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

COURT OF APPEAL FOR ONTARIO

BETWEEN:

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

(Appeal by Retirees regarding pension plan wind up deemed trust and breach of fiduciary duty)

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PART 1 - THE APPELLANTS AND THE DECISION UNDER APPEAL

1. This is an appeal from the decision of Justice Campbell of the Ontario Superior Court of Justice (Commercial List) (the "CCAA judge") dated February 18, 2010 by Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Richard Smith, Robert Leckie, Neil Fraser and Fred Granville (collectively, the "Retirees").

2. The Retirees are retired employees of the Applicants or their predecessor companies (hereinafter, "Indalex" or the "company"). They are entitled to receive pension benefits from the *Retirement Plan for Executive Employees of Indalex Canada and Associated Companies*, a registered pension plan sponsored by the company and filed with the Financial Services Commission of Ontario and Canada Revenue Agency under Registration No. 0455626 (the "Executive Plan").

3. On August 28, 2009, three motions were argued before the CCAA Judge:

   (a) A motion by the Retirees for a declaration that the amount representing the wind up liability owing to the Executive Plan is subject to a deemed trust under section 57(4) of the Ontario *Pension Benefits Act*, R.S.O. 1990, c, P.8 ("PBA") for the benefit of the beneficiaries of the Executive Plan and is to be paid to the fund of the Executive Plan. The Retirees also argued that the company had breached its fiduciary duty to the Retirees;

   (b) A motion by the United Steelworkers ("USW") for a declaration that the amount representing the wind up payments owing to the Retirement Plan for Salaried

Employees of Indalex and Associated Companies (the "Salaried Plan") is subject to a deemed trust for the benefit of the beneficiaries of the Salaried Plan to be paid to the fund of the Salaried Plan; and

(c) A motion by the company for an order lifting the CCAA stay of proceedings to allow the company to file a voluntary assignment in bankruptcy, and take all steps necessary for the filing of an assignment in bankruptcy.

4. The motions were decided by the CCAA Judge in one Reasons for Decision released on February 18, 2010. The results of the motions are as follows:

(a) The CCAA Judge dismissed the Retirees' motion essentially on the basis that since the wind up of the Executive Plan had not yet occurred, there were "no deficiencies in payments" owing to the Executive Plan and thus there was no basis for a deemed trust "at this time".[1] The CCAA Judge also erroneously concluded without any analysis and without addressing the company's breach of fiduciary duty that the Court "did not have the mandate to exercise discretion to do what it or any group might consider fair and equitable."[2]

(b) The CCAA Judge dismissed the USW's motion on the basis that, although the wind up process had commenced and wind up payments had been calculated, a payment was not actually due on July 20, 2009, the date of the sale approval motion (discussed further below) and therefore no amount was subject to a deemed trust as of that date. The CCAA Judge stated:

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1 Reasons for Decision of Justice Campbell of the Ontario Superior Court of Justice (Commercial List), dated February 18, 2010 [Campbell Reasons], Appeal Book and Compendium of the Retirees [Retirees' Compendium], Tab 5 at para. 24.

2 Campbell Reasons, Retirees' Compendium, Tab 5 at para. 47

> [49] In this case I have concluded there is no conflict between the federal and provincial legislation. I find that as of the date of closing and transfer of assets there were no amounts that were "due" or "accruing due" on July 20, 2010. On that date, Indalex was not required under the PBA or the Regulations thereunder to pay any amount into the [Salaried] Plan. There was an annual payment that would have become payable as at December 31, 2009 but for the stay provided for in the Initial Order under the CCAA.
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> [50] Since as of July 20, 2009, there was no amount due or payable, no deemed trust arose in respect of the remaining deficiency arising as at the date of wind-up.[3]

(c) The CCAA Judge dismissed the company's motion for leave to assign itself into bankruptcy on the basis that, given his rejection of on the deemed trust motions, the company's motion for an assignment into bankruptcy was moot. He stated:

> [52] The Applicants and Indalex US, in addition to disputing the validity of the deemed trust claim, sought to file a voluntary assignment in bankruptcy to ensure the priority regime they urged as the basis for resisting the deemed trust.
> ...
>
> [55] Given that disposition, the question of bankruptcy assignment might well be moot. In my view, a voluntary assignment under the BIA should not be used to defeat a secured claim under valid Provincial legislation, unless the Provincial legislation is in direct conflict with the provisions of Federal Insolvency Legislation such as the CCAA or the BIA. For that reason I did not entertain the bankruptcy assignment motion first.[4]

PART II – OVERVIEW

5. Through their years of employment service with the company, the Retirees earned an entitlement to be paid pension benefits on their retirement from the company under the Executive Plan.

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3 Campbell Reasons, Retirees' Compendium, Tab 5 at paras. 49-50.

4 Campbell Reasons, Retirees' Compendium, Tab 5 at paras. 52 and 55.

6. The Executive Plan is a defined benefit plan. As of January 1, 2008, there were 18 members of the Executive Plan, none of whom were active employees. The pension benefits from the Executive Plan are to be paid for the lives of the Retirees and the lives of the designated beneficiaries.[5]

7. The Executive Plan is underfunded. As of January 1, 2008, the Executive Plan had funding deficiencies on an ongoing basis of $2,535,100, on a solvency basis of $1,102,800 and on a wind-up basis of $2,996,400. As of July 15, 2009, an actuarial review indicated that the wind up deficiency had worsened and was estimated at $3,200,000.

8. On April 3, 2009, Indalex obtained protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36 ("CCAA"). An Initial CCAA Order was issued as of that date, and subsequently amended (the "Initial CCAA Order").

9. This was a "liquidating CCAA" proceeding from its outset. There was no restructuring of the company. There was no plan of compromise prepared and presented to creditors. Two and half weeks after obtaining CCAA protection, the company commenced a marketing process to sell itself.

10. On July 20, 2009, the CCAA court approved the sale of all the company's assets to a purchaser called SAPA Holdings AB. As a term of the sale negotiated between Indalex and SAPA, SAPA did not assume any responsibility or liability for the Executive Plan.

11. The company did nothing with the underfunded Executive Plan and did nothing to fund the deficit. In fact, the company took active steps to defeat the Retirees' claim for a

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[5] Affidavit of Keith Carruthers, sworn June 23, 2009 [Carruthers June 23, 2009 Affidavit], Retirees' Compendium, Tab 14 at para. 40.

deemed trust. The Ontario Superintendent of Financial Services subsequently appointed an administrator to take over the administration of the Executive Plan and wind up the plan.

12. There are no funds to pay unsecured creditors.

13. The Retirees are being severely prejudiced. Due to its current underfunded state, the Retirees have already had their monthly pension benefits from the Executive Plan cut by approximately 30-40%.[6] Unless money is paid into the Executive Plan, those cuts will become permanent. Coupled with the additional loss of their supplemental pension benefits that were terminated by the company after it obtained CCAA protection, this means that the Retirees are incurring a one-half to two-third cut to their pension benefits from the company.[7] This is a very substantial loss of pension benefits during their retirement years.[8]

14. The CCAA Judge erred in his interpretation of section 57(4) of the PBA that the deemed trust only applies to a pension plan that has already been wound up, and erred in his conclusion that an amount must actually be due and payable to a wound up pension plan as of a specific date for the deemed trust to apply. Although those were the conclusions upon which he based his decision, the CCAA Judge went further and erred in his suggestion that the wind up deemed trust does not cover unpaid wind up liability payments. He erred further by not deleting the provision of the Initial CCAA Order that granted priority to the DIP lender over deemed trusts, which is contrary to section 30(1) of the Ontario *Personal Property Security Act*, R.S.O. 1990, c. P. 10, s. 30 ("PPSA") where paramountcy was not invoked.

