

Court File No. M38599  
Court File No. M38282  
Superior Court File No. CV-09-8122-00L

**COURT OF APPEAL FOR ONTARIO**

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

-and-

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT  
OF DALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD.,  
6326765 CANADA INC. and NOVAR INC.**

(the Applicants)

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**FACTUM OF THE INTERVENOR  
MORNEAU SOBECO LIMITED PARTNERSHIP**

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**FACTUM OF THE INTERVENOR  
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**PART I: OVERVIEW**

1. This appeal raises issues regarding whether the deemed trust provision under subsection 57(4) of the Ontario *Pension Benefits Act* (the "PBA") applies to funds held in reserve by the Monitor of an insolvent company under the *Companies Creditors Arrangement Act* (the "CCAA") where pension plans are underfunded and have been, or are to be, wound-up and whether such funds should be directed towards the wind-up deficiencies in the pension plans in preference to the secured creditors.

2. The appeal arises from the February 18, 2010 decision of the Ontario Superior Court of Justice (Commercial List) that a deemed trust under ss. 57(4) of the PBA did not arise where there were no deficiencies in payments owed to a pension plan not yet wound up, or where a payment to a wound-up pension plan had accrued, but was not yet due.

3. The Appellants, representatives of members (the "Retirees") of the Retirement Plan for Executive Employees of Indalex Limited and Associated Companies (the "Executive Plan") and the United Steelworkers (the "USW"), as representatives of the members of the Retirement Plan for Salaried Employees of Indalex Limited and Associated Companies (the "Salaried Plan", together, the "Plans") appeal the decision.

4. The basis of their appeal is that Campbell J. erred in his interpretation of ss. 57(4) of the PBA when he determined that a deemed trust applies only to a pension plan that has already been wound-up, and that an amount must actually be due and payable to a wound-up pension plan as of a specific date for a deemed trust to apply. They also take the position that a deemed trust should apply to unpaid wind-up liability payments, and that certain provisions of the Initial CCAA Order should have been omitted in accordance with s. 30 of the *Personal Property Security Act* (the "PPSA").

5. Morneau Sobeco Limited Partnership ("Morneau Sobeco"), which was appointed as administrator of the Plans after the February 18 motion was heard, supports the

Appellants in their appeal.

## **PART II: THE FACTS**

6. Morneau Sobeco agrees with the facts as set out in the Factum of the Retirees and the Factum of the USW.

## **PART III: ISSUES AND ARGUMENT**

7. Morneau Sobeco agrees with the issues raised and the positions taken by the Appellants, save and except for the position taken by the USW and the Retirees on the costs of this appeal. Morneau Sobeco relies on the undertaking by counsel for the USW that this issue will not be pursued before this Court. Morneau Sobeco also supports the position taken by the Superintendent of Financial Services (the "Superintendent") and, as such, limits its submissions to the application of prior jurisprudence in this area.

### **i. Ivaco and Usarco are Not Determinative**

8. Subsection 57(4) of the PBA states:

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.

*Pension Benefits Act*, R.S.O. 1990, c.P.8, ss. 57(4)

9. This subsection has not yet been widely considered in Ontario. Despite the motion judge's heavy reliance on the prior decisions in *Re Ivaco* and *Toronto Dominion Bank v. Usarco*, these decisions are not determinative of the issues before this court.

*Re Ivaco*, 2005 CanLII 27605 (ON S.C.J.), aff'd (2006), 83 O.R. (3d) 108 (C.A.)

*Toronto Dominion Bank v. Usarco*, [1991] O.J. No. 1314 (Gen. Div.)

10. In both *Ivaco* and in *Usarco*, the prospect of bankruptcy was firmly before the court. In the matter at bar, the motions judge rejected, or at the very least postponed, the petition to lift the stay to file for bankruptcy. This brings the case at bar out of the ambit of the decisions in *Ivaco* and *Usarco*.

11. Moreover, there are conflicting statements in these cases regarding the applicability of the deemed trust to wind-up deficiencies. As such, it is open to this court to find that, in these circumstances, the deemed trust applies to the wind-up deficiencies in the Plans.

**ii. There is No Pending Bankruptcy but for These Motions**

12. In *Usarco*, as the motions judge stated, the issue concerned "the deemed trust provisions under what is now section 57(4) of the *PBA* in a context in which a declaration was sought prior to a bankruptcy petition." A bankruptcy petition had been filed, but no steps had been taken to proceed with the petition. The company was not



under CCAA protection.

Reasons for Decision at para. 27.

*Usarco* at 2 of 17 (Q.L.).

13. In that context, Farley J. held that:

It therefore appears to me that the deemed trust provisions of subs. 58(3) and (4) only refer to the regular contributions together with those special contributions which were to have been made but were not. In this situation, that would be the regular and special payments that should have been made but were not (as reflected in the report of December 31, 1988), together with any regular or special payments that were scheduled to have been made by the wind-up date, July 13, 1990, but were not made. This is contrasted with the obligation of *Usarco* to fully fund its pension obligations as of the wind-up date pursuant to s. 76(1).

*Usarco* at 10 of 17 (Q.L.)

14. In *Ivaco*, the major financiers and creditors wished to have the CCAA proceeding, which was functioning as a liquidation, transformed into a bankruptcy proceeding. Farley J. stated that the major difference between the *Usarco* and *Ivaco* proceedings was that there was a major creditor who wished to press forward with the bankruptcy proceeding. The reasoning in that case focussed primarily on whether there was a reason to defeat the bankruptcy petition.

