of a wind up deficit) are not anything but “fully constituted” or accrued.

Benefit Accruals

54. Generally, the scheme of the *PBA* deals with the accrual of pension benefits, not the accrual of contributions. For instance, section 14(1)(a) provides an important protection by prohibiting reductions in accrued pension benefits. As is apparent from a reading of the case law concerning relief from the requirement to make special payments during the course of a *CCAA* proceeding, pension benefits, in turn, accrue as a pension plan member’s accumulated pensionable service with the employer.

Pension Benefits Act, R.S.O. 1990, c. P.8, section 14(1)(a). *Factum “Schedule B”*

55. In this context, accrued employer contributions can be understood as contributions for benefits which have accrued under the pension plan. As benefit entitlements accrue, so does an associated employer obligation to make contributions to fund those benefits. Accordingly, the accrual of employer contribution obligations is inextricably linked to the accumulation of pensionable service by pension plan members. Quite simply, employer contributions accrue as pension plan members work and the issue of whether or not an employer contribution has accrued is simply a matter of determining whether or not the related employee service has occurred. This analysis is not only consistent with the treatment of special payments in *CCAA* proceedings but necessarily flows from this link between

the performed work and the accrued of benefits which are manifested in the contribution.

56. In fact, the process of benefit/contribution accrual occurs on a daily basis. Section 58(1) of the *PBA* states that "money that an employer is required to pay into a pension fund accrues on a daily basis." Thus, as pension plan members provide each additional day of service there is an additional amount of employer contribution which accrues in respect of that service.

Pension Benefits Act, R.S.O. 1990, c. P.8, section 58(1). *Factum "Schedule B"*

Section 75 of the *PBA*

57. The Respondents assert that the wording of section 75(1) supports their narrow interpretation of the deemed trust in section 57(4). They argue that section 75(1)(a) relates to the payments due to the date of wind up and that it is sufficiently similar to the wording of section 57(4) to conclude that the scope of section 57(4) goes no further than the scope of section 75(1)(a). The Respondents contend, further, that section 75(1)(b) creates a separate funding obligation and relates to the wind up deficit which is distinct from the amounts covered by section 75(1)(a) and, in their submission, section 57(4).

58. This argument, however, does not stand up to scrutiny when the specific wording of section 57(4) is compared to the wording of section 75(1)(a). There are two

aspects of the wording of section 57(4) and section 75(1)(a) which are determinative as follows:

a. Section 57(4) refers to "employer contributions accrued **to the date of wind up** but not yet due under the plan or regulations" (emphasis added). The words "to the date of wind up" do not appear in section 75(1)(a). As stated above, employer contributions accrue as benefits accrue. As of the effective date of the wind up, members have provided all services to which benefit accruals relate and, therefore, all corresponding contribution obligations necessary to fund all benefits have accrued. The use of the words "to the date of wind up" is a clear indication that the amounts covered by the deemed trust in section 57(4) include the wind up deficit. This conclusion is further reinforced by section 58(1) of the *PBA* which provides that employer contributions accrue on a daily basis. The combined effect of section 57(4) and section 58(1) requires that the words "employer contributions accrued **to the date of wind up**" be interpreted to so as to include all employer contributions necessary to fund all benefit accruals up to the very day of the wind up. The motion judge accepted this proposition:

> "The deemed trust provision of s. 57(4) requires the employer to accrue 'to the date of wind up but not yet due.' The wind up in this case is December 31, 2006. In my view the section contemplates the calculation to be made as of the date of wind-up of the amounts required to make up the deficiency. If, as here, the regulator permits that deficiency to be made up over a period of years, the amount of the yearly payments does not become due until it is required to be paid. It is 'payable annually in advance'."

Indalex Ltd. (Re), [2010] O.J. No. 974; Reasons for Decision of Justice Campbell, dated February 18, 2010, at paragraph 34. *Superintendent's Authorities Tab 7*

b. The opening words of section 57(4) are “where a pension plan is wound up in whole or in part.” These words also appear in the opening words of section 75(1) and, therefore, apply to both 75(1)(a) and 75(1)(b). Thus the precondition to the operation of section 57(4) is the same as the precondition to the operation of all of section 75(1) including section 75(1)(b) relating to the requirement to make contributions in respect of the wind up deficit. The parallels between the two sections supports an interpretation which recognizes that the amounts contemplated in the two sections are equal in scope.

59. Further, if the Legislature intended that the deemed trust wind up provision in section 57(4) be restricted to amounts determined in section 75(1)(a) as opposed to all of section 75, it could have said so in the *PBA*. This is not what the Legislature has done. The language in section 57(4) has no such restriction. Section 57(4) encompasses all amounts accrued “to the date of wind up” which, based on the above reasoning, must necessarily include the entire wind up deficit under section 75(1)(b).

Previous Caselaw

60. In coming to the conclusion that the deemed trust in section 57(4) does not extend to the wind up deficit, the motions judge relied heavily on the decision of Farley J. in *Toronto Dominion Bank v Usarco Ltd*. (“*Usarco*”) where Farley J. determined that the scope of section 58(4) (now section 57(4)) was limited to regular and special payments that should have been made but were not together with any

63. Further, Farley J. does cite the *Albright* decision of the Supreme Court of Canada and notes that there is a distinction as between the terms “due” and “accrued”. However, as with the decision of the motions judge, the ultimate disposition of the matter in *Usarco* does not acknowledge this distinction. In holding that the deemed trust in section 57(4) is limited to missed contributions and those contributions that were due to the date of wind up, section 57(4) was misconstrued. The holding in *Usarco* would have been consistent with the wording of section 57(4) if section 57(4) read so as to limit its scope to employer contributions **due** to the date of the wind up but not paid into the pension fund (emphasis added) (i.e.: in the words used in *Usarco* “any regular or special payments that were scheduled to have been made by the wind-up date but were not made”). Section 57(4) does not say this and the decision in *Usarco* (as with the decision of the motion judge) effectively reads out the concept of an employer contribution which “is accrued but not yet due”.

Toronto Dominion Bank v Usarco Ltd., 42 E.T.R. 235
Superintendent’s Authorities Tab 11

64. *Usarco* contains a candid admission that the *PBA* and regulations are technical legislation “which are not designed for persons not actively working in the field to tread with any comfort”. The result in *Usarco* should be evaluated with this caveat in mind and this Court should review the result in *Usarco* in light of a fuller understanding of the scheme of the *PBA* and the nature of special payments in respect of a wind up deficit as set out above.

Toronto Dominion Bank v Usarco Ltd., 42 E.T.R. 235
Superintendent’s Authorities Tab 11

65. It is interesting to note that in two cases decided after *Usarco*, Farley J. himself came to a different conclusion concerning the scope of the deemed trust under the *PBA* and the meaning of the concept of an accrued obligation. In *Ivaco Inc. (Re*), Farley J. stated that the deemed trust was "on account of unpaid contributions and wind up liabilities".