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[6] Exhibit F to the Carruthers June 23, 2009 Affidavit, Retirees' Compendium, Tab 14, Letter to Counsel from Koskie Minsky LLP, dated June 17, 2009.

[7] Carruthers June 23, 2009 Affidavit, Retirees' Compendium, Tab 14 at paras. 18 and 19 and Exhibit D to the Carruthers June 23, 2009 Affidavit, Affidavit of Timothy R. J. Stubbs, sworn April 3, 2009; Affidavit of Max Degen, sworn August 6, 2009, Tab 16.

[8] Exhibit G to the Affidavit of Andrea McKinnon, sworn July 1, 2009 [McKinnon Affidavit], Retirees' Compendium, Tab 15, Letter from Morneau Sobeco dated July 16, 2009.

PART III – THE FACTS

15. On March 20, 2009, the Applicants' U.S.-based affiliates comprised of Indalex Holdings Finance, Inc., Indalex Holdings Corp. ("Indalex Holding"), Indalex Inc., Caradon Lebanon, Inc., and Dolton Aluminum Company, Inc. ("Indalex US") commenced reorganization proceedings under Chapter II of Title 11 of the United States Code.[9] On April 3, 2009, the Applicants commenced parallel proceedings in Canada and obtained protection from their creditors under the CCAA.[10]

16. On April 8, 2009, the CCAA Court authorized Indalex to borrow funds (the "DIP Borrowings") pursuant to a debtor-in-possession credit agreement among Indalex US, the Applicants and a syndicate of lenders (the "DIP Lenders") for which JPMorgan Chase Bank, N.A. was the administrative agent (the "DIP Agent"). The Applicants' obligation to repay the DIP loan was guaranteed by Indalex U.S.[11]

17. The actuarial report of the Executive Plan revealed that the Executive Plan had a substantial wind up deficiency. On June 26, 2009, counsel to the Retirees sent a letter to counsel to Indalex and the Monitor with a copy to the entire Service List advising that the Retirees reserve all rights to the deemed trust under section 57(4) of the PBA in the

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[9] Campbell Reasons, Retirees' Compendium, Tab 5 at paras. 2-3; Keith Cooper Affidavit, sworn August 24, 2009 [Cooper Affidavit], Retirees' Compendium, Tab 20 at paras. 4-5.

[10] Order of Justice Morawetz, dated April 3, 2009, (Initial Order – Stay Period to May 1, 2009), Retirees' Compendium, Tab 6.

[11] Campbell Reasons, Retirees' Compendium, Tab 5 at paras. 2-3; Cooper Affidavit, Retirees' Compendium, Tab 20 at paras. 7-10; Order of Justice Morawetz, dated April 8, 2009 (Amended and Restated Initial Order), Retirees' Compendium, Tab 7 at para. 32; Order of Justice Campbell, dated July 20, 2009, (Approval and Vesting Order) Retirees' Compendium, Tab 9 at para. 14.

company's CCAA proceedings. There was no response or objection to that letter from the company, Monitor or any other party.[12]

18. On July 13, 2009, counsel to the Monitor confirmed that the Executive Plan would be wound up:

> As discussed at the July 2, 2009 Court hearing, it is unlikely that any bidder will elect to absorb obligations owing Indalex that provides no corresponding benefit to such bidder. Accordingly, it is expected that the Executive Plan will be fully wound up in accordance with the requirements of the *Pension Benefits Act* (Ontario).[13]

19. On July 20, 2009, the company moved for court approval of the sale to SAPA and to distribute the proceeds of the sale to its lenders (the "Sale Approval and Distribution Motion"). There was no provision in that motion for the purchaser to continue the administration of the Executive Plan nor for any of the sale proceeds to be paid to the Executive Plan.

20. The Retirees opposed the Sale Approval and Distribution Motion as there was no provision in the sale for the purchaser to continue the administration of the Executive Plan. The Retirees also opposed the distribution of the sale proceeds as sought by the company to its lenders because it was not making any payment to the underfunded Executive Plan.[14] The Retirees again advanced the PBA deemed trust.

21. At the July 20, 2009 court attendance, the CCAA Judge approved the sale to SAPA and approved a cash distribution to the DIP Lender from the sale proceeds to pay the

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[12] Exhibit "A" to the McKinnon Affidavit, Retirees' Compendium, Tab 15, Letter from Koskie Minsky LLP to counsel to Indalex and counsel to the Monitor dated June 26, 2009.

[13] Exhibit D to the McKinnon Affidavit, Retirees' Compendium, Tab 15, Letter from Stikeman Elliott to Koskie Minsky LLP, dated July 13, 2009.

[14] Campbell Reasons, Retirees' Compendium, Tab 5 at paras. 9, 18.

company's obligations to the DIP Lender.[15] The CCAA Judge directed that $3.2 million representing the wind-up liability in the Executive Plan be held back by the Monitor pending the disposition of a motion by the Retirees for a declaration that the deemed trust applied and that the $3.2 million should be paid to the Executive Plan.[16]

22. On July 31, 2009, the sale of the company's assets to SAPA closed. A total payment of US $17,041,391.80 was made from the Canadian Sale Proceeds by the Monitor, on behalf of the Applicants, to the DIP Agent. This resulted in a shortfall of US $10,751,247.22 in respect of the DIP loan. The DIP Agent then called on the guarantee granted to the DIP Lenders by Indalex US for the shortfall. Indalex US paid the shortfall amount. The DIP Lender has been paid in full and has no interest in this proceeding, nor did it appear on the motion before the CCAA Judge.[17]

23. The Retirees' and the USW's deemed trust motions were set down to be argued on August 28, 2009. On August 12, 2009, after the litigation schedule for those motions was in place and approved by the CCAA Judge, the company announced it would file a motion to lift the CCAA stay to assign itself into bankruptcy. At a subsequent case conference, the CCAA Judge directed that the company's bankruptcy motion be added to the August 28, 2009 hearing. The motions were decided by the CCAA Judge in one Reasons for Decision released on February 18, 2010.

24. On July 31, 2009, all the directors of Indalex Canada resigned. Also on that date, pursuant to the Unanimous Shareholders Declaration, Indalex Holding Corp (part of Indalex

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15 Order of Justice Campbell, dated July 20, 2009 (Approval and Vesting Order), Retirees' Compendium, Tab 9.

16 Campbell Reasons, Retirees' Compendium, Tab 5 at paras. 8, 10.

17 Campbell Reasons, Retirees' Compendium, Tab 5 at para. 11.

U.S.) became the management of Indalex in Canada.[18] Indalex U.S. and Indalex as of July 31, 2009 had the same management. Indalex U.S. was also the administrator of the Executive Plan. The administrator of the Executive Plan was in a conflict of interest.

