File Number:

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

FTI CONSULTING CANADA ULC,
IN ITS CAPACITY AS COURT-APPOINTED MONITOR OF INDALEX LIMITED, ON BEHALF OF INDALEX LIMITED

Applicant
(Respondent)

-and-

KEITH CARRUTHERS, LEON KOZIEROK, RICHARD BENSON, JOHN FAVERI, KEN WALDRON, JOHN (JACK) W. ROONEY, BERTRAM MCBRIDE, MAX DEGAN, EUGENE D'IORIO, RICHARD SMITH, ROBERT LECKIE, NEIL FRASER and FRED GRANVILLE ("RETIREES") and UNITED STEELWORKERS

Respondents
(Appellants)

-and-

MORNEAU SOBECO LIMITED PARTNERSHIP and THE SUPERINTENDENT OF FINANCIAL SERVICES

Interveners
(Interveners)

APPLICATION FOR LEAVE TO APPEAL OF FTI CONSULTING CANADA ULC, IN ITS CAPACITY AS THE COURT-APPOINTED MONITOR OF INDALEX LIMITED, ON BEHALF OF INDALEX LIMITED, APPLICANT

Pursuant to Subsection 40(1) of the *Supreme Court Act,* RSC 1985, C S-26 and Rules 25 of the *Rules of the Supreme Court of Canada*

VOLUME I of III

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Respondents
(Appellants)

-and-

MORNEAU SOBECO LIMITED PARTNERSHIP and
THE SUPERINTENDENT OF FINANCIAL SERVICES

Interveners
(Interveners)

NOTICE OF APPLICATION FOR LEAVE TO APPEAL OF FTI CONSULTING CANADA ULC, IN ITS CAPACITY AS THE COURT-APPOINTED MONITOR, ON BEHALF OF INDALEX LIMITED, APPLICANT

Pursuant to Subsection 40(1) of the *Supreme Court Act,* RSC 1985, c S-26 and Rule 25 of the *Rules of the Supreme Court of Canada*

TAKE NOTICE that FTI Consulting Canada ULC, in its capacity as the Court-appointed Monitor of Indalex Limited ("Indalex"), hereby applies, on behalf of Indalex, for an order granting the Monitor leave to appeal to this Court, pursuant to subsection 40(1) of the *Supreme Court Act,* and Rule 25 of the *Rules of the Supreme Court of Canada*, from the judgment of the Court of Appeal for Ontario, Court of Appeal File Nos. C52187 and C52346, made 7 April 2011; or for such further or other order that the Court may deem appropriate.

AND FURTHER TAKE NOTICE that this application for leave is made on the following grounds:

1. On April 3, 2009, Indalex and related entities (collectively, the "Debtors") made an application under the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36 (the "CCAA") and an Initial Order was made by the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) granting, *inter alia*, a stay of proceedings against the Debtors and appointing FTI Consulting Canada ULC as monitor (the "Monitor"). Indalex's parent company and certain US affiliates (collectively, the "US Debtors") had previously commenced proceedings under Chapter 11 of Title 11 of the United States Bankruptcy Code on March 20, 2009.

2. On April 8, 2009, Morawetz J. granted the Amended and Restated Initial Order which, *inter alia*, authorized Indalex to borrow funds (the "DIP Loan") pursuant to a debtor-in-possession ("DIP") credit agreement among the US Debtors, the Debtors and a syndicate of lenders (the "DIP Lenders"). On June 12, 2009, the Initial Order was amended to, *inter alia*, increase the Canadian sub-facility borrowing limit of the DIP loan.

3. The Initial Order provides that the Debtors' obligation to repay the DIP Loan is secured by a Court-ordered charge in favour of the DIP Lenders which ranks in priority to all liens and encumbrances, including deemed trusts and statutory liens, other than the "Administration Charge" and the "Directors' Charge" (as those terms are defined in the Initial Order).

4. The DIP Credit Agreement contemplated that the DIP Loan would be repaid from the proceeds derived from a going concern sale of Indalex's assets on or before August 1, 2009. The Debtors' obligation to repay the DIP Loan was guaranteed by the US Debtors.

5. On July 20, 2009, the sale of substantially all of the assets and business of the Debtors and the US Debtors on a going concern basis was approved by the Court (the "Approval and Vesting Order"). The Approval and Vesting Order required that the

proceeds of sale be paid to the Monitor and the Monitor was ordered and directed to make a distribution to the DIP Lenders in satisfaction of the Debtors' obligations to the DIP Lenders, subject to a reserve that the Monitor considered to be appropriate in the circumstances (the "Undistributed Proceeds").

6. The DIP Loan was not repaid in full and the DIP Lenders called on the guarantee granted by the US Debtors for the unpaid amount, which the US Debtors subsequently paid. The US Debtors are therefore fully subrogated to the rights of the DIP Lenders under the Initial Order for the amount of the payment under the guarantee.

7. Certain members of the United Steelworkers (the "USW") and certain retired executives of Indalex (the "Retirees") brought motions seeking, *inter alia*, orders in effect declaring that the amounts of any wind-up deficiencies in the Retirement Plan for Salaried Employees of Indalex Limited and Associated Companies (the "Salaried Plan") and the Retirement Plan for Executive Employees of Indalex Limited and Associated Companies (the "Executive Plan") were subject to deemed trusts under the *Pension Benefits Act,* RSO 1990, c. P.8 (the "PBA") and that such deemed trusts had priority to any other creditor of Indalex, including the DIP Lenders.

8. The CCAA judge dismissed the Retirees' and USW's motions. Relying on the plain language of the PBA and on the decisions of Farley J. in *Toronto Dominion Bank v. Usarco* and the Court of Appeal for Ontario in *Ivaco Inc. Re*., the CCAA Judge held (1) that no amounts were due or payable under the Salaried Plan and no deemed trust arose in respect of the remaining deficiency; and (2) that the Executive Plan had not been wound up, all contributions which were due had been paid, and no deemed trust arose (the "Deemed Trust Decision").

9. In the decision below, the Court of Appeal for Ontario allowed the appeals of the Deemed Trust Decision and declared that the claims of the USW and the Retirees take priority over the DIP Lenders (asserted by the US Debtors through their subrogation to rights of the DIP Lenders). The Court of Appeal ordered the Monitor to pay, from the Undistributed Proceeds, an amount sufficient to satisfy the wind-up

deficiencies in the Salaried Plan and the Executive Plan in priority to the DIP Loan despite the fact that the Initial Order (the relevant terms of which were never appealed, varied or amended) expressly gave the DIP Lenders priority over all liens and encumbrances, including deemed trusts and statutory liens and expressly provided that the DIP Lenders are entitled to rely on the Initial Order for all advances made under the DIP Credit Agreement up to and including the date the Initial Order may be varied and amended.

10. In reaching its decision, the Court of Appeal for Ontario held, contrary to prior appellate authority, that the PBA deemed trust includes any wind-up deficiency. The Court of Appeal also found that while Indalex was entitled to seek protection under the CCAA, it breached its fiduciary duties as administrator of the pension plans by, amongst other things, negotiating the DIP Loan and a sale of its assets that did not involve the assumption of the pension plans – corporate decisions that were wholly unconnected to the actual administration of the Plans.

11. The Court of Appeal's decision has immediate detrimental impacts on CCAA proceedings, commercial lending and pension administrators across Canada and raises crucial questions of public and national importance that require this Honourable Court's attention.

12. In particular, the Court of Appeal's decision results in the following consequences that run contrary to this Court's recent decision in *Century Services v. Canada (Attorney General)* and to the clear legislative intention of the CCAA (including the recent amendments thereto designed to foster the availability of DIP lending) and the PBA:

    (a) Unappealed CCAA orders are subject to being altered at a court's discretion despite the fact that parties may have relied on the order to their detriment;

    (b) Debtors and, in particular, companies with defined benefit pension plans, will have great difficulty or be unable to obtain DIP financing, resulting in their

inability to utilize the provisions of the CCAA and resulting in forced liquidations under the *Bankruptcy and Insolvency Act* (the "BIA");

(c) The scheme of distribution under the CCAA is to be treated differently from the scheme of distribution under the BIA, contrary to this Court's decision in *Century Services,* which can be expected to lead secured creditors of companies with defined benefit pension plans to force liquidation under the BIA to ensure that their priority rights are protected*;*

(d) Lenders will be unable to accurately evaluate security needed to support loans to companies with defined benefit pension plans as the wind-up deficiency is unascertainable until the final payment is made and the plan assets are distributed. As a result, companies with defined benefit pension plans will either be denied credit or will be required to pay substantially more for their credit facilities; and

(e) Employers with defined benefit pension plans will either be unable to act as administrators of their pension plans or will be put in the untenable position, contrary to fundamental principles of insolvency law, of having to prefer the interest of one class of stakeholders over all others, including creditors and employees, when making any and all corporate decisions.

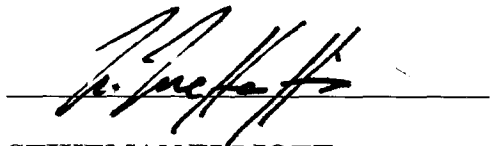
13. As such, the decision of Court of Appeal for Ontario raises the following crucial issues of public and national importance for consideration by this Court:

(a) Can a super-priority charge, granted by a supervising judge under the CCAA, in an order that has not been appealed, be retroactively revoked on a subsequent motion to the detriment of parties who have acted in reliance on it?

(b) Does Ontario's PBA create a deemed trust over wind-up deficiencies?

(c) Does a company's need to take steps under the CCAA place it in an irremediable conflict with its fiduciary obligations as administrator of a pension plan?

Dated at the City of Ottawa, in the Province of Ontario, this 6th day of June 2011.



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NOTICE TO THE RESPONDENTS: A respondent may serve and file a memorandum in response to this application for leave to appeal within 30 days after service of the application. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration pursuant to section 43 of the *Supreme Court Act.*

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-and-

MORNEAU SOBECO LIMITED PARTNERSHIP and THE SUPERINTENDENT OF FINANCIAL SERVICES

Interveners
(Interveners)

NOTICE OF NAME
Pursuant to Rule 25(1)(b) of the *Rules of the Supreme Court of Canada*

TAKE NOTICE that FTI Consulting Canada ULC is registered in accordance with *Business Corporations Act*, SBC 2002, c 57 under its name, only in English.

Dated at Ottawa, Ontario this 6th day of June, 2011.

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CERTIFICATE (AGENT OF THE APPLICANT)
Pursuant to Rule 25(1)(c) of the *Rules of the Supreme Court of Canada*

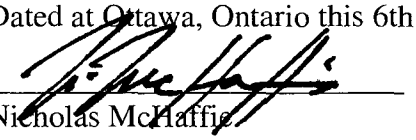
I, Nicholas McHaffie, agent for the Applicant, FTI Consulting Canada ULC, hereby certify that

(a) there is no sealing or confidentiality order in effect in the file from a lower court or the Court and no documents filed that include information that is subject to a sealing or confidentiality order or that is classified as confidential by legislation;

(b) there is no ban on the publication of evidence or the names or identity of a party or witness; and

(c) there is no information that is subject to limitations on public access;

Dated at Ottawa, Ontario this 6th day of June, 2011



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CITATION: Re Indalex 2010 ONSC 1114
Court File No. CV-09-8122-00CL
Date: 20100218

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C., 1985, c. C-36, as amended

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

Katherine McEachern, Linc Rogers, J.A. Prestage for the Applicants

Ashley Taylor, Lesley Mercer for the Monitor, FTI Consulting

Andrew Hatnay, Demetrios Yiokaris for various employees

Darrell Brown for the United Steelworkers

Mark Bailey for the Superintendent of Financial Services

Fred Myers, Brian Empey for Sun Indalex Finance, LLC

Heard: July 20 and August 28, 2009

C. CAMPBELL J.:

REASONS FOR DECISION

[1] On July 20, 2009, this Court heard a motion for approval of a sale and for a Vesting Order in a joint cross-border hearing with Justice Walsh of the United States Bankruptcy Court for the District of Delaware.

Background

[2] On March 20, 2009, Indalex US commenced reorganization proceedings under Chapter 11 of Title 11 of the United States Bankruptcy Code before the U.S. Court.

[3] On April 3, 2009, the Applicants commenced parallel proceedings and filed for and obtained protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, as amended (the "*CCAA*") pursuant to an order of Morawetz J. (the "Initial Order") Pursuant to the Initial Order, FTI Consulting Canada ULC was appointed as Monitor of the Applicants.

[4] On April 8, 2009, the Initial Order was amended and restated to, *inter alia*, authorize the Applicants to exercise certain restructuring powers and authorize Indalex Limited 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. is administrative agent (the "DIP Agent.")

[5] The Applicants' obligation to repay the DIP Borrowings was guaranteed by Indalex US. The guarantee by Indalex US was a condition to the extension of credit by the DIP Lenders to the Applicants.

[6] On April 22, 2009, this Court granted an Order which, inter alia, extended the stay of proceedings to June 26, 2009, and approved a marketing process.

[7] By Order dated July 20, 2009 (the "Approval and Vesting Order"), this Court approved the sale of the Applicants' assets as a going concern to SAPA Holding AB (including any assignees, "SAPA"), and ordered that upon closing of the SAPA transaction, the proceeds of sale (the "Canadian Sale Proceeds") were to be paid to the Monitor.

[8] Pursuant to the Approval and Vesting Order, the Monitor was ordered and directed to make a distribution to the DIP Lenders, from the Canadian Sale Proceeds, in satisfaction of the Applicants' obligations to the DIP Lenders, subject to a reserve that the Monitor considered to be appropriate in the circumstances (the "Undistributed Proceeds.")

[9] At the sale approval hearing, both the Former Executives and the United Steel Workers (USW) asserted deemed trust claims over the Canadian Sale Proceeds in respect of underfunded pension liabilities in connection with certain pension plans administered by Indalex Limited, and requested that an amount representing their estimate of the under-funded deficiencies be included in the amount retained by the Monitor as Undistributed Proceeds, pending further order of the Court.

[10] As a result of the Former Executives and USW's reservation of rights, the Monitor has retained the amount of $6.75 million as Undistributed Proceeds, in addition to other amounts reserved by the Monitor.

[11] On July 31, 2009, the sale of Indalex'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. As this resulted in a deficiency of US$10,751,247.22 in respect of the DIP Borrowings, the DIP Agent called on the guarantee granted to the DIP Lenders by Indalex US for the amount of the deficiency (the "Guarantee Payment") and Indalex US has satisfied the obligation of the Applicants.

[12] The approval motion was either supported or unopposed by all parties except for an issue raised on behalf of certain retirees under pension plans of the Company. Pursuant to paragraph 14 of the Approval and Vesting Order, Indalex US is fully subrogated to the rights of the DIP Lenders under the DIP Lenders' Charge for the amount of the Guarantee Payment.

[13] Counsel for the retirees objected to the sale on the basis that the liquidation values set forth in the 7th Monitor's Report would, it was suggested, provide greater return for unsecured creditors than would the proposed sale. That objection was dismissed on the basis that there was no clear evidence to support the proposition and in any event the transaction as approved did preserve value for suppliers, customers and preserve approximately 950 jobs of the Applicants' plant employees in Canada.1

[14] The second objection by certain retirees and employees involves a claim based on a statutory deemed trust said to be in respect of certain funds held by the Monitor proposed to be reserved from the funds for distribution on closing to the DIP Lenders.

[15] At the July 20, 2009 hearing, the Court expressed concern that the position of the retirees and employees, which was brought only at the time of the approval motion, if it were to be dealt with at all, without an adjournment of the approval hearing, should be dealt with promptly as part of the overall approval process.

[16] Following the submissions of counsel, it was agreed that an expedited hearing process on the retirees' and employees' positions would be undertaken promptly, and that the funds on hand with the Monitor would be sufficient if required to satisfy retirees' alleged trust claims.

[17] The motion in respect of the deemed trust came on for hearing on August 28, 2009. The position of the retirees was opposed by the Applicants and the purchaser. Submissions were also made by counsel for the Superintendent under the Ontario *Pension Benefits Act*, R.S.O. 1990 c. P-8 ("*PBA*.") This decision was then reserved pending the November 26, 2009 ruling of the Court of Appeal rendered in *Sproule v. Nortel Networks Corporation*, reported, 2009 ONCA 833.

[18] There are two groups of retired employees at issue in this matter. Those represented by Mr. Hatnay and his colleagues seek a declaration that the amount of $3.2 million, which represents the wind up liability said to be owing by the Applicants to the Retirement Plan for Executive Employees of Indalex Canada and Associated Companies (the "Executive Plan") and which is currently held in reserve by the Monitor, is subject to the deemed trust for the benefit of the beneficiaries of the Executive Plan under section 57(4) of the *PBA*. The Pensioners further seek an order that such amounts are not distributable to other creditors of the Applicants and are to be paid into the fund of the Executive Plan and that such orders and declarations survive any subsequent bankruptcy of the Applicants.

[19] There were, as of January 1, 2008, eighteen members of the Executive Plan, none of whom are active employees.

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1 Monitor's 7th Report, July 15, 2009, p. 13, paragraphs 34(c)(d)

[20] The second group of pension claimants are members of the United Steel Workers, who seek recovery from the sale proceeds based on deemed trust of a pension plan in wind-up of an amount equal to the deficiency in the Retirement Plan for Salaried Employees of Indalex and Associated Companies ("Salaried Plan.") The deficiency in the Salaried Plan is said to be $1,795,600 as of December 31, 2008.

The Issues

1. Do the deemed trust provisions of s. 57 and s. 75 of the *PBA* apply to the funds currently held in reserve by the Monitor in respect of:

    a. The Executive Plan;

    b. The Salaried Plan?

2. Should the stay currently in place under the *CCAA* be lifted to permit the Applicants to file for bankruptcy under the *BIA*?

[21] There are several differences between the Executive Plan and the Salaried Plan. The Salaried Plan contains both a defined benefit and defined contribution component. Indalex and members of the Salaried Plan were required to make joint contributions to the Salaried Plan.

[22] The Salaried Plan is in the process of being fully wound up with an effective wind-up date of December 31, 2006. No pensions have accrued since that date. The wind-up deficiency in the Salaried Plan at December 31, 2008 was $1,795,600, has been subject to special payments to deal with that deficiency, of $709,013 in 2007, $875,313 in 2008 and $601,000 in 2009, all of which have been made. The last special payment was scheduled to be made on December 31, 2009.

The Executive Plan

[23] The Executive Plan has not been wound up. The material filed with the Court exhibits an intention on the part of the Applicants to wind up that Plan. The uncontested evidence of Bob Kavanagh on behalf of the Applicants in his affidavit sworn August 12, 2009 is to the following effect:

16. Indalex has made all required contributions to the Executive Plan to date and no amounts are currently due or owing to the Executive Plan, including special payments.
17. As at January 1, 2008, the Executive Plan had an estimated deficiency of $2,996,400 determined on a wind-up basis. In 2008, Indalex made total special payments of $897,000 to the Executive Plan. No further special payments are due to be made to the Executive Plan until 2011.
18. If the Executive Plan were to be fully wound up, the funded status of the plan as of the wind-up date could only be determined by an actuarial valuation of the plan performed after the wind-up date once the plan's assets and liabilities have been determined. No actuarial valuation of the Executive Plan has been prepared since the valuation performed with an effective date of January 1, 2008.
19. Sixteen individuals with benefit entitlements under the Executive Plan were last employed by Indalex in Ontario and two individuals with benefit entitlements under the Executive Plan were last employed by Indalex in Alberta.

20. There is currently one member of the Executive Plan who is on long term disability and continues to accrue benefits under the plan.
21. Currently, approximately 80% of the assets of the Executive Plan are invested in fixed income securities and approximately 20% of the assets of the Executive Plan are invested in equities.
22. The market value of the assets of the Executive Plan as at June 30, 2009 was $5,022,940. Attached hereto as Exhibit "C" is a copy of the Statement of Net Assets Available for Benefits as of June 30, 2009.

[24] The affidavit of Keith Carruthers exhibits a letter of July 13, 2009 on behalf of the Monitor confirming the intention of the Applicants to wind up the Executive Plan in accordance with the provisions of the *PBA*. There are no deficiencies in payments under the Executive Plan as of July 20, 2009. The Executive Plan is not wound up. Given the analysis that follows in respect of the Salaried Plan, I see no basis for a deemed trust of any amount at this time in respect of the Executive Plan.

The Salaried Plan

[25] This motion essentially involves one aspect of the Salaried Plan of Indalex, namely the windup deficiency of the said plan. It is the position of the *CCAA* Applicants that prior to the sale of assets approved on July 20, 2009, all pension payments required under obligation to Indalex employees, both statutory and contractual, were met.

[26] What is at issue here is the requirement for an annual deficiency payment that was established to be made when the Salaried Plan was wound up as at December 31, 2006.

[27] The term "wind up" can be a misnomer unless understood in context. When a pension plan is "wound up," at the effective date it means that no new entrants are permitted. An actuarial calculation is then made of the assets to determine whether, based on certain actuarial assumptions, there will be sufficient monies available at the times required to pay the pension entitlement of employees who have and will retire.

[28] If the assets as of the wind-up date are found to be insufficient, that deficiency will be required to be made up under the *PBA*. As in this case, the Plan may be permitted to have the deficiency rectified in a period of up to five years by annual instalments.

[29] The issue for this Court is whether or not under the *PBA* there is a requirement that the deficiency commencing at the wind up date be paid as at the date of closing of the sale and transfer of assets, namely July 20, 2009.

[30] The issue is to be determined by analysis and application of the provisions of the *PBA*. The sections involved are the following:

57.

(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.

(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.

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.

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

[31] Section 75 of the *PBA* is amplified by sections of the regulations under the statute * * (see R.R.O. 1990 Regulation 909.) Section 28 and the following 144 pages of the Regulation deal with wind-up notices. Section 31(1) and (2) are as follows:

31. (1) The liability to be funded under section 75 of the Act shall be funded by annual special payments commencing at the effective date of the wind up and made by the employer to the pension fund. O. Reg. 712/92, s. 19.

(2) The special payments under subsection (1) for each year shall be at least equal to the greater of,

(a) the amount required in the year to fund the employer's liabilities under section 75 of the Act in equal payments, payable annually in advance, over not more than five years; and

(b) the minimum special payments required for the year in which the plan is wound up, as determined in the reports filed or submitted under sections 3, 4, 5.3, 13 and 14, multiplied by the ratio of the basic Ontario liabilities of the plan to the total of the liabilities and increased liabilities of the plan as determined under clauses 30 (2) (b) and (c). O. Reg. 712/92, s. 19.

[32] The most pertinent of all of these sections are 57(4) and 75(2), as they apply to this windup situation. The submission on behalf of the Superintendent distinguished between the words "due" and "accruing due." The assertion is that the word "accrue" must be given meaning. The meaning suggested is that by virtue of the inclusion of the word "accrue," the remaining deficiency payments become payable since they fall within the deemed trust provisions.

[33] The distinction to be made between amounts that are accruing and amounts that are due is that, in the case of an amount accruing, it is not yet payable, while generally an amount that is due is payable.

[34] The deemed trust provision of s. 57(4) requires the employer to accrue "to the date of the windup but not yet due." The windup in this case is December 31, 2006. In my view the section contemplates the calculation to be made as of the date of wind-up of the amounts required to make up the deficiency. If, as here, the regulator permits that deficiency to be made up over a

period of years, the amount of the yearly payments does not become due until it is required to be paid. It is "payable annually in advance."

[35] In *Re Ganong Estate; Ganong v Belyea*, [1941] S.C.R. 125, it was held:

> ...the words 'all dividends accrued due' can surely only mean dividends which have become payable by the corporation to the shareholder, as the words "dividends accruing due" during any stated period can only mean dividends as they become payable by the corporation to the shareholder.

The court went on to say:

> How can these dividends possibly be said to have 'accrued due' or to be 'accruing due' when no profits have been earned to provide for their payment and no declaration has been made by the directors fixing any date therefor? The shareholders acquire no right to payment of any dividends until there are net profits, out of which alone they can be paid and until such time as the directors determine they shall be paid.

[36] The use of the word "accrue" connotes the ability to calculate a precise amount of money. The word "due" connotes that it is payable whether or not the time for payment has arrived. See *Black's Law Dictionary*, 6th ed., The West Group at p. 499, where it is noted that with respect to the word "due," "it imports a fixed and settled obligation or liability but with reference to the time for its payment, there is considerable ambiguity in the use of the term."

[37] In *Toronto Dominion Bank v. Usarco Ltd.*, [1991] 42. E.T.R. 235, Ont. C.J. (Gen. Div.), Farley J. dealt with 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. He said at paragraph 26:

> 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). It is recognized in these circumstances, however, that the bank will have a secured position which will prevail against these additional obligations as to the special payments, which have not yet been required to be paid into the fund. Sadly, it is extremely unlikely there will be a surplus after taking care of the bank to allow the pension fund to be fully funded for this (the likelihood being that the wind-up valuation of assets and liabilities of the pension fund will show a deficiency.)

[38] The issue was dealt with again in *Ivaco Inc. Re.* [2006] 25 C.B.R. [5th] 176. (Ont. C.A.), J. Laskin J.A. speaking for the Court of Appeal noted at paragraph 38 that "in a series of cases, the Supreme Court of Canada has repeatedly said that a province cannot, by legislating a deemed trust, alter the scheme of priorities under the federal statute."

[39] Paragraph 44 of that decision states:

> 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.

[40] In the text "Essentials of Canadian Law-Pension Law" (Toronto: IrwinLaw, 2006) author Ari N. Kaplan at page 396 states:

> The *PBA* does not expressly state whether a funding deficiency on the wind up of a pension plan is secured by the deemed trust, but it appears that the deemed trust is intended to apply to the deficiency to the extent it relates to employer contributions and remittances due and owing to the pension fund on wind up, but which have not been paid."

[41] The author goes on in the next paragraph:

> The deemed trust does not extend to the obligation of an employer to fund pension obligations that have not yet become due or which "crystallize" only upon the windup of the pension plan.

The *Usarco* decision referred to above is the foundation for that statement.

[42] In his paper given at an Insight Conference, "Pension Management in Insolvency and Restructuring: What Is At Stake?" September 20, 2005, Gregory J. Winfield at page 29 states:

> Of particular note to secured creditors will be the fact that the courts have determined that the deemed trust created under that O*PBA* does not extend to the unfunded pension liability upon the windup of the plan, but is limited to the outstanding unremitted contributions that are past due plus those arising in respect of the stub period. Accordingly while the entirety of the pension fund shortfall remains an obligation of the employer, and an obligation exists under the O*PBA* to fund this deficiency over a period not exceeding five years from the date of wind up, at present this is an unsecured claim on the assets of the debtor." [Reference omitted]

[43] The difficulty in reconciling the requirements of the pension statute with the regime of the *CCAA* is that a company such as Indalex is entitled to carry on business and to make payments in the ordinary course of such business including those that may be required under the initial order which may well, as here, include certain ongoing pension obligations while in *CCAA*.

[44] Were it not for the provisions in s. 31 of the Regulations, Indalex would have had under s. 75 of the *PBA* to pay in as of the date of wind-up any Plan deficiency. Section 31 of the Regulation as anticipated in s. 75 of the Act spreads that into five equal annual instalments.

[45] One obvious purpose behind the provision in s. 31 of the Regulation is to ease the burden on the Company to enable it to have the funds to operate its normal business operations while it earns the revenue to make up the deficiency.

[46] The pension issues that have arisen given the nature of the recent recession, as here, are often complex and pit as adversaries creditors of a corporation who most often having advanced funds under security which creditors assert give them priority as to the repayment, as against employees many of whom are long-term or even retired who have seen the assets supporting their pensions decrease in value, risking the payments to which the employees are otherwise entitled by the terms of the plan of which they are members.

[47] In circumstances such as this, the Court does not have the mandate to exercise the discretion to do what it or any group might consider fair and equitable. The federal insolvency legislation in force (the *CCAA* and *BIA*) provide schemes of priority among creditors commencing with those who have security over the assets of the company. Pitted against those with security are those unsecured creditors who must share in whatever is left over after the secured creditors are paid.

[48] Employees or retired employees are entitled to pensions in accordance with the contractual terms of their pension plan. In certain circumstances those contractual terms will be augmented by the provisions of the *PBA* to the extent that they do not conflict with federal insolvency legislation. In some of these circumstances, a "deemed trust" will arise.

[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 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*.

[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.

[51] Since under the initial order priority was given to the DIP Lenders, they are entitled to be repaid the amounts currently held in escrow. Those entitled to windup deficiency remain as of that date unsecured creditors.

Motion To Lift Stay

[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.

[53] In support of that position, it was urged that since the Applicants no longer carried on business, have no active employees and no tangible assets apart from tax refunds (other than the cash sale proceeds associated with the above motion), and no directors (they having resigned), an assignment in bankruptcy is appropriate. The stay granted under the Initial Order, it is urged, should be lifted for that purpose.

[54] The decision on the voluntary assignment was reserved pending a decision in the main motion above, since to allow the bankruptcy to proceed might have deprived employees of an argument under the *CCAA*.

[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.

[56] I conclude that it is not necessary to deal with the issue of the voluntary assignment, at least on the basis sought by the Applicants at this time. I did not find conflict between the federal and provincial regimes.

[57] Should the Applicants wish to renew the request for bankruptcy relief, the motion can be scheduled through the Commercial List.

10

C. CAMPBELL J.

Released:

CITATION: Re Indalex 2010 ONSC 1114
Court File No. CV-09-8122-00CL
Date: 20100218

SUPERIOR COURT OF JUSTICE
ONTARIO
(Commercial List)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C., 1985, c. C-36, as amended

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

REASONS FOR DECISION

C. CAMPBELL J.

RELEASED: February 18, 2010

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	FRIDAY, THE 18[TH]
	)	
JUSTICE CAMPBELL	)	DAY OF FEBRUARY, 2010

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

- and -

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

ORDER

THIS MOTION, made 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 (the "Retirees") who are members of The Retirement Plan for Executive Employees of Indalex Canada and Associated Companies, Canada Revenue Agency Registration number 0455626, was heard July 20, 2009 and August 28, 2009 at 330 University Ave., Toronto, Ontario, Reasons for Decision having been reserved to February 18, 2010.

ON READING the Motion Record of the Retirees, the Retirees Notice of Motion, the Affidavit of Keith Carruthers, sworn June 23, 2009, the Affidavit of Andrea McKinnon, sworn July 17, 2009, the Affidavit of Keith Carruthers sworn August 15, 2009, the Affidavit of Max Degen sworn August 6, 2009, the Affidavit of Mari Trainor sworn September 3, 2009, the Cross-

Examination Transcripts of Keith Cooper on August 26, 2009 and the exhibits thereto; the Affidavit of Bob Kavanaugh sworn August 12, 2009, the Motion Record of the Applicants, including the Notice of Motion, the Affidavit of Keith Cooper sworn August 24, 2009; the Monitor's Eighth Report, dated July 28, 2009; the July 20, 2009 Endorsement of Justice Campbell, the July 27, 2009 Endorsement of Justice Campbell, the August 20, 2009 Factum of the Retirees; the August 24, 2009 Factum of the Applicants; the August 24, 2009 Responding Factum of the Applicants; the August 27, 2009 Reply Factum of the Retirees; the September 4, 2009 Written Submissions of the Superintendent of Financial Services; and the September 11, 2009 Supplementary Written Submissions of the Applicants filed, and upon hearing submissions for counsel from the Retirees, United Steelworkers, the Applicants, the Superintendent of Financial Services, the Monitor, and Sun Indalex Finance LLC,

1. **THIS COURT ORDERS** that the motion is dismissed.

G. Argyropoulos, Registrar
Superior Court of Justice

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO..

APR 0 8 2010

PER / PAR:

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36 AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF INDALEX LIMITED et al. the Applicants

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

ORDER

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	FRIDAY, THE 18TH
	)	
JUSTICE CAMPBELL	)	DAY OF FEBRUARY, 2010

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

- and -

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

ORDER

THIS MOTION, made by the United Steelworkers (the "USW") who represent beneficiaries of The Retirement Plan for Salaried Employees of Indalex Limited and Associated Companies, Canada Revenue Agency Registration number 0533646, was heard July 20, 2009 and August 28, 2009 at 330 University Avenue, Toronto, Ontario, Reasons for Decision having been reserved to February 18, 2010 and sought (a) a declaration that a deemed trust equal in amount to the Deficiency of assets in the Salaried Plan is enforceable against the assets of Indalex; (b) an order that the amount of assets required to eliminate the Deficiency in the Salaried Plan be segregated from the general assets of Indalex; (c) an order that the amount of assets segregated pursuant to (b) be paid to the fund of the Salaried Plan; (d) an order for costs; and (e) such further and other relief as to this Honourable Court seems just.

ON READING the Motion Record of the USW, the USW's Notice of Motion, the Affidavit of Cathy Braker, sworn August 5, 2009, the Cross-Examination Transcripts of Keith Cooper on August 26, 2009 and the exhibits thereto; the Affidavit of Bob Kavanaugh sworn August 12, 2009; the Affidavit of Fred Fazio sworn June 29, 2009; the Motion Record of the Applicants, including the Notice of Motion, the Affidavit of Keith Cooper sworn August 24, 2009; the July 20, 2009 Endorsement of Justice Campbell; the July 27, 2009 Endorsement of Justice Campbell; the August 20, 2009 Factum of the USW; the August 24, 2009 Responding Factum of the Applicants; the August 24, 2009 Factum of the Applicants; the August 27, 2009 Reply Factum of the USW; the August 27, 2009 Responding Factum of the USW; the September 4, 2009 Written Submissions of the Superintendent of Financial Services; and the September 11, 2009 Supplementary Written Submissions of the Applicants filed, and upon hearing submissions for counsel from the members of The Retirement Plan for Executive Employees of Indalex Canada and Associated Companies, the United Steelworkers, the Applicants, the Superintendent of Financial Services, the Monitor, and Sun Indalex Finance LLC,

1. **THIS COURT ORDERS** that the motion is dismissed.

Rm. Ittleman 2010/04/08

R. Ittleman, Registrar
Superior Court of Justice

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

APR 0 8 2010

PER / PAR: ✓

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,
R.S.C. c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADA INC. and NOVAR INC.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

ORDER

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

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.

Applicants

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

IT OF APPEAL FOR ONTARIO
RE MacPHERSON J.A. GILLESE J.A. BLAIR J.A.
MAY 2 0 2010

ISITION OF MOTION

The motion for leave to appeal is granted. Costs of Re motion reserved to Re and hearing Re appeal.

J.C. MacPherson J.A.
E.E. Gillese J.A.
R.J. Blair J.A.

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

JOINT MOTION RECORD OF THE RETIREES' AND THE UNITED STEELWORKERS
(Motion by retirees for leave to appeal regarding pension wind up deemed trust)

VOLUME 1

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CITATION: Indalex Limited (Re), 2011 ONCA 265
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COURT OF APPEAL FOR ONTARIO

MacPherson, Gillese and Juriansz JJ.A.

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/Respondents

Andrew J. Hatnay and Demetrios Yiokaris for the Former Executives, appellants

Darrell L. Brown for the United Steelworkers, appellants

Mark Bailey for the Superintendent of Financial Services

Hugh O'Reilly and Adam Beatty for Morneau Sobeco Limited Partnership, Intervenor

Fred Myers and Brian Empey for Sun Indalex Finance, LLC

Ashley Taylor and Lesley Mercer for the Monitor, FTI Consulting Canada ULC

Harvey Chaiton and George Benchetrit for George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the US Indalex Debtors

Heard: November 23 and 24, 2010

On appeal from the orders of Campbell J., of the Superior Court of Justice, dated

February 18, 2010.

Gillese J.A.:

[1] A Canadian company is insolvent. Its pension plans are underfunded and in the process of being wound up. The company is the administrator of the pension plans.

[2] The company obtains protection under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended (*CCAA*). A court order enables it to borrow funds pursuant to a debtor-in-possession (DIP) credit agreement. The order creates a "super-priority" charge in favour of the DIP lenders. The obligation to repay the DIP lenders is guaranteed by the company's U.S. parent company (the Guarantee).

[3] The company is sold through the *CCAA* proceedings but the sale proceeds are insufficient to repay the DIP lenders. The U.S. parent company covers the shortfall, in accordance with its obligations under the Guarantee.

[4] The *CCAA* monitor holds some of the sale proceeds in a reserve fund. The pension plan beneficiaries claim the money based on the deemed trust provisions in the *Pension Benefits Act,* R.S.O. 1990, c. P.8 (*PBA*). The U.S. parent company claims the money based on its payment under the Guarantee.

[5] Must the money in the reserve fund be used to pay the deficiencies in the pension plans in preference to the secured creditor? What fiduciary obligations, if any, does the company have in respect of its underfunded pension plans during the *CCAA* proceeding? These appeals wrestle with these difficult questions.

OVERVIEW

[6] Indalex Limited was the sponsor and administrator of two registered pension plans: the Retirement Plan for Salaried Employees of Indalex Limited and Associated Companies (the Salaried Plan) and the Retirement Plan for Executive Employees of Indalex Limited and Associated Companies (the Executive Plan) (collectively, the Plans).

[7] On March 20, 2009, Indalex's parent company and its U.S. based affiliates (collectively, Indalex U.S.) sought Chapter 11 protection in the United States.

[8] On April 3, 2009, Indalex Limited, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc. (Indalex or the Applicants) obtained protection from their creditors under the *CCAA*. At that time, the Salaried Plan was in the process of being wound up. Both Plans were underfunded. FTI Consulting Canada ULC (the Monitor) was appointed as monitor.

[9] On April 8, 2009, the court authorized Indalex to borrow funds pursuant to a DIP credit agreement. The court order gave the DIP lenders a super-priority charge on Indalex's property. Indalex U.S. guaranteed Indalex's obligation to repay the DIP lenders.

[10] On July 20, 2009, Indalex moved for approval of the sale of its assets on a going-concern basis. It also moved for approval to distribute the sale proceeds to the DIP lenders, with the result that there would be nothing to fund the deficiencies in the Plans.

Without further payments, the underfunded status of the Plans will translate into significant cuts to the retirees' pension benefits.

[11] At the sale approval hearing, the United Steelworkers appeared on behalf of its members who had been employed by Indalex and are the beneficiaries of the Salaried Plan (the USW). In addition, a group of retired executives appeared on behalf of the beneficiaries of the Executive Plan (the Former Executives).

[12] Both the USW and the Former Executives objected to the planned distribution of the sale proceeds. They asked that an amount representing the total underfunding of the Plans (the Deficiencies) be retained by the Monitor as undistributed proceeds, pending further court order. Their position was based on, among other things, the deemed trust provisions in the *PBA* that apply to unpaid amounts owing to a pension plan by an employer.

[13] The court approved the sale. However, as a result of the USW and Former Executives' reservation of rights, the Monitor retained an additional $6.75 million of the sale proceeds in reserve (the Reserve Fund), an amount approximating the Deficiencies.[1]

[14] The sale closed on July 31, 2009. The sale proceeds were insufficient to repay the DIP lenders. Indalex U.S. paid the shortfall of approximately US$10.75 million, pursuant to its obligations under the Guarantee.

[1] The Monitor retained the Reserve Fund as part of the Undistributed Proceeds. The Undistributed Proceeds also include amounts for the payment of cure costs, other costs associated with the completion of the SAPA transaction, legal and professional fees, and amounts owing under the DIP charge.