Ivaco Inc. (Re), [2005] O.J. No. 3337, 47 C.C.P.B. 62 at paragraph 11.
Superintendent's Authorities Tab 12

66. Further, in *Stelco Inc (Re)*, Farley J. was required to consider whether or not the *CCAA* applicant in that case was insolvent and, therefore, was entitled to protection under the *CCAA*. In doing so, the Court was required to consider the definition of "insolvent person" in the *Bankruptcy and Insolvency Act* which includes a condition that the person's assets are insufficient "to enable payment of all his obligations, **due and accruing due**" (emphasis added). In considering this definition, Farley J. made the following observation:

> "Again, I would refer to my conclusion above that every obligation of the corporation in the hypothetical or notional sale must be treated as "accruing due" to avoid orphan obligations. In that context, it matters not that a wind-up pension liability may be discharged over 15 years; in a test (c) situation, it is crystallized on the date of the test."

Stelco Inc (Re), [2004] O.J. No. 1257, 48 C.B.R. (4th) 299 at paragraph 59.
Superintendent's Authorities Tab 13

67. Accordingly, in *Stelco*, Farley J. correctly identified the fact that a pension wind up liability is a "crystallized" obligation even though it may be paid over a period of years and, as such, falls within the scope of the arguably more narrow concept of "accruing due".

68. This Court did consider, in passing, the differing views of Farley J. in the appeal in *Ivaco*. The Court expressed preference for Farley J.'s holding in *Usarco* but the Court was clear that the issue was not one which required resolution to dispose of the appeal. As such, the Court in *Ivaco* did not have the benefit of full argument on the issue from the parties.

69. Given the differing views expressed in various decisions, the Superintendent submits that this Court should carefully consider the issue of the scope of section 57(4) in light of the scheme and objects of the *PBA* rather than placing undue reliance on conflicting past authority especially when it appears that that authority is not reconcilable. As argued above, the scheme and objects of the *PBA* combined with a correct understanding concerning the nature of special payments compels a result that section 57(4) should be interpreted to encompass the whole of the wind up deficit.

PART IV – ADDITIONAL ISSUES OF THE SUPERINTENDENT

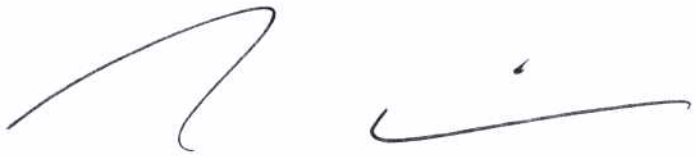
70. The Superintendent does not raise any issues in addition to the issues raised by the Appellants.

PART V – ORDER REQUESTED

71. In respect of the relief requested by the Retirees at paragraph 72 of the Retirees Factum, the Superintendent supports the relief requested in subparagraphs 72(a) to (c).

72. In respect of the relief requested by the USW at paragraph 98 of the USW's Factum, the Superintendent supports the relief requested in subparagraphs 98(a) to (d) and does not support the relief requested in subparagraph 98(e) to the extent that it requires the payment of costs from the pension fund for the Salaried Plan.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of September, 2010.



Mark Bailey

Court of Appeal File No. M38599
Court of Appeal File No. M38582
Superior Court File No. CV-09-8122-00CL

COURT OF APPEAL FOR ONTARIO

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

CERTIFICATE
(Pursuant to *Rule* 61.12(3)(f))

I, Mark Bailey, Counsel for the Respondent, the Superintendent of Financial Services, certify as follows:

1. An Order under subrule 61.09(2) (original record and exhibits) is not required.

2. I estimate that I will require 45 minutes for oral argument on this appeal, not including reply.

Dated at Toronto, Ontario, this 8th day of September, 2010.

Mark Bailey

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42
2. *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services),* 2004 SCC 54, [2004] 3 S.C.R. 152.
3. *Bourdon v. Stelco Inc*., 2005 SCC 64, [2005] 3 S.C.R. 279
4. *Buschau v. Rogers Communications Inc*., 2006 SCC 28, [2006] 1 S.C.R. 973
5. Garner, Brian A. editor, *Black's Law Dictionary*, 9th ed. (West Group 2009)
6. *Ontario (Hydro Electric Power Commission) v. Albright* (1922), 64 S.C.R. 306
7. *Indalex Ltd. (Re),* [2010] O.J. No. 974
8. *Fraser Papers Inc. (Re)* (2009), 55 C.B.R. (5th) 217, [2009] O.J. No. 3188
9. *AbitibiBowater Inc.(Re)* (2009), 74 C.C.P.B. 254
10. *Collins & Aikman Automotive Canada Inc.* (Re), [2007] O.J. No. 4186, 37 C.B.R. (5th) 282
11. *Toronto Dominion Bank v Usarco Ltd*., 42 E.T.R. 235
12. *Ivaco Inc. (Re),* [2005] O.J. No. 3337, 47 C.C.P.B. 62
13. *Ivaco Inc. (Re),* [2006] O.J. No. 3337, 56 C.C.P.B. 1
14. *Stelco Inc (Re)*, [2004] O.J. No. 1257, 48 C.B.R. (4th) 299

SCHEDULE "B"
RELEVANT STATUTES

Pension Benefits Act, R.S.O. 1990, c. P.8. s. 14

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.

Application of subs. (1)

(2) Subsection (1) does not apply in respect of a multi-employer pension plan established pursuant to a collective agreement or a trust agreement.

Idem

(3) Subsection (1) does not apply in respect of a pension plan that provides defined benefits if the obligation of the employer to contribute to the pension fund is limited to a fixed amount set out in a collective agreement. R.S.O. 1990, c. P.8, s. 14.

Pension Benefits Act, R.S.O. 1990, c. P.8. s. 55

Funding

55. (1) A pension plan is not eligible for registration unless it provides for funding sufficient to provide the pension benefits, ancillary benefits and other benefits under the pension plan in accordance with this Act and the regulations. R.S.O. 1990, c. P.8, s. 55 (1).

Payment by employers, etc.

(2) An employer required to make contributions under a pension plan, or a person or entity required to make contributions under a pension plan on behalf of an employer, shall make the contributions in accordance with the prescribed requirements for funding and shall make the contributions in the prescribed manner and at the prescribed times,

(a) to the pension fund; or

(b) if pension benefits under the pension plan are paid by an insurance company, to the insurance company that is the administrator of the pension plan. R.S.O. 1990, c. P.8, s. 55 (2); 2005, c. 31, Sched. 18, s. 6 (1).

Payment by members

(3) Members of a pension plan that provides contributory benefits shall make the contributions required under the plan in the prescribed manner and at the prescribed times. 2005, c. 31, Sched. 18, s. 6 (2).