25. According to the Affidavit of Keith Cooper, sworn August 24, 2009 (a senior managing director with FTI Consulting Inc. and at the material time the Chief Restructuring Officer of Indalex U.S.):

> The CCAA Applicants are no longer carrying on business, have no active employees and no tangible assets, other than cash (including sales proceeds and certain tax refunds). The Board of Directors of the Applicants has resigned and the former directors are currently employed by [the purchaser] SAPA The Applicants are insolvent shells.[19]

26. Keith Cooper deposed under cross-examination on August 26, 2009 that he was the administrator of the Indalex pension plans.[20] He also confirmed that he was the primary negotiator of the DIP Credit Agreement on behalf of the Indalex Group of Companies.[21]

27. Under the cross-examination he further admitted that:

- He and his staff acted as the administrator of the Executive Plan.[22]

- As the chief restructuring officer of Indalex U.S. he "was basically a co-CEO of the company [Indalex U.S.]" whose main duties were to "manage and direct" Indalex U.S. in the restructuring and eventual bankruptcy.[23]

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[18] Cross-Examination Transcript of Keith Cooper, August 26, 2009 [Cooper Transcript], Retirees' Compendium, Tab 21 at questions 15, and 75 to 80.

[19] Cooper Affidavit, Retirees' Compendium, Tab 20 at paras. 33.

[20] Cooper Affidavit, Retirees' Compendium, Tab 20 at paras. 30-31.

[21] Cooper Transcript, Retirees' Compendium, Tab 21 at questions 6-9 at 5.

[22] Cooper Transcript, Retirees' Compendium, Tab 21 at questions 62, 65 and 66, at 22 and 23.

- He was a senior managing director of FTI Consulting Inc., of which the Monitor in the Canadian CCAA proceedings, FTI Consulting Canada ULC, is a subsidiary.[24]

- He knew the Executive Plan was underfunded on a wind up basis.[25]

- He knew the Retirees would have their pension benefits reduced if the Executive Plan was wound up in its underfunded state.[26]

- He refused to answer questions about what steps the company took to have the purchaser of the company take over the administration of the Executive Plan. The inference was that the company took no such steps or even contrary steps.[27]

- He was the pension plan administrator and directing mind of the company at the time the company sought to assign itself into bankruptcy to defeat the Retirees' deemed trust motion.[28]

- He knew that if the deemed trust motions were defeated in the Canadian court then the money held in reserve by the Monitor "would be distributed to Indalex Inc. [Indalex U.S.]".[29]

28. Under the PBA there are two ways that a pension plan can be wound up. First, under section 68, an employer may voluntarily wind-up the pension plan. Second, under section 69,

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[23] Cooper Transcript, Retirees' Compendium, Tab 21 at question 33.
[24] Cooper Transcript, Retirees' Compendium, Tab 21 at questions 2, 3 and 31.
[25] Cooper Transcript, Retirees' Compendium, Tab 21 at questions 54, 55, at 20.
[26] Cooper Transcript, Retirees' Compendium, Tab 21 at question 55, at 20.
[27] Cooper Transcript, Retirees' Compendium, Tab 21 at questions 91-98, at 30-32.
[28] Cooper Transcript, Retirees' Compendium, Tab 21 at questions 63 and 70, at 23 and 25.
[29] Cooper Transcript, Retirees' Compendium, Tab 21 at questions 83 to 86.

where any of the listed conditions in the section exist – as was the case here - the Ontario Superintendent of Financial Services will become involved and appoint an outside party (typically an actuarial firm) to administer the wind up process.

29. On November 4, 2009, the Superintendent appointed the actuarial firm of Morneau Sobeco ("Morneau") as administrator to wind up the Executive Plan.[30] On March 2010, based on the recommendation of Morneau, the Superintendent issued a Notice of Proposal to wind up the Executive Plan effective as of September 30, 2009.[31] The wind up process is currently underway.

PART IV – THE ISSUES AND THE LAW

30. This appeal raises the following issues:

(a) Did the CCAA judge err by not giving effect to the wind up deemed trust?

(b) Did the company breach its fiduciary duty to the Retirees of the Executive Plan?

(c) Are wind up payments that are owing to the Executive Plan subject to the wind up deemed trust?

(d) Did the CCAA judge err by not applying the priority rule in the PPSA that explicitly gives priority to the PBA deemed trust over secured creditors?

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[30] Affidavit of Jenny Correia, sworn March 24, 2010 [Correia Affidavit], Retirees' Compendium, Tab 19 at para. 2.

[31] Correia Affidavit, Retirees' Compendium, Tab 19 at para. 2.

Issue #1: Did the CCAA judge err by not giving effect to the wind up deemed trust?

31. Section 57(4) of the PBA deems an employer to hold in trust an amount that is owing to a pension plan on its wind up regardless of whether the money has been segregated or not, and regardless of whether the amount is not yet due to be paid to the pension plan. Section 57(4) 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.[32]

32. Generally, a deemed trust is a statutory device whose purpose is to secure a payment of amounts to persons, funds or any other entity that Parliament or a provincial Legislature has determined is in need of protection and should receive a priority payment.[33] Deemed trusts exist in a plethora of federal and provincial statutes across Canada.

33. Deemed trusts have been specifically enacted to protect employees and members of pension plans.[34] For example, in addition to the deemed trust in the PBA, a deemed trust exists in the Ontario *Employment Standards Act*, 2000, S.O. 2000, c. 41 ("ESA") for vacation pay that is owing to employees.

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[32] PBA, s. 57 [emphasis added].

[33] Kevin McElcheran, *Commercial Insolvency in Canada* (Toronto: LexisNexis/Butterworths, 2005) [McElcheran], Book of Authorities of the Retirees [Retirees' Book of Authorities], Tab 11 at 110-112.

[34] *Employment Standards Act, 2000*, S.O. 2000, c. 41 [ESA], s. 40.

34. A deemed trust is valid in CCAA proceedings. The *only* situation where a deemed trust is not valid under current caselaw is where a company becomes a "bankrupt" as defined in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA").[35]

35. With respect to the deemed trust in section 57 of the PBA, the Ontario Legislature also enacted a priority to the deemed trust ahead of the claims of secured creditors in the Ontario *Personal Property Security Act* R.S.O. 1990, c.P.10 ("PPSA").[36] It is clear that the Legislature intended to protect the pensioners over secured creditors.[37]

The CCAA Judge misinterpreted section 57(4) of the PBA

36. The CCAA judge held that since the wind up of the Executive Plan had not yet occurred at the time of the motion on August 28, 2009, no deemed trust arose. With respect, this conclusion is incorrect for at least four reasons.

37. First, section 57(4) of the PBA states that the amount that is subject to the deemed trust are amounts owing to a pension plan that are "not yet due" to be paid. This phrase is clearly prospective. The section is aimed at attaching the deemed trust to amounts that *will be owed* to a pension plan on its wind up *in the future* and which are not yet required to be paid to the pension plan in the present. In the case at bar, the company knew that the Executive Plan was underfunded on a wind up basis and the Monitor confirmed the plan would be wound up. The wind up of the Executive Plan and the wind up liability owing to the plan are a certainty. The deemed trust applies.

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35 McElcheran, *supra*, Retirees' Book of Authorities, Tab 11 at 127-129.
36 PPSA, s. 30(7).
37 McElcheran, *supra*, Retirees' Book of Authorities, Tab 11 at 131.