[15] In accordance with a process designed by the *CCAA* court, the USW and the Former Executives brought motions returnable on August 28, 2009, based on their deemed trust claims. They claimed the Reserve Fund was subject to deemed trusts in favour of the Plans' beneficiaries and should be paid into the Plans in priority to Indalex U.S. They also claimed that during the *CCAA* proceedings, Indalex breached its fiduciary obligations to the Plans' beneficiaries.

[16] Indalex then brought a motion in which it sought to lift the stay and assign itself into bankruptcy (the Indalex bankruptcy motion). This motion was directed to be heard on August 28, 2009, along with the USW and Former Executives' motions.

[17] By orders dated February 18, 2010, (the Orders under Appeal), the *CCAA* judge dismissed the USW and Former Executives' motions on the basis that, at the date of sale, no deemed trust under the *PBA* had arisen in respect of either plan. He found it unnecessary to decide the Indalex bankruptcy motion.

[18] The USW and the Former Executives (together, the appellants) appeal. They ask this court to order the Monitor to pay the Reserve Fund to the Plans.

[19] On November 5, 2009, the Superintendent of Financial Services (Superintendent) appointed the actuarial firm of Morneau Sobeco Limited Partnership (Morneau) as administrator of the Plans.

[20] Morneau was granted intervenor status. It supports the appellants.

[21] The Superintendent also appeared. He, too, supports the appellants.

[22] Sun Indalex, as the principal secured creditor of Indalex U.S., asks that the appeals be dismissed and the Reserve Fund be paid to it. As a result of its payment under the Guarantee, Indalex U.S. is subrogated to the rights of the DIP lenders. Its claim to the Reserve Fund is based on the super-priority charge.

[23] The Monitor appeared. It supports Sun Indalex and asks that the appeals be dismissed. The Monitor and Sun Indalex will be referred to collectively as the respondents.

[24] George L. Miller, the trustee of the bankruptcy estates of Indalex U.S., appointed under Chapter 7 of Title 11 of the United States Bankruptcy Code (the U.S. Trustee), was given leave to intervene. He joins with the Monitor and Sun Indalex in opposing these appeals.

[25] For the reasons that follow, I would allow the appeals and order the Monitor to pay, from the Reserve Fund, amounts sufficient to satisfy the deficiencies in the Plans. For ease of reference, the various statutory provisions to which I make reference can be found in the schedules at the end of these reasons.

BACKGROUND

[26] Indalex Limited is a Canadian corporation. It is the entity through which the Indalex group of companies operates in Canada. It is a direct wholly-owned subsidiary of its U.S. parent, Indalex Holding Corp., which in turn is a wholly-owned subsidiary of Indalex Finance.

[27] Together, the group of companies referred to as Indalex and Indalex U.S. were the second largest manufacturer of aluminum extrusions in the United States and Canada. Aluminum is a durable, light weight metal that can be strengthened through the extrusion process, which involves pushing aluminum through a die and forming it into strips, which can then be customized for a wide array of end-user markets.

[28] Indalex Limited produced a portion of the raw material used in the extrusion process, called aluminum extrusion billets, through its casting division located in Toronto. It also processed the raw extrusion billets into extruded product at its Canadian extrusion plants, for sale to end users. In 2008, Indalex Limited accounted for approximately 32% of the Indalex group of companies total sales to third parties.

[29] Indalex Limited provided separate pension plans for its executives and salaried employees. The Plans were designed to pay pension benefits for the lives of the retirees and those of their designated beneficiaries. Indalex Limited was the sponsor and administrator of both Plans. The Plans were registered with the Financial Services Commission of Ontario (FSCO) and the Canadian Revenue Agency.

The Salaried Plan

[30] The USW has several locals certified as bargaining agents on behalf of members employed with Indalex, including members who are beneficiaries of the Salaried Plan. It was certified to represent certain Indalex employees, seven of whom were members of the Salaried Plan and have deferred vested entitlements under that plan.

[31] The Salaried Plan contains a defined benefit and defined contribution component.

[32] Unlike the Executive Plan, the Salaried Plan was in the process of being wound up when Indalex began *CCAA* proceedings. The effective date of wind up is December 31, 2006. Special wind up payments were made in 2007 ($709,013), 2008 ($875,313) and 2009 ($601,000). As of December 31, 2008, the wind up deficiency was $1,795,600.

[33] All current service contributions have been made to the Salaried Plan.

[34] Article 4.02 of the Salaried Plan obligates Indalex to make sufficient contributions to the Salaried Plan. Article 14.03 of the Salaried Plan requires Indalex to remit "amounts due or that have accrued up to the effective date of the wind-up and which have not been paid into the Fund, as required by the Plan and Applicable Pension Legislation".

The Executive Plan

[35] The Executive Plan is a defined benefit plan. Effective September 1, 2005, Indalex closed the Executive Plan to new members.

[36] As of January 1, 2008, there were eighteen members of the Executive Plan, none of whom were active employees.

[37] The Executive Plan is underfunded.

[38] As of January 1, 2008, the Executive Plan had an estimated funding deficiency, on an ongoing basis, of $2,535,100. On a solvency basis, the funding deficiency was $1,102,800 and on a windup basis, the deficiency was $2,996,400. An actuarial review

indicated that as of July 15, 2009, the wind up deficiency had increased to an estimated $3,200,000.

[39] In 2008, Indalex made total special payments of $897,000 to the Executive Plan. No further special payments were due to be made to the Executive Plan until 2011. All current service contributions had been made.

[40] Due to its underfunded status, the Former Executives' monthly pension benefits have already been cut by 30-40%. Unless money is paid into the Executive Plan, these cuts will become permanent. The Former Executives have also lost their supplemental pension benefits which were unfunded and terminated by Indalex after it obtained *CCAA* protection. Between the two cuts, the Former Executives have lost between one half and two-thirds of their pension benefits.

[41] On June 26, 2009, counsel for the Former Executives sent a letter to counsel to Indalex and the Monitor, advising that the Former Executives reserved all rights to the deemed trust under s. 57(4) of the *PBA* in the *CCAA* proceedings. There was no response or objection to that letter from Indalex, the Monitor or any other party.

[42] At the time the Orders under Appeal were made, the Executive Plan had not been wound up. However, a letter from counsel for the Monitor dated July 13, 2009, indicated that it was expected that the Executive Plan would be wound up.

[43] On March 10, 2010, the Superintendent issued a Notice of Proposal to wind up the Executive Plan effective as of September 30, 2009. The wind up process is currently underway.

Pension and Corporate Governance During the CCAA Proceedings

[44] Keith Cooper, the Senior Managing Director of FTI Consulting Inc., was a key advisor to the Indalex group of companies prior to and during the *CCAA* proceedings. On March 19, 2009, he was appointed the Chief Restructuring Officer for all of the Indalex U.S. based companies. However, he was responsible not only for Indalex U.S. but for the entire Indalex group of companies and subsidiaries, including the Applicants. Mr. Cooper described his role as being to maximize recovery for Indalex as a whole.

[45] Mr. Cooper was the primary negotiator of the DIP credit agreement on behalf of Indalex. He does not recall discussing Indalex's pension obligations in respect of the Salaried and Executive Plans during the negotiation of the DIP credit agreement. He was aware that the Plans were underfunded and that pensions would be reduced if the shortfalls were not met.

[46] FTI Consulting Inc., the company for which Mr. Cooper works, and the Monitor are affiliated entities. The Monitor (FTI Consulting Canada ULC) is a wholly-owned subsidiary of FTI Consulting Inc.

[47] On July 31, 2009, all of the directors of Indalex resigned. On that same day, Indalex Holding Corp. (part of Indalex U.S.) became the management of Indalex. Thus, as of July 31, 2009, Indalex and Indalex U.S. formally had the same management.

[48] On August 12, 2009, a Unanimous Shareholder Declaration was executed in which Mr. Cooper was appointed to direct the affairs of all Indalex entities.

[49] On August 13, 2009, Indalex (which was now under the management of Indalex U.S.) announced its intention to bring a motion to bankrupt the Canadian company.

THE *CCAA* PROCEEDINGS

The Initial Order, as amended (April 3 and 8, 2009)

[50] On April 3, 2009, pursuant to the order of Morawetz J., Indalex obtained protection from its creditors under the *CCAA* (the Initial Order). A stay of proceedings against Indalex was ordered.

[51] On April 8, 2009, the Initial Order was amended to authorize Indalex to borrow funds pursuant to a DIP credit agreement among Indalex, Indalex U.S. and a syndicate of lenders (the DIP lenders). JP Morgan Chase Bank, N.A. was the administrative agent (the DIP Agent). The DIP credit agreement contemplated that the DIP loan would be repaid from the proceeds derived from a going-concern sale of Indalex's assets on or before August 1, 2009.

[52] Indalex's obligation to repay the DIP borrowings was guaranteed by Indalex U.S. The Guarantee was a condition to the extension of credit by the DIP lenders.

[53] Paragraph 45 of the Initial Order, as amended, is the super-priority charge. It provides that the DIP lenders' charge "shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise", other than the Administration Charge and the Directors' Charge, as those terms are defined in the Initial Order.

The Initial Order is Further Amended (June 12, 2009)

[54] On June 12, 2010, Morawetz J. heard and granted a motion by the Applicants for approval of an amendment to the DIP credit agreement to increase the borrowings by about $5 million, from US$24.36 million to US$29.5 million. This resulted in an order dated June 12, 2009, further amending the Initial Order (the June 12, 2009 order).

[55] Counsel for the Former Executives was served with motion material on June 11, 2009, at 8:27 p.m. In response to an email from the Former Executives' counsel questioning the urgency of the motion, the Monitor's counsel responded that the motion was simply directed at obtaining more money under the DIP credit agreement.

[56] At the hearing of the motion on June 12, 2010, the Former Executives initially sought to reserve their rights to confirm that the motion was about an increase to the DIP and nothing more. When that was confirmed, the Former Executives withdrew their reservation and the motion proceeded later that afternoon.

The Sale Approval Order (July 20, 2009)

[57] Indalex brought two motions that were heard on July 20, 2009, by Campbell J. (the *CCAA* judge).

[58] First, Indalex sought approval of a sale of its assets, as a going concern, to SAPA Holdings AB (SAPA). Total consideration for the sale of Indalex and Indalex U.S. was approximately US$151,183,000.00. The Canadian sale proceeds were to be paid to the Monitor.

[59] As a term of the sale, SAPA assumed no responsibility or liability for the Plans.

[60] Second, Indalex moved for approval of an interim distribution of the sale proceeds to the DIP lenders.

[61] Both the Former Executives and the USW objected to the planned distribution of the sale proceeds. They asserted statutory deemed trust claims in respect of the underfunded pension liabilities in the Plans, arguing that preference was to be given for amounts owing to the Plans pursuant to ss. 57 and 75 of the *PBA*. They also relied on s. 30(7) of the Ontario *Personal Property Security Act,* R.S.O. 1990, c. P.10 (*PPSA)*, which expressly gives priority to the deemed trust in the *PBA* over secured creditors.

[62] The Former Executives and the USW further argued that Indalex had breached its fiduciary duty to the Plans' beneficiaries by failing to adequately meet its obligations under the Plans and by abdicating its responsibilities as administrator once *CCAA* proceedings had been undertaken.

[63] The court approved the sale in an order dated July 20, 2009 (the Sale Approval order). However, as a result of the USW and Former Executives' reservation of rights, the Monitor retained an additional $6.75 million of the sale proceeds in reserve, an amount approximating the Deficiencies.

[64] It was agreed that an expedited hearing process would be undertaken in respect of the USW and Former Executives' deemed trust claims and that the Reserve Fund held by the Monitor would be sufficient, if required, to satisfy the deemed trust claims.

The Guarantee is Called on

[65] On July 31, 2009, the sale to SAPA closed. The sale proceeds available for distribution were insufficient to repay the DIP loan in full. The Monitor made a payment of US$17,041,391.80 to the DIP Agent. This resulted in a shortfall of US$10,751,247.22 in respect of the DIP borrowings. The DIP Agent called on the Guarantee for the amount of the shortfall, which Indalex U.S. paid.

The Orders under Appeal (August 28, 2009)

[66] The USW and Former Executives brought motions to determine their deemed trust claims. The motions were set for hearing on August 28, 2009. Indalex then filed its bankruptcy motion, in which it sought to file a voluntary assignment in bankruptcy.

[67] By orders dated February 18, 2010, the *CCAA* judge dismissed the USW and Former Executives' motions.

[68] The *CCAA* judge found it unnecessary to deal with Indalex's bankruptcy motion.

THE REASONS OF THE *CCAA* JUDGE

The Former Executives' Motion

[69] The CCAA judge dismissed the Former Executives' motion on the basis that since the wind up of the Executive Plan had not yet taken place, there were no deficiencies in payments to that plan as of July 20, 2009. As there were no deficiencies in payments, there was no basis for a deemed trust.

The USW Motion

[70] Because the Salaried Plan was in the process of being wound up, the CCAA judge dismissed the USW motion for different reasons.

[71] The CCAA judge saw the issue raised on the USW motion to be whether the *PBA* required Indalex to pay the windup deficiency in the Salaried Plan as at the date of closing of the sale and transfer of assets, namely, July 20, 2009. In resolving the issue, the *CCAA* judge considered ss. 57 and 75 of the *PBA*. He called attention to the words "accrued to the date of the wind up but not yet due" in s. 57(4).

[72] The *CCAA* judge also considered ss. 31(1) and (2) of R.R.O. 1990, Reg. 909 (the Regulations). He concluded that because s. 31 of the Regulations permitted Indalex to make up the deficiency in the Salaried Plan over a period of years, the amount of the yearly payments did not become due until it was required to be paid. Were it not for s. 31 of the Regulations, the *CCAA* judge stated that Indalex would have had an obligation under the *PBA* to pay in any deficiency as of the date of wind up.

[73] The CCAA judge concluded:

> [49] ... 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.
>
> [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.
>
> [51] Since under the initial order priority was given to the DIP Lenders, they are entitled to be repaid the amounts currently held in escrow. Those entitled to windup deficiency remain as of that date unsecured creditors.

The Indalex Bankruptcy Motion

[74] Having found that the deemed trust claims failed, the *CCAA* judge considered that the question of Indalex's assignment into bankruptcy might be moot. He went on, in para. 55 of his reasons for decision, to state:

> [55] ... 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. [Emphasis added.]

[75] He found no conflict between the federal and provincial legislative regimes and allowed the Applicants to renew their request for bankruptcy relief in a further motion.

THE ISSUES

[76] The central issue raised on these appeals is whether the *CCAA* judge erred in his interpretation of s. 57(4) of the *PBA* and, specifically, in finding that no deemed trust existed with respect to the Deficiencies as at July 20, 2009.

[77] The USW and the Former Executives ask the court to decide a second issue: whether during the *CCAA* proceedings Indalex breached the fiduciary obligations that it owed to the Plans' beneficiaries by virtue of being the Plans' administrator.[2]

[78] The U.S. Trustee's submission raises two additional issues. Does the collateral attack rule bar the appellants' deemed trust motions? Do the principles of cross-border insolvencies apply to these appeals?

[79] The final issue that arises is that of remedy: how is the Reserve Fund to be distributed?

[80] Given the centrality of the wind up process to these appeals, I will briefly outline the salient aspects of the wind up process before turning to a consideration of each of these issues.

WINDING UP A PENSION PLAN

[81] To understand the wind up process, one must first understand how the pension plan operates while it is ongoing.

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[2] The appellants had raised this issue below but it had not been dealt with by the *CCAA* judge.

[82] A pension plan to which the employees contribute is called a contributory plan. In the case of contributory plans, the employer is obliged to remit the employee contributions, including payroll deductions, within a specified time frame. This aspect of an employer's obligations does not arise in these appeals.

[83] In addition to remitting the employee contributions, if any, while a defined benefit pension plan is ongoing, the employer must make two types of contributions to ensure that the plan is adequately funded and capable of paying the promised pension benefits.

> 1. **Current service or "normal cost" contributions** – the employer contributions necessary to pay for current service costs in respect of benefits that are currently accruing to members as a result of their ongoing participation in the plan as active employees. These must be made in monthly instalments within 30 days after the month to which they relate.
>
> 2. **Special payments** – a plan administrator must file an actuarial report annually in which the pension plan is valued on two different bases: a "going-concern" basis, where it is assumed the plan will continue to operate indefinitely; and a "solvency" basis, where it is assumed that the employer will discontinue its business and wind up its plan. If the actuarial report discloses a going-concern liability, the employer is required to make monthly special payments over a 15 year period to fund the unfunded liability. If the actuarial report discloses a solvency deficiency, the

employer is required to make monthly special payments over a 5 year period to fund the deficiency.

[84] It is important to understand that the solvency valuation is not the same thing as a wind up report. To repeat, the solvency valuation is prepared while the pension plan is ongoing. A solvency valuation is required while the plan is ongoing because it is crucial that there be adequate funds with which to pay pensions if the company becomes insolvent and the plan is wound up.

[85] The wind up of a pension plan is defined in the *PBA* as "the termination of the pension plan and the distribution of the assets of the pension fund" (s. 1(1)). At the effective date of wind up, the plan members cease to accrue further entitlements under the plan. Naturally, no new members may join the plan after the wind up date. The pension fund of a plan that is wound up continues to be subject to the *PBA* and the Regulations until all of the assets of the fund have been disbursed (s. 76).

[86] Winding up a pension plan must be distinguished from closing the plan, which simply means that no new entrants are permitted to join the plan.

[87] Under the *PBA*, there are two ways that a pension plan can be wound up. First, s. 68(1) recognizes that an employer[3] can voluntarily wind up the pension plan. Second, under s. 69(1), in certain circumstances, the Superintendent may order the wind up of the plan.

[3] Or, in the case of a multi-employer plan, the administrator.

[88] The *PBA* contains a detailed statutory scheme that must be followed when a pension plan is to be wound up. This scheme imposes obligations on the employer and plan administrator, including the following:

- The administrator has to give written notice of proposal to wind up to various people, including the Superintendent, and the notice must contain specified information (s. 68(2) and (4));
- A wind up date must be chosen and the administrator must file a wind up report showing, among other things, the plan's assets and liabilities as at that date (s. 70(1));
- No payments can be made out of the pension fund until the Superintendent has approved the wind up report (s. 70(4));
- Plan members with a certain combination of age and years of service or membership in the plan are entitled to additional benefits on wind up (grow-ins) (s. 74).

[89] Importantly, s. 75 requires an employer to make two different categories of payment on plan wind up. Sections 75(1)(a) and (b) read as follows:

> **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.

[90] Section 75(1)(a) requires the employer to make all payments that are due immediately or that have accrued and not been paid into the pension fund. Any unpaid current service costs and unpaid special payments are caught by this subsection. In other words, by virtue of this subsection, any payments that the employer had to make while the plan was ongoing must be paid. It will be recalled that while the plan was ongoing, some special payments could be made over time.

[91] Section 75(1)(b) requires the employer to pay additional amounts into the pension fund if there are insufficient assets to cover the value of the pension benefits in the three categories set out in s. 75(1)(b).

[92] It will be apparent that on wind up, an employer will often be faced with having to make significant additional contributions under s. 75(1)(b), in addition to being required to bring all contributions up to date because of s. 75(1)(a). Section 75(2) stipulates that "the employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times." Section 31 of the Regulations prescribes the manner and timing for the s. 75 wind up payments. It provides that the amounts an employer is to contribute under section 75 shall be by annual special payments, commencing at the effective date of the wind up, over not more than five years.

THE *PBA* DEEMED TRUST

[93] The central issue in these appeals is whether the *CCAA* judge erred in his interpretation of s. 57(4) of the *PBA*. Section 57(4) reads as follows:

> **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.** [emphasis added]

[94] The modern approach to statutory construction dictates that in interpreting s. 57(4), the words must be read

> in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[4]

[95] Section 57(4) deems an employer to hold in trust an amount equal to the contributions "accrued to the date of wind up but not yet due under the plan or regulations". The question is: what employer contributions are caught by s. 57(4) and, thus, are subject to the deemed trust?

[96] The introductory words of s. 57(4) refer to where a pension plan is "wound up". Therefore, to answer this question, one must refer to the wind up regime created by the *PBA* and Regulations, a summary of which is set out above.

[97] It will be recalled that when a pension plan is wound up, an actuarial calculation is made of the assets and liabilities, as of the wind up date. Because the plan liabilities relate to service that was provided up to the wind up date and not beyond, it is clear that all plan liabilities are accrued as of the wind up date. Put another way, no additional liability can accrue following the wind up because all events crystallize on the windup date – all pension benefit accruals by members cease and all amounts that an employer is required to pay into a pension plan are calculated as of the wind up date. For the same reason, the amounts that s. 75 requires an employer to contribute to the pension fund, on wind up, are accrued to the date of wind up. The required contributions are the amounts that an employer must make to the pension fund so that the accrued pension benefits of the plan members can be paid.

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[4] *Bell ExpressVu Limited Partnership v. Rex.*, [2002] 2 S.C.R. 559, at para. 26.

[98] It will be further recalled that s. 31 of the Regulations gives the employer up to five years in which to make all of the required s. 75 contributions. However, the fact that an employer is given time in which to pay the requisite contributions into the pension fund does not change the fact that the liabilities accrued by the wind up date.

[99] This point is reinforced when one distinguishes amounts that are "accrued" from amounts that are "not yet due". In *Hydro-Electric Power Commission (Ontario) v. Albright* (1922), 64 S.C.R. 306, at para. 23, the Supreme Court of Canada explains that money is "due" when there is a legal obligation to pay it, whereas payments are "accrued" when the rights or obligations are constituted and the liability to pay exists, even if the payment does not need to be made until a later date (*i.e.* is not "due" until a later date).

[100] Thus, just as s. 57(4) contemplates, while the amounts that the employer must contribute to the pension fund pursuant to s. 75 "accrued to the date of wind up", because of s. 31 those contributions are "not yet due under the ... regulations".

[101] There is nothing in the wording of s. 57(4) to suggest that its scope is confined to the amounts payable under only s. 75(1)(a), as the respondents contend. On the contrary, the words of s. 57(4), given their grammatical and ordinary meaning, contemplate that all amounts owing to the pension plan on wind up are subject to the deemed trust, even if those amounts are not yet due under the plan or regulations. Therefore, the deemed trust in s. 57(4) applies to all employer contributions that are required to be made pursuant to

s. 75. In short, the words "employer contributions accrued to the date of wind up but not yet due" in s. 57(4) include all amounts owed by the employer on the wind up of its pension plan.

[102] This interpretation accords with a contextual analysis of s. 57(4).

[103] As these appeals demonstrate, during the five-year "grace" period permitted by s. 31 of the Regulations, the rights of plan beneficiaries are at risk. Sections 57(4) and (5) provide some protection to the plan beneficiaries during that period. The employees' interest is in receiving their full pension entitlements. For that to happen, all s. 75 employer contributions must be made into the pension fund. The employer, on the other hand, has an interest in having a reasonable period of time within which to make the requisite s. 75 contributions. Section 31 of the Regulations gives the employer up to five years to make the contributions, during which time the deemed trust in s. 57(4) and the lien and charge in s. 57(5) provide a measure of protection for the employees over the amount of the unpaid employer contributions, contributions that had *accrued* to the date of wind up *but [were] not yet due under the regulations*.

[104] Further, this interpretation is consistent with the overall purpose of the *PBA*, which is to establish minimum standards,[5] safeguard the rights of pension plan beneficiaries,[6]

[5] *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, at para. 13, relying on *Gencorp Canada Inc. v. Ontario (Superintendent of Pensions)* (1998), 158 D.L.R. (4th) 497 (Ont. C.A.), at p. 503.
[6] *Ibid.*

and ensure the solvency of pension plans so that pension promises will be fulfilled.[7] As the Supreme Court of Canada said in *Monsanto*, at para. 38:

> The Act is public policy legislation that recognizes the vital importance of long-term income security. As a legislative intervention in the administration of voluntary pension plans, its purpose is to establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans (citations omitted).

[105] Much reference has been made to the two cases in which s. 57(4) has been discussed: *Re Ivaco* (2005), 12 C.B.R. (5th) 213 (Ont. S.C.), aff'd (2006), 83 O.R. (3d) 108 (C.A.), and *Toronto-Dominion Bank v. Usarco* (1991), 42 E.T.R. 235 (Ont. Ct. (Gen. Div.)). In my view, these decisions are of little assistance in deciding this issue.

[106] Factually, *Ivaco* and *Usarco* differ from the present case. In *Ivaco* and *Usarco*, the prospect of bankruptcy was firmly before the court whereas in this case, at its highest, there is a motion to lift the stay and file for bankruptcy.

[107] Moreover, there are conflicting statements in *Ivaco* and *Usarco* regarding the applicability of the deemed trust to wind up deficiencies. In *Usarco*, a bankruptcy petition had been filed but no steps had been taken to proceed with the petition. The company was not under *CCAA* protection. In that context, Farley J., the motion judge, held that the deemed trust provision referred only to the regular contributions together

[7] *Bourdon v. Stelco Inc.*, [2005] S.C.R. 279, at para. 24.

with special contributions that were to have been made but had not been.[8] In *Ivaco*, the major financers and creditors wished to have the *CCAA* proceeding, which was functioning as a liquidation, transformed into a bankruptcy proceeding. The case was focused primarily on whether there was a reason to defeat the bankruptcy petition. In *Ivaco,* Farley J. took a different view of the scope of the s. 57(4) deemed trust, stating that in a non-bankruptcy situation, the company's assets were subject to a deemed trust on account of unpaid contributions and wind up liabilities.[9] On appeal, although this court indicated that it thought that Farley J.'s statement in *Usarco* was correct, it found it unnecessary to decide the matter. Accordingly, these decisions are not determinative of the scope of the deemed trust created by s. 57(4) of the *PBA*.

[108] The *CCAA* judge concluded that because Indalex had made the going-concern and special payments to the Salaried Plan at the date of closing, there were no amounts due to the Salaried Plan. Therefore, there could be no deemed trust. Respectfully, I disagree. As I have explained, the deemed trust in s. 57(4) is not limited to the payment of amounts contemplated by s. 75(1)(a). It applies to all payments required by s. 75(1), including payments mandated by s. 75(1)(b).

[109] Accordingly, the deficiency in the Salaried Plan had accrued as of the date of wind up (December 31, 2006) and, pursuant to s. 57(4) of the *PBA*, was subject to a deemed trust. The *CCAA* judge erred in holding that no deemed trust existed with respect to that

[8] At para. 26.
[9] At para. 11.

deficiency as at July 20, 2009. The consequences that flow from this conclusion are explored in the section below on how the Reserve Fund is to be distributed.

[110] Are the unpaid liability payments owing to the Executive Plan also subject to the s. 57(4) deemed trust? The Former Executives, Superintendent and Morneau all contend that they are. On the plain wording of s. 57(4), I find it difficult to accept this argument – the introductory words of the provision speak to "where a pension plan is wound up". In other words, wind up of the pension plan appears to be a requirement for s. 57(4) to apply. If that is so, no deemed trust could arise unless and until a plan wind up occurred. As has been noted, the Executive Plan had not been wound up at the relevant time.

[111] Having said this, I am troubled by the notion that Indalex can rely on its own inaction to avoid the consequences that flow from wind up. In its letter of July 13, 2009, counsel for the Monitor confirmed that the Executive Plan would be wound up. Indeed, the *CCAA* judge acknowledged that the material filed with the court showed an intention on the part of the Applicants to wind up the plan. If the deemed trust does not extend to the Executive Plan, in the circumstances of this case, it appears that the result would be a triumph of form over substance.

[112] In the end, however, the question that drives these appeals is whether the Monitor should be directed to distribute the Reserve Fund to the Plans. As I explain below in the section on how the Reserve Fund should be distributed, in my view, such an order should be made. Consequently, it becomes unnecessary to decide whether the deemed trust

applies to the deficiency in the Executive Plan and I decline to do so. It is a question that is best decided in a case where the result depends on it and a fuller record would enable the court to appreciate the broader implications of such a determination.

DID INDALEX BREACH ITS FIDUCIARY OBLIGATION?

[113] The appellants say that Indalex, as administrator of the Plans, owed a fiduciary duty to the Plans' members and beneficiaries. Both appellants list a number of actions that Indalex took or failed to take during the *CCAA* proceedings that they say amounted to breaches of its fiduciary obligation. They contend that the appropriate remedy for those breaches is an order requiring the Reserve Fund to be paid into the Plans.

[114] The Monitor acknowledges that pension plan administrators have both a statutory and common law duty to act in the best interests of the plan beneficiaries and to avoid conflicts of interest, and that these duties are "fiduciary in nature". However, the Monitor contends that Indalex took all of the impugned actions in its role as employer and, therefore, could not have breached the fiduciary duties it owed to the Plans' beneficiaries as administrator. In any event, the Monitor adds, the issue is moot because any such breaches would merely give rise to an unsecured claim outside the ambit of the deemed trusts created by the *PBA*.

[115] Sun Indalex echoes the Monitor's latter argument and says that the allegations of breach of fiduciary duty are irrelevant in these appeals. Its submission on this issue is summarized in para. 79 of its factum:

> [79] There is no provision in the PBA that creates a deemed trust in respect of any claim for damages based on an alleged breach of fiduciary duty by an employer and there is no basis in the PBA for conferring a priority with respect to such a claim. If a claim for breach of fiduciary duty on the part of Indalex exists, it is merely an unsecured claim outside the ambit of the deemed trusts created by the PBA that does not have priority over Sun's secured claim or the super-priority DIP Lenders Charge.

[116] For the reasons that follow, I accept the appellants' submission that Indalex breached its fiduciary obligations as administrator during the *CCAA* proceedings. I deal with the question of what flows from that finding when deciding the issue of remedy.

[117] It is clear that the administrator of a pension plan is subject to fiduciary obligations in respect of the plan members and beneficiaries.[10] These obligations arise both at common law and by virtue of s. 22 of the *PBA*.

[118] The common law governing fiduciary relationships is well known. A fiduciary relationship will be held to exist where, given all the surrounding circumstances, one person could reasonably have expected that the other person in the relationship would act in the former's best interests.[11] The key factual characteristics of a fiduciary relationship are: the scope for the exercise of discretion or power; the ability to exercise that power unilaterally so as to affect the beneficiary's legal or practical interests; and, a peculiar vulnerability on the part of the beneficiary to the exercise of that discretion or power.[12]

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[10] *Burke v. Hudson's Bay Co.*, [2010] 2 S.C.R. 273, at paras. 39-41.
[11] *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at para. 32.
[12] *Ibid.*, at para. 30; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at p. 646.

[119] It is readily apparent that these characteristics exist in the relationship between the pension plan administrator and the plan members and beneficiaries. The administrator has the power to unilaterally make decisions that affect the interests of plan members and beneficiaries as a result of its responsibility for the administration of the plan and management of the fund. Those decisions affect the beneficiaries' interests. The plan members and beneficiaries reasonably rely on the administrator to ensure that the plan and fund are properly administered. And, as these appeals demonstrate, they are peculiarly vulnerable to the administrator's exercise of its powers. Thus, at common law, Indalex as the Plans' administrator owed a fiduciary duty to the Plans' members and beneficiaries to act in their best interests.

[120] Section 22 of the *PBA* also imposes a fiduciary duty on the administrator in the administration of the plan and fund. As well, it expressly prohibits the administrator from knowingly permitting its interest to conflict with its duties in respect of the pension fund. The relevant provisions in s. 22 read as follows:

> **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.
>
> ...
>
> **Conflict of interest**
>
> (4) An administrator ... shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

[121] In Ontario, an employer is expressly permitted to act as the administrator of its pension plan: see ss. 1 and 8 of the *PBA*.[13] It is self-evident that the two roles can conflict from time to time. In *Imperial Oil Ltd. v. Ontario (Superintendent of Pensions)* (1995), 18 C.C.P.B. 198 (*Imperial Oil*), the Pension Commission of Ontario (PCO) grappled with this statutorily sanctioned conflict in roles.

[122] In that case, the employer Imperial Oil was the administrator of two employee pension plans. Imperial Oil sought to file amendments to the pension plans with the PCO. Prior to the amendments, a plan member with 10 or more years of service with Imperial Oil whose employment was terminated for efficiency reasons was entitled to an enhanced early retirement annuity (the enhanced benefit). The effect of the amendments was to deny such an employee the enhanced benefit unless the employee would have been able to retire within five years of termination. Put another way, after the amendments, in addition to the other requirements, an employee had to be 50 years of age

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[13] In contrast, Quebec legislation requires that plan administration be entrusted to a pension committee of at least three persons, including a representative of each of the active and inactive members of the plan and an independent member. See *Supplemental Pension Plans Act*, R.S.Q. c. R-15.1, s. 147.

or older at the time his or her employment was terminated for efficiency reasons in order to receive the enhanced benefit.

[123] The Superintendent accepted the amendments for registration.

[124] Some six months after the amendments were passed, Imperial Oil terminated the employment of a large number of employees for efficiency reasons. A number of the affected employees had 10 or more years of service but, because they had not reached the age of 50, they were denied the enhanced benefit.

[125] A group of former employees (the Entitlement 55 Group) objected to the registration of the amendments. They brought an application to the PCO, seeking a declaration that the amendments were void and an order compelling Imperial Oil to administer the pension plans according to the terms of the plans in place before the amendments were passed.

[126] Among other things, the Entitlement 55 Group argued that when Imperial Oil amended the plans, it was acting in both its capacity as employer and its capacity as administrator of the plans. Thus, they contended, Imperial Oil placed itself in a conflict of interest situation prohibited by s. 22(4) of the *PBA* because in its role as employer it wished to reduce pension fund liabilities but in its role as administrator it had a duty to protect the interests of the beneficiaries who had reached the 10 year service qualification and thereby "qualified" for the enhanced benefit.

[127] The PCO dismissed the application. In so doing, it rejected the submission that Imperial Oil had contravened s. 22(4) by passing the amendments. It held that Imperial Oil had acted solely in its capacity as employer when it passed the amendments.

[128] The PCO acknowledged that the *PBA* allows an employer to wear "two hats" – one as employer and the other as administrator. However, at para. 33 of its reasons, the PCO explained that an employer plays a role in respect of the pension plan that is distinct from its role as administrator:

> Its role as employer permits it to make the decision to create a pension plan, to amend it and to wind it up. Once the plan and fund are in place, it becomes an administrator for the purposes of management of the fund and administration of the plan. If we were to hold that an employer was an administrator for all purposes once a plan was established, of what use would a power of amendment be? An employer could never use the power to amend the plan in a way that was to its benefit, as opposed to the benefit of the employees. Section 14 presupposes this power is with an employer as it created parameters around the exercise of a power of amendment.

[129] The "two hats" analogy in *Imperial Oil* assists in understanding the parameters of the dual roles of an employer who is also the administrator of its pension plan. The employer, when managing its business, wears its corporate hat. Although the employer *qua* corporation must treat all stakeholders fairly when their interests conflict, the directors' ultimate duty is to act in the best interests of the corporation: see *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560, at paras. 81-84. On the other hand, when

acting as the pension plan administrator, the employer wears its fiduciary hat and must act in the best interests of the plan's members and beneficiaries.

[130] The question raised by these appeals is whether, as the respondents contend, Indalex wore only its corporate hat during the *CCAA* proceedings. In my view, it did not. As I will explain, during the *CCAA* proceedings, in the unique circumstances of this case, Indalex wore both its corporate and its administrator's hats.

[131] I begin from the position that Indalex had the right to make the decision to commence *CCAA* proceedings wearing solely its corporate hat. That decision is not part of the administration of the pension plan or fund nor does it necessarily engage the rights of the beneficiaries of the pension plan. For example, an employer might sell its business under *CCAA* protection, with the purchaser agreeing to continue the pension plan. In that situation, there should be no effect on the payment of pension benefits. Similarly, if the pension plan were fully funded, *CCAA* proceedings should have no effect on pension entitlements.

[132] However, just because the initial decision to commence *CCAA* proceedings is solely a corporate one that does not mean that all subsequent decisions made during the proceedings are also solely corporate ones. In the circumstances of this case, Indalex could not simply ignore its obligations as the Plans' administrator once it decided to seek *CCAA* protection. Shortly after initiating *CCAA* proceedings, Indalex moved to obtain DIP financing, in which it agreed to give the DIP lenders a super-priority charge. At the

same time, Indalex knew that the Plans were underfunded and that unless more funds were put into the Plans, pensions would have to be reduced. The decisions that Indalex was unilaterally making had the potential to affect the Plans beneficiaries' rights, at a time when they were particularly vulnerable. The peculiar vulnerability of pension plan beneficiaries was even greater than in the ordinary course because they were given no notice of the *CCAA* proceedings, had no real knowledge of what was transpiring and had no power to ensure that their interests were even considered – much less protected – during the DIP negotiations.

[133] In concluding that Indalex was subject to its fiduciary duties as administrator as well as its corporate obligations during the *CCAA* proceedings, two points need to be made.

[134] First, it is significant that Indalex is unclear as to what it thinks happened to its role as administrator during the *CCAA* proceedings. When cross-examined on this matter, Mr. Cooper gave various responses as to whom he believed filled that role: Indalex, a combination of him and the Monitor, and a combination of him and his staff. This confusion is understandable, given the number of roles that Mr. Cooper played in these proceedings. It will be recalled that prior to the commencement of the *CCAA* proceedings, he became the Chief Restructuring Officer for Indalex U.S., a position which included responsibility for the Canadian group of Indalex companies. In this position, he served as Indalex's primary negotiator of the DIP credit agreement. But, at the same time, he worked for FTI Consulting Inc. The Monitor is a wholly-owned

subsidiary of FTI Consulting Inc. This blending of roles no doubt contributed to the apparent disregard for the obligations owed by the Plans' administrator.

[135] In any event, it is not apparent to me that Indalex could ignore its role as administrator or divest itself of those obligations without taking formal steps through the Superintendent, plan amendment, the courts, or some combination thereof, to transfer that role to a suitable person. However, I will not consider this particular question further because it was not squarely raised and argued by the parties and, in any event, even if Mr. Cooper became the administrator, through his various roles, including as Chief Restructuring Officer for Indalex U.S., he is so clearly allied in interest with Indalex that the following analysis remains applicable.

[136] Second, the respondents' submission that Indalex wore only its corporate hat during the proceedings is implicitly premised on the notion that an employer will wear its corporate hat or its administrator's hat, but never both. I do not accept this premise. Nor do I accept that the reasoning in *Imperial Oil*, which the respondents rely on, supports this submission.

[137] In *Imperial Oil*, the PCO had to decide whether certain acts taken in respect of a pension plan were those of the employer or the administrator. Because the provision of pension plans is voluntary in Canada, the employer has the right to decide questions of plan design, including whether to offer a pension plan and, if it does, whether to end it. In part because of the wording of s. 14 of the *PBA* and in part because the amendments at

issue in *Imperial Oil* were a matter of plan design, the PCO concluded that the employer was found to be acting solely in its corporate role when it passed the amendments. There is nothing in *Imperial Oil* to suggest that an employer cannot find itself in a position where it is wearing both hats at the same time.

[138] I turn next to the question of breach.