Same, jointly sponsored pension plans

(4) Members of a jointly sponsored pension plan shall make the contributions required under the plan, including contributions in respect of any going concern unfunded liability and solvency deficiency, in accordance with the prescribed requirements for funding and shall make the contributions in the prescribed manner and at the prescribed times. 2005, c. 31, Sched. 18, s. 6 (3).

Pension Benefits Act, R.S.O. 1990, c. P.8. s. 55

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.

Pension Benefits Act, R.S.O. 1990, c. P.8. s. 58

Accrual

58.(1)Money that an employer is required to pay into a pension fund accrues on a daily basis.

Interest

(2)Interest on contributions shall be calculated and credited at a rate not less than the prescribed rates and in accordance with prescribed requirements. R.S.O. 1990, c. P.8, s. 58.

Pension Benefits Act, R.S.O. 1990, c. P.8. s. 75

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.

Pension Benefits Act, Regulation 909, R.R.O. 1990, s.4 - 5

4. (1) Every pension plan shall set out the obligation of the employer or any person or entity required to make contributions on behalf of the employer and, in the case of a jointly sponsored pension plan, the obligation of the members of the pension plan, if applicable, to contribute both in respect of the normal cost and any going concern unfunded liability and solvency deficiency under the plan. O. Reg. 116/06, s. 4 (1).

(2) Subject to subsection (2.1), an employer who is required to make contributions under a pension plan or, if a person or entity is required to make contributions under the pension plan on behalf of the employer, that person or entity and, if applicable, the members of the pension plan or their representative shall make payments to the pension fund or to an insurance company, as applicable, that are not less than the sum of,

(a) all contributions, including contributions in respect of any going concern unfunded liability and solvency deficiency and money withheld by payroll deduction or otherwise from an employee, that are received from employees as the employees' contributions to the pension plan;
(b) all contributions required to pay the normal cost;
(c) all special payments determined in accordance with section 5;
(c.1) all special payments determined in accordance with section 5.6; and
(d) all special payments determined in accordance with sections 31, 32 and 35 and all payments determined in accordance with section 31.1. O. Reg.

712/92, s. 3 (2); O. Reg. 73/95, s. 2 (1); O. Reg. 116/06, s. 4 (2-4); O. Reg. 239/09, s. 2.

(2.1) Despite subsection (2), an employer required to make contributions under a designated plan shall not be required to make a payment to the pension fund or to an insurance company, as applicable, that is not an eligible contribution. O. Reg. 73/95, s. 2 (2).

(2.2) Despite subsections (1) and (2), the amount of contributions required to be made to a pension plan that provides defined benefits may be determined by using an actuarial cost method other than a benefit allocation method if,

(a) the actuarial cost method that is used is consistent with accepted actuarial practice; and
(b) the rules set out in subsection (2.3) are satisfied. O. Reg. 116/06, s. 4 (5).

(2.3) For the purposes of clause (2.2) (b), the rules are as follows:

1. If the valuation date of a report filed under section 3, 13 or 14 is before December 31, 2006 and, at the valuation date, the amount determined under clause (a) of the definition of “going concern assets” in subsection 1 (2) is not less than the going concern liabilities determined using a benefit allocation method, the present value of the required contributions for the three-year period referred to in paragraph 1.1 must not be less than the present value of the contributions for that period that would be made in respect of the normal cost for the plan if the benefit allocation method were used, after the application of any actuarial gains to reduce the normal cost in accordance with subsection 7 (3).

1.1 The three-year period referred to in paragraph 1 must begin,

i. in the case of a pension plan that is not a jointly sponsored pension plan, on the valuation date, or

ii. in the case of a jointly sponsored pension plan, on a date not later than 12 months after the valuation date or, in the case of an inter-valuation report described in section 5.5, not later than January 1, 2007.

1.2. If the valuation date of a report filed under section 3, 13 or 14 is on or after December 31, 2006 and, at the valuation date, the amount determined under clause (a) of the definition of “going concern assets” in subsection 1 (2) is not less than the going concern liabilities determined using a benefit allocation method, the present value of the required contributions for the five-year period referred to in paragraph 1.3 must not be less than the present value of the contributions for that period that would be made in respect of the normal cost for

the plan if the benefit allocation method were used, after the application of any actuarial gains to reduce the normal cost in accordance with subsection 7 (3).

1.3 The five-year period referred to in paragraph 1.2 must begin,

i. in the case of a pension plan that is not a jointly sponsored pension plan, on the valuation date, or

ii. in the case of a jointly sponsored pension plan, on a date not later than 12 months after the valuation date.

2. If, at the valuation date of a report filed under section 3, 13 or 14, the amount determined under clause (a) of the definition of “going concern assets” in subsection 1 (2) is less than the going concern liabilities determined using a benefit allocation method, the present value of the required contributions, which are determined under the actuarial cost method used by the plan, must not be less than the sum of the present value of the normal cost and the present value of the special payments determined in accordance with section 5 that would be required to liquidate any going concern unfunded liability determined using the benefit allocation method.

2.1 The present values referred to in paragraphs 1, 1.2 and 2 shall be determined without reference to paragraphs 7 and 10 and without reference to subsections (2.7) and (2.7.1).

3. The rate or rates of interest to be used in calculating present values referred to in paragraphs 1, 1.2 and 2 shall be the rate or rates used in the report for the going concern valuation.

3.1 For the purposes of paragraphs 1, 1.2 and 2, the going concern valuation prepared using the benefit allocation method shall use the same rate or rates of interest as those used in the going concern valuation prepared using the actuarial cost method used by the plan.

4. In the case of a pension plan that is not a jointly sponsored pension plan, the present values referred to in paragraph 2 shall be calculated using whichever of the following periods is longer:

i. The period that begins on the valuation date and continues until the end of the remaining amortization period of the going concern unfunded liability that has the longest remaining amortization period.

Ii. The period of five years that begins on the valuation date.

4.1 In the case of a jointly sponsored pension plan, the present values referred to in paragraph 2 shall be calculated using whichever of the following periods is longer:

i. The period that begins on a date not later than 12 months after the valuation date or, in the case of an inter-valuation report described in section 5.5, not later than January 1, 2007, and continues until the end of the remaining amortization period of the going concern unfunded liability that has the longest remaining amortization period.

ii. The period of five years that begins on a date not later than 12 months after the valuation date or, in the case of an inter-valuation report described in section 5.5, not later than January 1, 2007.

5. In the case of a jointly sponsored pension plan,

i. the present values referred to in paragraph 1 shall be calculated based on the sum of the projected pensionable earnings for each year in the three-year period referred to in that paragraph,

ii. the present values referred to in paragraph 1.2 shall be calculated based on the sum of the projected pensionable earnings for each year in the five-year period referred to in that paragraph,

iii. the present values referred to in paragraph 2 shall be calculated based on the period used for the purposes of paragraph 4.1 and the sum of the projected pensionable earnings for each year in that period, and

iv. the actuarial assumptions used to determine the sums referred to in subparagraphs i, ii and iii of the projected pensionable earnings shall be consistent with those used in the report for the going concern valuation based on the benefit allocation method.