38. Second, section 57(4) states that a deemed trust arises "Where" a pension is wound up – not "When". The deemed trust does not arise only when a wind up payment is due on a specific calendar date, which is how the CCAA Judge interpreted the section. The use of the broader word "Where" indicates that the deemed trust applies to any situation where there is an amount owing to a pension plan on its wind up – whether actually due to be paid or not.

39. Third, the Monitor in its letter of July 13, 2009 confirmed that the Executive Plan would be wound up. The company had been sold, it was an assetless shell and it had no board of directors. The wind up of the Executive Plan was a certainty at the time and is now well underway. The CCAA Judge acknowledged that "The material filed with the Court exhibits as intention or the part of the Applicants to wind up that Plan".[38] For the CCAA Judge to decide that the deemed trust did not apply because the Executive Plan had not yet began the wind up process ignores the evidence that the plan *was going to be* wound up. If also incorrectly places form over substance.

40. Fourth, the CCAA Judge's reasoning that the deemed trust did not apply because the Executive Plan had not yet started the wind up process puts in place a very troubling rule that the courts should not countenance.[39] It rewards the company for failing to administer and fund the Executive Plan properly and sends the message that a company in CCAA can avoid the PBA deemed trust and avoid paying wind up payments by simply doing nothing to wind up an underfunded pension plan. That holding encourages the exact opposite behaviour that the Ontario Legislature seeks in the PBA: the protection of pension plan members. The CCAA Judge's holding cannot be supported.

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38 Campbell Reasons, Retirees' Compendium, Tab 5 at para. 23.
39 Campbell Reasons, Retirees' Compendium, Tab 5.

Issue #2: Did the company breach its fiduciary duty to the Retirees of the Executive Plan?

41. The law is settled that a pension plan administrator owes a fiduciary duty to pension plan members.[40] That duty derives from both section 22 of the PBA and the common law.

42. In *Usarco,* Justice Farley held that the PBA deemed trust provisions themselves imply a fiduciary obligation on the employer.[41]

43. Indalex, as the administrator of the Executive Plan, owed a duty to the Retirees to act in the Retirees' best interests and not be in a conflict of interest. The evidence shows that Indalex did the exact opposite.

44. From the outset of the CCAA proceeding, when the company obtained a CCAA order that gave priority to the DIP Lender over the "statutory trust" without notice to the Retirees, the company embarked on a course of conduct that ranged from doing nothing to protect the Retirees from the looming reductions to their pension benefits, to aggressive efforts to defeat the Retirees' deemed trust claim, including bringing a motion to bankrupt the company. If that motion had been successful it would have rendered the PBA deemed trust of no force or effect under current caselaw and resulted in the amounts held in reserve by the Monitor transferred to Indalex U.S.

45. The evidence is incontrovertible that the company did not act in the best interests of the Retirees, was in a conflict of interest and breached its fiduciary duty:

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[40] *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, [2006] O.J. No. 4152 (C.A.) [*Ivaco*], Retirees' Book of Authorities, Tab 10 at para. 51; *Toronto-Dominion Bank v. Usarco Ltd.*, [1991] O.J. No. 1314, 42 E.T.R. 235 (Gen. Div.) [*Usarco*], Retirees' Book of Authorities, Tab 17 at 5; E.E. Gillese, 1996, "The Fiduciary Liability of the Employer as Pension Plan Administrator, Toronto, Ontario" 18 November 1996, The Canadian Institute, Retirees' Book of Authorities, Tab 6 at 1-25; *R. v. Christophe*, 2009 ONCJ 586, 78 C.C.P.B. 34 (Gen. Div.), Retirees' Book of Authorities, Tab 15 at paras. 165-166; PBA, s. 22.

[41] *Usarco, supra*, Retirees' Book of Authorities, Tab 17 at 5.

(a) Indalex was the administrator of the Executive Plan;[42]

(b) Indalex knew that the Executive Plan was underfunded;[43]

(c) Indalex knew that a wind up of the Executive Plan in its underfunded state would cause the retirees' pension benefits to be reduced;[44]

(d) Indalex entered into a loan arrangement and applied to court without giving notice to the members of the Executive Plan for an Initial CCAA order that contained a provision that reversed the priority in the PPSA that grants priority to the PBA deemed trust;[45]

(e) Indalex sold the assets of the company without any provision for the purchaser to assume the Executive Plan;

(f) Indalex did not respond to the correspondence from counsel to the Retirees (and to the Monitor and all other stakeholders) stating that the Retirees rely on the PBA deemed trust;[46]

(g) Indalex moved before the CCAA Judge to obtain orders approving the sale and approving a distribution of all the sale proceeds to the DIP lender with no payment being made to the underfunded Executive Plan;

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42 Cooper Transcript, Retirees' Compendium, Tab 21 at question 62 at 22.

43 Cooper Transcript, Retirees' Compendium, Tab 21 at questions 38-53 at 15-20.

44 Cooper Transcript, Retirees' Compendium, Tab 21 at questions 54-55 at 20.

45 Campbell Reasons, Retirees' Compendium, Tab 5 at paras. 2-3; Cooper Affidavit, Retirees' Compendium, Tab 20 at paras. 4-5; Order of Justice Morawetz, dated April 3, 2009 (Initial Order – Stay Period to May 1, 2009), Retirees' Compendium, Tab 6.

46 Affidavit of Keith Carruthers, sworn August 15, 2009, at paras. 18-19 and Exhibit F, Letter from Koskie Minsky LLP to counsel for the Monitor and counsel for the Applicants, dated June 26, 2009, Retirees' Compendium, Tab 17; Exhibit "A" to the McKinnon Affidavit, Retirees' Compendium, Tab 15, Letter from Koskie Minsky LLP to counsel to Indalex and counsel to the Monitor dated June 26, 2009.

(h) Indalex brought a motion returnable at the same time as the Retirees' deemed trust motion to bankrupt the company in an attempt defeat the Retirees' deemed trust claim;[47] and

(i) Indalex took no steps to wind up the Executive Plan despite its knowledge that the plan was underfunded, the company was selling itself, and the purchaser was not taking over the Executive Plan. Indalex then used its inaction to argue at the Retirees' motion before the CCAA Judge that the PBA deemed trust should not apply because the Executive Plan had not yet been wound up.

46. On July 31, 2009, all the directors of Indalex in Canada resigned. Also on July 31, 2009, pursuant to Unanimous Shareholders Declaration, Indalex Holding Corp. (part of Indalex U.S.) became the management of Indalex in Canada. Indalex U.S. and Indalex Canada had the same management. On August 13, 2009 Indalex which was now under the management of Indalex U.S. announced it would bring a motion to bankrupt the Canadian company. Keith Cooper admitted that the defeating of the deemed trust would see the reserve amount be paid to Indalex U.S.

47. The evidence is incontrovertible that Indalex U.S., now the administrator of the Executive Plan, vigorously sought to defeat the Retirees' deemed trust for the purpose of gaining the amounts held in reserve for Indalex U.S. and deny them to the Retirees. The administrator of Indalex was in a flagrant conflict of interest. Indalex U.S.'s conduct was inequitable.