[139] As previously noted, when Indalex commenced *CCAA* proceedings, it knew that the Plans were underfunded and that unless additional funds were put into the Plans, pensions would be reduced. Indalex did nothing in the *CCAA* proceedings to fund the deficit in the underfunded Plans. It took no steps to protect the vested rights of the Plans' beneficiaries to continue to receive their full pension entitlements. In fact, Indalex took active steps which undermined the possibility of additional funding to the Plans. It applied for *CCAA* protection without notice to the Plans' beneficiaries. It obtained a *CCAA* order that gave priority to the DIP lenders over "statutory trusts" without notice to the Plans' beneficiaries. It sold its assets without making any provision for the Plans. It knew the purchaser was not taking over the Plans.[14] It moved to obtain orders approving the sale and distributing the sale proceeds to the DIP lenders, knowing that no payment would be made to the underfunded Plans. And, Indalex U.S. directed Indalex to bring its bankruptcy motion with the intention of defeating the deemed trust claims and ensuring that the Reserve Fund was transferred to it. In short, Indalex did nothing to protect the

[14] On advice of counsel, Mr. Cooper refused to answer questions about what, if any, steps were taken to have the purchaser take over the Plans.

best interests of the Plans' beneficiaries and, accordingly, was in breach of its fiduciary obligations as administrator.

[140] Further, in my view, Indalex was in a conflict of interest position. As has been mentioned, Indalex's corporate duty was to treat all stakeholders fairly when their interests conflicted, but its ultimate duty was to act in the best interests of the corporation. Indalex's duty as administrator was to act in the Plans' beneficiaries best interests. It is apparent that in the circumstances of this case, these duties were in conflict.

[141] The common law prohibition against conflict of interest is not confined to situations where the fiduciary's personal interest conflicts with those of the beneficiaries. It also precludes the fiduciary from placing itself in a position where it acts for two parties who are adverse in interest: *Davey v. Woolley, Hames, Dale & Dingwall* (1982), 35 O.R. (2nd) 599 (C.A.), at para. 8. In *Davey*, a solicitor who acted for both sides of a business transaction was found to be in breach of his fiduciary obligations. Wilson J.A., writing for this court, explained that the conflict arose because the solicitor could not fulfill his duties in respect of both clients at the same time. At para. 18, she concluded that the solicitor was bound to refuse to act for the plaintiff in the circumstances.

[142] The prohibition against a fiduciary being in a position of conflicting duties governs the situation in which Indalex found itself in during the *CCAA* proceedings.

[143] Indalex was not at liberty to resolve the conflict in its duties by simply ignoring its role as administrator. A fiduciary relationship does not end simply because it becomes

impossible of performance. At the point where its duty to the corporation conflicted with its duties as administrator, it was incumbent on Indalex to take steps to address the conflict.

[144] Even if I am in error in concluding that Indalex was in breach of its common law fiduciary obligations, I would find that its actions amounted to a breach of s. 22(4) of the *PBA*. Section 22(4) prohibits an administrator from knowingly permitting its interest to conflict with its duties and powers in respect of the pension fund. Under s. 57(5) of the *PBA*, as administrator, Indalex had a lien and charge on its assets for the amount of the deemed trust. Any steps that it might have taken pursuant to s. 57(5), as administrator, would have been in respect of the pension fund. Thus, if nothing else, Indalex's actions during the *CCAA* proceedings demonstrate that it permitted its corporate interests to conflict with the administrator's duties and powers that flow from the lien and charge.

[145] Having found that Indalex breached its fiduciary obligations to the Plans' beneficiaries, the question becomes: what flows from such a finding? I address that question below when considering the issue of how to distribute the Reserve Fund. At that time I will return to the arguments of the Monitor and Sun Indalex to the effect that such a finding is largely irrelevant in these proceedings.

DOES THE COLLATERAL ATTACK RULE BAR THE DEEMED TRUST MOTIONS?

[146] The U.S. Trustee submits that even if the *PBA* creates a deemed trust for any wind up deficiencies in the Plans, the appeals should be dismissed because the underlying motions are an impermissible collateral attack on previous orders made in the *CCAA* proceedings. His argument runs as follows.

[147] The Initial Order, the June 12, 2009 order and the Sale Approval order (the "Court Orders") are all valid, enforceable court orders. The Court Orders gave super-priority rights to the DIP lenders and Indalex U.S. is subrogated to those rights. None of the Court Orders were appealed and no party sought to have them set aside or varied. As the appellants' motions seek to alter the priorities established by the Court Orders, they should be barred because they are an impermissible collateral attack on those orders.

[148] I do not accept this submission for three reasons, the first two of which can be shortly stated.

[149] First, this submission is an attack on the underlying motions. As such, it ought to have been raised below. The Former Executives say that the collateral attack doctrine was raised for the first time on appeal. Certainly, if it was raised below, the *CCAA* judge makes no reference to it. As a general rule, it is not appropriate to raise an issue for the first time on appeal. The exceptions to this general rule are very limited and do not apply in this case: see *Cusson* v. *Quan*, [2009] 3 S.C.R. 712, at paras. 36-37.

[150] Second, the USW and the Former Executives raised the matter of the deemed trusts in the *CCAA* proceedings. The *CCAA* judge designed a process by which their claims would be resolved. They followed that process. The USW and Former Executives can scarcely be faulted for complying with a court-designed process. Further, the Sale Approval order acknowledged the deemed trust issue in that it required the Monitor to hold funds in reserve that were sufficient to satisfy the deemed trust claims. That acknowledgment is inconsistent with a subsequent claim of impermissible collateral attack.

[151] Third, as I will now explain, an appreciation of the *CCAA* regime makes it apparent that the collateral attack rule does not apply in the circumstances of this case.

[152] The collateral attack rule rests on the need for court orders to be treated as binding and conclusive unless they are set aside on appeal or lawfully quashed. Court orders may not be attacked collaterally. That is, a court order may not be attacked in proceedings other than those whose specific object is the reversal, variation, or nullification of the order. See *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at para. 8.

[153] The fundamental policy behind the rule against collateral attacks is "to maintain the rule of law and to preserve the repute of the administration of justice": see *R. v. Litchfield*, [1993] 4 S.C.R. 333, at para. 22. If a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from

circumventing the effect of a decision rendered against it: see *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, at para. 72.

[154] The *CCAA* regime is designed to deal with all matters during an insolvent company's attempt to reorganize. The court-ordered stay of proceedings ensures that there is only one forum where parties can put forth their arguments and claims. By pre-empting other legal proceedings, the stay gives a corporation breathing space, which promotes the opportunity for reorganization.

[155] The *CCAA* regime is a flexible, judicially supervised reorganization process that allows for creative and effective decisions: see *Century Services Ltd.* v. *Canada (Attorney General)*, [2010] 3 S.C.R. 379, at para. 21. The *CCAA* judge is accorded broad discretion because the proceedings are a fact-based exercise that requires ongoing monitoring and because there is often a need for the court to act quickly. There is an underlying assumption, however, that the *CCAA* proceedings will provide an opportunity for affected persons to participate in the proceedings.

[156] This assumption finds voice in para. 56 of the Initial Order, as amended, which permits any interested party to apply to the *CCAA* court to vary or amend the Initial Order (the come-back clause). That is precisely what the appellants did. As interested parties, they went to the *CCAA* court to ask that the super-priority charge be varied or amended so that their claims could be properly recognised.

[157] Moreover, I do not accept that the appellants failed to act promptly in asserting their claims. It was only when Indalex brought a motion for approval of the sale of its assets to SAPA and for a distribution of the sale proceeds to the DIP lenders that it became clear that Indalex intended to abandon the Plans in their underfunded states. The appellants immediately took steps to assert their claims in the very forum in which all of the Court Orders had been made, namely, the *CCAA* court.

[158] The U.S. Trustee's argument that the Court Orders were never appealed is not persuasive. In *Algoma Steel Inc. Re* (2001), 147 O.A.C. 291, at paras. 7-9, this court stated that it is premature to grant leave to appeal from an initial order – brought on an urgent basis to deal with seemingly desperate circumstances – when the order specifically opens the proceeding to all interested parties and invites dissatisfied parties to bring their concerns to the court on a timely basis using a come-back provision.

[159] As the Former Executives point out, had the appellants sought to advance their deemed trust claims by bringing a motion challenging the paragraph of the Initial Order that established the DIP super-priority charge, it is likely that they would have been met by a response that their motions were premature. Depending on the amount paid for the company and/or the arrangements made in respect of the Plans, the interests of the Plans' beneficiaries might not have been affected by a sale. Indeed, on July 2, 2009, when Indalex brought a motion to have the bidding procedures approved for the asset sale and the Former Executives objected because of concerns that the Plans were underfunded, the

CCAA judge endorsed the record as follows: "The issues can be raised by the retirees on any application to approve a transaction – but that is for another day."

[160] The appellants followed that direction. When Indalex moved to have the sale transaction approved and the jeopardy to the appellants' interests became apparent, they went to the *CCAA* court and raised the deemed trust issue.[15]

[161] Thus, as I have said, I do not view the deemed trust motions as collateral attacks on the Court Orders. The motions were raised in a timely manner in the same court in which the orders were made. They can scarcely be termed attempts to circumvent decisions rendered against the USW and the Former Executives when no decision had ever been rendered in which their claims had been squarely raised and addressed. The process the USW and the Former Executives followed is exactly that which is contemplated in *CCAA* proceedings and, specifically, the come-back clause.

[162] Even if the collateral attack rule were applicable, however, this is not a case for its strict application.

[163] In *Litchfield*, the Supreme Court of Canada recognized that there will be situations in which the collateral attack rule should not be strictly applied. In that case, a physician had been charged with a number of counts of sexual assault on his patients. On motion, a judge (not the trial judge) ordered that the counts be severed and divided and three

[15] To the extent that the U.S. Trustee suggests that the Former Executives raised the deemed trust issue at the motion heard on June 12, 2010, I reject this submission. As explained in the background portion of these reasons, the Former Executives' reservation of rights on June 12, 2010, was to obtain time to confirm that the motion related solely to an increase in the DIP loan amount.

different trials be held. After one trial, the physician was acquitted. The Crown appealed. One of the grounds of appeal related to the pre-trial severance order. The question arose as to whether the Crown's challenge to the validity of the severance order violated the collateral attack rule.

[164] At paras. 16-19 of *Litchfield*, Iacobucci J., writing for the majority, explains that "some flexibility" is needed in the application of the rule against collateral attacks. Strictly applied, the rule would prevent the trial judge from reviewing the severance order because the trial was not a proceeding whose specific object was the reversal, variation or nullification of the severance order. However, Iacobucci J. noted, the rule is not intended to immunize court orders from review. He reiterated the powerful rationale behind the rule: to maintain the rule of law and preserve the repute of the administration of justice. This promotes certainty and finality, key aspects of the orderly and functional administration of justice. However, he concluded that flexibility was warranted because permitting a collateral attack on the severance order did not offend the underlying rationale for the rule.

[165] Similarly, in *R. v. Domm* (1996), 31 O.R. (3d) 540, at para. 31, Doherty J.A., writing for this court, states that if a collateral attack can be taken without harm to the interests of the rule of law and the repute of the administration of justice, the rule should be relaxed. At para. 36 of *Domm*, he says that the rule must yield where a person has "no other effective means" of challenging the order in question.

[166] I acknowledge that certainty and finality are necessary to the proper functioning of the legal system. And, I recognize that permitting the appellants' motions to proceed has generated some degree of uncertainty as to the priorities established by the Court Orders. However, in the circumstances of this case, there was no other effective means by which the appellants could assert their claims to a deemed trust. As has been mentioned, it was only when Indalex brought a motion for approval of the sale of its assets to SAPA and for a distribution of the sale proceeds to the DIP lenders that it became clear that Indalex intended to abandon the Plans in their underfunded states. The appellants immediately took steps to assert their claims in the very forum in which all of the Court Orders had been made, namely, the *CCAA* court. By permitting their motions to be heard, the *CCAA* judge did not damage the repute of the administration of justice. On the contrary, he strengthened it. He enabled the sale to proceed while ensuring that the competing claims to the Reserve Fund would be decided on the merits and expeditiously.

[167] Nor can it be said, for the reasons already given about the nature of *CCAA* proceedings, that the deemed trust motions jeopardize the rule of law. Given the nature of a *CCAA* proceeding, the court must often make orders on an urgent and expedited basis, with little or no notice to creditors and other interested parties. Its processes are sufficiently flexible that it can accommodate situations such as the one that arose here. A strict application of the rule would preclude the appellants from having the opportunity to meaningfully challenge the super-priority charge in the Initial Order, as amended. In my view, that result would be a fundamental flaw in the *CCAA* process, one in which

procedure triumphed over substance. As Iacobucci J. said in *Litchfield*, at para. 18, such a result cannot be accepted.

[168] Accordingly, in my view, while the collateral attack rule does not apply, even if it did, there are compelling reasons in this case to relax its strict application.

DO THE PRINCIPLES OF CROSS-BORDER INSOLVENCIES APPLY?

[169] The U.S. Trustee also submits that the principles of cross-border insolvencies should be applied when deciding these appeals. He contends that notwithstanding that separate proceedings were commenced in Canada and the U.S., those principles apply because the Applicants were direct and indirect subsidiaries of certain of the U.S. debtors, who commenced proceedings under Chapter 11 of Title 11 of the United States Bankruptcy Code in March 2009. Further, the U.S. Trustee contends that if the appellants' claims were to succeed, it would seriously undermine the basic principles underlying cross-border insolvencies and the confidence of foreign creditors and courts in the Canadian insolvency system.

[170] While this argument provides context for the U.S. Trustee's collateral attack submission, I do not see it as disclosing any legal grounds relevant to these appeals. By order dated May 12, 2009, Morawetz J. approved a cross-border protocol in these proceedings that stipulates that the U.S. and Canadian courts retain exclusive jurisdiction over the proceedings in their respective jurisdictions. Furthermore, there is no evidence to support the U.S. Trustee's claim that allowing these appeals would impair future

lending practices by U.S. companies. Finally, nothing has been raised which supports the notion that upholding valid provincial law in the circumstances of these appeals will undermine the principles of cross-border insolvencies.

HOW IS THE RESERVE FUND TO BE DISTRIBUTED?

The Salaried Plan

[171] Having concluded that a deemed trust exists with respect to the deficiency in the Salaried Plan as at July 20, 2009, the question becomes whether the Monitor should be ordered to pay the amount of that deficiency, from the Reserve Fund, into the Salaried Plan.

[172] The USW argues, on behalf of the beneficiaries of the Salaried Plan, that the deemed trust ranks in priority to all secured creditors and, therefore, the order should be made. Its argument rests on s. 30(7) of the *PPSA*, which reads as follows:

> **30. (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.*** [emphasis added]

[173] The USW contends that as s. 30(7) gives priority to the *PBA* deemed trust and no finding of paramountcy was made in these proceedings, it must be given effect.

[174] The respondents argue that the super-priority charge has priority over any deemed trusts and, therefore, the Reserve Fund should be paid to Sun Indalex, as the principal secured creditor of Indalex U.S. They point to well-established law that authorizes the

court to grant super-priority to DIP lenders in *CCAA* proceedings and argue that without such a charge, DIP lenders will no longer provide financing to companies under *CCAA* protection. Without DIP funding they say, many companies under *CCAA* protection will be unable to continue in business until a compromise or arrangement has been worked out. Consequently, companies will file for bankruptcy where deemed trusts have no priority. This, they say, will frustrate the very purpose of the *CCAA*, which is to facilitate the making of compromises or arrangements between insolvent debtor companies and their creditors.

[175] There is a great deal of force to the respondents' submissions. Indeed, in general, I agree with them. It is important that the courts not address the interests of pension plan beneficiaries in a manner that thwarts or even discourages DIP funding in future *CCAA* proceedings. Nonetheless, in the circumstances of this case, it is my view that the Monitor should be ordered to pay the amount of the deficiency, from the Reserve Fund, into the Salaried Plan.

[176] The *CCAA* court has the authority to grant a super-priority charge to DIP lenders in *CCAA* proceedings.[16] I fully accept that the *CCAA* judge can make an order granting a super-priority charge that has the effect of overriding provincial legislation, including the *PBA*. I also accept that without such a charge, DIP lenders may be unwilling to provide financing to companies under *CCAA* protection. However, this does not mean that the

[16] See, for example, *InterTAN Canada Ltd.(Re)*, (2009), 49 C.B.R. (5th) 232 (Ont. S.C.). And, the granting of super-priority charges is referred to with approval in *Century Services*, at para. 62.

super-priority charge in question has the effect of overriding the deemed trust. To decide whether it does, one must turn to the doctrine of paramountcy.

[177] Valid provincial laws continue to apply in federally regulated bankruptcy and insolvency proceedings absent an express finding of federal paramountcy. The onus is on the party relying on the doctrine of paramountcy to demonstrate that the federal and provincial laws are incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law: see *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, at para. 75 and *Nortel Networks Corp. (Re)* (2009), 99 O.R. (3d) 708 (C.A.), at para. 38, leave to appeal to S.C.C. refused, [2009] S.C.C.A. No. 531.

[178] In this case, there is nothing in the record to suggest that the issue of paramountcy was invoked on April 8, 2009, when Morawetz J. amended the Initial Order to include the super-priority charge. The documents before the court at that time did not alert the court to the issue or suggest that the *PBA* deemed trust would have to be overridden in order for Indalex to proceed with its DIP financing efforts while under *CCAA* protection. To the contrary, the affidavit of Timothy Stubbs, the then CEO of Indalex, sworn April 3, 2009, was the primary source of information before the court. In para. 74 of his affidavit, Mr. Stubbs deposes that Indalex intended to comply with all applicable laws including "regulatory deemed trust requirements".

[179] While the super-priority charge provides that it ranks in priority over trusts, "statutory or otherwise", I do not read it as taking priority over the deemed trust in this case because the deemed trust was not identified by the court at the time the charge was granted and the affidavit evidence suggested such a priority was unnecessary. As no finding of paramountcy was made, valid provincial laws continue to operate: the super-priority charge does not override the *PBA* deemed trust. The two operate sequentially, with the deemed trust being satisfied first from the Reserve Fund.

[180] Does this conclusion thwart the purpose of the *CCAA* regime, which is to facilitate the restructuring of failing businesses to avoid bankruptcy and liquidation? It does not appear that would have happened in the present case. The granting of a stay in a *CCAA* proceeding provides a company with breathing space so that it can restructure. In this case, the stay of proceedings gave Indalex the breathing space it needed to effect a sale of its business. Recall that this was a "liquidating CCAA" from the outset. There was no restructuring of the company. There was no plan of compromise or arrangement prepared and presented to creditors. Within days of obtaining *CCAA* protection, Indalex began a marketing process to sell itself. Very shortly thereafter, it sold its business as a going-concern. There is nothing in the record to suggest that giving the deemed trust priority would have frustrated Indalex's efforts to sell itself as a going-concern business.

[181] What of the contention that recognition of the deemed trust will cause DIP lenders to be unwilling to advance funds in *CCAA* proceedings? It is important to recognize that the conclusion I have reached does not mean that a finding of paramountcy will never be

made. That determination must be made on a case by case basis. There may well be situations in which paramountcy is invoked and the record satisfies the *CCAA* judge that application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy. But, this depends on the applicant clearly raising the issue of paramountcy, which will alert affected parties to the risks to their interests and put them in a position where they can take steps to protect their rights. That, however, is not this case.

[182] Nor am I persuaded by the argument that if the deemed trust is given effect in the unique circumstances of this case, companies will file for bankruptcy instead of moving for *CCAA* protection. This argument suggests that companies will act based on the desire to avoid their pension obligations. That motivation does not conform with the obligations that directors owe to the corporation. The obligation to act in the best interests of the corporation suggests that companies will choose the route that maximizes recovery for creditors. As the respondents point out, Indalex sought a going-concern sale for exactly that reason. In addition, by selling its business as a going concern, Indalex preserved value for suppliers and customers who can continue to do business with the purchaser and preserved approximately 950 jobs for its former employees. Surely the desire to maximize recovery for their creditors – along with those other considerations – would have prevailed had Indalex known it would have to satisfy the deemed trust when considering whether to pursue bankruptcy or *CCAA* proceedings. In this regard, it is worth recalling that consideration for the sale exceeded $151 million, all DIP lenders

were repaid in full, the Reserve Fund consists of undistributed proceeds, and the total deficiencies in the Plans appear to be approximately $6.75 million.

[183] As for the suggestion that Indalex will pursue its bankruptcy motion in order to defeat the deemed trust, I would simply echo the comments of the *CCAA* judge that a voluntary assignment into bankruptcy should not be used to defeat a secured claim under valid provincial legislation. I would add this additional consideration: it is inappropriate for a *CCAA* applicant with a fiduciary duty to pension plan beneficiaries to seek to avoid those obligations to the benefit of a related party by invoking bankruptcy proceedings when no other creditor seeks to do so.

[184] There is also the matter of Indalex U.S.'s apparent reliance on the super-priority charge when it gave the Guarantee. As explained more fully above, Indalex U.S. was fully aware of Indalex's obligations to the Plans when it entered into the Guarantee. Again as explained more fully above, there were a number of different steps that Indalex could have taken to deal with these obligations. It chose not to. This is not a case in which the secured creditor is an arm's length third party taken by surprise by the claims of the Plans' beneficiaries.

[185] A final consideration that must be addressed at this stage arises from the recent decision of the Supreme Court of Canada in *Century Services*, which was released after the oral hearing of the appeals. The parties were invited to make written submissions on

the impact of *Century Services*, if any, on these appeals. I am grateful for the excellence of those submissions, which mirrors the quality of the original submissions.

[186] *Century Services* deals with conflicting provisions in two pieces of federal legislation: s. 222(3) of the *Excise Tax Act*, R.S.C. 1985, c. E-15, which gives the federal Crown a deemed trust for unpaid GST, and s. 18.3(1) (now s. 37) of the *CCAA*, which expressly excludes deemed trusts in favour of the Crown from applying in *CCAA* proceedings. Deschamps J., for the majority, conducted a comprehensive analysis of the two conflicting sections and held that s. 18.3(1) of the *CCAA* prevails. In sum, *Century Services* stands for the proposition that s. 18.3(1) of the *CCAA* excludes the deemed trust for unpaid GST created by s. 222 of the *Excise Tax Act* from applying in a *CCAA* proceeding.

[187] It will be readily apparent that *Century Services* is distinguishable from the present case in a number of ways. Three significant differences between it and the present appeals are worthy of note.

[188] First, in *Century Services*, reorganization efforts had failed and the company sought leave to make an assignment into bankruptcy. Liquidation on a piecemeal basis through bankruptcy was inevitable. The *CCAA* proceedings in the present case, on the other hand, were successful – they resulted in the sale of Indalex's assets and the continuation of the business, albeit through another entity. It is not a situation in which

transition to the bankruptcy regime was inevitable because efforts under the *CCAA* had failed.

[189] Second, *Century Services* deals with competing provisions in two federal statutes. The conflict between the two provisions was patent: one or the other had to prevail. They could not be read together. Section 18.3(1) was found to prevail, in part because of its wording, which expressly excludes a deemed trust in favour of the Crown. The present appeals involve a consideration of the doctrine of federal paramountcy and whether a deemed trust under provincial legislation applies to a charge granted in a *CCAA* proceeding. Significantly, unlike the situation in *Century Services,* there is nothing in the *CCAA* that expressly excludes the provincial deemed trust for unpaid pension contributions from applying in *CCAA* proceedings. In these appeals, exclusion of the provincial deemed trust is dependent on the *CCAA* judge engaging in a factual examination and a determination that preservation of pension rights through the deemed trust would frustrate the purpose of the *CCAA* proceeding. Moreover, it is difficult to see how a finding of paramountcy would have been made on the record at the time the super-priority charge was made, given the evidence that Indalex intended to comply with all regulatory deemed trust requirements.[17]

[190] Third, no issue of fiduciary duty arose in *Century Services*. In the present case, as discussed previously and again below, the impact of fiduciary duties during the *CCAA* proceeding plays a significant role.

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[17] See para. 178 of these reasons.

[191] The respondents contend that *Century Services* is crucial in the disposition of these appeals because it stands for the proposition that federal priorities under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*) apply in *CCAA* proceedings. If *Century Services* stood for that proposition, I would agree. In a series of cases, the Supreme Court of Canada has repeatedly said that a province cannot, by legislating a deemed trust, alter the scheme of priorities under the *BIA*: see, for example, *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24.

[192] However, in my view, *Century Services* does not stand for that unqualified proposition. In *Century Services*, Deschamps J. explains that the *CCAA* and *BIA* are to be read in an integrated fashion but she is at pains to say that the *BIA* scheme of liquidation and distribution is the backdrop for what happens *if a CCAA reorganization is unsuccessful.*[18] Here, as I have noted, the *CCAA* proceedings were successful.

[193] Moreover, Deschamps J. repeatedly distinguishes the two regimes on the basis that the *BIA* is "characterized by a rules-based approach"[19] whereas the *CCAA* "offers a more flexible mechanism with greater judicial discretion".[20] Permitting the *PBA* deemed trust to survive, absent an express finding of paramountcy, is consistent with both those key features of the *CCAA* proceedings – greater flexibility and greater judicial discretion on the part of the *CCAA* court. This flexibility and discretion on the part of the *CCAA* court

[18] See, for example, para. 23.
[19] At para. 13, for example.
[20] See, for example, para. 14.

enables it to meaningfully assess the baseline considerations of appropriateness, good faith and due diligence, referred to by Deschamps J. at para. 70 of *Century Services.*

[194] The respondents point to paras. 47, 48 and 76 of *Century Services*, in which Deschamps J. notes the "strange asymmetry" that would occur if the *ETA* Crown priority were interpreted differently in *CCAA* proceedings than in *BIA* proceedings. She says this would encourage forum shopping in cases where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims. No "strange asymmetry" would occur in cases such as the present appeals. If the *CCAA* judge found that recognition of the *PBA* deemed trust would frustrate the purpose of the *CCAA* proceeding and paramountcy had been invoked, the *CCAA* judge would be free to make a super-priority charge that overrode the deemed trust. This approach leaves the *CCAA* court with greater flexibility and the ability to be "cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees".[21]

[195] In para. 70 of her reasons, Deschamps J. exhorts the *CCAA* courts to be "mindful that chances for successful reorganizations are enhanced where participants achieve common ground and *all stakeholders are treated as advantageously and fairly as the circumstances permit*" [emphasis added]. The Plans' beneficiaries are stakeholders. And, once the deemed trust claims are recognized, they are not to be treated as mere unsecured creditors. If, as the respondents contend based on *Century Services*, the deemed trusts are automatically overridden, there will be no incentive for companies that

[21] *Century Services*, at para. 60.

are similarly situated to Indalex to attempt to deal with their underfunded pension plans. There will be no incentive to treat pension plan beneficiaries "as advantageously and fairly as the circumstances permit". The incentive will be to do as Indalex did – go to court without notice to the affected pension plan beneficiaries and negotiate as if the pension obligations did not exist.

[196] Justice Deschamps also says that no "gap" should exist between the *BIA* and the *CCAA* and approves of Laskin J.A.'s reasoning to that effect at paras. 62-63 of *Ivaco*.[22] She explains that the gap is a situation "which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy". When the facts of the present case are considered carefully, it can be seen that a gap of this sort will not occur should the appeals be allowed. As I see it, the deemed trusts continued to exist during the *CCAA* proceedings although no steps could be taken to enforce them during the proceedings because of the stay. By the time of the Sale Approval Order, the *CCAA* court had become aware of the deemed trust claims. It dealt with the deemed trust claims as part of the *CCAA* proceedings, by deciding whether the undistributed sales proceeds held by the Monitor should go to Indalex U.S. or to the Plans' beneficiaries. Thus, rather than being a situation in which property interests that would be lost in bankruptcy were enforced at the conclusion of the *CCAA* proceedings, the property interests were dealt with as part of the *CCAA* proceedings.

[22] At para. 78.

[197] However, even if I am wrong in concluding that the deemed trust has priority over the secured creditor in this case, I would make the order on the basis that it is the appropriate remedy for the breaches of fiduciary obligation.

[198] It is important to keep in mind that the contest over the Reserve Fund is not a fight between the DIP lenders and the pensioners. The DIP lenders have been paid in full. The dispute is between the pensioners and Sun Indalex, the principal secured creditor of Indalex U.S. It is in that context that the court must consider the competing equities.

[199] The *CCAA* was not designed to allow a company to avoid its pension obligations. To give effect to Indalex U.S.'s claim would be to sanction Indalex's breaches of fiduciary obligation. In the circumstances of this case, such a result would work an injustice. The equities are not equal. The Plans' beneficiaries were vulnerable to the exercise of power by Indalex. They were not part of the negotiations for the DIP financing nor were they involved in the sale negotiations. They had no opportunity to protect their interests and, as a result of Indalex's actions, there was no one who fulfilled the administrator's role. Indalex, on the other hand, was fully aware of the Plans' underfunding and the result to the pensioners of a failure to inject additional funds. It was Indalex who advised the *CCAA* court that it intended to comply with "regulatory deemed trust requirements". To permit Sun Indalex to recover on behalf of Indalex U.S. would be to effectively permit the party who breached its fiduciary obligations to take the benefit of those breaches, to the detriment of those to whom the fiduciary obligations were owed.

[200] I do not accept the respondents' argument that a finding that Indalex breached its fiduciary obligation is irrelevant because it would merely give rise to an unsecured claim and there is no basis for conferring a priority for such a claim. This view fundamentally misunderstands the rights of the pension plan beneficiaries. Even if there is no deemed trust, the Plans' beneficiaries are not mere unsecured creditors. They are unsecured creditors to whom Indalex owed a fiduciary duty by virtue of its role as the Plans' administrator. There is a significant difference, in my view, between being a mere unsecured creditor and being an unsecured creditor to whom a fiduciary duty is owed.

[201] Further, the Supreme Court has repeatedly stated that equitable remedies are sufficiently flexible that they can be molded to meet the requirements of fairness and justice: see, for example, *Canson Enterprises v. Boughton* & Co., [1991] 3 S.C.R. 534, at para. 86 and *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, at para. 34.

[202] In *Soulos*, at para. 36, McLachlin J. (as she then was) writing for the majority, held that constructive trusts may be imposed where "good conscience requires" it. She went on to identify two different types of cases in which constructive trusts may be ordered: 1) those in which property is obtained by a wrongful act of the defendant, notably breach of fiduciary duty or breach of the duty of loyalty; and, 2) those in which there may not have been a wrongful act, but where there has been unjust enrichment. While the second type of case – one in which there is unjust enrichment – is not relevant to these appeals, the first is.

[203] At para. 45 of *Soulos*, McLachin J. sets out four conditions that should "generally be satisfied" if a constructive trust based on wrongful conduct is to be ordered:

> (1) the defendant must have been under an equitable obligation in relation to the activities giving rise to the assets in his or her hands;
>
> (2) the assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his or her equitable obligation to the plaintiff;
>
> (3) the plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and
>
> (4) there must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

[204] As I have already explained, in the circumstances of this case, Indalex's fiduciary obligations as administrator were engaged in relation to the *CCAA* proceedings and it is those proceedings that gave rise to the asset (*i.e.* the Reserve Fund) (condition 1). The assets that would flow to Indalex U.S., absent the constructive trust, are directly connected to the process in which Indalex committed its breaches of fiduciary obligation (condition 2). Without the proprietary remedy, the Plans' beneficiaries have no meaningful remedy. Moreover, there must be some incentive to require employers who

are also the administrators of their pension plans to remain faithful to their duties (condition 3). And, because Indalex U.S. is not an arm's length innocent third party, imposing a constructive trust in favour of the Plans' beneficiaries is not unjust (condition 4).

The Executive Plan

[205] As I explained above, it is not clear to me that a deemed trust arose in respect of the underfunded amounts in the Executive Plan because it had not been wound up at the time of sale. However, based on the breaches of fiduciary duty, the court is entitled to consider the equities of the parties competing for the Reserve Fund. For the reasons given in respect of the Salaried Plan in respect of those equities, I would make the same order in respect of the Executive Plan, namely, that the Monitor pay the deficiency from the Reserve Fund to the Executive Plan in priority to those entitled under the super-priority charge.

[206] In light of this conclusion, I find it unnecessary to deal with the Former Executives' submission that the doctrine of equitable subordination applies to remedy Indalex's breaches of fiduciary duty. In any event, I would decline to decide that issue as it was not argued below. It offends the general rule that appellate courts are not to entertain new issues on appeal.

DISPOSITION

[207] Accordingly, I would allow the appeals and declare that the claims of the USW and the Former Executives take priority over the claim asserted by Indalex U.S./Sun Indalex. I would order the Monitor to pay from the Reserve Fund into each of the Salaried Plan and the Executive Plan an amount sufficient to satisfy the deficiencies in each plan. I understand that the Reserve Fund is sufficient to satisfy the Deficiencies but if this proves problematic, the parties may return to the court for direction on that matter.

[208] If the parties are unable to agree on costs, they may make brief written submissions on that matter. The appellants, Morneau and the Superintendent shall file their submissions within fifteen days of the date of release of these reasons. The respondents shall have a further seven days within which to file their submissions.

RELEASED: APR 07 2011 ("JCM")

"E. E. Gillese J.A."
"I agree. J. C. MacPherson J.A."
"I agree. R. G. Juriansz J.A."

Schedule "A"

***Pension Benefits Act,* R.S.O. 1990, c. P.8, ss. 1(1), 8, 14(1), 22, 57(1) – (5), 70(1), 74(1), 75(1), (2), 76**

Definitions

1. (1) In this Act, ...

"administrator" means the person or persons that administer the pension plan; ...

"wind up" means the termination of a pension plan and the distribution of the assets of the pension fund;

Administrator

Requirement

8. (0.1) A pension plan must be administered by a person or entity described in subsection (1).

Prohibition

(0.2) No person or entity other than a person or entity described in subsection (1) shall administer a pension plan.

Administrator

(1) A pension plan is not eligible for registration unless it is administered by an administrator who is,

(a) the employer or, if there is more than one employer, one or more of the employers;

(b) a pension committee composed of one or more representatives of,

> (i) the employer or employers, or any person, other than the employer or employers, required to make contributions under the pension plan, and
>
> (ii) members of the pension plan;

(c) a pension committee composed of representatives of members of the pension plan;

(d) the insurance company that provides the pension benefits under the pension plan, if all the pension benefits under the pension plan are guaranteed by the insurance company;

(e) if the pension plan is a multi-employer pension plan established pursuant to a collective agreement or a trust agreement, a board of trustees appointed pursuant to the pension plan or a trust agreement establishing the pension plan of whom at least one-half are representatives of members of the multi-employer pension plan, and a majority of such representatives of the members shall be Canadian citizens or landed immigrants;

(f) a corporation, board, agency or commission made responsible by an Act of the Legislature for the administration of the pension plan;

(g) a person appointed as administrator by the Superintendent under section 71; or

(h) such other person or entity as may be prescribed.

Additional members

(2) A pension committee, or a board of trustees, that is the administrator of a pension plan may include a representative or representatives of persons who are receiving pensions under the pension plan.

Interpretation

(3) For the purposes of clause (1) (b), "employer" includes the following persons and entities:

1. Affiliates within the meaning of the *Business Corporations Act* of the employer.

2. Such other persons or entities, or classes of persons or entities, as may be prescribed.

Reduction of benefits

14. (1) An amendment to a pension plan is void if the amendment purports to reduce,

(a) the amount or the commuted value of a pension benefit accrued under the pension plan with respect to employment before the effective date of the amendment;

(b) the amount or the commuted value of a pension or a deferred pension accrued under the pension plan; or

(c) the amount or the commuted value of an ancillary benefit for which a member or former member has met all eligibility requirements under the pension plan necessary to exercise the right to receive payment of the benefit.

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).

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).

Wind up report

70. (1) The administrator of a pension plan that is to be wound up in whole or in part shall file a wind up report that sets out,

(a) the assets and liabilities of the pension plan;

(b) the benefits to be provided under the pension plan to members, former members and other persons;

(c) the methods of allocating and distributing the assets of the pension plan and determining the priorities for payment of benefits; and

(d) such other information as is prescribed.

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.

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.

Pension fund continues subject to Act and regulations

76. The pension fund of a pension plan that is wound up continues to be subject to this Act and the regulations until all the assets of the pension fund have been disbursed.

Schedule "B"

***Pension Benefits Act*, Regulation 909, R.R.O. 1990, s. 31(1), (2) and (3)**

31. (1) The liability to be funded under section 75 of the Act shall be funded by annual special payments commencing at the effective date of the wind up and made by the employer to the pension fund.

(2) The special payments under subsection (1) for each year shall be at least equal to the greater of,

(a) the amount required in the year to fund the employer's liabilities under section 75 of the Act in equal payments, payable annually in advance, over not more than five years; and

(b) the minimum special payments required for the year in which the plan is wound up, as determined in the reports filed or submitted under sections 3, 4, 5.3, 13 and 14, multiplied by the ratio of the basic Ontario liabilities of the plan to the total of the liabilities and increased liabilities of the plan as determined under clauses 30(2)(b) and (c).

(3) The special payments referred to in subsections (1) and (2) shall continue until the liability is funded.

Court of Appeal File No. C52187

COURT OF APPEAL FOR ONTARIO

THE HONOURABLE JUSTICE MACPHERSON	)	THURSDAY, THE 7th
THE HONOURABLE JUSTICE GILLESE	)	
THE HONOURABLE JUSTICE JURIANSZ	)	DAY OF APRIL, 2011

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/Respondents

ORDER

THIS APPEAL, made by the appellants, the Former Executives, from the Order of the Honourable Justice Campbell of the Ontario Superior Court of Justice (Commercial List), dated February 18, 2010 (the "February 18th Order"), by which Appeal the Former Executives seeks to set aside the February 18th Order and substitute an order declaring that the wind-up liability owing (the "Deficiency") to the Retirement Plan for Executive Employees (the "Executive Plan") of Indalex Limited and Associated Companies ("Indalex Canada") currently held in reserve (the "Deficiency Reserve") by FTI Consulting Canada ULC in its capacity as Monitor ("the Monitor") is subject to a deemed trust for the benefit of the beneficiaries of the Executive Plan under section 57(4) of the *Pensions Benefits Act* R.S.O. c. P.8 ("*PBA*"), a declaration that Indalex Limited, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc. ("Indalex Canada") as pension plan administrator of the Executive Plan breached their fiduciary duties to the Former Executives, and an order directing that the Deficiency Reserve be paid into the fund

of the Executive Plan, was heard this day at Osgoode Hall, 130 Queen Street West, Toronto, Ontario.

ON READING the February 18th Order, the Orders of Justice Campbell, dated July 20, 2009 and October 27, 2009, the Handwritten Endorsement of Justice Campbell, dated July 20, 2009, the Timetable of Justice Campbell dated July 27, 2009, the Orders of Justice Morawetz dated April 3, 2009, April 8, 2009, May 12, 2009, June 12, 2009 and July 2, 2009, the Amended and Restated Initial Order of Justice Morawetz, dated June 12, 2009, the Endorsements of Justice Morawetz dated April 17, 2009 and June 15, 2009, the Handwritten Endorsement of Justice Morawetz, dated July 2, 2009, the Reasons for Decision of Justice Campbell, dated February 18, 2010, the Affidavits of Keith Carruthers, sworn June 23, 2009 and August 15, 2009 (with exhibits thereto), the Affidavit of Andrea McKinnon, sworn July 17, 2009 (with exhibits thereto), the Affidavit of Max Degen, sworn August 6, 2009, the Affidavit of Mari Trainor, sworn September 3, 2009 (with exhibits thereto), the Affidavit of Jenny Correia, sworn March 19, 2010 (with exhibits thereto), the Affidavit of Keith Cooper, sworn August 24, 2009 (with exhibits thereto), the Affidavit of Bob Kavanaugh, sworn August 12, 2009 (with exhibits thereto), the Affidavit of Jalo Edwards, sworn November 19, 2010 (with exhibits thereto), the Affidavit of Demetrios Yiokaris, sworn November 19, 2010, the Cross-Examination Transcript of Keith Cooper, dated August 26, 2009 (with exhibits thereto), the Unanimous Shareholder Declaration, dated August 12, 2009, the Certificate respecting Evidence of the Appellant Former Executives, dated June 1, 2010, the Tenth Report of the Monitor, dated October 21, 2009, the Pre-Filing Report to Court submitted by the proposed Monitor, FTI Consulting Canada ULC, on April 3, 2009, the facta and briefs of authorities filed on behalf of the parties, and on hearing the submissions of counsel for the parties and the intervenors to this appeal, and reasons (the "OCA Reasons") being reserved until this day:

1. **THIS COURT ORDERS** that all capitalized terms not otherwise defined in this Order shall have the meanings ascribed to them in the OCA Reasons.