6. Subject to paragraph 7, the required contribution rate for a jointly sponsored pension plan shall be determined as a level percentage of pensionable earnings for each class of members, subject to any variation that is necessary in order to take into account integration with the Canada Pension Plan or the Quebec Pension Plan.

7. If the required contribution rate set out in a report filed under section 3 or 14 in respect of a jointly sponsored pension plan is higher than the required contribution rate determined in the last report filed under section 3, 13 or 14, the required contribution rate may be increased each year for up to three years, commencing not later than 12 months after the valuation date, by at least one third of the difference between the two contribution rates, but only if,

i. the contribution rate after that period is a level percentage of pensionable earnings, subject to any variation that is necessary in order to take into account integration with the Canada Pension Plan or the Quebec Pension Plan, and

ii. the present value of the required contributions using the increased rates is not less than,

A. the present value of the contributions that would be made in respect of the normal cost for the plan if the benefit allocation method were used, after the application of any actuarial gains to reduce the normal cost in accordance with subsection 7 (3), if paragraph 1 or 1.2 applies, or

B. the sum of the present value of the normal cost and the present value of the special payments determined in accordance with section 5 that would be required to liquidate any going concern unfunded liability determined using the benefit allocation method, if paragraph 2 applies.

8. For the purposes of paragraph 7, the determination of whether the required contribution rate set out in the report is higher than the required contribution rate determined in the last filed report shall be made without taking into account the ability to increase required contribution rates each year for up to three years under that paragraph, and without taking into account the ability to carry forward amounts under paragraph 10 to reduce those increases.

9. The present values referred to in subparagraph 7 ii shall be calculated using the same period as was used to calculate the present values referred to in paragraph 1, 1.2 or 2, whichever is applicable.

10. If paragraph 7 permits the required contribution rate to be increased each year for up to three years and the amount of any increase in the first or second year exceeds one third of the difference between the required contribution rate set out in the report and the required contribution rate determined in the last filed report, the excess may be carried forward to the following year or years and used to reduce the increases in the following year or years, as long as the present value of the required contributions using the increased rates, as adjusted, is not less than the present value referred to in sub-subparagraph 7 ii A or B, whichever is applicable. O. Reg. 116/06, s. 4 (5); O. Reg. 570/06, s. 2 (1-10).

(2.4) If, in accordance with subsection (2.2), the amount of contributions required to be made to a pension plan that provides defined benefits is determined by using an actuarial cost method other than a benefit allocation method, the payments to the

pension fund or to an insurance company, as applicable, shall not be less than the sum of,

(a) the required contributions determined using the actuarial cost method; and

(b) all special payments determined in accordance with section 5 with respect to any solvency deficiency. O. Reg. 116/06, s. 4 (5).

(2.5) If the amount of contributions required to be made to a pension plan that provides defined benefits is determined in accordance with subsection (2.2) using an actuarial cost method other than a benefit allocation method, the contributions shall be deemed to be the contributions required to be made under this Regulation and the definitions in section 1 shall apply with necessary modifications. O. Reg. 116/06, s. 4 (5).

(2.6) If a report filed under section 3 or 14 discloses, in respect of a jointly sponsored pension plan for which a benefit allocation method is used to set contribution rates, that an increase in the normal cost is required or that an increase is required in the amount of contributions that were previously reduced under subsection 7 (3), payment of that increase shall commence on a date not later than 12 months after the valuation date. O. Reg. 570/06, s. 2 (11).

(2.7) If a report filed under section 3 or 14 discloses that there is a going concern unfunded liability that is required to be liquidated in respect of a jointly sponsored pension plan for which a benefit allocation method is used to set the contribution rates, the special payments in respect of the going concern unfunded liability, as determined in accordance with subsection 5 (1.2), may be increased each year for up to three years, commencing not later than 12 months after the valuation date or, in the case of an inter-valuation report described in section 5.5, not later than January 1, 2007, by at least one third of the special payments, but only if,

(a) the special payments after that period are a level percentage of pensionable earnings for each class of members, subject to any variation that is necessary in order to take into account integration with the Canada Pension Plan or the Quebec Pension Plan; and

(b) the present value of the special payments, including the increased special payments, over the amortization period is not less than the amount of the going concern unfunded liability. O. Reg. 570/06, s. 2 (12).

(2.7.1) If subsection (2.7) permits the special payments in respect of the going concern unfunded liability, as determined in accordance with subsection 5 (1.2), to be increased each year for up to three years, and the amount of any increase in the first or second year exceeds one third of the special payments, the excess may be carried forward to the following year or years and used to reduce the increases in the following year or years, as long as the present value of the special payments, including the

increased special payments, as adjusted, over the amortization period is not less than the amount of the going concern unfunded liability. O. Reg. 570/06, s. 2 (13).

(2.8) In the case of a jointly sponsored pension plan, contributions referred to in subsection 39 (3) of the Act include contributions made by a former member in respect of any going concern unfunded liability or solvency deficiency. O. Reg. 116/06, s. 4 (5).

(3) Where there is a prior year credit balance, the employer may apply the prior year credit balance to reduce the payments required under clauses (2) (b), (c) and (d). O. Reg. 712/92, s. 3 (1).

(3.1) Subsection (3) does not apply if the pension plan provides defined benefits and a benefit allocation method is not used to set contribution rates. O. Reg. 116/06, s. 4 (6).

(4) The payments referred to in subsections (2) and (2.4) shall be made by the employer or, if a person or entity is required to make contributions on behalf of the employer, by that person or entity and, if applicable, by the members of the pension plan within the following time limits:

1. All sums received by the employer from an employee, including money withheld by payroll deduction or otherwise from the employee, as the employee's contribution to the pension plan, within thirty days following the month in which the sum was received or deducted.
2. Revoked: O. Reg. 116/06, s. 4 (8).
3. In the case of a pension plan that provides defined benefits, employer contributions in respect of the normal costs reported under clause 13 (1) (a) or 14 (7) (a) for each period covered by a report beginning on or after the 1st day of January, 1988, in monthly instalments within thirty days after the month for which contributions are payable, the amount of the instalments to be either a total fixed dollar amount, a fixed dollar amount for each employee or member of the plan or a fixed percentage either of the portion of the payroll related to members of the plan or of employee contributions.

3.1 Where all the pension benefits provided under the plan are defined contribution benefits, employer contributions for the plan's fiscal year, in monthly instalments within 30 days after the month for which contributions are payable, the amount of the instalments to be either a total fixed dollar amount, a fixed dollar amount for each employee or member of the plan or a fixed percentage either of the portion of the payroll related to members of the plan or of employee contributions.

4. Revoked: O. Reg. 116/06, s. 4 (8).

5. All special payments determined in accordance with section 5, subsection 31 (5) and subsection 35 (5), other than a payment made under paragraph 4, in equal monthly instalments in accordance with the times for payment set out in sections 5, 31 and 35.