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[47] Campbell Reasons, Retirees' Compendium, Tab 5 at para. 52.

The Court has wide powers to remedy breaches of fiduciary duty

48. Where a breach of fiduciary duty has been found, a court has wide latitude to fashion the appropriate remedy. The guiding factors are fairness and justice:

> It therefore seems appropriate in this case to assess damages according to the principles which generally govern damages for breach of fiduciary duty, having regard to the admonition in Canson that ***the remedy awarded need not be confined to that given in previous situations if the requirements of fairness and justice demand more,*** and that reference to the principles of assessment in contract and tort maybe of assistance in so far as they are relevant.
> As discussed in Canson, the goal of equity is to restore the plaintiff as fully as possible to the position he or she would have been in had the equitable breach not occurred.... Traditionally, equity made the defaulting trustee who had mismanaged a fund, for example, restore the entire fund, and would not countenance deductions for market fluctuation or failure of the beneficiary to mitigate or take appropriate care, as would the law of tort or contract. This is not a case where the traditional equitable remedies of restitution and account are available. Restoration in specie is not possible. And the plaintiff's loss is not economic. ***Where these remedies are not available, equity awards compensation in their stead: see Canson, supra at pp. 574-75. In awarding damages the same generous, restorative remedial approach, which stems from the nature of the obligation in equity, applies. The fiduciary, being the person with the advantage of power, assumes full responsibility and cannot be heard to complain that the victim of his or her abuse cooperated in his or her defalcation or failed to take reasonable care for his or her own interests.***[48]

49. Given the breach of fiduciary duty by the company to the Retirees, the requirements of fairness and justice require that this Court order the Executive Plan be funded so that it will provide the pension benefits the Retirees are owed. This can be done from the amounts held in reserve with the Monitor. Alternatively, damages should be ordered to be paid to the Retirees directly. Again, this can be done from the amounts held in reserve with the Monitor.

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[48] *Norberg v. Wynrib*, [1992] 2 SCR 226, Retirees' Book of Authorities, Tab 13 at paras. 103-104 [emphasis added].

Equitable Subordination

50. If this Court orders either payment to the Executive Plan or damages directly to the Retirees to remedy the company's breach of fiduciary duty, then the doctrine of equitable subordination, as well as fairness and equity, apply for this court to give those payments priority over the claim of Indalex U.S. which it advances in its capacity as guarantor of the DIP loan.

51. The doctrine of equitable subordination was recently summarized by Justice Pepall:

> **2. Equitable Subordination**
>
> [28] In considering this argument, it is helpful to briefly review its treatment in Canada. The Supreme Court of Canada was asked to invoke the doctrine in Canada Deposit Insurance Corp. v. Canadian Commercial Bank. That case involved the characterization of an advance of funds to the Canadian Commercial Bank and whether it constituted a loan or an investment of capital. Having concluded that it was in the nature of a loan and therefore the "lenders" would rank pari passu with the other unsecured creditors, Iacobucci J. went on to discuss the doctrine of equitable subordination. It was argued before the Supreme Court that the equitable jurisdiction of superior courts gives them authority in insolvency matters to subordinate claims that, while valid as against the insolvent's estate, arise from or are connected with conduct that is prejudicial to the interests of other creditors. This argument had not been made in the courts below but in any event, Iacobucci J. did not see the need to opine on whether such a doctrine should exist in Canada as some of its requisite elements had not been established. He stated that as he understood it, in the U.S., three requirements must be met:
>
> 1. the claimant must have engaged in some type of inequitable conduct;
> 2. the misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and
> 3. equitable subordination must not be inconsistent with the provisions of the bankruptcy statute. ...
>
> [29] Two years prior to the Supreme Court's decision, in the case of Virtual Network Services Corporation, the U.S. Court of Appeals, Seventh Circuit, held that the doctrine no longer required inequitable conduct on the part of the creditor. Rather, the decision depended on a consideration of the fairness of the circumstances of each case. The

right to make use of the doctrine had been codified in the Bankruptcy Reform Act of 1978, section 510(c)(1) of which stated:

> ...after notice and a hearing, the court may -
>
> (1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest.

[30] The Seventh Circuit Court of Appeals felt that this provision did not mandate a requirement of inequitable conduct. Other appellate courts in the U.S. also abandoned the misconduct requirement in certain instances. For instance, in Re Envirodyne Industries, Inc., the U.S. Court of Appeals, Seventh Circuit held that section 510(c)(1) authorized "courts to equitably subordinate claims to other claims on a case by case basis without requiring in every instance inequitable conduct on the part of the creditor claiming parity among other unsecured general creditors."

[31] The UTC submits that, amongst other things, the Supreme Court of Canada's understanding of the doctrine of equitable subordination was inexact because it was outdated and incomplete. In my view, this is an unfair assumption. Virtual Networks was cited to the Supreme Court of Canada in the Canadian Commercial Bank case but the Court chose not to refer to it. I also note that the U.S. Supreme Court considered the doctrine in U.S. v. Noland and did not depart from the three part test. While the Court said that it was clear that Congress meant to give courts some leeway to develop the doctrine, the Court expressly declined to decide whether a bankruptcy court must always find creditor misconduct before a claim may be equitably subordinated.

[32] Since the Canadian Supreme Court's decision in Canada Deposit Insurance Corp. v. Canadian Commercial Bank, the treatment of the doctrine in Canada has been uneven. ReMax Metro City Realty ltd. v. Baker (Trustee of), Pioneer Distributors Ltd. v. Bank of Montreal, and CIBC v. Sayani all are examples of courts that have refused to consider the applicability of the doctrine. Another line of cases has followed the lead of the Supreme Court and has considered the doctrine without opining on whether it in fact exists in Canada. Olympia & York Developments Ltd. v. Royal Trust Co.,] Lorbeth Development v. 795243 Ontario Ltd., Unisource Canada v. Hong Kong Bank of Canada, National Bank of Canada v. Merit Energy Ltd. and New Solution Financial Corp. v. 952339 Ontario Ltd. are all examples of this approach. Some other cases have applied the doctrine: *Bulut v. Brampton (City)* and Re Blue Range Resource Corp.

....

[33]...***On the other hand, a vibrant legal system must be responsive to new developments in the law and the need for reform. Jurisprudence from other jurisdictions often provides the impetus or basis for much needed legal developments.***

> [34]...***It seems to me that the importation or application of a doctrine such as equitable subordination should respond to a lacuna in our law.*** ...[49]

52. The factors for the equitable subordination of Indalex U.S.'s claim have been met. Indalex U.S. as management of Indalex and administrator of the Executive Plan behaved inequitably and in conflict of interest. As noted above, Keith Cooper admitted at his August 26, 2009 cross-examination that:

- He and his staff acted as the administrator of the Executive Plan.[50]

- As the chief restructuring officer of Indalex U.S. he "was basically a co-CEO of the company [Indalex U.S.]" whose main duties were to "manage and direct" Indalex U.S. in the restructuring and eventual bankruptcy.[51]

- He was a senior managing director of FTI Consulting Inc., of which the Monitor in the Canadian CCAA proceedings, FTI Consulting Canada ULC is a subsidiary.[52]

- He knew the Executive Plan was underfunded on a wind up basis.[53]

- He knew the Retirees would have their pension benefits cut if the Executive Plan was wound up in its underfunded state.[54]

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[49] *I. Waxman & Sons Ltd. (Re)*, 89 O.R. (3d) 427, [2008] O.J. No. 885 (S.C.J.), Retirees' Book of Authorities, Tab 9, at paras. 28-34 (citations removed) [emphasis added]; *Bulut v. Brampton (City) (2000)*, 48 O.R. (3d) 108, [2000] O.J. No. 1062 (C.A.), Retirees' Book of Authorities, Tab 2.