2. **THIS COURT ORDERS** that the Appeal is hereby allowed.

3. **THIS COURT DECLARES** that the claim of the Former Executives takes priority over the claim asserted by Indalex Holding Corp., Indalex Finance and their U.S. based affiliates and Sun Indalex Finance, LLC.

4. **THIS COURT ORDERS** that the Monitor pay from the Deficiency Reserve fund into the Executive Plan an amount sufficient to satisfy the Deficiency, and in the event that the Deficiency Reserve is insufficient to satisfy the Deficiency, the parties may return to this Court for direction on that matter.

5. **THIS COURT ORDERS** that ● pay costs of the within appeal to ● in the fixed amount of $●, both awards inclusive of disbursements and applicable taxes.

Registrar

THIS ORDER BEARS INTEREST at the rate of 3% per year commencing on April 7, 2011.

Court of Appeal File No.: C52187

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/Respondents

DRAFT

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

110

ORDER

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Court of Appeal File No. C52346

COURT OF APPEAL FOR ONTARIO

THE HONOURABLE JUSTICE MACPHERSON	)	THURSDAY, THE 7th
THE HONOURABLE JUSTICE GILLESE	)	
THE HONOURABLE JUSTICE JURIANSZ	)	DAY OF APRIL, 2011

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/Respondents

ORDER

THIS APPEAL, made by the appellant, the United Steelworkers (the "United Steelworkers"), from the Order of the Honourable Justice Campbell of the Ontario Superior Court of Justice, dated February 18, 2010 (the "February 18th Order"), by which Appeal the United Steelworkers seeks to set aside the February 18th Order and substitute an Order requiring FTI Consulting Canada ULC in its capacity as Monitor (the "Monitor") to pay the amount of the wind-up liability owing (the "Deficiency") to the Retirement Plan for the Salaried Employees (the "Salaried Plan") of Indalex Limited and Associated Companies ("Indalex Canada") currently held in reserve (the "Deficiency Reserve") by the Monitor, was heard this day at Osgoode Hall, 130 Queen Street West, Toronto, Ontario.

ON READING the February 18th Order, the Orders of Justice Campbell, dated July 20, 2009 and October 27, 2009, the Handwritten Endorsement of Justice Campbell, dated July 20, 2009,

the Timetable of Justice Campbell dated July 27, 2009, the Orders of Justice Morawetz, dated April 3, 2009, April 8, 2009, May 12, 2009, June 12, 2009 and July 2, 2009, the Amended & Restated Initial Order of Justice Morawetz, dated May 12, 2009, the Endorsements of Justice Morawetz dated April 17, 2009 and June 15, 2009, the Handwritten endorsement of Justice Morawetz, dated July 2, 2009, the Reasons for Decision of Justice Campbell, dated February 18, 2010, the Affidavit of Cathy Braker, sworn August 5, 2009 (with exhibits thereto), the Affidavit of Bob Kavanaugh, sworn August 12, 2009 (with exhibits thereto), the Affidavit of Fred Fazio, sworn June 29, 2009 (with exhibits thereto), the Affidavit of Keith Cooper, sworn August 24, 2009 (with exhibits thereto), the Affidavit of Jalo Edwards, sworn November 19, 2010 (with exhibits thereto), the Affidavit of Demetrios Yiokaris, sworn November 19, 2010, the Affidavit of Andrea McKinnon, sworn July 17, 2009 (with exhibits thereto), the Affidavit of Jenny Correia, sworn March 19, 2010 (with exhibit thereto), the Cross-Examination Transcript of Keith Cooper (with exhibits thereto), the Unanimous Shareholder Declaration, dated August 12, 2009, the Certificate of Evidence, dated July 2, 2010, the Tenth Report of the Monitor, dated October 21, 2009, the Pre-Filing Report to Court submitted by the proposed Monitor, FTI Consulting Canada ULC, on April 3, 2009, the facta and briefs of authorities filed on behalf of the parties, and on hearing the submissions of counsel for the parties and the intervenors to this appeal, and reasons (the "OCA Reasons") being reserved until this day:

1. **THIS COURT ORDERS** that all capitalized terms not otherwise defined in this Order shall have the meanings ascribed to them in the OCA Reasons.

2. **THIS COURT ORDERS** that the Appeal is hereby allowed.

3. **THIS COURT DECLARES** that the claim of the United Steelworkers takes priority over the claim asserted by Indalex Holding Corp., Indalex Finance and their U.S. based affiliates and Sun Indalex Finance, LLC.

4. **THIS COURT ORDERS** that the Monitor pay from the Deficiency Reserve fund into the Salaried Plan an amount sufficient to satisfy the Deficiency, and in the event that the Deficiency Reserve is insufficient to satisfy the Deficiency, the parties may return to this Court for direction on that matter.

5. **THIS COURT ORDERS** that ● pay costs of the within appeal to ● in the fixed amount of $●, both awards inclusive of disbursements and applicable taxes.

Registrar

THIS ORDER BEARS INTEREST at the rate of 3% per year commencing on April 7, 2011.

Court of Appeal File No: C52346

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/Respondents

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COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

114

ORDER

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IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

FTI CONSULTING CANADA ULC,
IN ITS CAPACITY AS COURT-APPOINTED MONITOR OF INDALEX LIMITED, ON BEHALF OF INDALEX LIMITED

Applicant
(Respondent)

-and-

KEITH CARRUTHERS, LEON KOZIEROK, RICHARD BENSON, JOHN FAVERI, KEN WALDRON, JOHN (JACK) W. ROONEY, BERTRAM MCBRIDE, MAX DEGAN, EUGENE D'IORIO, RICHARD SMITH, ROBERT LECKIE, NEIL FRASER and FRED GRANVILLE ("RETIREES") and UNITED STEELWORKERS

Respondents
(Appellants)

-and-

MORNEAU SOBECO LIMITED PARTNERSHIP and THE SUPERINTENDENT OF FINANCIAL SERVICES

Interveners
(Interveners)

MEMORANDUM OF ARGUMENT OF FTI CONSULTING CANADA ULC, IN ITS CAPACITY AS THE COURT-APPOINTED MONITOR OF INDALEX LIMITED, ON BEHALF OF INDALEX LIMITED, APPLICANT

Pursuant to Rule 25 of the *Rules of the Supreme Court of Canada*

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PART I: STATEMENT OF FACTS & ISSUES OF PUBLIC IMPORTANCE

A. Overview

1. This application for leave to appeal raises three questions of national public importance:

   A. Can a super-priority charge, granted by a supervising judge under the *Companies' Creditors Arrangement Act* (the "CCAA"), in an order that has not been appealed, be retroactively revoked on a subsequent motion to the detriment of parties who have acted in reliance on it?

   B. Does Ontario's *Pension Benefits Act* (the "PBA") create a deemed trust over wind-up deficiencies?

   C. Does a company's need to take steps under the CCAA place it in an irremediable conflict with its fiduciary obligations as administrator of a pension plan?

2. In the decision under appeal, the Court of Appeal for Ontario retroactively stripped debtor-in-possession ("DIP") lenders (the "DIP Lenders") of the security and priority that the supervising judge of a CCAA proceeding had expressly granted in earlier orders that had not been appealed. The Court of Appeal instead gave priority to a pension wind-up deficiency on the basis of both a deemed trust that it found to exist and a finding that the debtor breached its fiduciary obligations, as plan administrator, to plan beneficiaries. In doing so, the Court of Appeal effectively created a new discretionary scheme of distribution under the CCAA that is radically at odds with the scheme provided for in the *Bankruptcy and Insolvency Act* (the "BIA"), and that threatens to deprive both debtor companies under CCAA protection and pension sponsors nationally of access to credit. The decision runs contrary to the jurisprudence of this Court as well as the Court of Appeal's own prior decisions, and if allowed to stand would have far-reaching impact on commercial lending and on the ability of companies across Canada to restructure under the CCAA.

3. Indalex Limited ("Indalex") was the main Canadian subsidiary of a consolidated group of aluminum extruders. At the nadir of one of the worst recessions in 75 years, Indalex's parent company and its U.S. affiliates (the "US Debtors") filed for Chapter 11 protection in the United States with the intent of pursuing a sale of the company as a going concern. Indalex and certain related companies filed for protection under the CCAA in the Commercial List of the Ontario Superior Court of Justice shortly thereafter.

4. Without DIP financing, Indalex could not have continued operations. The company would have gone into liquidation, resulting in, among other things, the loss of jobs for 950 employees in Canada alone. As is typically sought and obtained in CCAA proceedings, the CCAA court granted a "super-priority" charge for the DIP financing, which expressly included priority over statutory liens and deemed trusts, in order to finance operations pending a going-concern sales process. In granting the super-priority charge, the CCAA judge considered the prejudice that might be occasioned to other creditors (such as pension plan members) and concluded that the benefit to stakeholders and creditors of the DIP financing outweighed any such prejudice. Neither this order nor a subsequent order approving additional advances under the DIP facility was contested or appealed by any party. In particular, these orders were not appealed by certain retired executives of Indalex (the "Retirees"), whose pension-related claims thereby ranked after the DIP financing. The DIP Lenders advanced credit to Indalex in reliance on the Court's express and unappealed orders as to the priority that the funds advanced would enjoy.

5. The DIP financing allowed for a sale of the business as a going concern. As in any CCAA proceeding, the sale and the distribution of proceeds resulting therefrom was subject to Court approval. Although they had not contested or appealed the order that gave the DIP Lenders priority over pension plan trust claims, the Retirees asserted at the sale approval hearing that any wind-up deficiency in Indalex's executive pension plan was subject to a deemed trust under the PBA that should be given priority over the previously approved DIP financing. The United Steelworkers (the "USW"), while supporting the sale transaction, reserved its rights with respect to any deemed trust claim in respect of Indalex's salaried pension plan. The sale was approved, all the Retirees' and USW's motions asserting the deemed trust claims were deferred to be heard later.

6. The Retirees' and USW's motions were dismissed by Campbell J. as CCAA judge who recognized the importance of the statutory schemes of priority under the CCAA and the BIA and the priority given by the Court to the DIP Lenders, and correctly concluded that no amounts were actually due or accrued to either pension plan so as to create a deemed trust. The Court of Appeal for Ontario overturned this decision and gave priority to the Retirees' and USW's claims for certain estimated wind-up deficiencies in the pension plans.

7. The Court of Appeal decision raises, among others, the three pressing questions of public importance set out above, and if allowed to stand will have an immediate detrimental impact on CCAA proceedings and commercial lending across Canada.

8. First, if, in the name of "flexibility", a Court can retroactively overturn an unappealed order of the supervising CCAA judge despite the fact that parties have relied on that order to their detriment, no faith may ever be placed on any order of a CCAA court. The Court of Appeal's decision is corrosive of commercial certainty and the rule of law that is critical in insolvency proceedings. It will substantially hinder, if not eliminate entirely, the ability of companies, particularly those with defined benefit pension plans, to obtain DIP financing, resulting in the forced liquidation of businesses and the resultant social harm that the CCAA was designed to prevent. It also places the reputation of Canadian courts and orders granted by them in jeopardy and risks causing Canadian debtors to seek to restructure in foreign proceedings in order to secure reliable access to funding. Further, by attempting to distinguish this Court's recent decision in *Century Services v. Canada (Attorney General)*[1] – which held that the scheme of distribution under the CCAA should be harmonized with the BIA – the Court of Appeal erroneously created a scheme of distribution for CCAA proceedings that is radically different from the BIA. This can be expected to lead secured creditors of companies with defined benefit pension plans to force liquidation under the BIA to protect their priority rights.

9. Second, the Court of Appeal found, contrary to earlier appellate authority,[2] that the PBA provides for a deemed trust in respect of any wind-up deficiency, an amount that is subject to continuous and substantial fluctuation. If this conclusion is allowed to stand, lenders will be unable to quantify obligations having priority over their loans, as future changes to workforce demographics, interest rates or annuity purchase rates could result in pension deficits that can neither be foreseen nor provided for. Companies that sponsor defined benefit pension plans – including those in good standing with creditors – will face a reduction in available credit and will be required to pay substantially more for credit facilities. This will, in turn, lead to increase pressure to abandon defined benefit plans or convert them to defined contribution plans. Thus

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[1] *Century Services v. Canada (Attorney General),* 2010 SCC 60, [2010] 3 S.C.R. 379, Application Record for Leave to Appeal of FTI Consulting Canada ULC, in its capacity as the Court-Appointed Monitor, on behalf of Indalex Limited, Applicant (the "Monitor's Application Record"), Tab 7A.
[2] *Ivaco (Re)*, 2006 CanLII 34551 (Ont.C.A.) at para. 44, Monitor's Application Record, Tab 7B.

while the decision appears to benefit pension plan members in this particular insolvency, it does untold damage to employees and pension plan members at large.

10. Third, the Court of Appeal found that Indalex breached its fiduciary obligations as pension plan administrator by, *inter alia*, negotiating the DIP facility and selling its assets on a going-concern basis that did not involve assumption of the pension plans. However, all of these steps were undertaken under court supervision and under the authority of court orders that were not challenged. The finding that a plan sponsor breaches its fiduciary obligations to plan members when negotiating corporate transactions that are wholly unconnected to the administration of the plan calls into question every corporate decision made by a plan sponsor. It also puts plan sponsors across the country in the untenable position, contrary to fundamental principals of insolvency law, of having to prefer the interests of one class of creditors (plan beneficiaries) over all other stakeholders, including creditors and employees (some of whom may also be plan beneficiaries).

11. As a result of its decision, the Court of Appeal has created conflicting appellate authority, including conflicts with this Court's decision in *Century Services*, with broad-ranging impact on both insolvency practice and commercial lending across Canada. These impacts are discussed in detail in the affidavit of Mr. Jay Swartz, President of the Insolvency Institute of Canada, (the "Swartz Affidavit"), a copy of which is included in the Application Record of FTI Consulting Canada ULC, in its capacity as the Court-appointed Monitor for Indalex (the "Monitor"), and are summarized at paragraph 15 of the Swartz Affidavit as follows:

> (a) uncertainty of priorities, in that the decision grants priority to certain pension deficiency claims not previously considered to have priority under established lending and insolvency practices in Canada, as determined in accordance with previous court decisions;
>
> (b) conflicting public policy objectives, arising from the Ontario Court of Appeal's determination that there is a statutory priority for the entire deficit in an underfunded pension plan. Such priority was recently rejected by Parliament in enacting amendments to the BIA and CCAA that granted only a limited priority to unpaid amounts owing to a pension plan and no priority for the entire deficit;
>
> (c) unachievable practical thresholds, arising from the requirements imposed by the Ontario Court of Appeal for giving prior notice of the relief sought by an insolvent company when it needs to obtain

super-priority debtor in possession ("DIP") financing to stabilize a distressed business on an urgent basis;

(d) the uncertain application of equitable remedies by an appellate court to alter statutory priorities among creditors; and

(e) the need for a consistent, harmonious application of both federal insolvency statutes, to avoid "statute shopping" and encourage the successful restructuring of insolvent businesses for the benefit of all stakeholders and the public.[3]

12. For the reasons set forth herein, the Monitor, on behalf of Indalex, respectfully requests that this Court grant leave to appeal.[4]

B. Background Facts

i) The Pension Plans

13. When the CCAA proceeding began, Indalex had two pension plans: the Retirement Plan for Salaried Employees (the "Salaried Plan") and the Retirement Plan for Executive Employees (the "Executive Plan", and jointly, the "Plans"). The Salaried Plan had both defined benefit and defined contribution components, and the Executive Plan was a defined benefit plan.[5]

14. The Salaried Plan was in the process of being wound up. All contributions due to the Salaried Plan prior to the effective date of wind-up were made (December 31, 2006). The wind-up deficiency was calculated as of the effective date and annual payments to fund the deficiency were made in 2007, 2008 and 2009. The wind-up deficiency calculated as at December 31, 2008 was $1,795,600.[6] The Executive Plan was not being wound up and Indalex had made all contributions required by the plan, the PBA and the regulations to the PBA. As the process of winding up the Executive Plan had not been commenced, no wind-up deficiency had been calculated.[7]

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[3] Affidavit of Jay A. Swartz sworn June 6, 2011 ("Swartz Affidavit") at para. 15, Monitor's Application Record, Tab 6N.
[4] By virtue of an Order made subsequent to the sale of Indalex's business, FTI's role as Monitor includes the power to take certain actions in the name of Indalex, including matters resulting from the appeal of Campbell J.'s Orders: Order of the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) dated October 27, 2009 (Increase to Monitor's Powers and Stay Extension), Monitor's Application Record, Tab 6H.
[5] Affidavit of Bob Kavanaugh sworn August 12, 2009 (the "Kavanaugh Affidavit") at paras. 5 and 15, Monitor's Application Record, Tab 6L.
[6] Affidavit of Keith Cooper sworn August 24, 2009 (the "Cooper Affidavit") at para. 21, Monitor's Application Record, Tab 6M; Kavanaugh Affidavit at paras. 5-11, the Monitor's Application Record, Tab 6L.
[7] Reasons for Decision of the Honourable Mr. Justice Campbell dated February 18, 2010, 2010 ONSC 114 ("Campell J. Reasons") at paras. 23-24, Monitor's Application Record, Tab 4A ; Cooper Affidavit at para. 20, Monitor's Application Record, Tab 6M; Kavanaugh Affidavit at paras. 15-16, Monitor's Application Record, Tab 6L.

2) The DIP Loan

15. Five days after obtaining protection under the CCAA, Indalex sought approval to borrow funds (the "DIP Loan") from the DIP Lenders (a syndicate of lenders) to allow Indalex to continue operating while it pursued a going-concern sale of its business. The DIP Loan was to be repaid from the proceeds of the sale, and was guaranteed by the US Debtors. In the event of any payment on the guarantee, the US Debtors were fully subrogated to the rights of the DIP Lenders under the Initial Order.[8]

16. Morawetz J. granted the Amended and Restated Initial Order (as amended, the "Initial Order") on April 8, 2009. The Initial Order provides a Court-ordered charge in favour of the DIP Lenders which, by its terms, ranks in priority to all liens and encumbrances, including deemed trusts and statutory liens, other than Court-ordered administration and directors charges. Paragraph 56 of the Initial Order contained a "comeback clause" permitting parties to seek variance or amendment, but specifically carved out the super-priority charge for the DIP Loan:

> THIS COURT ORDERS that any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order; provided however, the DIP Agent and the DIP Lenders shall be entitled to rely on this Order as issued for all advances made under the DIP Credit Agreement up to and including the date this Order may be varied and amended. (emphasis added)[9]

17. On June 12, 2009, Morawetz J. approved an increase in the borrowing limit of the DIP Loan. Counsel for the Retirees appeared at the hearing seeking a "reservation of rights" in respect of the priority of the DIP Loan over claims of the Retirees in relation to the wind-up deficiency. This requested reservation of rights was both rejected by the Court and ultimately withdrawn by the Retirees. [10] No appeal was ever sought by the Retirees or USW in respect of either the initial approval of the DIP Loan or the increase in the borrowing limit. The U.S. bankruptcy court also approved the DIP Loan on faith of the Canadian order. In reliance on this order the DIP Lenders advanced credit under the DIP Loan.

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[8] Cooper Affidavit at paras. 7-10, Monitor's Application Record, Tab 6M.
[9] Order of the Honourable Mr. Justice Morawetz dated April 8, 2009 (the "Amended and Restated Initial Order") at paras. 45 and 56, Monitor's Application Record, Tab 6B.

3) The Sale of Indalex

18. At the sale approval hearing on July 20, 2009, the Retirees objected to the sale, asserted a deemed trust claim over the Canadian proceeds and requested that $3.25 million (representing an estimate of the wind-up deficiency in the Executive Plan) be held in reserve.[11] The USW supported the sale of Indalex on a going-concern basis, which preserved the jobs of its members, but then also reserved its rights in respect of any deemed trust claim it may have for the Salaried Plan.[12] Campbell J. as CCAA judge approved the sale of the assets and business of Indalex, required the proceeds of sale to be paid to the Monitor and directed that a distribution be made to the DIP Lenders to satisfy the DIP Loan, subject to any reserve the Monitor considered appropriate, including in respect of the motions to be brought by the Retirees and USW in respect of their deemed trust claims.[13] The sale of Indalex closed on July 31, 2009.

C. The Decision of the CCAA Judge

19. The Retirees and USW brought motions seeking declarations that the amounts of any wind-up deficiencies in the Plans were subject to deemed trusts under the PBA and that such deemed trusts had priority to any other creditor of Indalex, including the DIP Lenders.[14]

20. Campbell J. dismissed the motions. Relying on the plain language of the PBA and on the decisions of Farley J. in *Usarco*[15] and the Ontario Court of Appeal in *Ivaco*,[16] Campbell J. held that no deemed trust arose under either Plan as (1) no contribution had accrued under the Salaried Plan and no deemed trust arose in respect of the remaining deficiency; and (2) the Executive Plan had not been wound up, and all contributions which were due had been paid. As a result of these conclusions, Campbell J. did not need to separately consider whether any deemed trusts under the PBA would have priority to the DIP Lenders under the Initial Order.[17]

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[10] Order of the Honourable Mr. Justice Morawetz dated June 12, 2009, Monitor's Application Record, Tab 6E; Endorsement of the Honourable Mr. Justice Morawetz dated June 15, 2009, Monitor's Application Record, Tab 6F
[11] Cooper Affidavit at para. 19, Monitor's Application Record, Tab 6M.
[12] Cooper Affidavit at para. 21, Monitor's Application Record, Tab 6M.
[13] Cooper Affidavit at paras. 16 and 18, Monitor's Application Record, Tab 6M; Order of the Honourable Mr. Justice Campbell dated July 20, 2009 (the "Approval and Vesting Order"), Monitor's Application Record, Tab 6G.
[14] Cooper Affidavit at para. 27, Monitor's Application Record, Tab 6M; Notice of Motion (Retirees) dated August 5, 2009, Monitor's Application Record, Tab 6I; Notice of Motion (United Steelworkers) dated August 5, 2009, Monitor's Application Record, Tab 6J.
[15] *Toronto-Dominion Bank v. Usarco Ltd.*, [1991] O.J. No. 1314 (Gen. Div.) at pp. 10-11, Monitor's Application Record, Tab 7C.
[16] *Ivaco, supra*, at para. 44, Monitor's Application Record, Tab 7B.
[17] Campbell J. Reasons, Monitor's Application Record, Tab 4A.

D. The Court of Appeal Judgment

21. Gillese J.A. for the Court of Appeal of Ontario allowed the appeal of the Retirees and the USW based on the following findings:

(a) the deficiency in the Salaried Plan was subject to a deemed trust[18];

(b) Indalex breached the fiduciary obligations it owed to Plan beneficiaries as administrator of the Plans by, among other things, negotiating the DIP Loan and the sale of Indalex's assets without providing for the payment of the Plans' wind-up deficiencies or the assumption of the Plans by the purchaser[19];

(c) both the deemed trust in the Salaried Plan and the deficiency in the Executive Plan should be paid in priority to the DIP Lenders despite the priority granted to the DIP Lenders in the Initial Order[20];

(d) the Retirees' and USW's motions were not collateral attacks on the Initial Order even though there was no attempt to appeal, set aside or vary the super-priority granted to the DIP Lenders, in part because the collateral attack rule should be "relaxed" in CCAA proceedings and has limited applicability in light of the "comeback clause" typically included in CCAA initial orders (though the Court of Appeal does not mention that the "comeback clause" contained an express carve-out in respect of advances under the DIP Loan)[21];

(e) that in a "successful" liquidation in a CCAA proceeding the Court can fashion creditor priorities that are inconsistent with the priorities in a BIA proceeding, and it may in fact be a breach of a CCAA applicant's fiduciary obligations to plan beneficiaries to voluntarily assign the company into bankruptcy if it would compromise the position of any pension plans.[22]

22. In arriving at these conclusions, Gillese J.A. decided that the *Usarco* and *Ivaco* decisions, both of which determined that wind-up deficiencies were not covered by the deemed trust provisions of the PBA, were not relevant to the issues on this appeal.[23] The Court of Appeal also purported to distinguish the recent decision of this Court in *Century Services*, finding that the policy favouring harmonization of the priorities in CCAA and BIA proceedings espoused in that decision did not apply in the context of what it referred to as a "successful" CCAA liquidation proceeding.[24]

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[18] Court of Appeal Reasons at paras. 101-103, Monitor's Application Record, Tab 4E.
[19] Court of Appeal Reasons at para. 132-135, Monitor's Application Record, Tab 4E.
[20] Court of Appeal Reasons at para. 199, Monitor's Application Record, Tab 4E.
[21] Court of Appeal Reasons at para. 164-168, Monitor's Application Record, Tab 4E.
[22] Court of Appeal Reasons at para. 192, Monitor's Application Record, Tab 4E.
[23] Court of Appeal Reasons at para. 105-107, Monitor's Application Record, Tab 4E.
[24] Court of Appeal Reasons at para. 192, Monitor's Application Record, Tab 4E.

PART II: QUESTIONS IN ISSUE

23. This application raises the following questions of national and public importance:

A. Can a super-priority charge, granted by a supervising judge under the CCAA, in an order that has not been appealed, be retroactively revoked on a subsequent motion to the detriment of parties who have acted in reliance on it?

B. Does Ontario's PBA create a deemed trust over wind-up deficiencies?

C. Does a company's need to take steps under the CCAA place it in an irremediable conflict with its fiduciary obligations as administrator of a pension plan?

PART III: STATEMENT OF ARGUMENT

A. The Court of Appeal's Negation of the CCAA Court's Order on Priority Raises a Matter of National and Public Importance

i) The Decision Undermines Commercial Certainty and the Rule of Law

24. The decision of the Court of Appeal retroactively stripped the DIP Lenders of rights acquired under the Initial Order, from which no appeal was sought nor any motion to amend or vary made. The DIP Lenders advanced credit in reliance on the priority granted to them by the CCAA judge in the Initial Order. The decision is corrosive of the rule of law and calls into question the validity and enforceability of virtually all orders made by Canadian courts in restructuring matters.

25. If a DIP lender cannot rely on the super-priority granted by a CCAA supervising court, there will be a strong disincentive to any lender to provide financing for a company that is in CCAA protection. This will decrease the credit available to restructuring companies and materially increase the costs for such financing altogether. It also weakens the tools available to a CCAA supervising judge to encourage an efficient and effective financial restructuring. The result will be more liquidations of businesses that could have been saved and the frustration of the objects of Parliament in enacting the CCAA.

26. The Court of Appeal's decision also frustrates the intent of recent amendments to the CCAA designed to foster the availability of DIP lending in insolvency proceedings. While orders granting super-priority to DIP lenders were previously granted under the Court's general

powers under the CCAA,[25] recent amendments to the CCAA now expressly contemplate an interim financing lender being granted super-priority over "any secured creditor of the company" (a term that expressly includes trust claims).[26] As the clause-by-clause analysis prepared by Industry Canada in respect of the amendments noted, "The most important element [of interim financing] is the obtaining of a priority charge by the interim lender in respect of the amount lent, thereby decreasing the lender's risk and increasing the likelihood that a willing lender can be found."[27]

27. This decision was made in the context of a cross border CCAA/Chapter 11 proceeding. The party stripped of its rights had sought and obtained parallel protection from the U.S. bankruptcy court granting super-priority status to the DIP Loan. This decision threatens to undermine the ability of Canadian courts to take an active role in cross-border insolvencies and promote the going concern restructuring or sale of the Canadian operations of multinational companies.

28. Corrective action is required to ensure that participants may once again place full faith and credit in orders issued by Canadian courts and not fear that their interests will be retroactively revoked.

2) The Court of Appeal's Approach Encourages Collateral Attacks

29. As set out above, the Initial Order was never appealed, yet the motions of the Retirees and the USW sought to collaterally attack an important term of that order: the super-priority given to the DIP Lenders. The Court of Appeal set out a series of grounds for not applying the collateral attack rule in the circumstances of this case. However, none of these grounds justify ignoring the collateral attack rule and the Court of Appeal's judgment effectively concludes that the rule against collateral attack should not apply in CCAA proceedings.

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[25] The case of Indalex being a case in point. As the Initial Order was obtained before recent amendments to the CCAA were proclaimed in September 2009, the super-priority granted to the DIP Lenders was granted under the Court's general powers under the CCAA and its inherent jurisdiction. *Companies' Creditors Arrangement Act,* RSC 1985, c C-36 ("CCAA"), s. 11 (version in force prior to September 18, 2009), Monitor's Application Record, Tab 5A.

[26] CCAA, s. 11.2 (current version), Monitor's Application Record, Tab 5B; *Legislative Summary for Bill C-12: An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*; House of Commons Debates, Vol. 140, No. 128 (1st Session, 38th Parliament), September 29, 2005, at pp. 8199-8202.

[27] Industry Canada, Corporate and Insolvency Law Policy Directorate, Briefing Book (Clause-by-clause analysis), Bill C-55: *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, Monitor's Application Record, Tab 7F.

30. First, the Court's finding that the Retirees and USW were merely making use of the "comeback clause" in the Initial Order "to ask that the super-priority charge be varied or amended"[28] is belied by the comeback clause itself, which carves out an exception in respect of the super-priority, as set out in paragraph 15 above.[29] Further, the motions brought by the Retirees and USW did not, in fact, seek to vary or amend the Initial Order. They sought other relief. The Retirees and USW could not and did not rely on the comeback clause for the motions.

31. Second, the Court of Appeal's conclusion that there was no determination of the Retirees' rights at the June 12, 2009 motion to increase the borrowing limit under the DIP Loan[30] is contradicted by the endorsement of Morawetz J. on the motion. Counsel for the Retirees attended at the hearing. The Retirees did not oppose the motion and, while initially seeking to reserve their rights, ultimately withdrew the request for a reservation.[31] Morawetz J. expressly noted that there was no reservation of rights with respect to the trust issue:

> I had difficulty dealing with the request to reserve rights for two reasons. First, the relief sought is inconsistent with the ability for a party, on a practical level, to reserve rights. If the DIP Facility were to be increased with a reservation of rights, uncertainty would prevail if such a reservation was to be granted. Would it cause the DIP lender to withhold advances? Or, if advances were made, would they have priority?
>
> Second, neither the retirees nor the Noteholders put forth any alternative. In the face of no alternative suggestion or proposal, uncertainty would again prevail. At this stage of the CCAA proceedings, additional uncertainty does not represent a positive development.[32] [emphasis added]

32. Although the Retirees initially sought to reserve their rights in respect of the priority of their trust claims over the DIP Loan, this was expressly denied on the basis that such a reservation was untenable in the face of advances being made by DIP Lenders in reliance on the terms of the order, and the Retirees withdrew their purported reservation. Neither the Retirees nor USW challenged nor sought to appeal the order approving the increase in the borrowing

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[28] Court of Appeal Reasons at para. 156, Monitor's Application Record, Tab 4E.
[29] Amended and Restated Initial Order dated April 8, 2009 at para. 56, Monitor's Application Record, Tab 6B.
[30] Court of Appeal Reasons at paras. 56, 159-160 and footnote 15, Monitor's Application Record, Tab 4E.
[31] Order of the Honourable Mr. Justice Morawetz dated June 12, 2009, Monitor's Application Record, Tab 6E; Endorsement of the Honourable Mr. Justice Morawetz dated June 15, 2009, Monitor's Application Record, Tab 6F.
[32] Endorsement of the Honourable Mr. Justice Morawetz dated June 15, 2009, Monitor's Application Record, Tab 6F.

limit. The Court of Appeal's decision, however, results in all future super-priority orders being subject to the same untenable uncertainty described by Morawetz J.

33. It is notable that the Court of Appeal did not rely on any insolvency authority for saying that the collateral attack rule does not apply or should be relaxed in this case. The Court relied on criminal authorities which stand for the proposition that "if a collateral attack can be taken without harm to the interests of the rule of law and the administration of justice, the rule should be relaxed."[33] The Court goes on to state that "[a] strict application of the rule would preclude the appellants from having the opportunity to meaningfully challenge the super-priority charge in the Initial Order, as amended."[34] However, the Retirees and the USW *did* have several opportunities to meaningfully challenge the super-priority charge: either on the motion seeking the charge in the first place, on the motion extending the financing, or on appeal of either of those orders. The Retirees took none of these opportunities, no doubt preferring to have the advantage to the restructuring that the DIP Loan would provide.

34. If the DIP Lenders cannot rely on the strict, or any, application of the collateral attack rule in the circumstances of this case, where the Initial Order, which was not appealed, expressly states that the DIP Lenders are entitled to rely on the Initial Order for all advances up to the time that the Initial Order is varied or amended, then no DIP lender, or frankly any other party in a CCAA proceeding, can rely on any court-ordered charge. The "relaxation" of the collateral attack rule in this case could not be more destructive of the interests of justice and the rule of law.

3) The Court of Appeal Judgment Creates Asymmetry Between the BIA and CCAA

35. The Court of Appeal judgment appears to accept that the PBA deemed trusts would not survive in the event of a bankruptcy of Indalex due to the priorities set out in the BIA, and was harshly critical of the suggestion that Indalex might voluntarily assign itself into bankruptcy to take advantage of those priorities.[35]

36. Of course, a creditor could seek a bankruptcy order and effect the same result. The result of the Court of Appeal judgment is that the priority rules in the CCAA in respect of provincial

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[33] Court of Appeal Reasons at para. 165, Monitor's Application Record, Tab 4E.
[34] Court of Appeal Reasons at para. 167, Monitor's Application Record, Tab 4E.
[35] Court of Appeal Reasons at para. 183, Monitor's Application Record, Tab 4E.

deemed trusts become different than those under the BIA. This can be expected to limit the ability of companies to use the restructuring provisions of the CCAA and is contrary to both legislative intent and this Court's recent decision in *Century Services*, which both strongly favour a unified scheme of priorities between the CCAA and BIA.

37. In the majority decision of Justice Deschamps in *Century Services*, the Canadian insolvency regime was described as having more than one statute but a unified approach:

> Another point of convergence of the CCAA and the BIA relates to priorities. Because the CCAA is silent about what happens if reorganization fails, the BIA scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a CCAA reorganization is ultimately unsuccessful ...
>
> With parallel CCAA and BIA restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible.[36]

38. The Court of Appeal judgment appears to have assumed the opposite – that the scheme of distribution in a going concern CCAA liquidation is and ought to be radically different than the priorities in the BIA. Such a conclusion is unsupportable in light of *Century Services* and the goal of insolvency practice generally.

39. The Court of Appeal purported to distinguish *Century Services* on the ground that this Court intended for the BIA scheme of distribution to apply only to a "failed" CCAA (*i.e.*, one where the liquidation would proceed in a BIA proceeding) but not a "successful" one such as Indalex. The Court defined Indalex as a "successful" CCAA proceeding even though it involved a sale of the business rather than a restructuring with a plan of arrangement, and even though there was insufficient recovery to pay the secured creditors in full, let alone any amount for unsecured creditors.[37] The Indalex proceeding was a liquidation, albeit on a going-concern basis. The impact of the Court of Appeal's decision is that since this liquidation was effected within a CCAA proceeding rather than a BIA proceeding, it is to be described as a "successful" CCAA with a radically different set of priorities. On this approach, there will be no incentive for a secured creditor to allow a debtor with a defined pension plan (or any other creditors with a

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[36] *Century Services, supra* at paras. 23-24, Monitor's Application Record, Tab 7A.
[37] Court of Appeal Reasons at para. 188, Monitor's Application Record, Tab 4E.

potential trust claim) to pursue a going concern sale through the CCAA rather than through the BIA.

40. It would not be just or convenient for a court to permit a company to remain under CCAA protection where this would disadvantage some creditors over others compared to the treatment they would receive under the BIA regime. This could only result in a rejection of CCAA proceedings by secured creditors whose interests would be better protected under the BIA, and a corresponding decline in restructurings under the CCAA and ultimately a frustration of the remedial purpose underlying the CCAA.

B. The Court of Appeal's Conclusion that Wind-up Deficiencies are Subject to a Deemed Trust Raises a Matter of Public and National Importance

i) The Court of Appeal Judgment Harms Commercial Lending in Canada

41. The judgment of the Court of Appeal has sanctioned, contrary to earlier authority,[38] the retroactive creation of deemed trusts for pension plan wind-up deficiencies. These deemed trusts would be in priority to commercial lenders that advanced funds prior to the pension deficits arising. As pension deficits frequently arise due to changes that cannot be forecast accurately in advance, the retroactive application of deemed trusts will materially and unpredictably increase the risk to lenders dealing with borrowers which sponsor defined benefit plans.

42. The Canadian Bankers' Association (the "CBA") has stated significant concern regarding the impact of the Court's of Appeal's decision on lending throughout Canada, in both the ordinary course and in insolvency situations. In particular, CBA members are concerned about the impact of the Court of Appeal's decision on the ability of a DIP lender to rely upon a super-priority charged granted in a CCAA proceeding, as well as the ability of a lender to calculate the appropriate amount to reserve when issuing a new loan in order to deal with claims that rank in priority to a secured lender.[39]

43. As described in the Swartz Affidavit, a significant source of operating capital in the Canadian market is provided in the form of asset based lending (ABL) and other operating

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[38] *Usarco, supra* at p. 10, Monitor's Application Record, Tab 7C; *Ivaco, supra* at para. 44, Monitor's Application Record, Tab 7B.
[39] Swartz Affidavit at para. 21 and Exhibit "D", Monitor's Application Record, Tab 6N.

loans.[40] When lenders are making ABL loans to borrowers, they generally require collateral valued in excess of both the ABL loans and the amount of any liabilities that represent potential payables in priority to the secured loans on a liquidation basis. The amount of credit available for such a loan is determined by the lender based on the liquidation value of the collateral readily disposed of (such as eligible accounts or inventory) and on the amount of any "priority payables". The lender will set up reserves on account of priority payables against the liquidation value of the eligible collateral. Typically ABL loans require periodic reporting of these amounts and the lender will limit the maximum amount of the loan that can be outstanding in consequence.[41]

44. Prior to the decision of the Ontario Court of Appeal in this matter, the list of potential priority payables was well understood by lenders and the amount of these payables was quantifiable.[42] Pension deficits, however, are not quantifiable in advance, as the amount of the deficit will necessarily depend on future unknown events. If those deficits, if and whenever they arise, were to have priority over the amount of the ABL loan, then it will be difficult for the lenders to quantify reserves to offset priority payables. In this event the amount of credit available to borrowers with defined benefit plans will be likely be reduced and the interest rates and fees charged to such borrowers will likely rise due to the increased risk assumed by the lender.[43]

45. As a further result, this uncertainty will encourage employers to abandon defined benefit plans, and will punish employers who do not or cannot abandon defined benefit plans by subjecting them to higher lending costs (if credit remains available at all). This result can be expected to cause a significant detriment to employees of these companies.