*Ivaco* SCJ at para. 14

15. In this appeal, the primary issue is whether the deemed trust extends to wind-up deficiencies. The primary purpose of any bankruptcy petition would have been to defeat the deemed trust, and the motions judge declined to deal with such a petition. Accordingly, the case at bar is contextually different, and should be dealt with *sui generis*.

**iii. The Impact of ss. 57(4) has not been Squarely Confronted**

16. In the Court of Appeal decision in *Ivaco*, the Court declined to deal squarely with the issue that is now before it.

At para. 11 of his decision, the motions judge said that both unpaid contributions and wind-up liabilities are deemed to be held in trust under s. 57(3). In his earlier decision in *Toronto-Dominion Bank v. Usarco* (1991), 42 E.T.R 235, Farley J. said, at para. 25, that the equivalent legislation then in force under the *Pension Benefits Act*, 1987, S.O. 1987, c.35 referred only to unpaid contributions, not to wind-up liabilities. I think that the statement in *Usarco* is correct, but I do not need to resolve the issue on this appeal.

*Ivaco* C.A. at para. 44 (emphasis added)

17. Indeed, in the lower court decision in *Ivaco* Farley J. had altered his earlier decision in *Usarco* by stating that:

While in a non-bankruptcy situation, the *Ivaco* Companies' assets are subject to a deemed trust on account of unpaid contributions and wind up liabilities in favour of the pension beneficiaries....

*Ivaco* SCJ at para. 11.

18. The motions judge relied on these prior decisions and on secondary sources based on these decisions not only to reach the conclusion that ss. 57(4) does not apply, but to find that this issue had been previously determined. In Morneau Sobeco's respectful submission, he was in error to do so.

19. For the reasons set out by the Appellants and the Superintendent, Morneau Sobeco submits that ss. 57(4) applies to the entirety of the wind-up deficit, and that prior

case law is not determinative of this matter.

**PART VI – ORDER REQUESTED**

20. Morneau Sobeco supports the relief requested in subparagraphs 72(a) to (c) of the Factum of the Retirees, and in the majority of paragraph 98 of the Factum of the USW.

21. Morneau Sobeco opposes the relief requested in subparagraphs 98(e) of the Factum of the USW and 72(d) of the Factum of the Retirees .

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 13th day of September, 2010.



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**Hugh O'Reilly- LSUC # 36271V**  
**Amanda Darrach – LSUC # 512570**

Lawyers for the Intervenor, Morneau  
Sobeco

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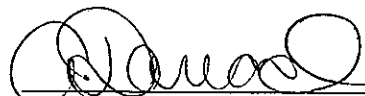
**CERTIFICATE OF THE INTERVENOR  
MORNEAU SOBECO LIMITED PARTNERSHIP**

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I, Hugh O'Reilly, counsel for the Intervenor, Morneau certify as follows:

1. That an order under subrule 61.09 (2) (original record and exhibits) has not been obtained and is not required; and
2. I estimate that I will require 10 minutes for oral argument on this appeal, not including reply.

DATED at Toronto, Ontario this 34<sup>th</sup> day of September, 2010.

  
\_\_\_\_\_  
Hugh O' Reilly  
Amanda Darrach

**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

1. *Re Ivaco*, 2005 CanLII 27605 (ON S.C.J.)
2. *Re Ivaco*, aff'd (2006), CanLii 34551(ON C.A) 83 O.R. (3d) 108 (C.A.)
3. *Toronto Dominion Bank v. Usarco*, [1991] O.J. No. 1314 (Gen. Div.)

**SCHEDULE "B"**  
**TEXT OF RELEVANT STATUTORY PROVISIONS**

**1. *Pension Benefits Act, R.S.O. 1990, c.P.8, ss. 57(4)***

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

**2. *Personal Property Security Act, R.S.O. 1990, c.P.10, ss.30***

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

1. Where priority is to be determined between security interests perfected by registration, priority shall be determined by the order of registration regardless of the order of perfection.

2. Where priority is to be determined between a security interest perfected by registration and a security interest perfected otherwise than by registration,

i. the security interest perfected by registration has priority over the other security interest if the registration occurred before the perfection of the other security interest, and

ii. the security interest perfected otherwise than by registration has priority over the other security interest, if the security interest perfected otherwise than by registration was perfected before the registration of a financing statement related to the other security interest.

3. Where priority is to be determined between security interests perfected otherwise than by registration, priority shall be determined by the order of perfection.

4. Where priority is to be determined between unperfected security interests, priority shall be determined by the order of attachment.

**Idem**

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

**Future advances**

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

**Exception**

(4) A future advance under a perfected security interest is subordinate to the rights of persons mentioned in subclauses 20 (1) (a) (ii) and (iii) if the advance was made after

the secured party received written notification of the interest of any such person unless,  
(a) the secured party makes the advance for the purpose of paying reasonable expenses, including the cost of insurance and payment of taxes or other charges incurred in obtaining and maintaining possession of the collateral and its preservation;

**or**

(b) the secured party is bound to make the advance, whether or not a subsequent event of default or other event not within the secured party's control has relieved or may relieve the secured party from the obligation.

**Proceeds**

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

**Reperfected security interests**

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

***Same, extended time***

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



perfection if the security interest is again perfected by registration by April 12, 1996.

**Deemed trusts**

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

**Exception**

(8) Subsection (7) does not apply to a perfected purchase-money security interest in inventory or its proceeds.