[50] Cooper Transcript, Retirees' Compendium, Tab 21 at questions 62, 65 and 66, at 22 and 23.

[51] Cooper Transcript, Retirees' Compendium, Tab 21 at question 33.

[52] Cooper Transcript, Retirees' Compendium, Tab 21 at questions 2, 3 and 31.

[53] Cooper Transcript, Retirees' Compendium, Tab 21 at questions 54, 55, at 20.

[54] Cooper Transcript, Retirees' Compendium, Tab 21 at question 55, at 20.

- He was the pension plan administrator and directing mind of the company at the time the company assigned into bankruptcy in an attempt to defeat the deemed trust motion by the Retirees.[55]

- He knew that if the deemed trust motions were defeated in the Canadian court then the money held in reserve by the Monitor "would be distributed to Indalex Inc. [Indalex U.S.]".[56]

53. The record indicates that the doctrine of equitable subordination as well as fairness and equity dictate that the funds held in reserve be distributed to the Executive Plan or the Retirees in priority to Indalex U.S.

Issue #3: Are all amounts that are owing to a pension plan on wind up (i.e. going concern payments, special payments and wind up payments) subject to the wind up deemed trust or only going concern payments or special payments?

54. An employer who sponsors a pension plan as part of the employment arrangement for its employees is required to make different categories of payments to the plan to ensure that the plan is adequately funded and capable of paying the benefits that are promised to the employees on their retirement. The categories of payments were recently summarised in *Fraser Papers* as follows:

> Employer pension contributions are described by M. Starnino, J-C Killey and C. P. Prophet in their article entitled "The Intersection of Labour and Restructuring Law in Ontario: A Survey of Current Law".
>
> > "In the case of a defined benefit plan, (i.e., a plan that promises to pay the beneficiaries of the plan a specific amount in retirement) the amount of the current service contribution is determined using actuarial estimations having regard to, among other things, the amount of the benefit to be provided, the demographics of the workforce and the

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55 Cooper Transcript, Retirees' Compendium, Tab 21 at questions 63 and 70, at 23 and 25.

56 Cooper Transcript, Retirees' Compendium, Tab 21 at questions 83 to 86.

> anticipated returns generated by the investments in which the pension plan is invested.
>
> Second, if the pension plan is a defined benefit plan then an employer may be required to make additional contributions to the pension plan called "special payments". The obligation to make special payments arises where the original plan experience or investment performance differed from that assumed by the actuaries in order to provide the benefit promised to employees and the plan develops either a going concern unfunded liability or a solvency deficiency.
>
> A going concern unfunded liability arises when it appears, based on a periodic actuarial assessment of the plan, that the plan is insufficiently funded to pay the benefits that are or will become due, assuming that the pension plan continues indefinitely. Once a going concern unfunded liability is identified, the employer is required to make monthly special payments to fund the deficiency within fifteen years.
>
> A solvency deficiency [ie a wind up deficiency] arises when it appears, based upon a periodic actuarial assessment of the plan, that the plan's current assets are insufficient to meet the obligations that would be due if the employer immediately discontinued its business and the plan were wound up. In the case of a solvency deficiency, the employer is required to make special payments to fix the deficiency within a five year time frame. Pending amendments will extend this period to 10 years." [57]

55. The CCAA Judge suggests in his Reasons for Decision that the PBA wind up deemed trust would not extend to wind-up payments. Respectfully, that interpretation is not correct and cannot be supported by the language of the PBA. It is also contrary to the purpose of the PBA which is to protect the members of pension plans.

56. As noted, Section 57(4) of the PBA establishes a deemed trust over wind up contributions that an employer is "required to pay . . . but [are] not yet due" to be paid to the pension fund. Section 57(4) states:

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[57] *Fraser Papers Inc. (Re)*, [2009] O.J. No. 3188, 55 C.B.R. (5th) 217, Retirees' Book of Authorities, Tab 5 at para. 13.

> (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.[58]

57. The amount of the wind-up liability for a pension plan, and hence, the deemed trust under section 57(4), is determined with reference to section 75 of the PBA. Section 75 requires an employer to pay "the total of all payments that...are due or that have accrued and that have not been paid into the pension fund" as well as other amounts set out in subsections 75(1)(b)(i)(ii) and (iii):

> **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.
>
> **Payment**
>
> (2) The employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times.[59]

58. The published policies of the Ontario Financial Services Commission have described the scope of the wind up liability to include all amounts owing to the pension plan:

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[58] PBA, s. 57(4) [emphasis added].

[59] PBA, s. 75.

> ***The wind up liability must reflect all benefits provided under the plan and the applicable legislation on wind up*** and should be separately summarized for each major category of membership....
>
> If the wind up report reveals that the plan does not have sufficient assets to pay the liabilities on wind up, the employer must pay into the pension fund amounts required under section 75 of the PBA.[60]

59. In paragraphs 37 to 39 of his Reasons for Decision, the CCAA Judge refers to the *Usarco* and *Ivaco* decisions to suggest that the wind up deficiency is not subject to the section 57(4) deemed trust.[61] However, those cases dealt with motions for deemed trusts for unpaid current service and special payments under current Section 57(3) of the PBA, not wind up payments.

60. The CCAA Judge in the case under review seemed to prefer the earlier approach of Justice Farley in *Usarco*, however, the CCAA Judge did not perform any analysis on the applicable provisions of the PBA. Further, the two legal commentaries referred to by the CCAA Judge are devoid of any legal analysis and are merely summaries of Justice Farley's *obiter* in *Usarco*.

The deemed trust should be interpreted with regard to its purpose to protect members of pension plans

61. The Supreme Court of Canada had made clear that statutory interpretation should be approached in a manner which takes into consideration not only the words of an Act, but also the "scheme of the Act, the object of the Act, and the intention of Parliament".[62]

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[60] PBA, ss. 73 – 75; Financial Services Commission of Ontario, Filing Requirements and Procedure on Full and Partial Wind Up of a Pension Plan, Index No. W100-101 (December 9, 2004), Retirees' Book of Authorities, Tab 10 [emphasis added].

61 *Ivaco Inc., supra*, Retirees' Book of Authorities, Tab 10 at para. 51, *Usarco, supra*, Retirees' Book of Authorities, Tab 17.

[62] *Bell ExpressVu Ltd. v. Partnership v. Rex*, [2002] 2 S.C.R. 559, Retirees' Book of Authorities, Tab 1 at paras. 26-27; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, Retirees' Book of Authorities, Tab 16 at para. 21.

62. The purpose of the PBA is to protect the members of pension plans. The Supreme Court of Canada has confirmed this purpose in many cases.