46. The Ontario Court of Appeal's application of the deemed trust in this case is not limited to inventory and accounts.[44] Priority claims in respect of pension deficits may be asserted against cash collateral, a fundamental aspect of the global derivatives market. Consequently, international counterparties could find cash an unacceptable form of collateral from Canadian

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[40] Swartz Affidavit at para. 16, Monitor's Application Record, Tab 6N.
[41] Swartz Affidavit at para. 17, Monitor's Application Record, Tab 6N.
[42] Swartz Affidavit at para. 18, Monitor's Application Record, Tab 6N.
[43] Swartz Affidavit at para. 19, Monitor's Application Record, Tab 6N.
[44] Swartz Affidavit at para. 20, Monitor's Application Record, Tab 6M.

counterparties. This could have a serious and adverse impact upon the ability of Canadian financial institutions and other entities with defined benefit plans to participate in the international derivative markets.[45]

2) The Court of Appeal's Decision is Contrary to the PBA and Prior Authority

47. The Court of Appeal found that when a pension plan is wound up, under s. 57(4) of the PBA, an employer is deemed to hold in trust not only current service contributions and special payments, but also any "wind-up deficiency". The wind-up deficiency is set out in section 75(1)(b), which sets out a formula for calculation of the deficiency, and creates a continuing obligation on the employer to pay what is ultimately required to satisfy the wind-up deficit.[46] The amount to be paid under s. 75(1)(b) is unascertainable until the final payment is made and plan assets are distributed. Indeed, the estimated amount will change annually even after the effective date of the wind-up, as is clear from the regulations requiring annual reports for a five-year period after wind-up.[47]

48. A more detailed analysis of the deemed trust provisions of the PBA is set forth at paragraphs 26 to 34 of the factum of Sun Indalex filed in connection with its application for leave to appeal. That analysis is incorporated herein by reference.

49. To suggest that a deemed trust may be imposed retroactively in respect of amounts that were not due as of the effective date on which it is imposed, were not ascertained or ascertainable as of that date, are adjusted annually after the preparation of a wind-up report, and may in fact never be due depending on the performance of the plan assets is inconsistent with prior decisions in this area, including a decision of the Ontario Court of Appeal.

50. The Court of Appeal dismissed the prior decisions that included the very opposite, *Usarco* and *Ivaco,*[48] as being of "little assistance".

51. In *Usarco*, Farley J. held that the deemed trust provisions only covered "the regular contributions together with those special contributions which were to have been made but were

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[45] Swartz Affidavit, Exhibit "E" at pp. 2-3, Monitor's Application Record, Tab 6N.
[46] *Pension Benefits Act,* RSO 1990, c P.8 ("PBA"), s.75(1)(b), Monitor's Application Record, Tab 5D.
[47] *Pension Benefits Act Regulations,* RSO 1990, Regulation 909, ss. 31, 32, Monitor's Application Record, Tab 5E.
[48] Court of Appeal Reasons at para. 105, Monitor's Application Record, Tab 4E.

not", and did not include "the obligation of Usarco to fully fund its pension obligations as of the wind up date".[49]

52. In *Ivaco,* the Ontario Court of Appeal in *obiter* approved of the reasoning in *Usarco*, taking issue with the contrary conclusion of the motions judge (also Farley J. in that case):

> 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 [*Usarco*], Farley J. said, at para. 25, that the equivalent legislation then in force . . . 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.[50]

53. The Court of Appeal judgment claims to distinguish the *Usarco* and *Ivaco* cases on their facts. The context of those cases is irrelevant to the interpretation of the plain language of the PBA and what amounts are deemed to be held in trust, however, the facts of *Ivaco* are strikingly similar to the facts in Indalex.

54. As recognized by Campbell J., the absence of any deemed trust in respect of a wind-up deficiency has also been recognized by commentators.[51]

55. Accordingly, the decision of the Court of Appeal changes the existing law as it was understood by commentators, lenders and borrowers and dramatically changes the assessment of risk that any commercial lender would need to perform when considering advancing credit to a company that sponsors a defined benefit plan.

56. As described in the Swartz Affidavit, the impact of the Court of Appeal's decision is not limited to Ontario, as similar pension benefits legislation is in force in virtually all provinces in Canada, and the interplay between such legislation and priorities arising under the CCAA and the BIA is therefore of importance in insolvencies across the country.[52]

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[49] *Usarco, supra* at p. 10, Monitor's Application Record, Tab 7C.
[50] *Ivaco, supra* at para. 44, Monitor's Application Record, Tab 7B.
[51] Campbell J. Reasons at para. 40-42, Monitor's Application Record, Tab 4A.
[52] Swartz Affidavit at para. 27, Monitor's Application Record, Tab 6N; See, e.g., *Pension Benefits Act,* SNB 1987, c P-5.1, ss. 51, 65; *Pension Benefits Act,* RSNS 1989, c 340, ss. 46, 80; *Pension Benefits Act,* CCSM c P32, ss. 26, 28; *Pension Benefits Act, 1992,* SS 1992, c P-6.001, ss. 43, 54; *Employment Pension Plans Act,* RSA 2000, c E-8, ss. 51, 73; *Pension Benefits Standards Act,* RSBC 1996, c 352, ss. 43.1, 51, Monitor's Application Record, Tab 5F-K.

C. The Court of Appeal's Finding of a Breach of Fiduciary Duty Raises an Issue of National and Public Importance

i) The Court of Appeal's Judgment Makes Being an Employer Administrator Under the PBA Untenable

57. The Court of Appeal declined to decide whether there was a deemed trust in respect of the Executive Plan.[53] Instead, the Court decided that the estimated deficiency in the Executive Plan should also be paid from the proceeds of the sale of Indalex in priority to the DIP Loan based on claimed breaches of the fiduciary obligations Indalex owed to Plan beneficiaries as administrator of the Plans.

58. However, the claimed breaches of fiduciary duty, set out below, do not in any way relate to matters over which an administrator has any power or authority. Section 8 of the PBA lists a number of potential administrators other than employers, including, for example, a pension committee of plan members or someone appointed by the Superintendent of Financial Services (the "Superintendent").[54] None of these other potential administrators, if in place, would have had any involvement in negotiating the sort of corporate transactions, such as credit facilities and a sale of the company's assets, that Indalex is impugned for having undertaken.

59. By effectively disregarding the fact that the PBA expressly permits employers to be plan administrators and statutorily sanctions any resulting conflict of interest, the Court of Appeal judgment has made it impossible for an employer to act as a plan administrator at any time, especially when the employer is in or on the verge of insolvency. It strains credulity that a company filing for CCAA protection and negotiating DIP financing so that it can pursue a going concern sale, in the hopes of preserving jobs for employees and maximizing recovery for all stakeholders, should be under a fiduciary obligation to favour the interests of pension beneficiaries to the detriment of its employees and all other stakeholders including secured lenders. This runs directly contrary to the fundamental principles of insolvency law and the statutory duty to avoid preferring the interests of certain creditors recognized in s. 95 of the BIA.[55]

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[53] Court of Appeal Reasons at para. 112, Monitor's Application Record, Tab 4E.
[54] PBA, s. 8, Monitor's Application Record, Tab 5D.
[55] *Bankruptcy and Insolvency Act,* RSC 1985, c. B-3, s. 95, Monitor's Application Record, Tab 5A.

60. Gillese J.A. states that she begins "from the position that Indalex had the right to make the decision to commence CCAA proceedings wearing solely its corporate hat."[56] Given what follows, it is unclear how this can be the case, as the decision proceeds to state that every other material act relating to the CCAA proceeding (including applying for CCAA protection "without notice to the Plans' beneficiaries") "had the potential to affect the Plans beneficiaries' rights" and therefore "Indalex was subject to its fiduciary duties as administrator as well as its corporate obligations during the CCAA proceedings."[57]

61. The activities identified by the Court of Appeal as breaches of fiduciary duty are not part of a plan administrator's duties under the PBA. They were performed by Indalex in accordance with orders of the CCAA court and on notice to the Retirees and the USW. Certain of the activities identified as breaches of fiduciary duty, such as not funding the Plans (which is not the responsibility of plan administrators), were constrained by the Initial Order and would have been an improper preference over other creditors. Notably, the sale of assets, which is identified as a breach of fiduciary duty, was supported by USW, presumably because it resulted in the preservation of its members' jobs.

62. In paragraph 135 of its Reasons, the Court of Appeal suggests that Indalex should have transferred the role of administrator to a suitable person, but decides not to consider that question as it was not raised on the appeal. However, the Court of Appeal then concludes at paragraph 140 that Indalex's ultimate duty to act in the best interests of the corporation was in conflict with its duty as administrator to act in the Plan beneficiaries' best interests and states that "it was incumbent on Indalex to take steps to address the conflict." The PBA does not contain any mechanism for an employer to withdraw as the administrator. The Superintendent, who made submissions on this motion, could have ordered a substitute administrator, but did not do so.[58]

63. Even if Indalex could have withdrawn as the administrator, what difference would a new administrator have made? A substitute administrator would not have had any role in negotiating the DIP Loan, negotiating the sale of assets, or participating in any of the other corporate activities set out above through which Indalex is said to have breached its fiduciary obligations

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[56] Court of Appeal Reasons at para. 131, Monitor's Application Record, Tab 4E.
[57] Court of Appeal Reasons at para. 132-133, Monitor's Application Record, Tab 4E.
[58] PBA, s. 71, Monitor's Application Record, Tab 5D.

as administrator. Accordingly, even if Indalex could have taken steps to appoint an independent administrator prior to the commencement of the CCAA proceeding, the DIP Loan and the sale would have been unchanged and no benefit would have flowed to the Plan beneficiaries.

64. There is accordingly no basis for the Court of Appeal to have taken these claimed breaches of fiduciary duty, which were unconnected to an administrator's duties and for which no damages actually flowed to the Plan beneficiaries, and use them as an equitable ground on which to overturn a super-priority charge that was granted to a third party at the beginning of the CCAA proceeding and prior to the claimed breaches of fiduciary duty. The Court of Appeal implicitly pierces the corporate veil, without any analysis of whether it is appropriate to do so, to use these claimed breaches of fiduciary duty by Indalex as administrator of the Plans against the bankrupt US Debtors, which had no role as administrator, to override their Court-ordered subrogation rights to the super-priority charge.

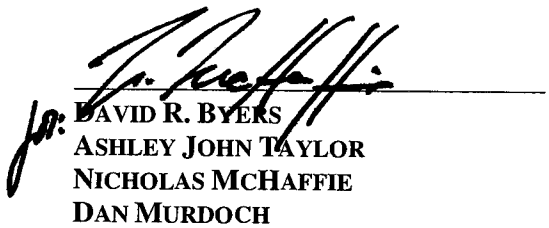
65. If a pension plan administrators' fiduciary obligations are so widespread and can have such far-reaching consequences, no employer can expect to manage the statutorily sanctioned conflict of interest between employer and administrator and, if uncorrected, the Court of Appeal judgment will surely result in employers not taking on and seeking ways to abandon that role.

PART IV: SUBMISSIONS ON COSTS

66. The applicant asks that costs follow the event of this application.

PART V: ORDER SOUGHT

67. The applicant respectfully seeks an Order granting the Monitor, on behalf of Indalex, leave to appeal, with costs.



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PART VI: TABLE OF AUTHORITIES

PART VII: STATUTORY PROVISIONS

A. *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3. s. 95

B. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s. 11 (version in force prior to September 18, 2009)

C. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s.11.2 (current version)

D. *Employment Pension Plans Act*, RSA 2000, c E-8, ss. 51, 73

E. *Pension Benefits Act,* RSO 1990, c P.8, ss. 8, 57, 75

F. *Pension Benefits Act Regulations,* RSO 1990, Regulation 909, ss. 31, 32

G. *Pension Benefits Act,* SNB 1987, c P-5.1, ss. 51, 65

H. *Pension Benefits Act,* RSNS 1989, c 340, ss. 46, 80;

I. *Pension Benefits Act,* CCSM c P32, ss. 26, 28

J. *Pension Benefits Act, 1992,* SS 1992, c P-6.001, ss. 43, 54

K. *Pension Benefits Standards Act*, RSBC 1996, c 352, ss. 43.1, 51

Idem

(2) In relation to a bankruptcy or proposal, a security referred to in subsection (1) that is registered in accordance with that subsection

(*a*) is subordinate to securities in respect of which all steps necessary to make them effective against other creditors were taken before that registration; and

(*b*) is valid only in respect of amounts owing to Her Majesty or a workers' compensation body at the time of that registration, plus any interest subsequently accruing on those amounts.

R.S., 1985, c. B-3, s. 87; 1992, c. 27, s. 39; 1997, c. 12, s. 74; 2004, c. 25, s. 53; 2005, c. 47, s. 70.

Rang

(2) Dans le cadre d'une faillite ou d'une proposition, les garanties visées au paragraphe (1) et enregistrées conformément à ce paragraphe :

a) prennent rang après toute autre garantie à l'égard de laquelle les mesures requises pour la rendre opposable aux autres créanciers ont toutes été prises avant l'enregistrement;

b) ne sont valides que pour les sommes dues à Sa Majesté ou à l'organisme mentionné au paragraphe 86(1) lors de l'enregistrement et les intérêts échus depuis sur celles-ci.

L.R. (1985), ch. B-3, art. 87; 1992, ch. 27, art. 39; 1997, ch. 12, art. 74; 2004, ch. 25, art. 53; 2005, ch. 47, art. 70.

PRIORITY OF FINANCIAL COLLATERAL

Priority

88. In relation to a bankruptcy or proposal, no order may be made under this Act if the order would have the effect of subordinating financial collateral.

R.S., 1985, c. B-3, s. 88; 1992, c. 27, s. 39; 1994, c. 26, s. 6; 2007, c. 29, s. 99, c. 36, s. 112; 2009, c. 31, s. 65.

RANG DES GARANTIES FINANCIÈRES

Rang

88. Il ne peut être rendu au titre de la présente loi, dans le cadre de toute faillite ou proposition, aucune ordonnance dont l'effet serait d'assigner un rang inférieur à toute garantie financière.

L.R. (1985), ch. B-3, art. 88; 1992, ch. 27, art. 39; 1994, ch. 26, art. 6; 2007, ch. 29, art. 99, ch. 36, art. 112; 2009, ch. 31, art. 65.

89. and 90. [Repealed, 1992, c. 27, s. 39]

89. et 90. [Abrogés, 1992, ch. 27, art. 39]

PREFERENCES AND TRANSFERS AT UNDERVALUE

TRAITEMENTS PRÉFÉRENTIELS ET OPÉRATIONS SOUS-ÉVALUÉES

91. [Repealed, 2005, c. 47, s. 71]

91. [Abrogé, 2005, ch. 47, art. 71]

92. and 93. [Repealed, 2000, c. 12, s. 12]

92. et 93. [Abrogés, 2000, ch. 12, art. 12]

94. [Repealed, 2005, c. 47, s. 72]

94. [Abrogé, 2005, ch. 47, art. 72]

Preferences

95. (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person

(*a*) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and

Traitements préférentiels

95. (1) Sont inopposables au syndic tout transfert de biens, toute affectation de ceux-ci à une charge et tout paiement faits par une personne insolvable de même que toute obligation contractée ou tout service rendu par une telle personne et toute instance judiciaire intentée par ou contre elle :

a) en faveur d'un créancier avec qui elle n'a aucun lien de dépendance ou en faveur d'une personne en fiducie pour ce créancier, en vue de procurer à celui-ci une préférence sur un autre créancier, s'ils surviennent au cours de la période commençant à la date précédant de trois mois la date de l'ouverture de la faillite et se terminant à la date de la faillite;

b) en faveur d'un créancier avec qui elle a un lien de dépendance ou d'une personne en fiducie pour ce créancier, et ayant eu pour ef-

(*b*) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

fet de procurer à celui-ci une préférence sur un autre créancier, s'ils surviennent au cours de la période commençant à la date précédant de douze mois la date de l'ouverture de la faillite et se terminant à la date de la faillite.

Preference presumed

(2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(*a*) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

(2) Lorsque le transfert, l'affectation, le paiement, l'obligation ou l'instance judiciaire visé à l'alinéa (1)*a*) a pour effet de procurer une préférence, il est réputé, sauf preuve contraire, avoir été fait, contracté ou intenté, selon le cas, en vue d'en procurer une, et ce même s'il l'a été sous la contrainte, la preuve de celle-ci n'étant pas admissible en l'occurrence.

Préférence — présomption

Exception

(2.1) Subsection (2) does not apply, and the parties are deemed to be dealing with each other at arm's length, in respect of the following:

(*a*) a margin deposit made by a clearing member with a clearing house; or

(*b*) a transfer, charge or payment made in connection with financial collateral and in accordance with the provisions of an eligible financial contract.

(2.1) Le paragraphe (2) ne s'applique pas aux opérations ci-après et les parties à celles-ci sont réputées n'avoir aucun lien de dépendance :

a) un dépôt de couverture effectué auprès d'une chambre de compensation par un membre d'une telle chambre;

b) un transfert, un paiement ou une charge qui se rapporte à une garantie financière et s'inscrit dans le cadre d'un contrat financier admissible.

Exception

Definitions

(3) In this section,

(3) Les définitions qui suivent s'appliquent au présent article.

Définitions

"clearing house" « *chambre de compensation* »

"clearing house" means a body that acts as an intermediary for its clearing members in effecting securities transactions;

« chambre de compensation » Organisme qui agit comme intermédiaire pour ses membres dans les opérations portant sur des titres.

« chambre de compensation » "*clearing house*"

"clearing member" « *membre* »

"clearing member" means a person engaged in the business of effecting securities transactions who uses a clearing house as intermediary;

« créancier » S'entend notamment de la personne qui se porte caution ou répond d'une dette envers un tel créancier.

« créancier » "*creditor*"

"creditor" « *créancier* »

"creditor" includes a surety or guarantor for the debt due to the creditor;

« dépôt de couverture » Tout paiement, dépôt ou transfert effectué par l'intermédiaire d'une chambre de compensation, en application des règles de celle-ci, en vue de garantir l'exécution par un membre de ses obligations touchant des opérations portant sur des titres; sont notamment visées les opérations portant sur les

« dépôt de couverture » "*margin deposit*"

"margin deposit" « *dépôt de couverture* »

"margin deposit" means a payment, deposit or transfer to a clearing house under the rules of the clearing house to assure the performance of the obligations of a clearing member in connection with security transactions, including, without limiting the generality of the foregoing,

transactions respecting futures, options or other derivatives or to fulfil any of those obligations.

R.S., 1985, c. B-3, s. 95; 1997, c. 12, s. 78; 2004, c. 25, s. 56; 2007, c. 29, s. 100, c. 36, ss. 42, 112.

contrats à terme, options ou autres dérivés et celles garantissant ces obligations.

« membre » Personne se livrant aux opérations portant sur des titres et qui se sert d'une chambre de compensation comme intermédiaire. « membre » "*clearing member*"

L.R. (1985), ch. B-3, art. 95; 1997, ch. 12, art. 78; 2004, ch. 25, art. 56; 2007, ch. 29, art. 100, ch. 36, art. 42 et 112.

Transfer at undervalue

96. (1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

(*a*) the party was dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,

(ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and

(iii) the debtor intended to defraud, defeat or delay a creditor; or

(*b*) the party was not dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or

(ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or

(B) the debtor intended to defraud, defeat or delay a creditor.

Opération sous-évaluée

96. (1) Sur demande du syndic, le tribunal peut, s'il estime que le débiteur a conclu une opération sous-évaluée, déclarer cette opération inopposable au syndic ou ordonner que le débiteur verse à l'actif, seul ou avec l'ensemble ou certaines des parties ou personnes intéressées par l'opération, la différence entre la valeur de la contrepartie qu'il a reçue et la valeur de celle qu'il a donnée, dans l'un ou l'autre des cas suivants :

a) l'opération a été effectuée avec une personne sans lien de dépendance avec le débiteur et les conditions suivantes sont réunies :

(i) l'opération a eu lieu au cours de la période commençant à la date précédant d'un an la date de l'ouverture de la faillite et se terminant à la date de la faillite,

(ii) le débiteur était insolvable au moment de l'opération, ou l'est devenu en raison de celle-ci,

(iii) le débiteur avait l'intention de frauder ou de frustrer un créancier ou d'en retarder le désintéressement;

b) l'opération a été effectuée avec une personne qui a un lien de dépendance avec le débiteur et elle a eu lieu au cours de la période :

(i) soit commençant à la date précédant d'un an la date de l'ouverture de la faillite et se terminant à la date de la faillite,

(ii) soit commençant à la date précédant de cinq ans la date de l'ouverture de la faillite et se terminant à la date qui précède d'un jour la date du début de la période visée au sous-alinéa (i) dans le cas où le débiteur :

(A) ou bien était insolvable au moment de l'opération, ou l'est devenu en raison de celle-ci,

Form of applications

10. Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

R.S., c. C-25, s. 10.

Powers of court

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

Initial application

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

Initial application court orders

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

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

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

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

Other than initial application court orders

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

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

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

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

Notice of orders

(5) Except as otherwise ordered by the court, the monitor appointed under section 11.7 shall send a copy of any order made under subsection (3), within ten days after the order is made, to every known creditor who has a claim against the company of more than two hundred and fifty dollars.

Burden of proof on application

(6) The court shall not make an order under subsection (3) or (4) unless

(*a*) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(*b*) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124.

Definitions

11.1

(1) [Repealed, 2007, c. 29, s. 106]

No stay, etc., in certain cases

(2) No order may be made under this Act staying or restraining the exercise of any right to terminate, amend or claim any accelerated payment under an eligible financial contract or preventing a member of the Canadian Payments Association established by the *Canadian Payments Act* from ceasing to act as a clearing agent or group clearer for a company in accordance with that Act and the by-laws and rules of that Association.

Permitted actions

(3) The following actions are permitted in respect of an eligible financial contract that is entered into before proceedings under this Act are commenced in respect of the company and is terminated on or after that day, but only in accordance with the provisions of that contract:

(*a*) the netting or setting off or compensation of obligations between the company and the other parties to the eligible financial contract; and

(*b*) any dealing with financial collateral including

(i) the sale or foreclosure or, in the Province of Quebec, the surrender of financial collateral, and

(ii) the setting off or compensation of financial collateral or the application of the proceeds or value of financial collateral.

Restriction

(4) No order may be made under this Act if the order would have the effect of staying or restraining the actions permitted under subsection (3).

Net termination values

(5) If net termination values determined in accordance with an eligible financial contract referred to in subsection (3) are owed by the company to another party to the eligible financial contract, that other party is deemed to be a creditor of the company with a claim against the company in respect of those net termination values.

Priority

(6) No order may be made under this Act if the order would have the effect of subordinating financial collateral.

1997, c. 12, s. 124; 2001, c. 9, s. 576; 2007, c. 29, s. 106.

No stay, etc., in certain cases

11.11 No order may be made under this Act staying or restraining

(*a*) the exercise by the Minister of Finance or the Superintendent of Financial Institutions of any power, duty or function assigned to them by the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act*;

(*b*) the exercise by the Governor in Council, the Minister of Finance or the Canada Deposit Insurance Corporation of any power, duty or function assigned to them by the *Canada Deposit Insurance Corporation Act*; or

(*c*) the exercise by the Attorney General of Canada of any power, assigned to him or her by the *Winding-up and Restructuring Act*.

2001, c. 9, s. 577.

No stay, etc. in certain cases

11.2 No order may be made under section 11 staying or restraining any action, suit or proceeding against a person, other than a debtor company in respect of which an application has been made under this Act, who is obligated under a letter of credit or guarantee in relation to the company.

1997, c. 12, s. 124.

Effect of order

11.3 No order made under section 11 shall have the effect of

(*a*) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(*b*) requiring the further advance of money or credit.

1997, c. 12, s. 124.

Limitation — aircraft objects

11.31 No order made under section 11 prevents a creditor who holds security on aircraft objects — or a lessor of aircraft objects or a conditional seller of aircraft objects — under an agreement with a debtor company in respect of which an application is made under this Act from taking possession of the equipment

(*a*) if, after the commencement of proceedings under this Act, the company defaults in protecting or maintaining the equipment in accordance with the agreement;

(*b*) sixty days after the commencement of proceedings under this Act unless, during that period, the company

(i) remedied the default of every other obligation under the agreement, other than a default constituted by the commencement of proceedings under this Act or the breach of a provision in the agreement relating to the company's financial condition,

(ii) agreed to perform the obligations under the agreement, other than an obligation not to become insolvent or an obligation relating to the company's financial condition, until proceedings under this Act end, and

(iii) agreed to perform all the obligations arising under the agreement after the proceedings under this Act end; or

(*c*) if, during the period that begins on the expiry of the sixty-day period and ends on the day on which proceedings under this Act end, the company defaults in performing an obligation under the agreement, other than an obligation not to become insolvent or an obligation relating to the company's financial condition.

2005, c. 3, s. 16.

Her Majesty affected

11.4 (1) An order made under section 11 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

(iv) the default by the company on any term of a compromise or arrangement, or

(v) the performance of a compromise or arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) may apply.

When order ceases to be in effect

(2) An order referred to in subsection (1) ceases to be in effect if

(*a*) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

Operation of similar legislation

(3) An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

1997, c. 12, s. 124; 2000, c. 30, s. 156; 2001, c. 34, s. 33(E).

Stay of proceedings — directors

11.5 (1) An order made under section 11 may provide that no person may commence or continue any action against a director of the debtor company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company where directors are under any law liable in their capacity as directors for the payment of such obligations, until a compromise or arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

Exception

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

Resignation or removal of directors

(3) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or

supervises the management of the business and affairs of the company shall be deemed to be a director for the purposes of this section.

1997, c. 12, s. 124.

Bankruptcy and Insolvency Act matters

11.6 Notwithstanding the *Bankruptcy and Insolvency Act*,

(*a*) proceedings commenced under Part III of the *Bankruptcy and Insolvency Act* may be taken up and continued under this Act only if a proposal within the meaning of the *Bankruptcy and Insolvency Act* has not been filed under that Part; and

(*b*) an application under this Act by a bankrupt may only be made with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act* but no application may be made under this Act by a bankrupt whose bankruptcy has resulted from

(i) the operation of subsection 50.4(8) of the *Bankruptcy and Insolvency Act*, or

(ii) the refusal or deemed refusal by the creditors or the court, or the annulment, of a proposal under the *Bankruptcy and Insolvency Act*.

1997, c. 12, s. 124.

Court to appoint monitor

11.7 (1) When an order is made in respect of a company by the court under section 11, the court shall at the same time appoint a person, in this section and in section 11.8 referred to as "the monitor", to monitor the business and financial affairs of the company while the order remains in effect.

Auditor may be monitor

(2) Except as may be otherwise directed by the court, the auditor of the company may be appointed as the monitor.

Functions of monitor

(3) The monitor shall

(*a*) for the purposes of monitoring the company's business and financial affairs, have access to and examine the company's property, including the premises, books, records, data, including data in electronic form, and other financial documents of the company to the extent necessary to adequately assess the company's business and financial affairs;

(*b*) file a report with the court on the state of the company's business and financial affairs, containing prescribed information,

(i) forthwith after ascertaining any material adverse change in the company's projected cash-flow or financial circumstances,

(ii) at least seven days before any meeting of creditors under section 4 or 5, or

(iii) at such other times as the court may order;

(*c*) advise the creditors of the filing of the report referred to in paragraph (*b*) in any notice of a meeting of creditors referred to in section 4 or 5; and

(*d*) carry out such other functions in relation to the company as the court may direct.

Monitor not liable

(4) Where the monitor acts in good faith and takes reasonable care in preparing the report referred to in paragraph (3)(*b*), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

Assistance to be provided

(5) The debtor company shall

(*a*) provide such assistance to the monitor as is necessary to enable the monitor to adequately carry out the monitor's functions; and

(*b*) perform such duties set out in section 158 of the *Bankruptcy and Insolvency Act* as are appropriate and applicable in the circumstances.

1997, c. 12, s. 124.

Non-liability in respect of certain matters

11.8 (1) Notwithstanding anything in any federal or provincial law, where a monitor carries on in that position the business of a debtor company or continues the employment of the company's employees, the monitor is not by reason of that fact personally liable in respect of any claim against the company or related to a requirement imposed on the company to pay an amount where the claim arose before or upon the monitor's appointment.

Status of claim ranking

(2) A claim referred to in subsection (1) shall not rank as costs of administration.

Liability in respect of environmental matters

(3) Notwithstanding anything in any federal or provincial law, a monitor is not personally liable in that position for any environmental condition that arose or environmental damage that occurred

(*a*) before the monitor's appointment; or

(*b*) after the monitor's appointment unless it is established that the condition arose or the damage occurred as a result of the monitor's gross negligence or wilful misconduct.

Reports, etc., still required

(4) Nothing in subsection (3) exempts a monitor from any duty to report or make disclosure imposed by a law referred to in that subsection.

Non-liability re certain orders

(5) Notwithstanding anything in any federal or provincial law but subject to subsection (3), where an order is made which has the effect of requiring a monitor to remedy any environmental condition or environmental damage affecting property involved in a proceeding under this Act, the monitor is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(*a*) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the monitor, if the order is in effect when the monitor is appointed or during the period of the stay referred to in paragraph (*b*), the monitor

(i) complies with the order, or

(ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(*b*) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (*a*) or within ten days after the order is made or within ten days after the appointment of the monitor, if the order is in effect when the monitor is appointed, by

(i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the monitor to contest the

order, or

(ii) the court having jurisdiction under this Act for the purposes of assessing the economic viability of complying with the order; or

(*c*) if the monitor had, before the order was made, abandoned or renounced any interest in any real property affected by the condition or damage.

Stay may be granted

(6) The court may grant a stay of the order referred to in subsection (5) on such notice and for such period as the court deems necessary for the purpose of enabling the monitor to assess the economic viability of complying with the order.

Costs for remedying not costs of administration

(7) Where the monitor has abandoned or renounced any interest in real property affected by the environmental condition or environmental damage, claims for costs of remedying the condition or damage shall not rank as costs of administration.

Priority of claims

(8) Any claim by Her Majesty in right of Canada or a province against a debtor company in respect of which proceedings have been commenced under this Act for costs of remedying any environmental condition or environmental damage affecting real property of the company is secured by a charge on the real property and on any other real property of the company that is contiguous thereto and that is related to the activity that caused the environmental condition or environmental damage, and the charge

(*a*) is enforceable in accordance with the law of the jurisdiction in which the real property is located, in the same way as a mortgage, hypothec or other security on real property; and

(*b*) ranks above any other claim, right or charge against the property, notwithstanding any other provision of this Act or anything in any other federal or provincial law.

Claim for clean-up costs

(9) A claim against a debtor company for costs of remedying any environmental condition or environmental damage affecting real property of the company shall be a claim under this Act, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced.

1997, c. 12, s. 124.

Definition of "claim"

12. (1) For the purposes of this Act, "claim" means any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*.

Determination of amount of claim

(2) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:

(*a*) the amount of an unsecured claim shall be the amount

(i) in the case of a company in the course of being wound up under the *Winding-up and Restructuring Act*, proof of which has been made in accordance with that Act,

(ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, proof of which has been made in accordance with that Act, or

(iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor; and

S.R., ch. C-25, art. 9.

Forme des demandes

10. Les demandes prévues par la présente loi peuvent être formulées par requête ou par voie d'assignation introductive d'instance ou d'avis de motion conformément à la pratique du tribunal auquel la demande est présentée.

S.R., ch. C-25, art. 10.

Pouvoir du tribunal

11. (1) Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

Demande initiale

(2) La demande faite pour la première fois en application du présent article relativement à une compagnie — la demande initiale — doit être accompagnée d'un état portant, projections à l'appui, sur l'évolution de l'encaisse de la compagnie, des copies des états financiers, vérifiés ou non, établis au cours de l'année précédant la demande, sinon d'une copie des états financiers les plus récents.

Demande initiale — ordonnances

(3) Dans le cas d'une demande initiale visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour une période maximale de trente jours :

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

Autres demandes — ordonnances

(4) Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime indiquée :

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

Avis de l'ordonnance

(5) À moins que le tribunal n'en ordonne autrement, le contrôleur nommé en application de l'article 11.7 transmet, dans les dix jours suivant celui où elle a été rendue, une copie de l'ordonnance visée au paragraphe (3) à chaque créancier connu ayant une réclamation supérieure à deux cent cinquante dollars.

Preuve

(6) Le tribunal ne rend l'ordonnance visée aux paragraphes (3) ou (4) que si :

a) le demandeur le convainc qu'il serait indiqué de rendre une telle ordonnance;

b) dans le cas de l'ordonnance visée au paragraphe (4), le demandeur le convainc en outre qu'il a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue.

L.R. (1985), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 124.

11.1

(1) [Abrogé, 2007, ch. 29, art. 106]

Restrictions

(2) Le tribunal ne peut rendre, en application de la présente loi, une ordonnance suspendant ou restreignant le droit de résilier ou de modifier un contrat financier admissible ou de se prévaloir d'une clause de déchéance du terme, ou une ordonnance empêchant un membre de l'Association canadienne des paiements constituée par la *Loi canadienne sur les paiements* de cesser d'agir, pour une compagnie, à titre d'agent de compensation ou d'adhérent correspondant de groupe conformément à cette loi et aux règles et règlements administratifs de l'Association.

Opérations permises

(3) Si le contrat financier admissible conclu avant qu'une procédure soit intentée sous le régime de la présente loi à l'égard de la compagnie est résilié à la date d'introduction de la procédure ou par la suite, il est permis d'effectuer les opérations ci-après en conformité avec le contrat :

a) la compensation des obligations entre la compagnie et les autres parties au contrat;

b) toute opération à l'égard de la garantie financière afférente, notamment :

(i) la vente, la demande en forclusion ou, dans la province de Québec, la demande en délaissement,

(ii) la compensation, ou l'affectation de son produit ou de sa valeur.

Restriction

(4) Aucune ordonnance rendue au titre de la présente loi ne peut avoir pour effet de suspendre ou de restreindre le droit d'effectuer les opérations visées au paragraphe (3).

Valeurs nettes dues à la date de résiliation

(5) Si, aux termes du contrat financier admissible visé au paragraphe (3), des sommes sont dues par la compagnie à une autre partie au contrat au titre de valeurs nettes dues à la date de résiliation, cette autre partie est réputée être un créancier de la compagnie relativement à ces sommes.

Rang

(6) Il ne peut être rendu, au titre de la présente loi, aucune ordonnance dont l'effet serait d'assigner un rang inférieur à toute garantie financière.

1997, ch. 12, art. 124; 2001, ch. 9, art. 576; 2007, ch. 29, art. 106.

Restrictions

11.11 Le tribunal ne peut rendre, en application de la présente loi, une ordonnance suspendant ou restreignant :

a) l'exercice par le ministre des Finances ou par le surintendant des institutions financières des attributions qui leur sont conférées par la *Loi sur les banques*, la *Loi sur les associations coopératives de crédit*, la *Loi sur les sociétés d'assurances* ou la *Loi sur les sociétés de fiducie et de prêt*;

b) l'exercice par le gouverneur en conseil, le ministre des Finances ou la Société d'assurance-dépôts du Canada des attributions qui leur sont conférées par la *Loi sur la Société d'assurance-dépôts du Canada*;

c) l'exercice par le procureur général du Canada des pouvoirs qui lui sont conférés par la *Loi sur les liquidations et les restructurations*.

2001, ch. 9, art. 577.

Restriction

11.2 Sauf à l'égard d'une compagnie débitrice visée par une demande faite en application de la présente loi, le tribunal ne peut rendre d'ordonnance en application de l'article 11 relativement à des demandes touchant des lettres de crédit ou de garantie se rapportant à la compagnie.

1997, ch. 12, art. 124.

Précision quant aux fournisseurs

11.3 L'ordonnance prévue à l'article 11 ne peut avoir pour effet :

a) d'empêcher une personne d'exiger que soient effectués immédiatement les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie valable qui ont lieu après l'ordonnance prévue à cet article;

b) d'exiger la prestation de nouvelles avances de fonds ou de nouveaux crédits.

1997, ch. 12, art. 124.

Restriction relative aux biens aéronautiques

11.31 L'ordonnance prévue à l'article 11 ne peut avoir pour effet d'empêcher le créancier qui est titulaire d'une garantie portant sur un bien aéronautique — ou la personne qui est le bailleur ou le vendeur conditionnel d'un tel bien — au titre d'un contrat conclu avec une compagnie débitrice visée par une demande faite en application de la présente loi de prendre possession de celui-ci :

a) si, après l'institution de procédures au titre de la présente loi, la compagnie manque à l'obligation énoncée au contrat de préserver ou d'entretenir le bien;

b) après un délai de soixante jours suivant l'institution de procédures au titre de la présente loi si, pendant le délai :

(i) elle n'a pas remédié à un manquement aux autres obligations énoncées au contrat, exception faite d'un manquement résultant de l'institution des procédures ou de la contravention d'une disposition du contrat relative à sa situation financière,

(ii) elle ne s'est pas engagée à se conformer jusqu'à la date de conclusion des procédures à toutes les obligations qui y sont énoncées, sauf l'obligation de ne pas devenir insolvable ou toute obligation relative à sa situation financière,

(iii) elle ne s'est pas engagée à se conformer à partir de cette date à toutes les obligations qui y sont énoncées;

c) si elle manque, pendant la période commençant à l'expiration du délai de soixante jours et se terminant à la date de conclusion des procédures intentées au titre de la présente loi, à l'une des obligations énoncées au contrat, sauf l'obligation de ne pas devenir insolvable ou toute obligation relative à sa situation financière.

2005, ch. 3, art. 16.

Suspension des procédures

11.4 (1) Le tribunal peut ordonner :

a) la suspension de l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents, à l'égard d'une compagnie lorsque celle-ci est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour une période se terminant au plus tard :

(i) à l'expiration de l'ordonnance rendue en application de l'article 11,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) la suspension de l'exercice par Sa Majesté du chef d'une province, pour une période se terminant au plus tard au moment visé à celui des sous-alinéas *a*)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition législative de cette province à l'égard d'une compagnie, lorsque celle-ci est un débiteur visé par la loi provinciale et qu'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Cessation

(2) L'ordonnance cesse d'être en vigueur dans les cas suivants :

a) la compagnie manque à ses obligations de paiement pour un montant qui devient dû à Sa Majesté après l'ordonnance et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime

provincial de pensions » au sens de ce paragraphe;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l'exercice des droits que lui confère l'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Effet

(3) Les ordonnances du tribunal, autres que celles rendues au titre du paragraphe (1), n'ont pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

1997, ch. 12, art. 124; 2000, ch. 30, art. 156; 2001, ch. 34, art. 33(A).

Suspension des procédures — administrateurs

11.5 (1) L'ordonnance rendue au titre de l'article 11 peut prévoir que nul ne peut intenter ou continuer d'action contre les administrateurs de la compagnie débitrice relativement aux réclamations contre eux qui sont antérieures aux procédures intentées sous le régime de la présente

loi et visent des obligations de celle-ci dont ils peuvent être, ès qualités, responsables en droit tant que la transaction ou l'arrangement, le cas échéant, n'a pas été homologué par le tribunal ou rejeté par celui-ci ou les créanciers.

Exclusion

(2) La suspension ne s'applique toutefois pas aux actions contre les administrateurs pour les garanties qu'ils ont données relativement aux obligations de la compagnie ni aux mesures de la nature d'une injonction les visant au sujet de celle-ci.