6. All special payments determined in accordance with subsections 31 (1) and (2), section 32 and subsection 35 (3), by annual instalment in accordance with the times for payment set out in sections 31, 32 and 35. O. Reg. 712/92, s. 3 (1); O. Reg. 386/04, s. 1; O. Reg. 116/06, s. 4 (7).

(5) Subject to subsections (10) and (11), if the period covered by a report filed under section 3, 5.3, 13 or 14 or submitted under this section has ended, and no report covering a subsequent period is filed under section 14 or submitted under this section, the employer or, if a person or entity is required to make contributions on behalf of the employer, that person or entity and, if applicable, the members of the pension plan shall continue to make payments in accordance with the report most recently filed or submitted under section 3, 5.3, 13 or 14 or this section. O. Reg. 116/06, s. 4 (9).

(6) The Superintendent may cause a report on a plan to be prepared where,
(a) a report required under section 3, 13 or 14 on the plan has not been filed within one year after the time required by this Regulation; and
(b) the Superintendent is of the opinion that the preparation of a report in accordance with subsection (7) is necessary to ensure that the plan is sufficiently funded to provide the benefits under the plan. O. Reg. 712/92, s. 3 (2); O. Reg. 307/98, s. 2 (1); O. Reg. 144/00, s. 4 (1).

(7) A report under subsection (6) must contain the information required by section 3, 13 or 14, whichever applies. O. Reg. 144/00, s. 4 (2).

(7.1) A report under subsection (6) must be prepared by an actuary chosen by the Superintendent and must be submitted by the actuary to the Superintendent. O. Reg. 144/00, s. 4 (2).

(8) If, during the preparation of a report on a plan, under this section, the Superintendent forms the opinion that the report is no longer necessary to ensure that the plan is sufficiently funded to provide the benefits under the plan, the Superintendent may cause work on the report to cease and the actuary need not submit the report to the Superintendent. O. Reg. 712/92, s. 3 (2); O. Reg. 307/98, s. 2 (3).

(9) If a report is submitted to the Superintendent under subsection (7.1), the employer or, if another person or entity is required to make contributions on behalf of the employer, that person or entity and, if applicable, the members of the pension plan shall make payments in accordance with the report. O. Reg. 116/06, s. 4 (10).

(10) Except as provided in subsection (11), if a payment requirement set out in a report submitted under subsection (7.1) concerning a plan differs from a payment requirement set out in a report filed by the administrator, the employer or, if another person or entity is required to make contributions on behalf of the employer, that person or entity and, if applicable, the members of the pension plan shall make payments in accordance with the higher requirement. O. Reg. 116/06, s. 4 (10).

(11) If, in the opinion of the Superintendent, a payment in accordance with the higher requirement under subsection (10) is not necessary to ensure that the plan is sufficiently funded to provide benefits under the plan, the payments shall be made in accordance with the lower requirement. O. Reg. 116/06, s. 4 (10).

(12) Revoked: O. Reg. 144/00, s. 4 (3).

(13) This section does not apply to a pension plan described in subsection 6 (1) unless it is a jointly sponsored pension plan. O. Reg. 116/06, s. 4 (11).

SPECIAL PAYMENTS — GENERAL

5. (1) Except as otherwise provided in this section and in sections 4, 5.1 and 7, the special payments required to be made after the initial valuation date under clause 4 (2) (c) shall be not less than the sum of,

(a) any special payments remaining to be paid with respect to any initial unfunded liability or experience deficiency within the meaning of Regulation 746 of the Revised Regulations of Ontario, 1980 as it read on the 31st day of December, 1987, after reducing the sum of the initial unfunded liability and experience deficiency by the amount of any unused actuarial gains existing on the 31st day of December, 1987;

(b) with respect to any going concern unfunded liability not covered by clause (a), the special payments required to liquidate the liability, with interest at the going concern valuation interest rate, by equal monthly instalments over a period of fifteen years beginning on the valuation date of the report in which the going concern unfunded liability was determined;

(c) with respect to each solvency deficiency redetermined under subsection (3), the special payments required to liquidate the redetermined solvency deficiency, with interest at the rates used in calculating the solvency liabilities in the first report filed or submitted under section 3, 4 or 14 with a valuation date after the Regulation date, by equal monthly instalments over the period beginning on the valuation date of the report in which the solvency deficiency was determined and ending on the 31st day of December, 2002;

(d) with respect to each solvency deficiency arising before the Regulation date that is not redetermined under subsection (3), the special payments required to liquidate the solvency deficiency, with interest at the rates described in subsection (2), by equal monthly instalments over the period beginning on the valuation date of the report in which the solvency deficiency was determined and ending on the 31st day of December, 2002 or an earlier date; and

(e) with respect to any solvency deficiency arising on or after the Regulation date, the special payments required to liquidate the solvency deficiency, with interest at the rates described in subsection (2), by equal monthly instalments over the period beginning on the valuation date of the report in which the solvency deficiency was determined and ending on the 31st day of December, 2002, or five years, whichever is longer. O. Reg. 712/92, s. 4.

(1.1) Despite clauses (1) (b) and (e), in the case of a jointly sponsored pension plan, the special payments may be determined in accordance with subsection (1.2) as of,

(a) the date the going concern unfunded liability arose, for special payments referred to in clause (1) (b); or

(b) the date the solvency deficiency arose, for special payments referred to in clause (1) (e). O. Reg. 116/06, s. 5 (1).

(1.2) The special payments referred to in subsection (1.1) are determined under the following rules:

1. Each scheduled payment must be a level percentage of the sum of pensionable earnings of the members of the pension plan at the valuation date projected to the date when the scheduled payments commence and, after that date, projected annually until the end of the amortization period without reference to,

   i. changes in the membership of the plan that may occur after the valuation date and that arise from termination of employment or membership, the

retirement or death of members or the addition of new members to the plan, or

ii. any other changes in the membership of the plan that may occur after the valuation date.

1.1 Despite paragraph 1, if there is reason to believe that there will be a material decline in the number of members before the end of the amortization period, the sum in paragraph 1 of the projected pensionable earnings must reflect the expected decline in the sum of projected pensionable earnings.

2. The sum in paragraph 1 of the projected pensionable earnings must be determined based on actuarial assumptions that are consistent with those used to project pensionable earnings in the going concern valuation based on the benefit allocation method.

3. The present value of the scheduled payments at the date described in subsection (1.1) must be equal to the amount of the going concern unfunded liability or solvency deficiency being liquidated.

4. The amortization periods for each series of scheduled payments must be the same as the respective periods under clauses (1) (b) and (e), beginning not later than 12 months after the valuation date.