> [28] The purpose of the PBA was explained at para. 13 of *Monsanto*, citing *GenCorp Canada Inc.* v. *Ontario (Superintendent, Pensions)* (1998), 158 D.L.R. (4th) 497 (Ont. C.A.), at para. 16:
>
> > [T]he Pension Benefits Act is clearly public policy legislation establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Ontario. It is intended to benefit and protect the interests of members and former members of pension plans, and "evinces a special solicitude for employees affected by plant closures".[63]

63. The purpose of the PBA is well summarized in the unanimous decision of this Court in *Huus* v. *Ontario Superintendent of Pensions.*[64]

> [25] I start with this observation: pension plans are for the benefit of the employees, not the companies which create them. They are a particularly important component of the compensation employees receive in return for their labour. They are not a gift from the employer; they are earned by the employees. Indeed, in addition to their labour, employees usually agree to other trade-offs in order to obtain a pension. As explained by Cory J. in *Schmidt* v. *Air Products Canada Ltd.*, [1994] 2 S.C.R. 611 at 646:
>
> > In the case of pension plans, employees not only contribute to the fund, in addition they almost invariably agree to accept lower wages and fewer employment benefits in exchange for the employer's agreeing to set up the pension trust in their favour.
>
> [261 Similar statements have been expressed by this court in several cases. In *Gencorp Canada Inc.* v. *Ontario (Superintendent of Pensions)* (1998), 39 O.R. (3d) 38 at 43 (C.A.), Robins J.A. said:
>
> > [T]he Pension Benefits Act is clearly public policy legislation establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Ontario. It is intended to benefit and protect the interests of members and former members of pension plans....

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[63] *Nolan v. Kerry (Canada) Inc.*, [2009] 2 S.C.R. 678, Retirees' Book of Authorities, Tab 12 at para. 28

[64] *Huus v. Ontario (Superintendent of Pensions)* (2002), 58 O.R. (3rd) 380, [2002] O.J. No. 524 (C.A.), Retirees' Book of Authorities, Tab 8.

> [27] In *Firestone Canada Inc.* v. *Ontario (Pension Commission)* (1990), 1 O.R. (3d) 122 at 127 (C.A.) ("Firestone"), Blair J.A. stated that the PBA "is clearly intended to benefit employees" and "[i]n. particular. . . evinces a special solicitude for employees affected by plant closures".[65]

64. The language of Sections 57(4) and 75 of the PBA must be interpreted with the purpose of the PBA in mind. The correct interpretation supports the application of the deemed trust over the totality of amounts owed by an employer to a pension plan on its wind up.

Issue #4: Can a CCAA judge issue an Initial Order granting priority to a secured creditor over the deemed trust contrary to the provisions of the PPSA without invoking paramountcy?

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

> **Priorities**
>
> 30. 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*.**[66]

66. In *Usarco*, Farley, J. gave effect to the priority rule in section 30(7) of the PPSA and ordered the receiver to pay an amount of money equal to the regular and special payments required to have been made but not yet paid into the pension plan:

> Therefore, since the bankruptcy petition has not been dealt with, we are presently dealing with a claim by the administrator for certain trust funds held by the receiver. ***The security interest of the bank is***

---

[65] *Huus, supra*, Retirees' Book of Authorities, Tab 8 at paras. 25-27.

[66] PPSA, s. 30.

> ***subordinate to the interest of the beneficiaries of the deemed trust (represented by the administrator) (see: s. 30(7), PPSA).***[67]

67. Paragraphs 45 of the Initial CCAA Order states that the DIP Lenders will have priority over "statutory trusts". In respect of the PBA deemed trust, this provision is in direct conflict with the PPSA, as well as the holding of the court in *Usarco*.[68] The CCAA Judge also referenced this priority change in his Reasons, but without removing the provision from the Initial CCAA Order and without any analysis of the doctrine of paramountcy.[69] In so doing, the CCAA Judge erred.

68. Provincial laws, such as the PPSA, in federally regulated bankruptcy and insolvency proceedings continue to apply so long as the doctrine of paramountcy is not triggered. In this case paramountcy has not been triggered.[70]

69. In *Nortel Networks Corp. (Re),*[71] this Court held that the only way a valid provincial law can be rendered inoperative in a CCAA proceeding is if the doctrine of paramountcy was invoked to show that the provincial law is frustrating the purpose of the CCAA:

> [35]...As there is no specific protection from the general stay provision for the ESA termination and severance payments, the questions to be determined is whether the court is entitled to extend the effect of its stay order to such payments based on the constitutional doctrine of paramountcy: *Crystalline Investments Ltd. Domgroup Ltd.*,[2004] 1 S.C.R. 60 at para. 43.
>
> [36] The scope, intent and effect of the operation of the doctrine of paramountcy was recently reviewed and summarized by Binnie and

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67 *Usarco, supra,* Retirees' Book of Authorities, Tab 17 at 4-5 [emphasis added].

68 Order of Justice Morawetz, dated April 8, 2009 (Amended and Restated Initial Order), Retirees' Compendium, Tab 7 at para. 45; Campbell Reasons, Retirees' Compendium, Tab 5 at para. 51.

69 Campbell Reasons, Retirees' Compendium, Tab 5.

70 *Crystalline Investments Ltd. v. Domgroup Ltd.*, [2004] 1 S.C.R. 60, Retirees' Book of Authorities, Tab 4 at para. 43; *GMAC Commercial Credit Corp. Canada v. TCT Logistics Inc.*, [2006] 2 S.C.R. 123, Retirees' Book of Authorities, Tab 7 at para. 50-52.

71 *Nortel Networks Corp. (Re)*, 2009 ONCA 833, 99 O.R. (3d) 708 (CA) [*Nortel*], Retirees' Book of Authorities, Tab 14.

> Level JJ. in *Canadian Western Bank v. Alberta,* [2007] 2 S.C.R. at paras. 69-75. They reaffirmed the "conflict" test stated by Dickson J. in *Multiple Access Ltd. v. McCutcheon,* [1982] 2 S.C.R. 161:
>
> > In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other. [p. 191].
>
> [37] However, they also explained an important proviso or gloss on the strict conflict rule that has developed in the case law since *Multiple Access:*
>
> ...
>
> [38] ***Therefore, the doctrine of paramountcy will apply either where a provincial and a federal statutory provision are in conflict and cannot both be complied with, or where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament.***[72]

70. This was a liquidating CCAA proceeding. There was no restructuring. There is no plan of compromise.

71. In this case, not only was paramountcy not invoked by the company when it applied to court for a CCAA order that overrides the PPSA priority, but even if paramountcy was invoked, the record indicates that the PPSA priority of the deemed trust over the DIP Lender would not have frustrated the Company's liquidation efforts and thus, would not have frustrated the purpose of the CCAA. Without a finding of paramountcy, the PPSA priority continues in force and operates to require the company to pay the PBA deemed trust amount to the Executive Plan. Accordingly, with respect to the PBA deemed trust, paragraph 45 of the Initial CCAA Order should be declared of no force or effect.

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[72] *Nortel, supra,* Retirees' Book of Authorities, Tab 14 at paras. 35-38 [emphasis added].