Démission ou destitution des administrateurs

(3) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la compagnie est réputé un administrateur pour l'application du présent article.

1997, ch. 12, art. 124.

Lien avec la *Loi sur la faillite et l'insolvabilité*

11.6 Par dérogation à la *Loi sur la faillite et l'insolvabilité* :

a) les procédures intentées sous le régime de la partie III de cette loi ne peuvent être traitées et continuées sous le régime de la présente loi que si une proposition au sens de la *Loi sur la faillite et l'insolvabilité* n'a pas été déposée au titre de cette même partie;

b) le failli ne peut faire une demande au titre de la présente loi qu'avec l'aval des inspecteurs visés à l'article 116 de la *Loi sur la faillite et l'insolvabilité*, aucune demande ne pouvant toutefois être faite si la faillite découle, selon le cas :

(i) de l'application du paragraphe 50.4(8) de la *Loi sur la faillite et l'insolvabilité*,

(ii) du rejet — effectif ou présumé — de sa proposition par les créanciers ou le tribunal ou de l'annulation de celle-ci au titre de cette loi.

1997, ch. 12, art. 124.

Contrôle

11.7 (1) Le tribunal qui accorde l'ordonnance visée à l'article 11 nomme une personne pour agir à titre de contrôleur des affaires et des finances de la compagnie pour la période pendant laquelle l'ordonnance est en vigueur.

Nomination du vérificateur

(2) Sauf décision contraire du tribunal, le vérificateur de la compagnie peut être nommé pour agir à titre de contrôleur.

Attributions

(3) Le contrôleur :

a) dans le cadre de la surveillance des affaires et des finances de la compagnie et dans la mesure où cela s'avère nécessaire pour lui permettre de les évaluer adéquatement, a accès aux biens de celle-ci — notamment locaux, livres, données sur support électronique ou autre, registres et autres documents financiers —, biens qu'il est d'ailleurs tenu d'examiner;

b) est tenu de déposer auprès du tribunal un rapport portant sur l'état des affaires et des finances de la compagnie et contenant les renseignements prescrits :

(i) dès qu'il note un changement négatif important au chapitre des projections relatives à l'encaisse ou au chapitre de la situation financière de la compagnie,

(ii) au moins sept jours avant la tenue de l'assemblée des créanciers au titre des articles 4 ou 5,

(iii) aux autres moments déterminés par ordonnance de celui-ci;

c) est tenu de mentionner dans l'avis à envoyer aux créanciers au titre des articles 4 ou 5 que le rapport visé à l'alinéa *b*) a été déposé;

d) est tenu d'accomplir tout ce que le tribunal lui ordonne de faire.

Non-responsabilité du contrôleur

(4) S'il agit de bonne foi et prend toutes les précautions voulues pour bien préparer le rapport visé à l'alinéa (3)*b*), le contrôleur ne peut être tenu responsable des dommages ou pertes subis par la personne qui s'y fie.

Assistance

(5) La compagnie débitrice doit aider le contrôleur à remplir adéquatement ses fonctions et satisfaire aux obligations visées à l'article 158 de la *Loi sur la faillite et l'insolvabilité* selon ce qui est indiqué et applicable dans les circonstances.

1997, ch. 12, art. 124.

Immunité en matière de réclamations

11.8 (1) Par dérogation au droit fédéral et provincial, le contrôleur qui, ès qualités, continue l'exploitation de l'entreprise de la compagnie débitrice ou succède à celle-ci comme employeur est dégagé de toute responsabilité personnelle découlant de toute réclamation contre le débiteur ou liée à l'obligation de celui-ci de payer une somme si la réclamation est antérieure à sa nomination ou découle de celle-ci.

Frais

(2) Une telle réclamation ne fait pas partie des frais d'administration.

Responsabilité en matière d'environnement

(3) Par dérogation au droit fédéral et provincial, le contrôleur est, ès qualités, dégagé de toute responsabilité personnelle découlant de tout fait ou dommage lié à l'environnement survenu, avant ou après sa nomination, sauf celui causé par sa négligence grave ou son inconduite délibérée.

Rapports

(4) Le paragraphe (3) n'a pas pour effet de soustraire le contrôleur à l'obligation de faire rapport ou de communiquer des renseignements prévus par le droit applicable en l'espèce.

Immunité — ordonnances

(5) Par dérogation au droit fédéral et provincial, mais sous réserve du paragraphe (3), le contrôleur est, ès qualité, dégagé de toute responsabilité personnelle découlant du non-respect de toute ordonnance de réparation de tout fait ou dommage lié à l'environnement et touchant un bien visé par des procédures intentées au titre de la présente loi, et de toute responsabilité personnelle relativement aux frais engagés par toute personne exécutant l'ordonnance :

a) si, dans les dix jours suivant l'ordonnance ou dans le délai fixé par celle-ci, dans les dix jours suivant sa nomination si l'ordonnance est alors en vigueur ou pendant la durée de la suspension visée à l'alinéa *b*) :

(i) il s'y conforme,

(ii) il abandonne, après avis à la personne ayant rendu l'ordonnance, tout intérêt dans l'immeuble en cause, en dispose ou s'en dessaisit;

b) pendant la durée de la suspension de l'ordonnance qui est accordée, sur demande présentée dans les dix jours suivant l'ordonnance visée à l'alinéa *a*) ou dans le délai fixé par celle-ci, ou dans les dix jours suivant sa nomination si l'ordonnance est alors en vigueur :

(i) soit par le tribunal ou l'autorité qui a compétence relativement à l'ordonnance, en vue de permettre au contrôleur de la contester,

(ii) soit par le tribunal qui a compétence en matière de faillite, en vue d'évaluer les conséquences économiques du respect de l'ordonnance;

c) si, avant que l'ordonnance ne soit rendue, il avait abandonné tout intérêt dans le bien immeuble en cause ou y avait renoncé, ou s'en était dessaisi.

Suspension

(6) En vue de permettre au contrôleur d'évaluer les conséquences économiques du respect de l'ordonnance, le tribunal peut en ordonner la suspension après avis et pour la période qu'il estime indiqués.

Frais

(7) Si le contrôleur a abandonné tout intérêt dans le bien immeuble en cause ou y a renoncé, les réclamations pour les frais de réparation du fait ou dommage lié à l'environnement et touchant le bien ne font pas partie des frais d'administration.

Priorité des réclamations

(8) Dans le cas où des procédures ont été intentées au titre de la présente loi contre une compagnie débitrice, toute réclamation de Sa Majesté du chef du Canada ou d'une province contre elle pour les frais de réparation du fait ou dommage lié à l'environnement et touchant un de ses biens immeubles est garantie par une sûreté sur le bien immeuble en cause et sur ceux qui sont contigus à celui où le dommage est survenu et qui sont liés à l'activité ayant causé le fait ou le dommage; la sûreté peut être exécutée selon le droit du lieu où est situé le bien comme s'il s'agissait d'une hypothèque ou autre garantie sur celui-ci et, par dérogation aux autres dispositions de la présente loi et à toute règle de droit fédéral et provincial, a priorité sur tout autre droit, charge ou réclamation visant le bien.

Précision

(9) La réclamation pour les frais de réparation du fait ou dommage lié à l'environnement et touchant un bien immeuble de la compagnie débitrice constitue une réclamation, que la date du fait ou dommage soit antérieure ou postérieure à celle où des procédures sont intentées au titre de la présente loi.

1997, ch. 12, art. 124.

Définition de « réclamation »

12. (1) Pour l'application de la présente loi, «réclamation » s'entend de toute dette, tout engagement ou toute obligation d'un genre quelconque qui, s'il n'était pas garanti, constituerait une dette prouvable en matière de faillite au sens de la *Loi sur la faillite et l'insolvabilité*.

Détermination du montant de la réclamation

(2) Pour l'application de la présente loi, le montant représenté par une réclamation d'un créancier garanti ou chirographaire est déterminé de la façon suivante :

a) le montant d'une réclamation non garantie est le montant :

(i) dans le cas d'une compagnie en voie de liquidation sous le régime de la *Loi sur les liquidations et les restructurations*, dont la preuve a été établie en conformité avec cette loi,

(ii) dans le cas d'une compagnie qui a fait une cession autorisée ou à l'encontre de laquelle une ordonnance de faillite a été rendue sous le régime de la *Loi sur la faillite et l'insolvabilité*, dont la preuve a été établie en conformité avec cette loi,

(iii) dans le cas de toute autre compagnie, dont la preuve pourrait être établie en vertu de la *Loi sur la faillite et l'insolvabilité*, mais si le montant ainsi prouvable n'est pas admis par la compagnie, ce montant est déterminé par le tribunal sur demande sommaire par la compagnie ou le créancier;

b) le montant d'une réclamation garantie est le montant dont la preuve pourrait être établie à son égard sous le régime de la *Loi sur la faillite et l'insolvabilité* si cette réclamation n'était pas garantie, mais ce montant, s'il n'est pas admis par la compagnie, est, dans le cas d'une compagnie assujettie à des procédures pendantes en vertu de la *Loi sur les liquidations et les restructurations* ou de la *Loi sur la faillite et l'insolvabilité*, établi par preuve de la même manière qu'une réclamation non garantie aux termes de la *Loi sur les liquidations et les restructurations* ou de la *Loi sur la faillite et l'insolvabilité*, selon le cas, et, s'il s'agit de toute autre compagnie, ce montant est

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

(*a*) the period during which the company is expected to be subject to proceedings under this Act;

(*b*) how the company's business and financial affairs are to be managed during the proceedings;

(*c*) whether the company's management has the confidence of its major creditors;

(*d*) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(*e*) the nature and value of the company's property;

(*f*) whether any creditor would be materially prejudiced as a result of the security or charge; and

(*g*) the monitor's report referred to in paragraph 23(1)(*b*), if any.

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 36, s. 65.

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

(*a*) an agreement entered into on or after the day on which proceedings commence under this Act;

Déclaration : organisme agissant à titre de créancier

(4) En cas de différend sur la question de savoir si l'organisme administratif cherche à faire valoir ses droits à titre de créancier dans le cadre de la mesure prise, le tribunal peut déclarer, par ordonnance, sur demande de la compagnie et sur préavis à l'organisme, que celui-ci agit effectivement à ce titre et que la mesure est suspendue.

1997, ch. 12, art. 124; 2001, ch. 9, art. 576; 2005, ch. 47, art. 128; 2007, ch. 29, art. 106, ch. 36, art. 65.

11.11 [Abrogé, 2005, ch. 47, art. 128]

Financement temporaire

11.2 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter à la compagnie la somme qu'il approuve compte tenu de l'état de l'évolution de l'encaisse et des besoins de celle-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

Priorité — créanciers garantis

(2) Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

Priorité — autres ordonnances

(3) Il peut également y préciser que la charge ou sûreté n'a priorité sur toute autre charge ou sûreté grevant les biens de la compagnie au titre d'une ordonnance déjà rendue en vertu du paragraphe (1) que sur consentement de la personne en faveur de qui cette ordonnance a été rendue.

Facteurs à prendre en considération

(4) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la durée prévue des procédures intentées à l'égard de la compagnie sous le régime de la présente loi;

b) la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures;

c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;

d) la question de savoir si le prêt favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;

e) la nature et la valeur des biens de la compagnie;

f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers de la compagnie;

Trusts

(7) This section applies despite any trust that may exist in favour of any person. 2010, c. 1, Sched. 23, s. 2 (1).

REGISTRATION AND ADMINISTRATION

Prohibition of administration of unregistered pension plan

6.(1)No person shall administer a pension plan unless a certificate of registration or an acknowledgment of application for registration of the pension plan has been issued by the Superintendent.

Application of subs. (1)

(2)Subsection (1) does not apply to prevent administration during the first ninety days after the establishment of the pension plan. R.S.O. 1990, c. P.8, s. 6.

Refusal or revocation

7.(1)No person shall administer a pension plan if registration of the pension plan has been refused or revoked by the Superintendent.

Exception

(2)Subsection (1) does not apply to prevent administration for the purpose of wind up of a pension plan. R.S.O. 1990, c. P.8, s. 7.

Administrator
Requirement

8. (0.1) A pension plan must be administered by a person or entity described in subsection (1). 2010, c. 9, s. 3 (1).

Prohibition

(0.2) No person or entity other than a person or entity described in subsection (1) shall administer a pension plan. 2010, c. 9, s. 3 (1).

Administrator

(1) A pension plan is not eligible for registration unless it is administered by an administrator who is,

(a) the employer or, if there is more than one employer, one or more of the employers;

(b) a pension committee composed of one or more representatives of,

(i) the employer or employers, or any person, other than the employer or employers, required to make contributions under the pension plan, and

(ii) members of the pension plan;

(c) a pension committee composed of representatives of members of the pension plan;

(d) the insurance company that provides the pension benefits under the pension plan, if all the pension benefits under the pension plan are guaranteed by the insurance company;

(e) if the pension plan is a multi-employer pension plan established pursuant to a collective agreement or a trust agreement, a board of trustees appointed pursuant to the pension plan or a trust agreement establishing the pension plan of whom at least one-half are representatives of members of the multi-employer pension plan, and a majority of such representatives of the members shall be Canadian citizens or landed immigrants;

(f) a corporation, board, agency or commission made responsible by an Act of the Legislature for the administration of the pension plan;

(g) a person appointed as administrator by the Superintendent under section 71; or

Note: On a day to be named by proclamation of the Lieutenant Governor, clause (g) is repealed and the following substituted:

(g) a person appointed as administrator by the Superintendent;

Demand for payment

(9) In such circumstances as may be prescribed, the prescribed person or entity shall demand payment of the amount of the letter of credit into the pension fund by the issuer of the letter of credit. 2010, c. 24, s. 18.

Costs of letter of credit

(10) The fees or expenses associated with obtaining, holding, amending or cancelling a letter of credit are not payable from the pension fund. However, subject to section 22.1, the fees and expenses associated with enforcing a letter of credit are payable from the pension fund. 2010, c. 24, s. 18.

Status of public sector pension plans

(11) This section does not apply with respect to a public sector pension plan unless the regulations specify that it applies to the pension plan. 2010, c. 24, s. 18.

Exclusion of multi-employer pension plans

(12) This section does not apply with respect to multi-employer pension plans. 2010, c. 24, s. 18.

Conflict

(13) This section prevails over subsection 55 (2). 2010, c. 24, s. 18.

See: 2010, c. 24, ss. 18, 49 (4).

Duty re payment of contributions

56.(1)The administrator of a pension plan and the agent, if any, of the administrator who is responsible for receiving contributions under the pension plan shall ensure that all contributions are paid when due.

Notice

(2)If a contribution is not paid when due, the administrator and the agent, if any, shall notify the Superintendent in the prescribed manner and within the prescribed period. 1999, c. 15, s. 10.

Duty to pension fund trustees

56.1 (1) The administrator shall give the persons who are prescribed for the purposes of subsection 22 (6) (trustee of pension fund) a summary of the contributions required to be made in respect of the pension plan, and shall do so in the prescribed manner and within the prescribed period. 1999, c. 15, s. 10.

Exception

(1.1) Subsection (1) does not apply if the administrator is also the trustee of the pension fund. 2005, c. 31, Sched. 18, s. 7.

Notice re summary

(2) A person who is entitled to receive a summary shall notify the Superintendent in the prescribed manner and within the prescribed period if the person is not given the summary in accordance with subsection (1). 1999, c. 15, s. 10.

Notice re contributions

(3) A person who is entitled to receive a summary shall notify the Superintendent in the prescribed manner and within the prescribed period if a contribution is not paid when due. 1999, c. 15, s. 10.

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. R.S.O. 1990, c. P.8, s. 57 (1).

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. R.S.O. 1990, c. P.8, s. 57 (2).

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. R.S.O. 1990, c. P.8, s. 57 (3).

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. R.S.O. 1990, c. P.8, s. 57 (4).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (4) is amended by striking out "in whole or in part". See: 2010, c. 9, ss. 40, 80 (2).

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). R.S.O. 1990, c. P.8, s. 57 (5).

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. R.S.O. 1990, c. P.8, s. 57 (6).

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 (7).

Accrual

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

Interest

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

Collection of contributions

59. The administrator may commence proceedings in a court of competent jurisdiction to obtain payment of contributions due under the pension plan, this Act and the regulations. R.S.O. 1990, c. P.8, s. 59.

Bond

60. The administrator of a multi-employer pension plan may require a person who receives contributions to the pension fund or who administers or invests the pension fund to be bonded in an amount required by the administrator or in the prescribed amount. R.S.O. 1990, c. P.8, s. 60.

Statement of employer's obligation

61. An employer who is required to make contributions to a multi-employer pension plan shall transmit to the administrator of the plan a copy of the agreement that requires the employer to make the contributions or a written statement that sets out the contributions the employer is required to make and any other obligations of the employer under the pension plan. R.S.O. 1990, c. P.8, s. 61.

Investment of pension fund

62. Every person engaged in selecting an investment to be made with the assets of a pension fund shall ensure that the investment is selected in accordance with the criteria set out in this Act and prescribed by the regulations. R.S.O. 1990, c. P.8, s. 62.

Overpayments, etc., by employer

62.1 (1) This section applies,

(a) if an employer pays an amount in respect of a pension plan that should have been paid out of the pension fund; or

(b) if an employer makes an overpayment into the pension fund. 2010, c. 24, s. 19.

Rescission

(6) An election may be rescinded by the persons and entities described in subsection (1) or (2), as the case may be, and the rescission takes effect when notice of the rescission is filed with the Superintendent or on a later date specified in the notice. 2010, c. 9, s. 57.

See: 2010, c. 9, ss. 57, 80 (3).

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,

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (1) is amended by striking out "in whole or in part" in the portion before clause (a). See: 2010, c. 9, ss. 58, 80 (2).

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario. R.S.O. 1990, c. P.8, s. 75 (1); 1997, c. 28, s. 200.

Payment

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

Exception, jointly sponsored pension plans

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

Liability on wind-up, jointly sponsored pension plans

Employers, etc.

75.1 (1) Where a jointly sponsored pension plan is wound up in whole or in part, the employer or the person or entity required to make contributions under the plan on behalf of the employer shall pay into the pension fund,

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (1) is amended by striking out "in whole or in part" in the portion before clause (a). See: 2010, c. 9, ss. 59 (1), 80 (2).

(a) an amount equal to the total of all payments that, under this Act, the regulations and the plan, are payable by the employer or by the person or entity on behalf of the employer, that are due or have accrued and that have not been paid into the pension fund; and

(b) any additional amounts that, under the documents that create and support the plan, are payable in the circumstances by the employer or the person or entity on behalf of the employer. 2005, c. 31, Sched. 18, s. 11.

Members

(2) Where a jointly sponsored pension plan is wound up in whole or in part, the members shall pay into the pension fund,

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (2) is amended by striking out "in whole or in part" in the portion before clause (a). See: 2010, c. 9, ss. 59 (2), 80 (2).

(a) an amount equal to the total of all payments that, under this Act, the regulations and the plan, are payable by the members, that are due or have accrued and that have not been paid into the pension fund; and

(b) any additional amounts that, under the documents that create and support the plan, are payable in the circumstances by the members. 2005, c. 31, Sched. 18, s. 11.

Payments

(3) The payments required by subsections (1) and (2) shall be made in the prescribed manner and at the prescribed times. 2005, c. 31, Sched. 18, s. 11.

Pension fund continues subject to Act and regulations

76. The pension fund of a pension plan that is wound up continues to be subject to this Act and the regulations until all the assets of the pension fund have been disbursed. R.S.O. 1990, c. P.8, s. 76.

Insufficient pension fund

77. Subject to the application of the Guarantee Fund, where the money in a pension fund is not sufficient to pay all the pension benefits and other benefits on the wind up of the pension plan in whole or in part, the pension benefits and other benefits shall be reduced in the prescribed manner. R.S.O. 1990, c. P.8, s. 77.

Note: On a day to be named by proclamation of the Lieutenant Governor, section 77 is amended by striking out "in whole or in part". See: 2010, c. 9, ss. 60, 80 (2).

Note: On a day to be named by proclamation of the Lieutenant Governor, the Act is amended by adding the following sections:

TRANSITION – PARTIAL WIND UP

Authority for partial wind up

77.1 (1) A pension plan may be wound up in part if the effective date of the partial wind up precedes the date on which this section comes into force. 2010, c. 9, s. 61.

Restriction

(2) A pension plan cannot be wound up in part if the effective date of the partial wind up would fall on or after the date on which this section comes into force. 2010, c. 9, s. 61.

Effective date

(3) The effective date of the partial wind up may be determined after the date on which this section comes into force. 2010, c. 9, s. 61.

Same

(4) The Superintendent by order may change the effective date of the partial wind up if the Superintendent is of the opinion that there are reasonable grounds for the change. 2010, c. 9, s. 61.

Definition

(5) In this section and in sections 77.2 to 77.9,

"partial wind up" means the termination of part of a pension plan and the distribution of the assets of the pension fund related to that part of the pension plan. 2010, c. 9, s. 61.

Partial wind up by employer, administrator

77.2 Section 68 applies, with necessary modifications, with respect to a partial wind up of a pension plan. 2010, c. 9, s. 61.

participant retraité» à «relativement à un participant ou à un ancien participant». Voir : 2010, chap. 1, annexe 23, par. 2 (2) et 15 (2).

Documents relatifs au régime de retraite

(6) Le présent article s'applique malgré les documents qui créent un régime de retraite à lois d'application multiples désigné et une caisse de retraite et en justifient l'existence. 2010, chap. 1, annexe 23, par. 2 (1).

Fiducies

(7) Le présent article s'applique malgré toute fiducie qui existe en faveur d'une personne. 2010, chap. 1, annexe 23, par. 2 (1).

ENREGISTREMENT ET ADMINISTRATION

Administration d'un régime non enregistré interdite

6. (1) Nul ne doit administrer un régime de retraite sans que le surintendant n'ait délivré un certificat d'enregistrement ou un accusé de réception d'une demande d'enregistrement du régime de retraite.

Champ d'application du par. (1)

(2) Le paragraphe (1) n'a pas pour effet d'empêcher l'administration pendant les quatre-vingt-dix jours qui suivent l'établissement d'un régime de retraite. L.R.O. 1990, chap. P.8, art. 6.

Refus ou révocation

7. (1) Nul ne doit administrer un régime de retraite dont l'enregistrement a été refusé ou révoqué par le surintendant.

Exception

(2) Le paragraphe (1) n'a pas pour effet d'empêcher l'administration aux fins de la liquidation d'un régime de retraite. L.R.O. 1990, chap. P.8, art. 7.

Administrateur

Exigence

8. (0.1) Un régime de retraite est administré par une personne ou une entité indiquée au paragraphe (1). 2010, chap. 9, par. 3 (1).

Interdiction

(0.2) Nulle autre personne ou entité qu'une personne ou entité indiquée au paragraphe (1) administre un régime de retraite. 2010, chap. 9, par. 3 (1).

Administrateur

(1) Un régime de retraite n'est admissible à l'enregistrement que s'il est administré par un administrateur qui est, selon le cas :

a) l'employeur ou, s'il y en a plus d'un, un ou plusieurs des employeurs;

b) un comité de retraite composé d'un ou de plusieurs représentants :

(i) de l'employeur ou des employeurs, ou des personnes, autres que l'employeur ou les employeurs, qui sont tenus de cotiser aux termes du régime de retraite,

(ii) des participants au régime de retraite;

c) un comité de retraite composé de représentants des participants au régime de retraite;

d) la compagnie d'assurance qui fournit les prestations de retraite aux termes du régime de retraite, si toutes les prestations de retraite aux termes du régime de retraite sont garanties par la compagnie d'assurance;

e) si le régime de retraite est un régime interentreprises établi conformément à une convention collective ou à un contrat de fiducie, un conseil de fiduciaires qui est constitué conformément au régime de retraite ou à un contrat de fiducie établissant le régime de retraite et dont au moins la

Obligation : paiement des cotisations

56.(1) L'administrateur d'un régime de retraite et, le cas échéant, son représentant chargé de recevoir les cotisations prévues par le régime veillent à ce que toutes les cotisations soient payées à leur date d'exigibilité.

Avis

(2) Si une cotisation n'est pas payée à sa date d'exigibilité, l'administrateur et, le cas échéant, le représentant en avisent le surintendant de la manière et dans le délai prescrits. 1999, chap. 15, art. 10.

Obligation envers les fiduciaires de la caisse de retraite

56.1 (1) L'administrateur remet, de la manière et dans le délai prescrits, aux personnes prescrites pour l'application du paragraphe 22 (6) (fiduciaire d'une caisse de retraite) un sommaire des cotisations qui doivent être versées à l'égard du régime de retraite. 1999, chap. 15, art. 10.

Exception

(1.1) Le paragraphe (1) ne s'applique pas si l'administrateur est également le fiduciaire de la caisse de retraite. 2005, chap. 31, annexe 18, art. 7.

Avis : sommaire

(2) La personne qui a le droit de recevoir un sommaire avise le surintendant de la manière et dans le délai prescrits s'il ne lui est pas remis conformément au paragraphe (1). 1999, chap. 15, art. 10.

Avis : cotisations

(3) La personne qui a le droit de recevoir un sommaire avise le surintendant de la manière et dans le délai prescrits si une cotisation n'est pas payée à sa date d'exigibilité. 1999, chap. 15, art. 10.

Biens en fiducie

57. (1) L'employeur qui reçoit de l'argent d'un employé en vertu d'un arrangement précisant que l'employeur versera cet argent à une caisse de retraite en tant que cotisation de l'employé aux termes du régime de retraite, est réputé détenir cet argent en fiducie pour l'employé jusqu'à ce que l'employeur verse cet argent à la caisse de retraite. L.R.O. 1990, chap. P.8, par. 57 (1).

Sommes retenues

(2) Pour l'application du paragraphe (1), l'argent retenu des sommes payables à l'employé par l'employeur, que ce soit par retenues salariales ou autrement, est réputé être de l'argent que l'employeur a reçu de l'employé. L.R.O. 1990, chap. P.8, par. 57 (2).

Cotisations accumulées

(3) L'employeur qui est tenu de cotiser à une caisse de retraite est réputé détenir en fiducie pour le compte des bénéficiaires du régime de retraite un montant égal aux cotisations de l'employeur qui sont dues et impayées à la caisse de retraite. L.R.O. 1990, chap. P.8, par. 57 (3).

Liquidation

(4) Si un régime de retraite est liquidé en totalité ou en partie, l'employeur qui est tenu de cotiser à la caisse de retraite est réputé détenir en fiducie pour le compte des bénéficiaires du régime de retraite un montant égal aux cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements. L.R.O. 1990, chap. P.8, par. 57 (4).

Remarque : Le jour que le lieutenant-gouverneur fixe par proclamation, le paragraphe (4) est modifié par suppression de «en totalité ou en partie». Voir : 2010, chap. 9, art. 40 et par. 80 (2).

Privilège

(5) L'administrateur du régime de retraite a un privilège sur l'actif de l'employeur pour un montant égal aux montants réputés être détenus en fiducie en vertu des paragraphes (1), (3) et (4). L.R.O. 1990, chap. P.8, par. 57 (5).

Champ d'application des par. (1), (3) et (4)

(6) Les paragraphes (1), (3) et (4) s'appliquent, que les sommes aient été ou non gardées à part des autres sommes ou biens de l'employeur. L.R.O. 1990, chap. P.8, par. 57 (6).

Sommes devant être payées à la compagnie d'assurance

(7) Les paragraphes (1) à (6) s'appliquent, avec les adaptations nécessaires, à l'égard des sommes qui doivent être payées à une compagnie d'assurance qui garantit des prestations de retraite prévues par un régime de retraite. L.R.O. 1990, chap. P.8, par. 57 (7).

Accumulation

58. (1) L'argent qu'un employeur est tenu de verser à une caisse de retraite s'accumule sur une base quotidienne.

Intérêt

(2) L'intérêt sur les cotisations est calculé et crédité à des taux qui ne sont pas inférieurs aux taux prescrits et conformément aux exigences prescrites. L.R.O. 1990, chap. P.8, art. 58.

Recouvrement des cotisations

59. L'administrateur peut introduire des instances devant un tribunal compétent pour obtenir le paiement des cotisations dues aux termes du régime de retraite, de la présente loi et des règlements. L.R.O. 1990, chap. P.8, art. 59.

Cautionnement

60. L'administrateur d'un régime de retraite interentreprises peut exiger qu'une personne qui reçoit les cotisations à la caisse de retraite ou qui administre la caisse ou fait des placements avec les fonds de la caisse fournisse un cautionnement pour le montant prescrit ou pour le montant qu'il exige. L.R.O. 1990, chap. P.8, art. 60.

Déclaration des obligations de l'employeur

61. L'employeur qui est tenu de cotiser à un régime de retraite interentreprises transmet à l'administrateur du régime une copie de l'accord selon lequel l'employeur doit cotiser, ou une déclaration écrite qui indique les cotisations que l'employeur doit verser ainsi que les autres obligations de l'employeur aux termes du régime de retraite. L.R.O. 1990, chap. P.8, art. 61.

Placement de la caisse de retraite

62. Toute personne qui participe au choix d'un placement qui sera fait avec l'actif d'une caisse de retraite veille à ce que le choix du placement soit conforme aux critères énoncés dans la présente loi et prescrits par les règlements. L.R.O. 1990, chap. P.8, art. 62.

Versements excédentaires faits par l'employeur

62.1 (1) Le présent article s'applique dans l'un ou l'autre des cas suivants :

a) un employeur verse, à l'égard d'un régime de retraite, une somme qui aurait dû être prélevée sur la caisse de retraite;

b) un employeur fait un versement excédentaire à la caisse de retraite. 2010, chap. 24, art. 19.

Conditions préalables au remboursement

(2) L'administrateur du régime de retraite est autorisé à rembourser à l'employeur un versement visé au paragraphe (1) par prélèvement sur la caisse de retraite ou à autoriser un tel remboursement seulement si le surintendant y consent au préalable. 2010, chap. 24, art. 19.

Demande de remboursement

(3) L'employeur ou, dans le cas d'un régime de retraite conjoint ou d'un régime de retraite interentreprises, l'administrateur peut demander au surintendant de consentir au remboursement à l'employeur d'un versement visé au paragraphe (1) par prélèvement sur la caisse de retraite. 2010, chap. 24, art. 19.

Échéance

(4) La demande doit être présentée avant la dernière en date des échéances suivantes :

a) 24 mois après la date à laquelle l'employeur fait le versement visé au paragraphe (1);

b) six mois après la date à laquelle l'administrateur, agissant raisonnablement, apprend l'existence du versement visé au paragraphe (1). 2010, chap. 24, art. 19.

Remarque : Le 1er juillet 2012, la Loi est modifiée par adjonction de l'article suivant :

Choix concernant les droits d'acquisition réputée : certains régimes de retraite

Régimes de retraite conjoints

74.1 (1) Les employeurs d'un régime de retraite conjoint (ou les personnes ou entités qui cotisent au régime pour leur compte ou qui les représentent) et les participants à ce régime (ou leurs représentants) peuvent choisir, conformément au présent article, de soustraire le régime et les participants à l'effet de l'article 74. 2010, chap. 9, art. 57.

Régimes de retraite interentreprises

(2) L'administrateur d'un régime de retraite interentreprises peut choisir, conformément au présent article, de soustraire le régime et les participants à l'effet de l'article 74. 2010, chap. 9, art. 57.

Restrictions

(3) Le choix ne peut être fait que dans le délai prescrit et les personnes ou entités qui le font doivent satisfaire aux exigences prescrites à l'égard du choix. 2010, chap. 9, art. 57.

Idem

(4) Il ne peut être fait qu'un seul choix à l'égard d'un régime de retraite. 2010, chap. 9, art. 57.

Avis du choix

(5) Le choix de soustraire un régime de retraite et les participants à l'effet de l'article 74 entre en vigueur au dépôt de l'avis de choix auprès du surintendant ou à la date postérieure qui y est précisée. 2010, chap. 9, art. 57.

Annulation

(6) Le choix peut être annulé par les personnes et les entités visées au paragraphe (1) ou (2), selon le cas, et l'annulation entre en vigueur au dépôt de l'avis d'annulation auprès du surintendant ou à la date postérieure qui y est précisée. 2010, chap. 9, art. 57.

Voir : 2010, chap. 9, art. 57 et par. 80 (3).

Responsabilité de l'employeur à la liquidation

75. (1) Si un régime de retraite est liquidé en totalité ou en partie, l'employeur verse à la caisse de retraite :

Remarque : Le jour que le lieutenant-gouverneur fixe par proclamation, le paragraphe (1) est modifié par suppression de «en totalité ou en partie» dans le passage qui précède l'alinéa a). Voir : 2010, chap. 9, art. 58 et par. 80 (2).

a) d'une part, un montant égal au total de tous les paiements qui, en vertu de la présente loi, des règlements et du régime de retraite, sont dus ou accumulés, et qui n'ont pas été versés à la caisse de retraite;

b) d'autre part, un montant égal au montant dont :

(i) la valeur des prestations de retraite aux termes du régime de retraite qui seraient garanties par le Fonds de garantie en vertu de la présente loi et des règlements si le surintendant déclare que le Fonds de garantie s'applique au régime de retraite,

(ii) la valeur des prestations de retraite accumulées à l'égard de l'emploi en Ontario et acquises aux termes du régime de retraite,

(iii) la valeur des prestations accumulées à l'égard de l'emploi en Ontario et qui résultent de l'application du paragraphe 39 (3) (règle des 50 pour cent) et de l'article 74,

dépassent la valeur de l'actif de la caisse de retraite attribué, comme cela est prescrit, pour le paiement de prestations de retraite accumulées à l'égard de l'emploi en Ontario. L.R.O. 1990, chap. P.8, par. 75 (1); 1997, chap. 28, art. 200.

Paiement

(2) L'employeur paie les sommes dues en vertu du paragraphe (1) de la manière prescrite et aux moments prescrits. L.R.O. 1990, chap. P.8, par. 75 (2).

Exception : régimes de retraite conjoints

(3) Le présent article ne s'applique pas à l'égard des régimes de retraite conjoints. 2005, chap. 31, annexe 18, art. 10.

Responsabilité à la liquidation : régimes de retraite conjoints
Employeurs

75.1 (1) Si un régime de retraite conjoint est liquidé en totalité ou en partie, l'employeur ou la personne ou entité tenue de cotiser aux termes du régime pour le compte de l'employeur verse à la caisse de retraite :

Remarque : Le jour que le lieutenant-gouverneur fixe par proclamation, le paragraphe (1) est modifié par suppression de «en totalité ou en partie» dans le passage qui précède l'alinéa a). Voir : 2010, chap. 9, par. 59 (1) et 80 (2).

a) d'une part, un montant égal au total de tous les paiements qui, en vertu de la présente loi, des règlements et du régime, sont payables par l'employeur ou la personne ou entité pour le compte de l'employeur, qui sont dus ou accumulés et qui n'ont pas été versés à la caisse de retraite;

b) d'autre part, les montants supplémentaires qui, aux termes des documents qui créent le régime et en justifient l'existence, sont payables dans les circonstances par l'employeur ou la personne ou entité pour le compte de l'employeur. 2005, chap. 31, annexe 18, art. 11.

Participants

(2) Si un régime de retraite conjoint est liquidé en totalité ou en partie, les participants versent à la caisse de retraite :

Remarque : Le jour que le lieutenant-gouverneur fixe par proclamation, le paragraphe (2) est modifié par suppression de «en totalité ou en partie» dans le passage qui précède l'alinéa a). Voir : 2010, chap. 9, par. 59 (2) et 80 (2).

a) d'une part, un montant égal au total de tous les paiements qui, en vertu de la présente loi, des règlements et du régime, sont payables par les participants, qui sont dus ou accumulés et qui n'ont pas été versés à la caisse de retraite;

b) d'autre part, les montants supplémentaires qui, aux termes des documents qui créent le régime et en justifient l'existence, sont payables dans les circonstances par les participants. 2005, chap. 31, annexe 18, art. 11.

Paiements

(3) Les paiements exigés par les paragraphes (1) et (2) sont versés de la manière prescrite et aux moments prescrits. 2005, chap. 31, annexe 18, art. 11.

La caisse de retraite continue d'être assujettie

76. La caisse de retraite d'un régime de retraite qui est liquidé continue d'être assujettie à la présente loi et aux règlements tant que l'actif de la caisse de retraite n'a pas été déboursé. L.R.O. 1990, chap. P.8, art. 76.

Insuffisance de fonds

77. Sous réserve de l'application du Fonds de garantie, si les sommes de la caisse de retraite ne suffisent pas à payer toutes les prestations de retraite et autres prestations à la liquidation totale ou partielle du régime de retraite, les prestations de retraite et autres prestations sont réduites de la manière prescrite. L.R.O. 1990, chap. P.8, art. 77.

Remarque : Le jour que le lieutenant-gouverneur fixe par proclamation, l'article 77 est modifié par suppression de «totale ou partielle» Voir : 2010, chap. 9, art. 60 et par. 80 (2).

minimum value of the required contributions made by the member or former memb plan;

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

(i) employment in Ontario,

(ii) employment in each designated jurisdiction, and

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

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

(f) determining the Ontario wind up liability;

(g) if the Ontario assets exceed the Ontario wind up liability, first applying the Ontario a provide for the Ontario wind up liability and then applying any remaining Ontario a provide, on an equitable basis determined by the person preparing the report and ac the Superintendent, for those benefits included in calculating the basic Ontario liabi included in calculating the Ontario wind up liability;

(h) dealing with the portion of the plan assets allocated for the provision of benefits res employment in each designated jurisdiction in accordance with the laws of the juris

(i) Revoked: O. Reg. 342/10, s. 4 (2).

(j) dealing on an equitable basis with the portion of plan assets allocated for the provisic benefits from any other employment. O. Reg. 712/92, s. 18; O. Reg. 570/06, s. 6 (3, 342/10, s. 4.

(3) A wind up report shall describe everything done under subsection (2). O. Reg. 712/9

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

31. (1) The liability to be funded under section 75 of the Act shall be funded by annual payments commencing at the effective date of the wind up and made by the employer to the pe O. Reg. 712/92, s. 19.

(2) The special payments under subsection (1) for each year shall be at least equal to the

(a) the amount required in the year to fund the employer's liabilities under section 75 of equal payments, payable annually in advance, over not more than five years; and

(b) the minimum special payments required for the year in which the plan is wound up, determined in the reports filed or submitted under sections 3, 4, 5.3, 13 and 14, mult ratio of the basic Ontario liabilities of the plan to the total of the liabilities and incre liabilities of the plan as determined under clauses 30 (2) (b) and (c). O. Reg. 712/92

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

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

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

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

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

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

31.1 (1) Any liability to be funded under clause 75.1 (1) (b) or (2) (b) of the Act shall b equal monthly instalments for five years or less or by payments determined in accordance with of payments. O. Reg. 116/06, s. 17.

(2) The instalments or payments required under subsection (1) shall be made to the pens the employer or, if another person or entity is required to make payments on behalf of the emp person or entity and, if applicable, by the members of the pension plan, commencing on the ef of the wind up. O. Reg. 116/06, s. 17.

(3) The schedule of payments referred to in subsection (1) shall be determined as follow

1. The present value of the scheduled payments at the effective date of the wind up is ec liability to be funded.

2. The amortization period for the scheduled payments shall end not later than five year effective date of the wind up.

3. The present value of the scheduled payments is determined using the interest rates us wind up report. O. Reg. 116/06, s. 17.