5. The present value of the scheduled payments must be determined,

i. with respect to any going concern unfunded liability, using the interest rate or rates used in the report to determine the going concern unfunded liability, and

ii. with respect to any solvency deficiency, using the interest rates used in the report to determine the solvency deficiency. O. Reg. 116/06, s. 5 (1); O. Reg. 570/06, s. 3.

(2) The rates of interest to be used in calculating the special payments under clauses (1) (d) and (e) with respect to a solvency deficiency are the rates used in the report under section 14 in which the solvency deficiency was determined for the applicable portions of the amortization period for the special payments. O. Reg. 712/92, s. 4.

(3) Except where the employer elects not to redetermine under subsection (8), every solvency deficiency determined in a report with a valuation date before the Regulation date shall be redetermined in accordance with this Regulation and the amount of the redetermined solvency deficiency shall be reported in a report filed in accordance with subsection (5). O. Reg. 712/92, s. 4.

(4) A determination under subsection 13 (1.1) or clause 14 (8) (a) that a solvency deficiency is zero is a determination of a solvency deficiency for the purposes of subsection (3). O. Reg. 712/92, s. 4.

(5) Except where the employer elects not to redetermine under subsection (8), the administrator shall file a report in accordance with subsections (6) and (7). O. Reg. 712/92, s. 4.

(6) The valuation date of the report referred to in subsection (5) shall be not later than the last day of the fiscal year of the plan in which the Regulation date falls and the report shall be filed within nine months of the valuation date. O. Reg. 712/92, s. 4.

(7) The report referred to subsection (5) shall set out,

(a) the information described in subsections 14 (7), (8) and (9);
(b) the amount of each redetermined solvency deficiency;
(c) the special payments, determined in accordance with clause 5 (1) (c), with respect to each redetermined solvency deficiency;
(d) the amount of the initial solvency balance; and
(e) the amount of the prior year credit balance. O. Reg. 712/92, s. 4.

(8) The employer for a plan may elect not to redetermine the solvency deficiencies arising before the Regulation date if the conditions of subsection (9) are met in relation to each of the following reports:

1. Reports in respect of the plan filed under sections 3, 13 and 14 with valuation dates on or after the lst day of January, 1988 but nine months before the Regulation date.
2. Reports required to be filed in respect of the plan under section 3 on or after the 1st day of July, 1988 but before the Regulation date.
3. Reports required to be filed in respect of the plan under section 13 on or after the 1st day of March, 1988 but before the Regulation date.
4. Reports required to be filed in respect of the plan under section 14 on or after the 1st day of October, 1988 but before the Regulation date. O. Reg. 712/92, s. 4.

(9) The following are the conditions that must be met in relation to the reports described in subsection (8):

1. The reports have all been filed.
2. The reports have all been prepared in accordance with the requirements of the Act and this Regulation in effect on the valuation date of the report.
3. All payments required by the reports to be made before the Regulation date have been made.
4. An actuary has signed a statement that the requirements of paragraph 2 have been met.

5. The administrator has signed a statement that the requirements of paragraphs 1 and 3 have been met. O. Reg. 712/92, s. 4.

(10) An employer who elects not to redetermine under subsection (8) may not rescind the election. O. Reg. 712/92, s. 4.

(11) Where an employer for a plan has elected not to redetermine under subsection (8), the administrator for the plan shall file, within nine months after the last day of the fiscal year of the plan in which the Regulation date falls, a report including,

(a) the statements described in paragraphs 4 and 5 of subsection (9);
(b) with respect to the special payments required under clause 5 (1) (d), the amount of the monthly instalments and the period over which they are to be paid;
(c) the amount of initial solvency balance at the Regulation date; and
(d) the amount of the prior year credit balance at the Regulation date. O. Reg. 712/92, s. 4.

(12) In this section,
"prepayments", in relation to a plan, means that part of the special payments that exceeded the special payments required under this Regulation as it read before the Regulation date and that were paid by the employer before the Regulation date with respect to the going concern unfunded liability but that were not applied by the employer before the Regulation date under subsection 12 (1) of this Regulation as it read before the Regulation date, but no special payments by the employer that were included in the calculation of the initial solvency balance of the plan shall be included in prepayments. O. Reg. 712/92, s. 4.

(13) For a plan established on or after the Regulation date, the prior year credit balance to be used in the report on the plan filed under section 13 shall be zero. O. Reg. 712/92, s. 4.

(14) For a plan in respect of which an administrator files a report under subsection (11), the prior year credit balance to be used in the subsection (11) report shall be an amount equal to the sum of any positive initial solvency balance for the plan and an amount equal to the prepayments for the plan. O. Reg. 712/92, s. 4.

(15) For a plan not referred to in subsection (13) or (14), the prior year credit balance to be used in the first report filed or submitted under any one of sections 3, 4 and 14 after the Regulation date shall be an amount equal to the sum of any positive initial solvency balance for the plan and an amount equal to the prepayments for the plan or, in the case of a plan with no positive initial solvency balance, an amount equal to the prepayments for the plan. O. Reg. 712/92, s. 4.

(16) Subject to subsections (13), (14), (15), (16.1) and 5.1 (5), the prior year credit balance to be used in any report or actuarial cost certificate required under this Regulation in respect of a plan is the amount calculated using the formula,

A + B – C

in which,

"A" is the prior year credit balance stated in the last report or actuarial cost certificate filed or submitted in respect of the plan under this Regulation,

"B" is the total amount of contributions made to the plan by an employer or by a person or entity required to make contributions under the plan on behalf of an employer,

(a) after the valuation date of the last report or actuarial cost certificate filed or submitted in respect of the plan under this Regulation, and

(b) before the valuation date for the report or actuarial cost certificate being prepared, and

"C" is the total amount of contributions that, under section 4, would be required to have been made during the period described in the definition of "B" by an employer or by a person or entity required to make contributions under the plan on behalf of an employer if the contributions had been calculated without reference to any prior year credit balance.

O. Reg. 239/09, s. 3.

(16.1) For a report filed under section 3 or 14 or submitted under section 4 that has a valuation date of December 31, 1998 or later, the prior year credit balance may be reduced to an amount that is,

(a) less than the amount otherwise determined in accordance with subsection (16); and

(b) not less than zero. O. Reg. 144/00, s. 5 (2).

(16.2) Despite subsections (13), (14), (15), (16) and (16.1), if a pension plan provides defined benefits and a benefit allocation method is not used to set the contribution rates, the prior year credit balance to be used in any report filed or submitted in respect of the pension plan shall be zero. O. Reg. 116/06, s. 5 (2).

(17) If, on any valuation date after the initial valuation date the sum of the solvency assets and the solvency asset adjustment exceeds the sum of the solvency liabilities, the solvency liability adjustment and the prior year credit balance (such excess being referred to in this subsection as the "solvency excess"), the special payments under clauses (1) (c), (d) and (e) with respect to solvency deficiencies arising

before the valuation date that are scheduled for payment after the valuation date shall be adjusted in accordance with the following rules:

1. Where the solvency excess is greater than or equal to the present value of the special payments under clauses (1) (c), (d) and (e), the special payments shall be reduced to zero.
2. Where the solvency excess is less than the present value of the special payments under clauses (1) (c), (d) and (e), the monthly rate of the special payments shall not be changed but the amortization period or periods for the special payments shall be reduced so as to reduce the solvency excess to zero. O. Reg. 712/92, s. 4; O. Reg. 116/06, s. 5 (3).