PART IV - ORDERS REQUESTED

72. The Retirees respectfully request:

(a) an order allowing the appeal and declaring that the deemed trust in section 57(4) of the PBA is valid and ordering payment of the $3.2 million held in reserve by the Monitor to the fund of the Executive Plan;

(b) in the alternative, allowing the appeal and declaring that the company breached its fiduciary duty to the Retirees of the Executive Plan and ordering damages payable of $3.2 million to the Executive Plan or alternatively, damages to the Retirees directly;

(c) a declaration that paragraph 45 of the Initial CCAA Order in respect of the priority of the DIP Lender over the PBA deemed trust is of no force or effect; and

(d) costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of July, 2010.

Andrew J. Hatnay

Demetrios Yiokaris

CERTIFICATE OF COUNSEL

I, Andrew Hatnay, lawyer for the Appellants, certify that:

1. An order under subrule 61.09(2) is not required; and

2. The estimated time of my oral argument is 4 hours, not including reply.

Date: July 2, 2010

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SCHEDULE "A"
LIST OF AUTHORITIES

1. McElcheran, Kevin, *Commercial Insolvency in Canada* (Toronto: LexisNexis/Butterworths, 2005).

2. *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, [2006] O.lJ. No. 4152 (C.A.).

3. *Toronto-Dominion Bank v. Usarco Ltd.*, [1991] O.J. No. 1314, 42 E.T.R. 235 (Gen. Div.).

4. Gillese, E.E., 1996, "The Fiduciary Liability of the Employer as Pension Plan Administrator, Toronto, Ontario" 18 November 1996, The Canadian Institute.

5. *R. v. Christophe*, 2009 ONCJ 586, 78 C.C.P.B. 34 (Gen. Div.)

6. *Norberg v. Wynrib*, [1992] 2 SCR 226.

7. *I. Waxman & Sons Ltd. (Re)*, 89 O.R. (3d) 427, [2008] O.J. No. 885 (S.C.J.).

8. *Bulut v. Brampton (City)* (2000), 48 O.R. (3d) 108, [2000] O.J. No. 1062 (C.A.).

9. *Fraser Papers Inc. (Re)*, [2009] O.J. No. 3188, 55 C.B.R. (5th) 217.

10. Financial Services Commission of Ontario, Filing Requirements and Procedure on Full and Partial Wind Up of a Pension Plan, Index No. W100-101 (December 9, 2004).

11. *Bell ExpressVu Ltd. v. Partnership v. Rex*, [2002] 2 S.C.R. 559.

12. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27.

13. *Nolan v. Kerry (Canada) Inc.*, [2009] 2 S.C.R. 678.

14. *Huus v. Ontario (Superintendent of Pensions)* (2002), 58 O.R. (3rd) 380, [2002] O.J. No. 524 (C.A.).

15. *Crystalline Investments Ltd. v. Domgroup Ltd.*, [2004] 1 S.C.R. 60.

16. *GMAC Commercial Credit Corp. Canada v. TCT Logistics Inc.*, [2006] 2 S.C.R. 123.

17. *Nortel Networks Corp. (Re)*, 2009 ONCA 833, 99 O.R. (3d) 708 (CA).

SCHEDULE "B"
RELEVANT STATUTES

Employment Standards Act, 2000 S.O. 2000, c. 41

Vacation pay in trust

40.(1) Every employer shall be deemed to hold vacation pay accruing due to an employee in trust for the employee whether or not the employer has kept the amount for it separate and apart.

Same

(2) An amount equal to vacation pay becomes a lien and charge upon the assets of the employer that in the ordinary course of business would be entered in books of account, even if it is not entered in the books of account.

Care, diligence and skill

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

Special knowledge and skill

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

Member of pension committee, etc.

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

Conflict of interest

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

Employment of agent

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

Trustee of pension fund

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

Responsibility for agent

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

Employee or agent

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

Benefit by administrator

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

Member of pension committee, etc.

(10) Subsection (9) applies with necessary modifications to a member of a pension committee or board of trustees that is the administrator of a pension plan and to a member of a board, agency or commission made responsible by an Act of the Legislature for the administration of a pension plan.

Payment to agent

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

Trust property

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

Money withheld

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

Accrued contributions

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

Wind up

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

Lien and charge

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

Application of subss. (1, 3, 4)

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

Money to be paid to insurance company

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

Determination of entitlements

73.(1) For the purpose of determining the amounts of pension benefits and any other benefits and entitlements on the winding up of a pension plan, in whole or in part,

(a) the employment of each member of the pension plan affected by the winding up shall be deemed to have been terminated on the effective date of the wind up;

(b) each member's pension benefits as of the effective date of the wind up shall be determined as if the member had satisfied all eligibility conditions for a deferred pension; and

(c) provision shall be made for the rights under section 74.

Transfer rights on wind up

(2) A person entitled to a pension benefit on the wind up of a pension plan, other than a person who is receiving a pension, is entitled to the rights under subsection 42 (1) (transfer) of a member who terminates employment and, for the purpose, subsection 42 (3) does not apply. R.S.O. 1990, c. P.8, s. 73.

Combination of age and years of employment

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

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

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

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

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

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

Part year

(2) In determining the combination of age plus employment or membership, one-twelfth credit shall be given for each month of age and for each month of continuous employment or membership at the effective date of the wind up.

Member for ten years

(3) Bridging benefits offered under the pension plan to which a member would be entitled if the pension plan were not wound up and if the membership of the member were continued shall be included in calculating the pension benefit under subsection (1) of a person who has at least ten years of continuous employment with the employer or has been a member of the pension plan for at least ten years.

Prorated bridging benefit

(4) For the purposes of subsection (3), if the bridging benefit offered under the pension plan is not related to periods of employment or membership in the pension plan, the bridging benefit shall be prorated by the ratio that the member's actual period of employment bears to the period of employment that the member would have to the earliest date on which the member would be entitled to payment of pension benefits and a full bridging benefit under the pension plan if the pension plan were not wound up.

Notice of termination of employment

(5) Membership in a pension plan that is wound up in whole or in part includes the period of notice of termination of employment required under Part XV of the Employment Standards Act, 2000. R.S.O. 1990, c. P.8, s. 74 (5);

Application of subs. (5)

(6) Subsection (5) does not apply for the purpose of calculating the amount of a pension benefit of a member who is required to make contributions to the pension fund unless the member makes the contributions in respect of the period of notice of termination of employment.

Consent of employer

(7) For the purposes of this section, where the consent of an employer is an eligibility requirement for entitlement to receive an ancillary benefit, the employer shall be deemed to have given the consent.

Consent of administrator, jointly sponsored pension plans

(7.1) For the purposes of this section, where the consent of the administrator of a jointly sponsored pension plan is an eligibility requirement for entitlement to receive an ancillary benefit, the administrator shall be deemed to have given the consent.

Application of section

(8) This section and sections 73 (determination of entitlements), 84, 85 and 86 (guaranteed benefits) apply in respect of the wind up, in whole or in part, of a pension plan where the effective date of the wind up is on or after the 1st day of April, 1987.

Refund

(9) A person affected by a wind up who elects to receive a benefit under subsection (1) is not entitled to payment of any refund of contributions or interest under subsection 63 (3) or (4) (refunds).

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.

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.

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

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.

N 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
NDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADA INC. and NOVAR INC.

Applicants

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

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at **Toronto**

FACTUM

(Appeal by retirees regarding pension plan wind up deemed trust and breach of fiduciary duty)

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