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

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

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

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

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

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

32.1 (1) Until any liability under section 75.1 of the Act is funded, the administrator of sponsored pension plan shall annually cause the plan to be reviewed and a report to be prepare

person authorized by section 15 and shall file the report within six months after the valuation d report. O. Reg. 116/06, s. 18.

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

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

(b) the increase or decrease in the remaining special payments that will liquidate the gai referred to in clause (a) over the remainder of the five-year period commencing fron effective date of the wind up. O. Reg. 116/06, s. 18.

(3) Any special payments required as a result of a loss referred to in clause (2) (a) shall l as payments required to be made according to section 75.1 of the Act. O. Reg. 116/06, s. 18.

(4) Where a report made under this section shows that there is no further amount to be fi surplus shall be dealt with according to the terms and conditions of the pension plan. O. Reg. 1

33. Where an order is made under subsection 83 (1) of the Act with respect to a pension has been terminated or wound up and the employer is in the process of making the funding pay required under section 75 of the Act, the wind up funded ratio and the liability for benefits gua the Guarantee Fund shall be recalculated as of the date referred to in the order. R.R.O. 1990, R s. 33; O. Reg. 307/98, s. 14.

34. (1) Where an order has been made under subsection 83 (1) of the Act in respect of a the effective date of the wind up is before the Regulation date and when the order is made the (assets of the plan are less than its Ontario wind up liability, the administrator shall provide ben the plan in accordance with this section as it read immediately before the Regulation date. O. F s. 21; O. Reg. 307/98, s. 15 (1).

(2) Where an order has been made under subsection 83 (1) of the Act in respect of a plaı effective date of the wind up is on or after the Regulation date and when the order is made the assets of the plan are less than its Ontario wind up liability, the administrator shall provide ben the plan in accordance with this section. O. Reg. 712/92, s. 21; O. Reg. 307/98, s. 15 (2).

(3) For purposes of this section,

"modified Ontario wind up liability" means the Ontario wind up liability excluding any liab benefits described in subsection 47 (2). O. Reg. 712/92, s. 21.

(4) For purposes of this section,

"Guaranteed Benefit liability" means the total liability of the plan for benefits guaranteed by Guarantee Fund and other amounts guaranteed by the Guarantee Fund, excluding the am which the contributions made by any member, plus interest, for such guaranteed benefits amounts exceeds the liability for the member's guaranteed benefits and other amounts. (712/92, s. 21.

(5) If, on the date an order is made under subsection 83 (1) of the Act in respect of a plaı Ontario assets of the plan are less than its Ontario wind up liability, the administrator shall pay person entitled on wind up to payment of benefits guaranteed by the Guarantee Fund or other a guaranteed by the Guarantee Fund, the greater of,

(a) the sum of,

(viii) des rajustements indexés qui n'ont pas été effectués à la date de prise d'effet de la liquidation,

(ix) Abrogé : Règl. de l'Ont. 576/06, par. 6 (4).

(x) des augmentations futures des prestations,

(xi) des prestations fournies aux termes d'un contrat de rente garanti ou d'un contrat accordé en vertu de la *Loi relative aux rentes sur l'État* (Canada), si le contrat a été accordé avant le 1er janvier 1988;

c) en augmentant le passif déterminé aux termes de l'alinéa b) relativement à chaque participant et ancien participant de façon que le passif rattaché à chacun d'eux ne soit pas inférieur à la valeur minimale des cotisations obligatoires versées au régime par le participant ou l'ancien participant;

d) en attribuant le passif déterminé aux termes des alinéas b) et c) aux éléments suivants :

(i) l'emploi en Ontario,

(ii) l'emploi dans chaque autorité législative désignée,

(iii) l'emploi autre que celui visé aux sous-alinéas (i) et (ii);

e) en déterminant la différence entre l'actif de solvabilité et la valeur des cotisations facultatives supplémentaires déterminée aux termes de l'alinéa a), et en attribuant cette différence aux catégories d'emploi prévues à l'alinéa d), en proportion du passif attribué à chacune d'elles aux termes de l'alinéa d);

f) en déterminant le passif ontarien de liquidation;

g) si l'actif ontarien dépasse le passif ontarien de liquidation, en imputant d'abord l'actif ontarien à l'élimination de celui-ci et en imputant par la suite le reliquat de l'actif ontarien à la fourniture, selon une base équitable déterminée par la personne qui prépare le rapport et que le surintendant juge acceptable, des prestations incluses dans le calcul du passif de base ontarien, mais non dans celui du passif ontarien de liquidation;

h) en réglant la question de la partie de l'actif du régime attribuée à la fourniture des prestations qui résultent de l'emploi dans chaque autorité législative désignée conformément aux lois de cette autorité législative;

i) Abrogé : Règl. de l'Ont. 342/10, par. 4 (2).

j) en réglant, selon une base équitable, la question de la partie de l'actif du régime attribuée à la fourniture des prestations qui résultent d'autres emplois. Règl. de l'Ont. 142/94, art. 1; Règl. de l'Ont. 342/10, art. 4.

(3) Le rapport de liquidation décrit chaque mesure prise aux termes du paragraphe (2). Règl. de l'Ont. 142/94, art. 1.

(4) Le présent article, tel qu'il existait immédiatement avant la date du Règlement, continue de s'appliquer aux régimes dont la date de prise d'effet de la liquidation est antérieure à la date du Règlement. Règl. de l'Ont. 142/94, art. 1.

31. (1) Le passif qui doit être financé aux termes de l'article 75 de la Loi l'est au moyen de paiements spéciaux annuels qui commencent à la date de prise d'effet de la liquidation et qui sont faits par l'employeur à la caisse de retraite. Règl. de l'Ont. 142/94, art. 1.

(2) Les paiements spéciaux prévus au paragraphe (1) sont, pour chaque exercice, au moins égaux au plus élevé des montants suivants :

a) le montant exigé pendant l'exercice pour financer le passif de l'employeur aux termes de l'article 75 de la Loi, en paiements égaux payables annuellement par anticipation, sur une période maximale de cinq ans;

b) le montant des paiements spéciaux minimaux exigés pour l'exercice au cours duquel le régime est liquidé et déterminés dans les rapports déposés ou présentés aux termes des articles 3, 4, 5.3, 13 et 14, multiplié par le ratio du passif de base ontarien du régime par rapport au total du passif et du passif augmenté du régime, déterminés aux termes des alinéas 30 (2) b) et c). Règl. de l'Ont. 142/94, art. 1.

(3) Les paiements spéciaux visés aux paragraphes (1) et (2) continuent jusqu'à ce que le passif soit financé. Règl. de l'Ont. 142/94, art. 1.

(4) Le paragraphe (5) s'applique au régime admissible ou au régime qui a les antécédents suivants :

1. Un choix a été fait à l'égard du régime en vertu du paragraphe 5.1 (1) ou (2).

2. Le choix a été annulé conformément au paragraphe 5.1 (12).

3. Après la date du choix, mais dans les cinq années qui suivent la date de son annulation, le régime a été liquidé. Règl. de l'Ont. 142/94, art. 1.

(5) Dans le cas d'un régime admissible ou d'un régime qui a les antécédents prévus au paragraphe (4), le passif qui doit être financé aux termes de l'article 75 de la Loi l'est au moyen de paiements spéciaux mensuels faits par l'employeur à la caisse de retraite, sur une période maximale d'un an commençant à la date de prise d'effet de la liquidation. Règl. de l'Ont. 142/94, art. 1.

31.1 (1) Tout passif qui doit être financé aux termes de l'alinéa 75.1 (1) b) ou (2) b) de la Loi l'est au moyen de versements mensuels égaux pendant un maximum de cinq ans ou au moyen de paiements fixés selon un échéancier. Règl. de l'Ont. 116/06, art. 17.

(2) Les versements ou les paiements exigés par le paragraphe (1) sont faits à la caisse de retraite par l'employeur ou par la personne ou l'entité qui est tenue de cotiser pour son compte, le cas échéant, et, s'il y a lieu, par les participants au régime à partir de la date de prise d'effet de la liquidation. Règl. de l'Ont. 116/06, art. 17.

(3) L'échéancier des paiements visé au paragraphe (1) est fixé de la façon suivante :

1. La valeur actuelle des paiements prévus, à la date de prise d'effet de la liquidation, est égale au passif qui doit être financé.

2. La période d'amortissement applicable aux paiements prévus se termine au plus tard cinq ans après la date de prise d'effet de la liquidation.

3. La valeur actuelle des paiements prévus est déterminée selon les taux d'intérêt utilisés dans le rapport de liquidation. Règl. de l'Ont. 116/06, art. 17.

32. (1) Jusqu'à ce que le passif de l'employeur visé à l'article 75 de la Loi ait été financé, l'administrateur du régime fait annuellement réviser le régime et préparer un rapport par une personne autorisée aux termes de l'article 15. Il dépose le rapport dans les six mois qui suivent sa date d'évaluation. Règl. de l'Ont. 142/94, art. 1.

(2) Le rapport exigé par le paragraphe (1) précise les éléments suivants :

a) le gain ou la perte du régime, depuis la date d'évaluation du rapport précédent, résultant de la différence entre la statistique actuarielle réelle et la statistique actuarielle prévue par les hypothèses faites dans le rapport précédent;

b) l'augmentation ou la diminution des paiements spéciaux restants qui élimineront le gain ou la perte visé à l'alinéa a) sur le restant de la période de cinq ans commençant à la date de prise d'effet de la liquidation. Règl. de l'Ont. 142/94, art. 1.

(3) Les paiements spéciaux exigés en raison d'une perte visée à l'alinéa (2) a) sont compris dans les paiements que doit faire l'employeur aux termes de l'article 75 de la Loi. Règl. de l'Ont. 142/94, art. 1.

(4) Lorsqu'un rapport préparé aux termes du présent article indique qu'il ne reste plus de montant à financer, l'excédent peut être versé à l'employeur, sous réserve des exigences de l'article 79 de la Loi. Règl. de l'Ont. 142/94, art. 1.

(a) if the fund holder is a trust to which section 49(1)(b)(ii) applies, the custodian, and

(b) if the fund holder is not such a trust, the fund holder.

(1) An employer shall, within the prescribed period, remit employer and member contributions due to the plan,

(a) in the case of a specified multi-employer plan or a multi-unit plan, to the administrator, and

(b) in the case of any other plan, to the ultimate recipient.

(2) The administrator of a specified multi-employer plan or a multi-unit plan shall, within the prescribed period after receiving the contributions from the employer, remit them to the ultimate recipient.

(3) If the ultimate recipient does not receive the contributions it should receive within the period prescribed with reference to subsection (1)(b) or (2), as the case may be, it shall, within the prescribed period, report that fact in writing to the Superintendent.

(3.1) The ultimate recipient shall monitor the remittances that have been and that should have been received by it so as to be able to give the report required by subsection (3) accurately and in time.

(3.2) The employer or administrator, as the case may be, shall provide to the ultimate recipient, at the prescribed time and in the form required by the Superintendent, a summary of the contributions that it is required by this section to remit and that it expects to remit that will enable the ultimate recipient to comply with this section.

(3.3) If any information provided under subsection (3.2) becomes inaccurate, the employer or administrator shall forthwith provide to the ultimate recipient a revised statement giving the correct information.

(4) Money that an employer is required to pay into a pension fund shall be treated as accruing on a daily basis.

RSA 2000 cE-8 s50;2005 c26 s33

Trust arrangement for contributions

51(1) Where an employer receives or withholds money from an employee under an arrangement whereby the employer will pay the money into a pension fund as the employee's contributions under the pension plan, the employer holds the money in trust for the employee until the employer pays the money into the pension fund.

(2) An employer who is required to pay contributions to a pension fund holds in trust for the beneficiaries of the pension plan an amount equal to the employer contributions due and not paid into the pension fund.

(2.1) An administrator who is required to remit contributions under section 50 holds in trust for the beneficiaries of the pension plan an amount equal to those contributions that remain to be so remitted.

(3) Where a pension plan is terminated or wound up in whole or in part, an employer who is required to pay contributions to the pension fund holds in trust for the members, former members and beneficiaries of the pension plan an amount equal to employer contributions accrued to the date of the termination or winding-up but not yet due.

(4) Subsections (1), (2) and (3) apply whether or not the money has been kept separate and apart from other property of the employer.

(5) Subsections (1) to (4) apply in respect of money to be paid to an insurance business that guarantees benefits under a pension plan.

RSA 2000 cE-8 s51;2005 c26 s34

Deemed trust for unremitted contributions

52(1) In this section, "security interest" has the meaning given to it in the *Personal Property Security Act*.

(2) Subject to subsection (3) and section 53, money held by an employer in respect of a member, former member or beneficiary of a plan subject to a trust under section 51 is secured by a security interest on the property and assets of the employer to a maximum of $5000 whether or not that property or those assets are subject to other security interests and is payable, without registration or other perfection of that security interest, in equal priority to claims or rights under section 109 of the *Employment Standards Code* as applied with respect to the money so held.

(3) This section and sections 51 and 53 apply notwithstanding any other Act but with the same force as sections 109 and 111 of the *Employment Standards Code*.

(4) The security interest under this section may be enforced by the administrator, who may commence and conduct a proceeding to enforce it.

1992 c13 s34;1996 cE-10.3 s142

(b) the Superintendent

(i) considers that the employer does not intend to make the contributions, and

(ii) notifies the employer in writing of that fact.

(5) Subsection (2) does not apply where employer contributions cease in respect of the sole member or all the members of a plan for connected individuals by reason of the fact that the sole member or all the members have commenced to receive the sole member's pension or all the members' pensions, as the case may be.

(6) The deemed cessation is effective from the last date in respect of which the Superintendent considers that the employer made contributions, and the Superintendent shall specify that date in the notice.

(7) Subsection (2) does not apply to the extent that excess assets are used to provide employer contributions, so long as the plan does not prohibit that use.

(8) Except where the Superintendent gives an approval under section 31(4), the cessation or suspension of contributions by a participating employer to a specified multi-employer plan does not in itself constitute a termination of the part of the plan that relates to that employer and that employer's employees unless the plan provides that it does so, but the plan may not make any such provision to the extent that it would conflict with regulations made with respect to section 80.

(9) Notwithstanding subsection (8), where

(a) all the members of a trade union that holds the right to bargain collectively within the meaning of the *Labour Relations Code* on behalf of those of its members who are members of a specified multi-employer plan, cease to be members of that plan, and

(b) all or a specific and identifiable class or group of the persons referred to in clause (a) do not become members of another plan,

there is a termination of that part of the plan that relates to those persons who do not become members of another plan.

(10) Where an employer withdraws from a multi-unit plan and does not join or establish a successor plan, there is a termination of that part of the plan that relates to that employer and members and former members relating to that employer.

(11) A termination under subsection (1) takes effect when the remedy under section 26 has been exhausted or the time limit for appealing under section 26 has expired without the appeal's having been made.

RSA 2000 cE-8 s70;2005 c26 s39;2005 c26 s39

Superintendent's authority to declare termination of plan

71(1) Where an employer has discontinued or is in the process of discontinuing all or an identifiable part of the employer's business operations, the Superintendent may declare the plan to be terminated or partially terminated, as the case may be, as of the date determined by the Superintendent.

(2) Where the Superintendent declares a plan to be terminated or partially terminated under subsection (1), sections 25 and 26 apply in respect of that declaration as if the Superintendent were cancelling a registration.

1986 cE-10.05 s46;1999 c21 s38

Notification of termination or winding-up

72 An administrator who intends to terminate or to wind up a pension plan shall notify the Superintendent in writing of that intention

(a) at least 60 days before the date of the intended termination or commencement of the winding-up, or

(b) if it is intended to terminate or to commence to wind up the plan within 60 days after the decision to terminate or wind up is made, immediately after the making of that decision.

1986 cE-10.05 s47

Payments to meet solvency requirements

73(1) Subject to this section, within 30 days after the termination of a pension plan, the employer shall pay into the plan all amounts whose payment is required by the terms of the plan or this Act and, without limiting the generality of the foregoing, shall make all payments that, by the terms of the plan or this Act, are due from the employer to the plan but have not been made at the date of the termination and those that have accrued to that date but that are not yet due.

(2) Where, at the termination of a pension plan other than a specified multi-employer plan, a multi-unit plan or a pension plan to which section 48(6) applies, the plan has a solvency deficiency, then, subject to limitations imposed by the tax Act in respect of plans for specified individuals, the employer shall continue to make payments into the plan fund after the termination, and the prescribed rules apply.

(3) Where a multi-unit plan is terminated or a participating employer withdraws from a multi-unit plan and does not join or establish a successor plan that assumes responsibility for the liabilities of the predecessor plan in respect of that employer and there is a solvency deficiency, the employers who are no longer participating employers as a result of that event shall continue to make payments into the plan fund after the termination, and the prescribed rules apply.

(4) Without limiting subsection (3), the employer designated under section 11(1), if any, is and remains liable to make all the payments required by subsection (3) should the employers referred to in subsection (3) fail to make them.

RSA 2000 cE-8 s73;2005 c26 s40

Effect of termination on assets

74(1) On the termination of a pension plan, all contributions made after the initial qualification date in respect of a pension, together with interest, gains and losses described in section 36 on those contributions, shall be applied, to the extent required by the plan and to the extent that they have not already been so applied, toward the provision of the pension.

(2) All assets of the plan that were subject to this Act before the termination continue to be so subject after the termination.

1986 cE-10.05 s49;1999 c21 s40

Entitlements on partial termination

75(1) Subject to subsection (2), where only part of a pension plan is terminated, the entitlements of members and former members affected by the partial termination are not less than those to which they would have been entitled had the whole of the plan been terminated on the date of the partial termination.

(2) Subsection (1) shall not in itself be construed as entitling any person affected by the partial termination to share in any distribution of the surplus assets on the partial termination of the plan, but the plan may provide such entitlements.

1986 cE-10.05 s50;1992 c13 s37

Commencement of winding-up

76(1) The winding-up of a pension plan must commence forthwith after the termination of the plan unless the Superintendent gives the Superintendent's written approval to postponing the winding-up.

(2) The Superintendent may at any time in writing withdraw an approval given under subsection (1), in which case the winding-up must commence forthwith after the withdrawal of the approval.

(3) Within 60 days after the termination of a pension plan, the administrator shall file with the Superintendent a report prepared by a Fellow of the Canadian Institute of Actuaries or any other person who is prescribed, setting out

(a) the nature of the benefits to be provided,

(b) the assets and liabilities of the plan,

(c) the allocation and distribution of the assets of the plan and the priorities for determining the benefits of persons entitled to them, and

(d) any other information that the Superintendent may require to ensure that the termination and winding-up of the plan comply with this Act.

(4) Where the winding-up does not commence forthwith after the termination, the administrator shall, within 60 days after the decision to wind up is made, file an additional report prepared by a person referred to in subsection (3) setting out the information required by subsection (3), but updated in a manner acceptable to the Superintendent.

1986 cE-10.05 s51;1999 c21 s41

Allocation and distribution of assets

77(1) Assets of a pension plan that has been terminated may not, without the prior written consent of the Superintendent, be applied toward the provision of any benefits until the Superintendent has approved the report required by section 76(3) and, where applicable, section 76(4), except that the administrator may, in respect of occurrences giving rise to the benefits before the termination, pay any benefits to persons entitled to them as they become due.

(1.1) Without limiting subsection (1), no assets may be applied or paid from a terminated plan in any manner to any person until

(a) the administrator has applied in writing to the Superintendent for consent to that specific transaction, supported by such documents as the Superintendent requires to determine whether or not the consent should be given, and

(b) the Superintendent has consented in writing to that transaction.

(2) Where

(a) a plan has been terminated,

50(1) Subject to section 59, a pension fund is trust property for the benefit of the beneficiaries of the fund.

50(2) The beneficiaries of the pension fund are members, former members, and any other persons entitled to pensions, pension benefits, ancillary benefits or refunds under the plan.

2002, c.12, s.24.

50(1) Sous réserve de l'article 59, le fonds de pension est un bien en fiducie au profit des bénéficiaires du fonds.

50(2) Les bénéficiaires d'un fonds de pension sont les participants, anciens participants et toutes autres personnes qui ont droit aux pensions, aux prestations de pension, aux prestations accessoires ou aux remboursements en vertu du régime de pension.

2002, c.12, art.24.

51(1) If 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.

51(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.

51(3) An employer who is required by a pension plan 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 employer contributions due and not paid into the pension fund.

51(4) If 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 equal to employer contributions accrued to the date of the wind-up but not yet due under the plan or regulations.

51(5) The administrator of the pension plan has a lien and charge upon the assets of the employer in an amount equal to the amount that is deemed to be held in trust under subsections (1), (3) and (4).

51(6) Subsections (1), (3) and (4) apply whether or not the money mentioned in those subsections is kept separate and apart from other money or property of the employer.

52 If the administrator of the pension plan is the employer and the employer is bankrupt or insolvent, the Superintendent may act as administrator or appoint an administrator of the plan.

51(1) L'employeur qui reçoit de l'argent d'un salarié en vertu d'un arrangement précisant que l'employeur versera cet argent dans un fonds de pension en tant que cotisation du salarié en vertu du régime de pension, est réputé détenir cet argent en fiducie pour le salarié jusqu'à ce que l'employeur verse cet argent au fonds de pension.

51(2) Aux fins du paragraphe (1), l'argent retenu des sommes payables au salarié par l'employeur, que ce soit par déduction dans la feuille de paie ou autrement, est réputé être l'argent que l'employeur a reçu du salarié.

51(3) L'employeur tenu de payer des cotisations à un fonds de pension en vertu d'un régime de pension, est réputé détenir en fiducie pour le compte des bénéficiaires du régime de pension une somme d'argent égale aux cotisations dues par l'employeur et impayées au fonds de pension.

51(4) Si un régime de pension est liquidé totalement ou partiellement, un employeur qui est tenu de payer des cotisations à un fonds de pension est réputé détenir en fiducie pour le compte des bénéficiaires du régime de pension un montant égal aux cotisations de l'employeur accumulées à la date de la liquidation mais pas encore dues en vertu du régime ou des règlements.

51(5) L'administrateur d'un régime de pension a sur les éléments d'actif de l'employeur un privilège et une charge d'un montant égal au montant réputé être détenu en fiducie en vertu des paragraphes (1), (3) et (4).

51(6) Les paragraphes (1), (3) et (4) s'appliquent, peu importe que l'argent y mentionné soit ou ne soit pas gardé séparément et à l'écart d'autres sommes ou biens de l'employeur.

52 Si l'employeur qui est l'administrateur du régime de pension est en faillite ou insolvable, le surintendant peut agir à titre d'administrateur ou nommer un administrateur du régime.

65(1) Upon wind-up of a pension plan, in whole or in part, an employer required to make contributions to the pension fund shall pay into the fund

(a) an amount equal to the total of all payments that, under this Act, the regulations and the plan have accrued to and including the date of the wind-up, whether or not payment of such money is due on that date, and

(b) an amount equal to all payments that under this Act, the regulations and the plan are due from the employer to the pension fund but that have not been paid at the date of wind-up.

65(1.1) For the purpose of paragraph (1)(a), if a pension plan is wound up, in whole or in part, and as of the date of the wind-up the market value of the investments held by the plan does not equal or exceed its solvency liabilities, the employer shall pay into the fund in accordance with subsection (4), an amount so that

(a) where the plan is wholly wound up, the market value of investments held by the plan equals its solvency liabilities, or

(b) where the plan is wound up in part, the market value of the investments held by the plan attributable to that portion of the plan being wound up equals its solvency liabilities for that part,

and such amount required to be paid shall be deemed to have accrued as of the effective date of the wind-up.

65(1.2) Subsection (1.1) does not apply to a defined benefit plan established under one or more collective agreements or a trust agreement in which the requirement that an employer's contributions, or a person required to make contributions on behalf of an employer, to a pension fund are limited to a fixed amount established in a collective agreement or a trust agreement.

65(2) For the purposes of subsection (1), the amount required to be paid shall be deemed to accrue on a daily basis.

65(3) The employer shall pay the amounts required under subsection (1), other than an amount determined pursuant to subsection (1.1), to the pension fund in the manner and on the terms prescribed.

65(1) À la liquidation totale ou partielle d'un régime de pension, un employeur qui est tenu de cotiser au fonds de pension doit verser au fonds

a) un montant égal au total de tous les paiements qui, en vertu de la présente loi, des règlements et du régime, sont accumulés jusqu'à la date de la liquidation inclusivement, que le paiement de ces sommes soit dû ou non à cette date, et

b) un montant égal à tous les paiements qui, en vertu de la présente loi, des règlements et du régime sont dus par l'employeur au fonds de pension mais qui n'ont pas été payés à la date de la liquidation.

65(1.1) Aux fins de l'alinéa (1)a), si un régime de pension est liquidé, totalement ou partiellement, et qu'à la date de la liquidation, la valeur marchande des placements du régime est inférieure à ses passifs de solvabilité, l'employeur doit verser au fonds conformément au paragraphe (4), un montant dont le paiement est requis et qui est réputé s'accumuler à la date réelle de la liquidation et, ce montant doit être suffisant de façon à produire ce qui suit :

a) dans le cas d'une liquidation totale, pour que la valeur marchande des placements du régime soit égale à ses passifs de solvabilité;

b) dans le cas d'une liquidation partielle, pour que la valeur marchande des placements attribuables à la partie du régime qui est liquidée soit égale à ses passifs de solvabilité imputables à cette partie du régime.

65(1.2) Le paragraphe (1.1) ne s'applique pas à un régime de prestation déterminée établi en vertu d'une ou de plusieurs conventions collectives ou d'une convention fiduciaire qui limitent les cotisations au fonds de pension faites par l'employeur ou les cotisations faites pour le compte de l'employeur à un montant fixe.

65(2) Aux fins du paragraphe (1), le montant dont le paiement est requis est réputé s'accumuler sur une base journalière.

65(3) L'employeur doit payer au fonds de pension les montants requis en vertu du paragraphe (1), autre que le montant dont il est question au paragraphe (1.1), de la manière et dans les conditions prescrites.

65(4) Where a pension plan is wound up, in whole or in part, and an amount under subsection (1.1) is determined to be owing and the employer is not insolvent,

(a) the employer shall fund the amount over a period of not more than five years after the effective date of the wind-up,

(b) the administrator shall continue to file annual information returns and actuarial valuation reports as required under this Act until the amount has been retired, and

(c) subject to subsections 62(2) and (7), the assets of the plan shall be distributed in the manner and to the extent prescribed.

65(5) If a plan is wound up, in whole or in part, and an amount is owing pursuant to subsection (1.1), a schedule of special payments shall be established, subject to the approval of the Superintendent, for the amount to be retired over a period of not more than five years, commencing as of the effective date of the wind-up.

65(6) For the purposes of subsection (1.1), the amount shall be considered to have been retired if a subsequent actuarial valuation reveals that the market value of investments of the plan or of the part of the plan that was wound up, as the case may be, equals or exceeds its solvency liabilities.

2007, c.51, s.1.

66(1) Upon the wind-up of a pension plan in whole or in part, if insufficient funds are available to pay the pensions and benefits under the plan, the amount of the pension or benefit to which a person is entitled may be reduced in accordance with the regulations.

66(2) Nothing in subsection (1) prevents the Superintendent from ordering a reduction in pensions and benefits under a pension plan before the wind-up of the plan is completed if the Superintendent is of the opinion, upon reasonable and probable grounds, that there are or are likely to be insufficient funds available to pay the pensions and benefits under the plan.

2007, c.51, s.2.

67(1) If a pension plan is wound up in whole or in part, after satisfaction of all pensions, pension benefits and an-

65(4) Lorsqu'à la liquidation totale ou partielle du régime de pension, il est déterminé qu'un montant est dû au titre du paragraphe (1.1) et que l'employeur est solvable,

a) l'employeur doit combler le déficit de solvabilité dans un délai maximal de cinq ans en ayant pour point de départ la date réelle de la liquidation du régime;

b) l'administrateur doit continuer à déposer les rapports annuels de renseignements et les rapports d'évaluation actuarielle qui sont exigés par la présente loi jusqu'à ce que le déficit de solvabilité soit comblé;

c) sous réserve des paragraphes 62(2) et (7), les actifs du régime doivent être distribués de la manière et dans la mesure prescrites.

65(5) Si le régime de pension est liquidé totalement ou partiellement, et qu'un montant est dû au titre du paragraphe (1.1), un calendrier des paiements spéciaux doit être établi, sujet à l'approbation du surintendant. Les paiements spéciaux doivent être faits dans un délai maximal de cinq ans en ayant pour point de départ la date réelle de la liquidation du régime.

65(6) Aux fins du paragraphe (1.1), le déficit de solvabilité est considéré comme comblé si une évaluation actuarielle subséquente révèle que la valeur des placements du régime de pension qui est liquidé ou de la partie du régime de pension qui est liquidée n'est plus inférieure à ses passifs de solvabilité.

2007, c.51, art.1.

66(1) À la liquidation totale ou partielle d'un régime de pension, lorsque des fonds disponibles pour le paiement des pensions et des prestations en vertu du régime sont insuffisants, le montant de la pension ou de la prestation à laquelle une personne a droit peut être réduit conformément aux règlements.

66(2) Rien au paragraphe (1) n'empêche le surintendant d'ordonner la réduction des pensions et des prestations d'un régime de pension avant que la liquidation ne soit complétée si, en se fondant sur des motifs raisonnables et probables, il est d'avis qu'il y une insuffisance de fonds disponibles pour verser les pensions ou les prestations prévues au régime de pension ou qu'une telle insuffisance de fonds est vraisemblable.

2007, c.51, art.2.

67(1) Si un régime de pension est liquidé totalement ou partiellement, après avoir réglé toutes les pensions, pres-

(5) Where a member of a multi-employer pension plan is represented by a trade union that, in accordance v Union Act ceases to represent the member, and the member joins a different pension plan, a member is ent terminate membership in the first plan.

(6) Subsection (5) does not apply where there is a reciprocal agreement respecting the two pension plans. *F 44; 2002, c. 21, s. 20.*

Notice of overdue contribution

45 (1) The administrator of a pension plan or, if there is an agent of the administrator responsible for receiv contributions under the pension plan, the administrator and the agent shall give written notice to the Superi contribution that is not paid when due.

(2) The administrator and the agent shall give the notice to the Superintendent within sixty days after the d the administrator or the agent first became aware of the failure to pay the contribution. *R.S., c. 340, s. 45.*

Employee and employer contributions to be held in trust

46 (1) Where an employer receives money from an employee pursuant to an arrangement that the employe money into a pension fund as the employee's contribution under the pension plan, the employer shall hold t trust for the employee until the employer pays the money into the pension fund.

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

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

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

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

(5A) The lien referred to in subsection (5) is not a charge against a parcel registered pursuant to the Land R until a certificate evidencing the lien has been recorded in the judgment roll.

(5B) The Administrator may record a notice of the lien referred to in subsection (5) in the parcel register of owned by a person for whom or on account of whom the amounts are required to be held in trust pursuant t (1), (3) and (4) to which the lien applies and shall thereupon serve that person with a copy of the lien and r particulars.

(5C) Upon satisfaction of the lien including payment of the fees for recording the lien and the release, the A shall record a release of the lien in the parcel registers in which notice of the lien was recorded.

(6) Money required by subsection (1), (3) or (4) to be held in trust shall be kept separate and apart from ot property of the employer.

(7) Subsections (1) to (6) apply mutatis mutandis in respect of money to be paid to an insurance company t guarantees pension benefits under a pension plan. *R.S., c. 340, s. 46; 1992, c. 27, s. 2; 2001, c. 6, s. 120; s. 21.*

BENEFITS

Minimum commuted value

47 (1) Where the commuted value of a former member's deferred pension accrued prior to the first day of J is less than the value of the contributions the former member was required to make under the pension plan date plus interest credited to the contributions, the former member is entitled to have the commuted value pension increased so that the commuted value is equal to the value of the contributions and the interest.

(5) Membership in a pension plan that is wound up, in whole or in part, includes the period of notice of term employment required pursuant to the Labour Standards Code.

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

(7) For the purpose of this Section, where the consent of an employer is an eligibility requirement for entitle receive an ancillary benefit, the employer is deemed to have given the consent.

(8) This Section and Section 78 apply in respect of the windup, in whole or in part, of a pension plan where date of the windup is on or after the coming into force of this subsection.

(9) A person affected by a windup who elects to receive a benefit under subsection (1) is not entitled to pay refund of contributions under subsection (3) or (4) of Section 68.

(10) This Section does not apply in respect of a multi-employer pension plan. *R.S., c. 340, s. 79; 2002, c. 2*

Employer's payments on wind up

80 (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund a equal to the total of all payments that, pursuant to this Act, the regulations and the pension plan, are due o and that have not been paid into the pension fund.

(1A) *Where, at the wind up on or after May 1, 2007, of a pension plan in whole or in part, other than a mult pension plan, the assets in the pension fund are less than the value of the benefits provided under the plan Section 79, the employer shall make such payments into the pension fund of the amount necessary to fund provided under the plan and under Section 79.*

(2) The employer shall pay the monies due pursuant to subsections (1) and (1A) in the prescribed manner a prescribed time. *R.S., c. 340, s. 80; 2007, c. 49, s. 1.*

Application of Act after wind up

81 The pension fund of a pension plan that is wound up continues to be subject to this Act and the regulatio *employer satisfies its obligations under Section 80 and* all the assets of the pension fund have been disburse *340, s. 81; 2007, c. 49, s. 2.*

Reduction of benefits

82 Where the money in a pension fund is not sufficient to pay all the pension benefits and other benefits on the pension plan, in whole or in part, the pension benefits and other benefits shall be *distributed and, if app* reduced in the prescribed manner. *R.S., c. 340, s. 82; 2007, c. 49, s. 3.*

SURPLUS

Consent of Superintendent to pay surplus

83 (1) No money that is surplus shall be paid out of a pension fund to the employer without the prior conser Superintendent.

(2) An employer who applies to the Superintendent for consent to payment of money to the employer out o fund shall transmit notice of the application, containing the prescribed information, to

(a) each member and each former member;

(b) each trade union that represents members; and

(c) any individual who is receiving payments out of the pension fund.

(3) A person to whom notice has been transmitted pursuant to subsection (2) may make written representa Superintendent with respect to the application within thirty days after receiving the notice. *R.S., c. 340, s. 8*

23(4) The spouse or common-law partner may, after being given prescribed information accordance with the regulations, waive his or her entitlement to a joint pension by signing and fil with the administrator of the pension plan a waiver in a form approved by the superintendent.

Revoking waiver

23(5) A spouse or common-law partner who has provided a waiver under subsection (4) m revoke the waiver at any time before the pension commences by filing a written revocation with t administrator.

S.M. 1992, c. 36, s. 8; S.M. 2001, c. 37, s. 7; S.M. 2005, c. 2, s. 14.

No termination of survivor benefits

24 No pension plan shall provide that a pension payable to the surviving spouse or comm law partner of a member terminates in the event the surviving spouse or common-law partner

(a) remarries or subsequently marries; or

(b) subsequently enters into a common-law relationship.

S.M. 1992, c. 36, s. 9; S.M. 2001, c. 37, s. 7; S.M. 2005, c. 2, s. 15.

Rate of interest on defined benefit pension plan

25(1) Every defined benefit pension plan shall provide that, after January 1, 1984, interest a rate prescribed in the regulations shall be credited, not less frequently than once every 12 months, contributions made by members of the pension plan after December 31, 1983.

Consistent methods of calculating interest

25(2) The method of determining the rate of interest to be credited to the contributions members of a defined benefit pension plan shall be consistent for the defined benefit pension p from year to year and shall not be changed or varied without the prior approval of the superintende

Interest on other plans

25(3) A pension plan other than a defined benefit pension plan must provide for interest to credited on member and employer contributions in accordance with the regulations.

S.M. 1992, c. 36, s. 10; S.M. 2005, c. 2, s. 16.

Funding and solvency of plans

26(1) A pension plan filed for registration in accordance with section 18 shall contractually prov for,

(a) funding, in accordance with the tests for solvency prescribed by the regulations, that adequate to provide for payment of all pension and other benefits required to be paid under t terms of the plan;

(b) investment of the pension fund in accordance with this Act and the regulations.

Restriction on payments out of plan

26(2) Subject to subsections (2.1), (2.2) and (2.3), no funds, including surplus, in a pension p shall be paid out of the plan to an employer unless the commission consents thereto in writing.

Conditions for payment of surplus to employer

26(2.1) The commission shall not under subsection (2) consent to the payment of surplus to employer out of a pension plan, unless

(a) one of the following conditions is satisfied:

(i) the employer has demonstrated to the satisfaction of the commission that the employe entitled under the terms governing the plan to the surplus,

(ii) a judge of the Court of Queen's Bench, upon application of the employer, has determin that the employer is entitled under the terms governing the plan to the surplus,

(iii) the employer has made a proposal, in accordance with the regulations, to the membe and other beneficiaries of the plan for the payment of the surplus, and has provided to t commission the following written consents to the proposed payment:

(A) the consent of every bargaining agent who represents members in relation to t proposed payment,

(B) the consents of at least 2/3 of the active members, if any, who are not represented a bargaining agent in relation to the proposed payment,

(C) the consents of at least 2/3 of the non-active members, if any, who are r represented by a bargaining agent in relation to the proposed payment, and

(D) the consents of such number or proportion, as determined by the superintendent, the other beneficiaries who have an absolute entitlement to a pension or other bene under the plan;

(b) all facts relevant to the payment, including the amount of the assets and liabilities of t pension plan and such other relevant information as the superintendent may require, have be disclosed to all members of the pension plan; and

(c) the employer submits a written application for the payment that contains or has attached t information required by the regulations.

For the purpose of subclause (a)(iii), **"bargaining agent"** has the same meaning as in *The Labo Relations Act*, and a bargaining agent may represent its members in relation to a proposed paym of surplus, unless the relevant collective agreement provides otherwise.

26(2.2) Repealed, S.M. 2005, c. 2, s. 17.

Maximum surplus payable

26(2.3) The maximum amount of any surplus payable to an employer out of a pension plan unc this section is that portion of the surplus that is in excess of

(a) two times the total amount of the employer's current annual service contributions; or

(b) 125% of the total amount of the liabilities of the pension plan determined on the basis factors that would apply if the pension plan were being terminated or wound up on the date payment, less the total amount of those liabilities determined on the basis of factors applying the assumption that the pension plan is not being so terminated or wound up;

whichever is the greater, but this subsection does not apply where the payment of surplus occ upon the termination or winding-up of the pension plan.

Trustee Act does not apply

26(2.4) If the requirements of this Act and the regulations have been met for making a payment surplus in accordance with a proposal made under subclause (2.1)(a)(iii), the payment may be ma despite the provisions of *The Trustee Act*.

Liability on winding up of plan

26(3) Upon the termination or winding up of a pension plan filed or required to be filed registration under section 18, the employer is liable to pay all amounts that would otherwise ha been required to be paid, up to the date of the termination or winding up, to meet the prescribed te for solvency.

Notification of termination of plan

26(4) Before a pension plan that has been or is required to be filed for registration unc section 18 is wound up or terminated, the person responsible under section 18 for filing the ann information return in respect of the pension plan shall notify the commission in writing of the date of which the pension plan will be wound up or terminated and no pension plan shall be wound up terminated as of a date prior to the date on which the commission is notified.