(18) If on the Regulation date a plan provides plant closure benefits or permanent layoff benefits, the employer may elect, by filing written notice with the Superintendent within the time set out in subsection (19), to exclude all plant closure benefits and permanent layoff benefits in calculating the solvency liabilities of the plan. O. Reg. 712/92, s. 4.

(19) An election under subsection (18) shall be made within the time set out in this Regulation for the filing of the first report on the plan after the Regulation date under section 3 or 14. O. Reg. 712/92, s. 4.

(20) At any time after an election is made under subsection (18), the employer may rescind the election by filing written notice. O. Reg. 712/92, s. 4.

(21) A rescission under subsection (20) is effective from the date on which the written notice is filed. O. Reg. 712/92, s. 4.

(22) An employer who has rescinded an election under subsection (18) shall not make any further election under subsection (18) in respect of the plan. O. Reg. 712/92, s. 4.

(23) Except where an employer elects not to redetermine under subsection (8) or files an initial special report under subsection 5.3 (1), the special payments required in the period beginning on the Regulation date and ending on the initial valuation date to amortize a going concern unfunded liability or solvency deficiency shall be not less than the special payments required under this Regulation as it read immediately before the Regulation date. O. Reg. 712/92, s. 4.

(24) Where an employer has elected not to redetermine under subsection (8), the special payments required in the period beginning on the Regulation date and ending on the initial valuation date with respect to each solvency deficiency determined in a report with a valuation date before the Regulation date shall be not less than the special payments required under clause 5 (1) (d). O. Reg. 712/92, s. 4.

(25) Nothing in this section relieves any person from making any payments required under this Regulation in respect of a negative initial solvency balance of a plan. O. Reg. 712/92, s. 4.

Pension Benefits Act, Regulation 909, R.R.O. 1990, s.14

14. (0.1) This section does not apply with respect to a pension plan where all the pension benefits provided under the plan are defined contribution benefits. O. Reg. 144/00, s. 9 (1).

(1) Subject to subsections (2) to (6.1), the administrator of a pension plan shall cause the plan to be reviewed and a report prepared and certified by a person authorized under section 15 at regular intervals, with the first valuation date not more than three years after the date of the establishment of the plan and with valuation dates at intervals of not more than three years thereafter. O. Reg. 712/92, s. 10; O. Reg. 73/95, s. 4 (1).

(2) For the purposes of subsection (3), a report indicates solvency concerns where,

(a) the ratio of the solvency assets to the solvency liabilities is less than 0.8;

(b) the solvency liabilities exceed the solvency assets by more than $5,000,000 and the ratio of the solvency assets to the solvency liabilities is less than 0.9; or

(c) the employer has elected under subsection 5 (18) to exclude plant closure benefits or permanent layoff benefits and this election has not been rescinded. O. Reg. 712/92, s. 10.

(3) Where a report filed under this section or submitted under section 4 indicates solvency concerns, the next report under this section in respect of the plan shall be prepared and certified with a valuation date within one year rather than the three year interval set out in subsection (1). O. Reg. 712/92, s. 10.

(4) Subsections (2) and (3) do not apply to a plan established for less than three years except where the plan is a successor plan as described in subsection 80 (2) or section 81 of the Act. O. Reg. 712/92, s. 10.

(4.1) Subsections (2) and (3) do not apply to a pension plan that is a designated plan. O. Reg. 73/95, s. 4 (2).

(5) Where an election has been made under subsection 5.1 (1) or (2) with respect to a plan and the employer files an initial special report within the time set out in subsection 5.3 (1), the administrator of the plan shall cause the plan to be reviewed and a report prepared and certified by an actuary with a valuation date not more than one year after the valuation date of the initial special report and thereafter with valuation dates at intervals of not more than one year. O. Reg. 712/92, s. 10.

(6) Where an election has been made under subsection 5.1 (1) or (2) with respect to a plan and the employer does not file an initial special report within the time set out in subsection 5.3 (1), the administrator of the plan shall cause the plan to be reviewed and a report prepared and certified by an actuary with a valuation date not more than one year after the date on which the election is made under subsection 5.1 (1) or (2) and with valuation dates at intervals of not more than one year thereafter. O. Reg. 712/92, s. 10.

(6.1) Where a pension plan ceases to be a designated plan, the administrator of the plan shall cause the plan to be reviewed and a report prepared and certified by an actuary with a valuation date no later than the end of the fiscal year of the plan in which the plan ceased to be a designated plan. O. Reg. 73/95, s. 4 (2).

(7) Each report under this section shall set out, on the basis of a going concern valuation,

(a) the normal cost in the year following the valuation date of the report and the rule for computing the cost in subsequent years up to the valuation date of the next report;

(b) an estimate of the normal cost in the subsequent years up to the valuation date of the next report;

(c) the estimated aggregate employee contributions to the pension plan during the year following the valuation date of the report and the subsequent years up to the valuation date of the next report;

(c.1) the special payments remaining to be paid after the valuation date with respect to the going concern unfunded liability determined in any of the previously filed reports;

(c.2) if there is a going concern unfunded liability in the report, the amount of the going concern unfunded liability and the special payments required to liquidate it in accordance with section 5;

(c.3) despite clause (c.2), in the case of a specified Ontario multi-employer pension plan, if there is a going concern unfunded liability in the report, the amount of the going concern unfunded liability and the special payments required to liquidate it in accordance with section 6.0.4;

(d) the present value of future special payments remaining to be paid after the valuation date and established in certificates appended to previous reports;

(e) where the plan provides for an escalated adjustment, whether and to what extent,

(i) liability for the future cost of the adjustment has been included in the determination of any going concern unfunded liability, or

(ii) the cost for the escalated adjustment is included in the normal cost; and

(f) the actuarial gain or actuarial loss in the plan and,

(i) where there is an actuarial loss, the special payments that will liquidate any increase in a going concern unfunded liability resulting from the loss over a term not exceeding fifteen years, and

(ii) where there is an actuarial gain, any intended application of the gain in accordance with section 7. O. Reg. 712/92, s. 10; O. Reg. 570/06, s. 4 (1); O. Reg. 489/07, s. 3.