No reduction of accrued benefits

26(5) A pension plan amendment that adversely affects the pension or the pension benefit cre of any person in respect of a period of employment or membership in the plan before the effect date of the amendment is void, unless it meets prescribed requirements and

(a) the amendment is necessary for the plan to comply with the *Income Tax Act* (Canada) a does not affect any pension or pension benefit credit any more than is necessary for the plan comply; or

(b) the amendment

(i) is permitted by the terms of a multi-unit pension plan,

(ii) is necessary for the plan to meet prescribed solvency requirements, and does not aff any pension or pension benefit credit any more than is necessary for the plan to meet thc requirements, and

(iii) is approved in writing by the superintendent.

S.M. 1992, c. 36, s. 11; S.M. 2005, c. 2, s. 17.

Definitions

26.1(1) In this section,

"collective agreement" means a collective agreement as defined in *The Labour Relations A* (« convention collective »)

"multi-unit pension plan" means a pension plan designated as a multi-unit pension plan unc subsection (2); (« régime multipartite »)

"participating employer" means an employer who is contractually required to ma contributions to a multi-unit pension plan. (« employeur participant »)

Designation of multi-unit pension plan

26.1(2) Upon the written request of the administrator of a pension plan, the superintendent m designate the plan as a multi-unit pension plan if the plan complies with this Act and the regulatic and

(a) the plan is organized and administered for employees of one employer, who is required unc two or more collective agreements to make contributions to the plan;

(b) the plan

(i) is organized and administered for employees of two or more employers who are requi under one collective agreement to make contributions to the plan, and none of wh employs more than 95% of the active members of the plan, and

(ii) provides a pension determined with reference to periods of employment with thc employers; or

(c) the plan

(i) is organized and administered for employees of two or more employers each of whom required by two or more collective agreements to make contributions to the plan, and none whom employs more than 95% of the active members of the plan, and

(ii) provides a pension determined with reference to periods of employment with thc employers.

For the purpose of this subsection, two or more employers who are affiliated with each other for t purposes of *The Corporations Act* are to be treated as one employer.

26.1(3) Repealed, S.M. 2005, c. 2, s. 18.

Board of trustees

26.1(4) The administrator of a multi-unit pension plan must be a board of trustees with

(a) at least as many trustees representing members of the plan as there are trustees represent the participating employer or employers; and

(b) at least one trustee representing non-active members of the plan.

Transfer to another plan

26.1(5) Where an employee who is a member of a multi-unit pension plan is transferred to otl employment governed by another pension plan of a participating employer, the employee m immediately join the other pension plan.

Employment with two or more employers

26.1(6) In determining when an employee who has been employed at different times by two more participating employers is eligible or required to become a member of a multi-unit pension pl all those periods of employment must be treated as one period of continuous employment with c employer.

26.1(7) and (8) Repealed, S.M. 2005, c. 2, s. 18.

Forfeiture of minimal benefit

26.1(9) If

(a) a member's pension benefit credit under a multi-unit pension plan is less than a prescrib amount;

(b) no contributions have been made by or behalf of the member for a period of two years; and

(c) the administrator is unable to locate the member, having made a reasonable effort to do so;

the member's pension benefit credit may be forfeited to the plan in accordance with the regulations

Liability of employer limited

26.1(10) A participating employer's liability for funding the benefits of a multi-unit pension plan limited to the amount the participating employer is contractually required to contribute to the plan.

Required provisions in multi-unit plans

26.1(11) A multi-unit pension plan shall contain provisions, consented to in writing by t superintendent,

(a) specifying the methods of allocation and distribution of the assets of the plan and the priorit for determining the benefits of members entitled to them, where the assets of the plan are i sufficient to pay all benefits on the winding-up of the plan;

(b) providing for the allocation of surplus assets on the winding-up of the plan;

(c) outlining the consequences of a participating employer's withdrawal from the plan, in respect the funding and vesting of the benefits of members affected by the withdrawal;

(d) specifying, in accordance with the regulations, the circumstances when a member ceases be an active member of the plan;

(e) specifying how the plan will meet the tests for solvency prescribed in the regulations;

(f) outlining the consequences of a participating union's withdrawal from the plan, in respect of t funding and vesting of the benefits of members affected by the withdrawal; and

(g) setting out a process for selecting those trustees of the plan representing the employer employers, and those trustees of the plan representing the members of the plan.

No partial termination

26.1(12) The suspension or cessation of contributions by a participating employer to a multi-u pension plan does not constitute a partial termination of the plan unless

(a) the plan expressly provides that it does; or

(b) the superintendent, upon application by the administrator, declares that it does.

S.M. 1992, c. 36, s. 12; S.M. 2005, c. 2, s. 18.

Contents of plan

27 In any pension plan filed for registration in accordance with section 18,

(a) the conditions for membership shall not, in the opinion of the commission, prevent the grad accrual of benefits or the spreading of the employer's contributions over an employee's years employment in the class covered by the plan; and

(b) provisions for computation of the employer's contributions and of the pension and, in the ca of a deferred profit-sharing pension plan, the formula governing allocation of contributions a surplus amongst the members of the plan shall not be variable at the discretion of the employer

unless in the opinion of the commission the circumstances of the plan warrant otherwise.

S.M. 2005, c. 2, s. 19.

Trust for contributions

28(1) Any sum received by an employer from an employee pursuant to an arrangement for t payment of such sum by the employer into a pension plan as the employee's contribution ther shall be deemed to be held by the employer in trust for payment of the sum after his receipt ther into the pension plan as the employee's contribution thereto, whether or not the amount thereof h been kept separate and apart by the employer and the employer shall not appropriate or convert a part thereof to his own use or to any use not authorized by the trust.

Payroll deductions

28(2) For the purposes of subsection (1), any sum withheld by an employer for pension purpos whether by payroll deduction or otherwise, from moneys payable to an employee shall be deemed be a sum received by the employer from the employee.

Employer's contributions in trust

28(3) Any sum required to be paid into a pension plan by an employer as the employe contribution to the pension plan shall, when due under the pension plan, be deemed to be held by t employer in trust for payment of the same into the pension plan in accordance with the pension pl and this Act and the regulations as the employer's contribution, whether or not the amount ther has been kept separate and apart by the employer and the employer shall not appropriate or conv any part of the amount required to be paid to the pension plan to his own use or to any use r authorized by the terms of the pension plan.

Enforcement of trust

28(4) Notwithstanding that the government is not a beneficiary of the trusts deemed to be creat under this section, the minister, for and on behalf of the government, may enforce those trusts and that purpose the government has a lien and charge in the amount of the sums deemed to be held trust on the assets of the employer that in the ordinary course of business would be entered in t accounts of the business of the employer whether so entered or not.

Payment of trust moneys

28(5) Where under this section the government recovers any moneys deemed to be held in tr under this section, the moneys shall be paid, after deductions of any costs and disbursemer incurred by the government in recovering the moneys, to the administrator or, if the employer is t administrator, to the commission as the agency to hold the moneys and disburse the pension bene under the pension plan.

Notice to be given of any late payment by employer

28(6) Where an employer who is required under a pension plan to remit a sum fails to do within 60 days after the date required under the plan, the administrator or fund holder to whom t sum was to be remitted shall immediately notify the superintendent in writing.

28(7) Repealed, S.M. 2005, c. 2, s. 20.

S.M. 1997, c. 15, s. 5; S.M. 2005, c. 2, s. 20.

Who may be administrator

28.1(1) A pension plan must be administered by the following person or body:

(a) in the case of a multi-unit pension plan, by a board of trustees in accordance w subsection 26.1(4);

(b) in the case of a jointly trusteed plan, by a board of trustees with at least as many truste representing members of the plan as there are trustees representing the employer;

(c) in the case of a simplified money purchase pension plan, by an administrator as defined in t regulations;

(d) in the case of a plan with fewer than the prescribed number of members, by the employer;

(e) where an Act of the Legislature makes a board, agency or commission responsible for administration, by that board, agency or commission;

(f) in any other case, by a pension committee or as otherwise prescribed.

Administration by superintendent or appointee

28.1(1.1) Subsection (1) does not apply to a pension plan while it is being administered by t superintendent or a person appointed under subsection 8(3).

Pension committee

28.1(1.2) A pension plan that is required by clause (1)(f) to be administered by a pension committ must provide for the appointment or election of the committee members in accordance with t regulations, and, in doing so, must ensure that

(a) the active members, as a group, are required to appoint or elect at least one voting member the committee;

(b) the non-active members, as a group, are required to appoint or elect at least one voti member of the committee;

(c) each of those groups may appoint or elect one additional non-voting member of t committee; and

(d) committee members are given prescribed rights and obligations.

Care, diligence and skill

28.1(2) The administrator of a pension plan shall exercise the care, diligence and skill in t administration of the plan and the pension fund that a person of ordinary prudence would exercise dealing with the property of another person.

Investing pension assets

28.1(2.1) The administrator of a pension plan shall invest the assets of the pension fund, a manage those investments, in accordance with the regulations and in a manner that a reasonal and prudent person would apply in investing and managing a portfolio of investments of a pens fund.

Non-financial considerations

28.1(2.2) Unless a pension plan otherwise provides, an administrator who uses a non-financ criterion to formulate an investment policy or to make an investment decision does not there commit a breach of trust or contravene this Act if, in formulating the policy or making the decision, or she has complied with subsections (2) and (2.1).

Special knowledge and skill

28.1(3) The administrator of a pension plan shall use in the administration of the plan and in t administration and investment of the pension fund all relevant knowledge and skill that t administrator possesses or, by reason of the administrator's profession, business or calling, ought possess.

Application of subsection (3)

28.1(4) Subsection (3) applies with necessary modifications to a member of a board, agency commission made responsible by an Act of the legislature for the administration of a pension plan.

28.1(7) L'administrateur d'un régime de retraite qui emploie ou nomme un mandataire le choisit personnellement et doit être convaincu de son aptitude à accomplir l'acte pour lequel il est employé ou nommé. L'administrateur exerce sur son mandataire une surveillance prudente et raisonnable.

Employé ou mandataire

28.1(8) Les normes qui s'appliquent à l'administrateur en vertu des paragraphes (2), (2.1), (3) et (5) s'appliquent également aux employés ou au mandataire de l'administrateur.

Prestations de l'administrateur

28.1(9) L'administrateur d'un régime de retraite n'a pas droit à d'autres prestations du régime de retraite en dehors des prestations de retraite, des prestations accessoires, d'un remboursement de cotisations et des honoraires et dépenses connexes à l'administration du régime de retraite qui sont permis par la common law ou prévus par le régime de retraite.

Membres d'un conseil ou d'un comité

28.1(10) Si l'administrateur est un conseil, un comité ou un autre groupe de personnes, le paragraphe (9) s'applique avec les adaptations nécessaires à chaque membre de cette entité.

Paiement au mandataire

28.1(11) Le mandataire de l'administrateur d'un régime de retraite n'a droit qu'au paiement sur la caisse de retraite des honoraires et dépenses habituels et raisonnables pour les services qu'il a rendus à l'égard du régime de retraite.

L.M. 1997, c. 15, art. 6; L.M. 2005, c. 2, art. 21.

Obligation de fournir des renseignements

29 Conformément aux règlements, l'administrateur d'un régime de retraite fournit des renseignements au sujet du régime et des prestations qu'il prévoit aux personnes et dans les circonstances que précisent ces règlements.

L.M. 2005, c. 2, art. 22.

Communication de documents par l'administrateur

30 L'administrateur d'un régime de retraite communique, conformément aux règlements, aux personnes et dans les circonstances que ceux-ci précisent, les documents se rapportant au régime.

L.M. 2005, c. 2, art. 22.

Protection des sommes du régime

31(1) Sous réserve du paragraphe (1.1) et de la *Loi sur la saisie-arrêt*, les sommes indiquées ci-dessous ne peuvent faire l'objet d'une exécution, d'une saisie ni d'une saisie-arrêt et ne peuvent être cédées, grevées, escomptées ni données à titre de sûreté :

a) les sommes portées au crédit d'un régime de retraite ou devant être versées en vertu de celui-ci;

b) les sommes portées au crédit d'un régime réglementaire, ou devant être versées en vertu de celui-ci, dans le cas où aucune somme n'a été transférée ni cotisée à un tel régime si ce n'est en vertu :

(i) du paragraphe 21(13), (13.1) ou (26.2) ou de l'alinéa 31(4)b),

(ii) d'un autre régime réglementaire auquel le présent paragraphe s'applique;

c) les sommes portées au crédit d'un fonds enregistré de revenu de retraite, au sens de l'article 21.4, auquel aucune somme n'a été transférée ni cotisée, à l'exception de sommes transférées en vertu de cet article.

Toute opération ayant pour but la prise des mesures visées plus haut est nulle.

Exceptions

31(1.1) Le paragraphe (1) n'a pas pour effet d'empêcher :

a) que les sommes visées à l'alinéa (1)a) ou b) soient payées ou transférées afin de permettre le partage visé au paragraphe (2);

b) que les sommes visées à l'alinéa (1)c) fassent l'objet d'une exécution, d'une saisie ou d'une saisie-arrêt :

(i) aux fins de l'exécution d'une ordonnance rendue en vertu de la *Loi sur les biens familiaux*,

(ii) par un fonctionnaire désigné au sens de l'article 52 de la *Loi sur l'obligation alimentaire* conformément à la partie VI de cette loi.

c) dans le cas d'un régime de retraite à cotisations déterminées simplifié, par l'administrateur au sens des règlements;

d) dans le cas d'un régime de retraite comptant moins de participants que le nombre réglementaire, par l'employeur;

e) dans le cas où une loi de l'Assemblée législative charge un conseil, un organisme ou une commission de l'administration du régime, par cette entité;

f) dans tous les autres cas, par un comité de retraite ou conformément aux règlements.

Administration par le surintendant

28.1(1.1) Le paragraphe (1) ne s'applique pas à un régime de retraite pendant qu'il est administré par le surintendant ou par une personne nommée en vertu du paragraphe 8(3).

Comité de retraite

28.1(1.2) Les dispositions d'un régime de retraite qui, en application de l'alinéa (1)f), est administré par un comité de retraite prévoient la nomination ou l'élection des membres en conformité avec les règlements et précisent que :

a) les participants actifs doivent collectivement nommer ou élire au moins un des membres ayant droit de vote;

b) les membres non actifs doivent collectivement nommer ou élire au moins un des membres ayant droit de vote;

c) chacun de ces groupes peut nommer ou élire un autre membre n'ayant pas droit de vote;

d) les membres du comité exercent les droits et remplissent les obligations réglementaires.

Soin, diligence et compétence

28.1(2) L'administrateur d'un régime de retraite apporte à l'administration du régime et des fonds de la caisse de retraite le soin, la diligence et la compétence qu'une personne d'une prudence normale exercerait relativement à la gestion des biens d'autrui.

Placement de l'actif du régime

28.1(2.1) L'administrateur d'un régime de retraite place l'actif de la caisse de retraite et gère les placements conformément aux règlements et comme le ferait une personne prudente à l'occasion du placement et de la gestion d'un portefeuille de placement d'une caisse de retraite.

Critères de nature non financière

28.1(2.2) Sauf disposition contraire du régime de retraite, l'administrateur qui utilise des critères de nature non financière pour élaborer une politique de placement ou prendre une décision en matière de placement ne viole ni la présente loi ni ses obligations fiduciaires dans la mesure où il se conforme aux paragraphes (2) et (2.1).

Connaissances et compétences particulières

28.1(3) L'administrateur d'un régime de retraite apporte à l'administration du régime ainsi qu'à l'administration et au placement des fonds de la caisse de retraite toutes les connaissances et compétences pertinentes qu'il possède ou devrait posséder en raison de sa profession, de ses affaires ou de sa vocation.

Application du paragraphe (3)

28.1(4) Le paragraphe (3) s'applique avec les adaptations nécessaires aux membres d'un conseil, d'une commission ou d'un organisme auquel une loi de la province confie l'administration d'un régime de retraite.

Conflit d'intérêts

28.1(5) L'administrateur ne permet pas sciemment que son intérêt entre en conflit avec ses attributions à l'égard du régime de retraite et des fonds de la caisse de retraite.

Emploi de mandataires

28.1(6) Si cela est raisonnable et prudent dans les circonstances, l'administrateur d'un régime de retraite peut employer ou nommer un ou plusieurs mandataires pour accomplir les actes nécessaires à l'administration du régime ainsi qu'à l'administration et au placement des fonds de la caisse de retraite.

Personne de qui relève le mandataire

cotisations patronales sur les années d'emploi d'un employé dans la catégorie couverte par le régime;

b) les dispositions en vue du calcul des cotisations patronales et de la pension et dans le cas d'un régime de retraite à participation différée aux bénéfices, la formule régissant la répartition des cotisations et des surplus parmi les participants au régime ne peuvent être modifiées à la discrétion de l'employeur.

Les mesures indiquées ci-dessus s'appliquent, sauf si la Commission est d'avis que le contexte du régime de retraite ne justifie pas ces mesures.

L.M. 2005, c. 2, art. 19.

Fiducie pour les cotisants

28(1) Les sommes qu'un employeur reçoit d'un employé conformément à une entente en vue du versement de ces sommes par l'employeur à un régime de retraite, à titre de cotisations salariales relatives à ce régime, sont réputées être détenues en fiducie par l'employeur en vue du versement de ces sommes, après qu'il les ait reçues, au régime de retraite, à titre de cotisations salariales au régime, que l'employeur ait ou non confondu ces cotisations avec d'autres sommes. L'employeur ne peut s'approprier ou convertir une partie de ces cotisations pour son usage personnel ou pour tout autre usage non autorisé par la fiducie.

Retenues salariales

28(2) Pour les besoins du paragraphe (1), les sommes qu'un employeur retient des montants payables à un employé, à des fins de pension, notamment par retenue salariale, sont réputées être des sommes que l'employeur reçoit de l'employé.

Cotisations patronales en fiducie

28(3) Les sommes qu'un employeur doit verser à un régime de retraite à titre de cotisations patronales relatives à ce régime sont réputées, lorsqu'elles sont exigibles aux termes du régime de retraite, être détenues en fiducie par l'employeur en vue de leur versement au régime de retraite, à titre de cotisations patronales, conformément au régime, à la présente loi et aux règlements, que l'employeur ait ou non confondu ces cotisations avec d'autres sommes. L'employeur ne peut s'approprier ou convertir une partie du montant devant être versé au régime pour son usage personnel ou pour tout autre usage non autorisé aux termes du régime.

Exécution d'une fiducie

28(4) Même si le gouvernement n'est pas un bénéficiaire des fiducies réputées être constituées en vertu du présent article, le ministre, au nom du gouvernement, peut exécuter ces fiducies. À cette fin, le gouvernement possède un privilège et une charge correspondant au montant réputé être détenu en fiducie à l'égard de l'actif de l'employeur, et qui dans le cadre ordinaire des affaires serait porté au compte des états financiers de l'employeur, qu'il y soit porté ou non.

Sommes en fiducie

28(5) Si le gouvernement, en vertu du présent article, recouvre les sommes réputées être détenues en fiducie en vertu de cet article, celles-ci sont versées à l'administrateur, après déduction des frais et débours que le gouvernement a engagés pour le recouvrement de ces sommes. Toutefois, si l'employeur est l'administrateur, elles sont versées à la Commission en tant qu'organisme détenant les sommes et versant les prestations de pension aux termes du régime de retraite.

Avis de paiement en retard

28(6) Si un employeur est tenu, en vertu d'un régime de retraite, de remettre une somme et qu'il ne la remet pas dans les 60 jours qui suivent l'échéance que prévoit le régime, l'administrateur ou le dépositaire des fonds à qui la somme était destinée en informe immédiatement le surintendant par écrit.

28(7) Abrogé, L.M. 2005, c. 2, art. 20.

L.M. 1997, c. 15, art. 5; L.M. 2005, c. 2, art. 20.

Fonctions d'administrateur

28.1(1) Un régime de retraite est administré :

a) dans le cas d'un régime multipartite, par un conseil d'administration visé au paragraphe 26.1 (4);

b) dans le cas d'un régime de retraite à fiduciaire conjoint, par un conseil d'administration dont le nombre d'administrateurs représentant les participants correspond au moins à celui des administrateurs représentant l'employeur;

a) dont le nombre d'administrateurs représentant les participants au régime correspond au moins à celui des administrateurs représentant les employeurs participants;

b) dont au moins un des administrateurs représente les participants non actifs du régime.

Transfert de régime

26.1(5) L'employé qui participe à un régime multipartite et qui est transféré à un autre lieu de travail régi par un autre régime de retraite de l'employeur participant peut participer immédiatement au régime en question.

Emploi auprès de plusieurs employeurs

26.1(6) Lorsqu'il faut déterminer si un employé qui a travaillé pour le compte de plusieurs employeurs participants à différents moments a le droit ou est tenu de participer à un régime multipartite, toutes les périodes d'emploi sont considérées comme une seule période d'emploi continu auprès d'un employeur.

26.1(7) et (8) Abrogés, L.M. 2005, c. 2, art. 18.

Perte par défaut du crédit de prestations de pension

26.1(9) Le crédit de prestations de pension que prévoit un régime multipartite peut être perdu par défaut au profit du régime conformément aux règlements dans le cas suivant :

a) le crédit de prestations de pension est inférieur au montant réglementaire;

b) aucune cotisation n'a été versée par le participant ou en son nom pendant une période de deux ans;

c) l'administrateur est incapable de retracer le participant après avoir déployé des efforts raisonnables à cette fin.

Responsabilité limitée de l'employeur

26.1(10) La responsabilité de l'employeur participant relativement au financement des prestations d'un régime multipartite se limite au montant qu'il est tenu de verser au régime en vertu d'un contrat.

Dispositions requises

26.1(11) Les régimes multipartites comprennent les dispositions suivantes auxquelles le surintendant consent par écrit, à savoir :

a) des dispositions précisant les méthodes de répartition de l'actif du régime et les priorités en vue de la détermination des prestations auxquelles les participants ont droit, si l'actif du régime ne suffit pas à payer toutes les prestations au moment de la liquidation du régime;

b) des dispositions prévoyant la répartition du surplus de l'actif au moment de la liquidation du régime;

c) des dispositions énonçant les conséquences du retrait d'un employeur participant au régime, à l'égard du financement et de l'acquisition des prestations des participants touchés par le retrait;

d) des dispositions précisant, conformément aux règlements, les circonstances dans lesquelles un participant cesse d'être actif;

e) des dispositions précisant la façon dont le régime satisfera aux exigences en matière de solvabilité établies par règlement;

f) des dispositions énonçant les conséquences du retrait d'un syndicat participant au régime, à l'égard du financement et de l'acquisition des prestations des participants touchés par le retrait;

g) des dispositions établissant une méthode pour choisir les fiduciaires du régime qui représentent l'employeur ou les employés et ceux qui représentent les participants au régime.

Fermeture partielle

26.1(12) La suspension ou la cessation des cotisations patronales à un régime multipartite ne constitue une fermeture partielle du régime que si le régime le prévoit expressément ou que si le surintendant, sur demande en ce sens de l'administrateur, déclare qu'il s'agit d'une fermeture partielle.

L.M. 1992, c. 36, art. 12; L.M. 2005, c. 2, art. 18.

Contenu du régime de retraite

27 Un régime de retraite déposé en vue de son agrément conformément à l'article 18 comprend les mesures suivantes :

a) les conditions s'appliquant à la participation à un régime de retraite ne doivent pas, selon l'avis de la Commission, empêcher l'accroissement graduel des prestations ou l'échelonnement des

26(2.4) Si ont été satisfaites les exigences de la présente loi et des règlements pour que le paiement d'un surplus soit fait conformément à une proposition visée au sous-alinéa (2.1)a)(iii), les dispositions de la *Loi sur les fiduciaires* ne s'appliquent pas.

Responsabilité suite à la liquidation du régime

26(3) Suite à la cessation ou à la liquidation d'un régime de retraite déposé ou devant être déposé en vue de son agrément en vertu de l'article 18, l'employeur est responsable du paiement des sommes dont le versement aurait été par ailleurs exigible afin de satisfaire aux critères de solvabilité réglementaires. L'employeur doit verser les sommes jusqu'à la date de la cessation ou de la liquidation de ce régime.

Avis de cessation du régime

26(4) Avant la liquidation ou la cessation d'un régime de retraite qui a été déposé ou a dû être déposé en vue de son agrément en vertu de l'article 18, la personne responsable, aux termes de cet article, du dépôt du rapport documentaire annuel relatif au régime de retraite avise par écrit la Commission de la date de la liquidation ou de la cessation du régime de retraite. La liquidation ou la cessation du régime ne peut être effectuée avant que la Commission ait été avisée.

Aucune réduction des prestations accumulées

26(5) Toute modification qui est apportée à un régime de retraite et qui a des répercussions négatives sur la pension ou le crédit de prestations de pension d'une personne à l'égard d'une période d'emploi ou de participation antérieure à l'entrée en vigueur de la modification en question est nulle sauf si elle est conforme aux exigences réglementaires et satisfait à l'une des conditions suivantes :

a) elle est nécessaire afin que le régime respecte la *Loi de l'impôt sur le revenu* (Canada) et les répercussions concernant le crédit de prestations de pension se limitent à celles qui s'imposent pour assurer la conformité du régime à cette loi;

b) elle est permise en vertu d'un régime multipartite, elle est nécessaire pour que ce régime satisfasse aux normes de solvabilité réglementaires, les répercussions concernant le crédit de prestations de pension se limitant à celles qui s'imposent pour assurer la conformité du régime aux normes, et elle est approuvée par écrit par le surintendant.

L.M. 1992, c. 36, art. 11; L.M. 2005, c. 2, art. 17.

Définitions

26.1(1) Les définitions qui suivent s'appliquent au présent article.

« **convention collective** » Convention collective au sens de la *Loi sur les relations du travail.* ("collective agreement")

« **employeur participant** » Employeur qu'un contrat oblige à verser des cotisations à un régime multipartite. ("participating employer")

« **régime multipartite** » Régime de retraite désigné à titre de régime multipartite en vertu du paragraphe (2). ("multi-unit pension plan")

Désignation d'un régime multipartite

26.1(2) À la suite d'une demande écrite en ce sens de la part de l'administrateur du régime, le surintendant peut désigner le régime à titre de régime multipartite s'il est conforme à la présente loi et aux règlements et s'il satisfait à l'une des conditions suivantes :

a) il est conçu et administré à l'intention des employés d'un employeur qui est tenu, en vertu de plusieurs conventions collectives, d'y cotiser;

b) il est conçu et administré à l'intention des employés de plusieurs employeurs qui sont tenus, en vertu d'une convention collective, d'y cotiser et aucun des employeurs participants n'emploie plus de 95 % des participants actifs; de plus, il prévoit une pension déterminée en fonction des périodes d'emploi auprès de ces employeurs;

c) il est conçu et administré à l'intention des employés de plusieurs employeurs qui sont tenus, en vertu de plusieurs conventions collectives, d'y cotiser et aucun des employeurs participants n'emploie plus de 95 % des participants actifs; de plus, il prévoit une pension déterminée en fonction des périodes d'emploi auprès de ces employeurs.

Pour l'application du présent paragraphe, plusieurs employeurs qui appartiennent au même groupe pour l'application de la *Loi sur les corporations* sont considérés comme un seul employeur.

26.1(3) Abrogé, L.M. 2005, c. 2, art. 18.

Conseil d'administration

26.1(4) L'administrateur d'un régime multipartite est un conseil d'administration :

Intérêts imputés à d'autres régimes

25(3) Chaque régime de retraite, à l'exception d'un régime de retraite à prestations déterminées, prévoit que les cotisations salariales et patronales portent intérêt conformément aux règlements.

L.M. 1992, c. 36, art. 10; L.M. 2005, c. 2, art. 16.

Capitalisation et solvabilité des régimes

26(1) Un régime de retraite déposé en vue de son agrément, conformément à l'article 18, prévoit par contrat :

a) la capitalisation, conformément aux critères de solvabilité prescrits par les règlements, des montants suffisants en vue du paiement de la pension et des autres prestations devant être versées aux termes du régime;

b) le placement de la caisse de retraite conformément à la présente loi et aux règlements.

Restrictions relatives aux paiements sur les régimes

26(2) Sous réserve des paragraphes (2.1), (2.2) et (2.3), les fonds d'un régime de retraite, y compris les surplus, ne sont versés sur le régime à un employeur que si la Commission donne son consentement par écrit.

Conditions de paiement d'un surplus à l'employeur

26(2.1) La Commission ne consent au paiement d'un surplus en vertu du paragraphe (2) que si :

a) l'une des conditions suivantes est respectée :

(i) l'employeur a démontré à la Commission, d'une manière qu'elle juge satisfaisante, qu'il a droit au paiement du surplus en vertu des dispositions du régime,

(ii) un juge de la Cour du Banc de la Reine a statué, à la suite d'une requête de l'employeur, que celui-ci a droit au paiement du surplus en vertu des dispositions du régime,

(iii) conformément aux règlements, l'employeur a présenté aux participants et aux autres bénéficiaires du régime une proposition en vue de recevoir le surplus et a fourni à la Commission le consentement écrit à cet effet :

(A) de chaque agent négociateur représentant les participants relativement au paiement éventuel,

(B) d'au moins les deux tiers des participants actifs, le cas échéant, qui ne sont pas représentés par un agent négociateur relativement au paiement éventuel,

(C) d'au moins les deux tiers des participants non actifs, le cas échéant, qui ne sont pas représentés par un agent négociateur relativement au paiement éventuel,

(D) du nombre ou de la proportion des autres bénéficiaires du régime qui ont un droit absolu à des prestations de pension ou autres en vertu du régime, ce nombre ou cette proportion étant déterminé par le surintendant;

b) tous les faits relatifs au paiement, y compris le montant de l'actif et du passif du régime de retraite ainsi que les autres renseignements pertinents qu'exige le surintendant, ont été communiqués à tous les participants au régime de retraite;

c) l'employeur soumet une demande de paiement par écrit qui comprend ou qui a en annexe les renseignements exigés par règlement.

Pour l'application du sous-alinéa a)(iii), « **agent négociateur** » s'entend au sens de la *Loi sur les relations du travail*. Un tel agent peut représenter ses membres relativement au paiement éventuel du surplus, sauf disposition contraire de la convention collective pertinente.

26(2.2) Abrogé, L.M. 2005, c. 2, art. 17.

Montant maximal du surplus

26(2.3) Le montant maximal du surplus payable sur un régime de retraite à un employeur en vertu du présent article équivaut à la partie du surplus qui dépasse le plus élevé des montants suivants :

a) le double du montant total des cotisations annuelles de l'employeur pour services courants;

b) 125 % du montant total du passif du régime de retraite établi selon des facteurs qui s'appliqueraient si la cessation ou la liquidation du régime de retraite avait lieu à la date du paiement, moins le montant total du passif établi selon des facteurs qui s'appliquent, si on suppose que la cessation ou la liquidation du régime de retraite n'a pas lieu.

Toutefois, le présent paragraphe ne s'applique pas si le paiement du surplus a lieu à la cessation ou à la liquidation du régime de retraite.

Non-application de la *Loi sur les fiduciaires*

(3) Where an employer has failed to remit any contributions required by subsection (1) before the expiration of 30 days after the end of the prescribed period mentioned in that subsection, the administrator or the fund holder who should have received them shall immediately notify the superintendent in writing of the failure.

1992, c.P-6.001, s.42.

Sums held in trust

43(1) Notwithstanding any other Act, any sum received by an employer from an employee pursuant to an arrangement for the payment of the sum by the employer into a plan as the employee's contribution to the plan is deemed to be held by the employer in trust to be paid into the plan as the employee's contribution, and the employer shall not appropriate or convert any part of it to the employer's own use or to any use not authorized by the terms of the plan.

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

(3) Notwithstanding any other Act, any sum required to be paid into a plan by an employer as the employer's contribution to the plan is, when due pursuant to the plan, deemed to be held by the employer in trust to be paid into the plan in accordance with the plan, this Act and the regulations as the employer's contribution, and the employer shall not appropriate or convert any part of it to the employer's own use or to any use not authorized by the terms of the plan.

1992, c.P-6.001, s.43.

Investments

44 Assets of a plan must be invested, and the investments must be made in accordance with the regulations.

1992, c.P-6.001, s.44.

Discrimination on the basis of sex

45 The sex of a person shall not be taken into account in determining:

(a) the amount or rate of contributions required to be made by a member of a plan;

(b) the amount of a pension or the commuted value of a pension to which a person is or may become entitled; or

(c) the entitlement of a person to become a member of a plan.

1992, c.P-6.001, s.45.

(6) On the registration of a plan that includes an identifiable class or group of the members of another plan:

(a) years of continuous employment pursuant to the other plan count as years of continuous employment pursuant to the plan; and

(b) the other plan or the part of the other plan that affects the class or group is not to be terminated unless the superintendent determines that the plan should be terminated.

(7) A termination pursuant to subsection (1), (2), (3) or (6) takes effect when the remedies pursuant to sections 22 and 23 have been exhausted.

1992, c.P-6.001, s.51.

Discontinuation of business

52(1) Where, in the opinion of the superintendent, an employer who employs or employed members or former members of a plan has discontinued or is about to discontinue part or all of the employer's business operations, the superintendent may terminate all or part of the plan.

(2) Where the superintendent terminates all or part of a plan pursuant to subsection (1), the termination is deemed to be a cancellation of the registration for the purposes of sections 22 and 23.

1992, c.P-6.001, s.52.

Termination by administrator

53 An administrator who decides to terminate all or part of a plan shall notify the superintendent in writing of the decision immediately after making the decision.

1992, c.P-6.001, s.53.

Payments to and from employer on termination

54(1) Within 30 days after the termination of a plan, the employer:

(a) shall pay into the plan all amounts whose payment is required by the terms of the plan or this Act; and

(b) without limiting the generality of clause (a), shall make all payments that, by the terms of the plan or this Act:

(i) are due from the employer to the plan but have not been made at the date of the termination; or

(ii) have accrued to that date but are not yet due.

(2) Notwithstanding any provision of the plan, where a plan is terminated, no part of the assets of the plan shall revert to the benefit of the employer until provision has been made for the funding or purchase of all pensions and other benefits pursuant to the plan.

1992, c.P-6.001, s.54.

(b) be issued or assigned to the trustees.

(4) The trustees are entitled to deal fully with all the contracts, including the assignment or transfer of each contract to the applicable member

(a) on the termination of the membership,

(b) on the termination of the plan, or

(c) on pension commencement.

(5) This section does not apply to a public sector pension plan.

Remitting of contributions

43 (1) and (2) [Repealed 1999-41-30.]

(3) An employer must, within the prescribed period, remit employer and member contributions due to the pension plan, as follows:

(a) in the case of a multi-employer plan, to the administrator;

(b) in the case of a plan other than a multi-employer plan, to the fund holder.

(4) If the administrator of a multi-employer plan is not the fund holder, the administrator must, on receipt of the contributions, promptly remit them to the fund holder.

(5) If, 60 days following the period allowed by subsection (3) for remitting contributions, an employer has still failed to remit the contributions, the administrator or the fund holder who should have received the contributions must notify the superintendent, in writing and within 30 days, respecting the failure of the employer to remit, whether or not the contributions were subsequently remitted.

(6) Subsection (5) does not apply to a pension plan administered by a board of trustees.

Deemed trust

43.1 (1) An employer must, with respect to a pension plan to which the employer is required to make contributions, keep separate and apart from the employer's own assets

(a) all contributions that are due or owing to the pension plan by the employer,

(b) all amounts that have been deducted by the employer from a member's remuneration and not yet remitted to the fund holder, and

(c) all contributions that have been received by the employer with respect to a member and not yet remitted to the fund holder.

(2) The amounts referred to in subsection (1) are deemed to be held in trust for members of the pension plan, former members, and any other persons entitled to pension benefits, refunds or other payments under the plan in accordance with their interests under the plan.

(3) If there is, in respect of an employer, a proceeding

(a) under the *Companies Creditors Arrangement Act* (Canada),

(b) under the *Winding-up and Restructuring Act* (Canada) or similar provincial legislation,

(c) in relation to liquidation, receivership or secured creditor enforcement, or

(d) in relation to insolvency other than under the *Bankruptcy and Insolvency Act* (Canada),

an amount equal to the amounts deemed to be held in trust under subsection (2) is deemed to be separate and apart and form no part of the estate of the employer, whether or not that amount has in fact been kept separate and apart from the employer's own assets or from the assets of the estate.

Investment requirements

44 (1) Pension plan investments, loans and other pension plan financial decisions must be made in accordance with this Act and the regulations and in the best financial interests of plan members, former members and other plan beneficiaries.

(2) Pension plan assets must be invested in a manner that a reasonable and prudent person would apply in respect of a portfolio of investments made on behalf of another person to whom there is owed a fiduciary duty to make investments without undue risk of loss and with a reasonable expectation of a return on the investments commensurate with the risk.

(3) Pension plan assets must be held and invested in the name of the plan, or in the name of a custodian or trustee in accordance with a custodial agreement, trust agreement or statute that clearly indicates that the investments are held for the benefit of the plan.

(4) A plan may provide that investment decisions may be made by a member respecting

50 (1) An administrator who intends to terminate or wind up a pension plan must give notice of the intention to terminate or wind up, in writing, to the following:

(a) the superintendent;

(b) each member and former member;

(c) each union whose members will be affected;

(d) if a member or former member has died, the surviving spouse, designated beneficiary or personal representative of the estate of the member or former member as ascertainable by the administrator.

(2) The notice required under subsection (1) must

(a) give the effective date of termination or start of the winding up, and

(b) be given

(i) at least 60 days before the date of the intended termination or start of the winding up, or

(ii) immediately after the making of that decision if it is intended to terminate or to start to wind up the plan within 60 days after the decision to terminate or wind up is made.

Payments to meet solvency requirements

51 (1) Within 30 days after the termination of a pension plan, the employer must

(a) pay into the plan all amounts for which payment is required by the terms of the plan or this Act, and

(b) without limiting the generality of paragraph (a), make all payments that, by the terms of the plan or this Act,

(i) are due from the employer to the plan but have not been made at the date of the termination, and

(ii) have accrued to the date of termination but that are not yet due.

(2) If a pension plan, other than a negotiated cost plan, is terminated with a solvency deficiency and the employer is not insolvent,

(a) the employer must fund the remaining solvency deficiency as prescribed,

(b) the administrator must continue to file information returns and actuarial valuation reports as required by section 9 (3) (a) and (b) until the solvency deficiency has been retired, and

(c) subject to section 55, the assets of the plan must be distributed in the manner and to the extent prescribed.

Effect of termination on assets

52 (1) On the termination of a pension plan, all contributions made after the initial qualification date in respect of a pension, together with interest, gains and losses on those contributions, as determined in accordance with the regulations, must be applied towards the provision of the pension as required by the plan and to the extent that those contributions have not already been applied.

(2) All assets of the plan that were subject to this Act before the termination continue to be subject to this Act after the termination.

Entitlements on partial termination

53 (1) If only part of a pension plan is terminated, the entitlements of members and former members affected by the partial termination must not be less than those to which the members and former members would have been entitled had the whole of the plan been terminated on the date of the partial termination.

(2) Subsection (1) does not entitle a person affected by the partial termination of the plan to share in any surplus assets on the partial termination, but the plan may provide for such an entitlement.

Winding up of a pension plan

54 (1) The winding up of a pension plan must begin immediately after the termination of the plan unless the superintendent gives written approval to postpone the winding up.

(2) The superintendent may at any time, in writing, withdraw the approval given under subsection (1), in which case the winding up must begin immediately after the withdrawal of the approval.

(3) Within 60 days after the termination of a pension plan, the administrator must file with the superintendent a report prepared by a Fellow of the Canadian Institute of Actuaries, or other prescribed person, setting out the following:

(a) the nature of the benefits to be provided;