(8) Each report under this section shall also set out, on the basis of a solvency valuation,

(a) whether there is a solvency deficiency;

(b) the special payments remaining to be paid after the valuation date with respect to the solvency deficiency determined in any of the previously filed reports;

(b.1) if there is a solvency deficiency in the report, the amount of the solvency deficiency and the special payments required to liquidate it in accordance with section 5;

(c) the liabilities referred to in clauses (a) to (h) of the definition of “solvency liabilities” that are being excluded from the calculation of the solvency liabilities;

(d) whether there is a Guarantee Fund assessment required to be paid under section 37;

(e) if a Guarantee Fund assessment is required to be paid, the PBGF assessment base;

(e.1) if a Guarantee Fund assessment is required to be paid and if the PBGF assessment base is greater than zero, the PBGF liabilities and, if applicable, the amount described in subclause 37 (4) (a) (ii);

(f) whether the transfer ratio is less than one; and

(g) if the transfer ratio is less than one, the transfer ratio. O. Reg. 712/92, s. 10; O. Reg. 144/00, s. 9 (2, 3); O. Reg. 489/07, s. 4.

(8.1) A report prepared under subsection (1) in which a benefit allocation method was not used to set contribution rates must,

(a) if the plan is not a jointly sponsored pension plan, set out the contribution rate or rates that are required under the pension plan;

(a.1) if the plan is a jointly sponsored pension plan, set out the required contribution rate or rates that are determined in accordance with paragraph 6 of subsection 4 (2.3) and, if applicable, the required contribution rates that are determined in accordance with paragraph 7 or 10 of that subsection;

(b) identify the normal cost or the equivalent of normal cost determined using the actuarial cost method adopted by the pension plan; and

(c) include the information required under subsection (7) determined using a benefit allocation method and the information required under subsection (8). O. Reg. 116/06, s. 13; O. Reg. 570/06, s. 4 (2).

(9) Each report under this section shall also set out the prior year credit balance on the valuation date of the report. O. Reg. 712/92, s. 10.

(9.1) Each report under this section for a designated plan shall contain a maximum funding valuation. O. Reg. 73/95, s. 4 (2).

(10) The administrator shall file each report required under this section within nine months of the valuation date. O. Reg. 712/92, s. 10.

(11) Despite subsection (10), the administrator may file the first report for which the valuation date is on or after September 30, 2008 and before November 1, 2008 up to 10 months after the valuation date. O. Reg. 239/09, s. 7.

Pension Benefits Act, Regulation 909, R.R.O. 1990, s.30

30. (1) This section applies to a pension plan that provides defined benefits guaranteed in whole or in part by the Guarantee Fund. O. Reg. 570/06, s. 6 (2).

(2) A wind up report for a pension plan shall be prepared by,

(a) determining the value of any additional voluntary contributions, including interest on such contributions, and providing for the immediate payment from the pension fund to each member of the additional voluntary contributions made by the member plus interest;

(b) determining the liabilities for the commuted value of all benefits in respect of each member and former member under the plan including,

(i) accrued benefits for members not yet vested under the terms of the plan,

(ii) escalated adjustments that have been made before the effective date of the wind up,

(iii) plant closure benefits payable on plan wind up,

(iv) permanent layoff benefits payable on plan wind up,

(v) funded consent benefits,

(v.1) benefit enhancements resulting from the application of section 74 of the Act, and

(vi) funded special allowances,

but not including the value of,

(vii) amounts determined under clause (a),

(viii) escalated adjustments that have not been made as of the effective date of the wind up,

(ix) Revoked: O. Reg. 570/06, s. 6 (4).

(x) prospective benefit increases, and

(xi) benefits provided under a guaranteed annuity contract or a contract issued under the *Government Annuities Act* (Canada) if the contract was issued before the 1st day of January, 1988;

(c) increasing the liabilities determined under clause (b) in respect of each member or former member so that the liabilities in respect of the member or former member are not less than the minimum value of the required contributions made by the member or former member to the plan;

(d) allocating the liabilities determined under clauses (b) and (c) among,

(i) employment in Ontario,

(ii) employment in each designated province, and employment for which pension benefits are provided in a plan registered under the *Pension Benefits Standards Act, 1985* (Canada), and

(iii) employment other than employment referred to in subclauses (i) and (ii);

(e) determining the difference between the solvency assets and the value of any additional voluntary contributions determined under clause (a), and allocating the difference among the categories of employment set out in clause (d) in proportion to the liabilities allocated under clause (d) to each of the categories;

(f) determining the Ontario wind up liability;

(g) if the Ontario assets exceed the Ontario wind up liability, first applying the Ontario assets to provide for the Ontario wind up liability and then applying any remaining Ontario assets to provide, on an equitable basis determined by the person preparing the report and acceptable to the Superintendent, for those benefits included in calculating the basic Ontario liabilities but not included in calculating the Ontario wind up liability;

(h) dealing with the portion of the plan assets allocated for the provision of benefits resulting from employment in each designated province in accordance with the laws of the province;

(i) dealing with the portion of the plan assets allocated for the provision of pension benefits provided in a plan registered under the *Pension Benefits Standards Act, 1985* (Canada) in accordance with that Act; and

(j) dealing on an equitable basis with the portion of plan assets allocated for the provision of benefits from any other employment. O. Reg. 712/92, s. 18; O. Reg. 570/06, s. 6 (3, 4).

(3) A wind up report shall describe everything done under subsection (2). O. Reg. 712/92, s. 18.

(4) This section as it read immediately before the Regulation date continues to apply with respect to a pension plan with an effective date of wind up before the Regulation date. O. Reg. 712/92, s. 18.

Pension Benefits Act, Regulation 909, R.R.O. 1990, s.31

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.

Pension Benefits Act, Regulation 909, R.R.O. 1990, s. 32

32. (1) Until the employer's liability under section 75 of the Act is funded, the administrator of the plan shall annually cause the plan to be reviewed and a report to be prepared by a person authorized by section 15 and shall file the report within six months after the valuation date of the report. R.R.O. 1990, Reg. 909, s. 32 (1); O. Reg. 712/92, s. 20 (1).

(2) A report required under subsection (1) shall show,

(a) the gain or the loss in the pension plan since the valuation date of the immediately preceding report as a result of differences between the actual experience and the experience anticipated by the assumptions made in the previous report; and

(b) the increase or decrease in the remaining special payments that will liquidate the gain or loss referred to in clause (a) over the remainder of the five-year period commencing from the effective date of the wind up. R.R.O. 1990, Reg. 909, s. 32 (2); O. Reg. 712/92, s. 20 (2).

(3) Any special payments required as a result of a loss referred to in clause (2) (a) shall be included as payments required to be made by the employer under section 75 of the Act. R.R.O. 1990, Reg. 909, s. 32 (3).

(4) Where a report made under this section shows that there is no further amount to be funded, any surplus may revert to the employer, subject to the requirements of section 79 of the Act. R.R.O. 1990, Reg. 909, s. 32 (4).

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 of Appeal File No. M38599
Court of Appeal File No. M38582
Superior Court File No: CV-09-8122-00CL

COURT OF APPEAL FOR ONTARIO
Proceeding commenced at Toronto

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