S.C.C. File No. 34308

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

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

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

B E T W E E N:

FTI CONSULTING CANADA ULC, IN ITS CAPACITY AS THE MONITOR OF INDALEX LIMITED, ON BEHALF OF INDALEX LIMITED

APPLICANT
(Respondent)

- and -

UNITED STEEL WORKERS, KEITH CARRUTHERS, LEON KOZIEROK, RICHARD BENSON, JOHN FAVERI, KEN WALDRON, JOHN (JACK) W. ROONEY, BERTRAM MCBRIDE, MAX DEGEN, EUGENE D'IORIO, NEIL FRASER, RICHARD SMITH, ROBERT LECKIE, FRED GRANVILLE, GEORGE L. MILLER, THE CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATES OF THE US INDALEX DEBTORS, and SUN INDALEX FINANCE, LLC

RESPONDENTS
(Appellants/Respondents)

- and –

MORNEAU SOBECO LIMITED PARTNERSHIP and THE SUPERINTENDENT OF FINANCIAL SERVICES

PROPOSED INTERVENERS
(Interveners)

MEMORANDUM OF ARGUMENT OF THE RETIREES IN RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL BY FTI CONSULTING CANADA, ULC, IN ITS CAPACITY AS THE MONITOR OF INDALEX LIMITED, ON BEHALF OF INDALEX LIMITED, APPLICANT

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MEMORANDUM OF ARGUMENT OF THE RETIREES IN RESPONSE TO FTI CONSULTING CANADA ULC

PART I - OVERVIEW AND CONCISE STATEMENT OF FACTS

1. The three respondents in the decision below, FTI Consulting Canada ULC, in its capacity as the Monitor of Indalex Limited ("Indalex"), Sun Indalex Finance LLC and George L. Miller, (the U.S. Bankruptcy Trustee) each seek leave to appeal from the unanimous decision of the Ontario Court of Appeal dated April 7, 2011 (the "Decision"). Each of the Applicants has filed a leave application. This is the Response of the Retirees to the Monitor's memorandum of argument.

2. The Decision dealt with two appeals heard by the Ontario Court of Appeal at the same time. One was an appeal by the Retirees of Indalex who are members of the "Retirement Plan for Executive Employees of Indalex Limited and Associated Companies" (the "Executive Plan"), bearing Ontario Court of Appeal file number C52346. The other was an appeal by the United Steelworkers ("USW") on behalf of certain members of the "Retirement Plan for Salaried Employees of Indalex Limited and Associated Companies" (the "Salaried Plan"), bearing Ontario Court of Appeal file number C52187.

3. Both pension plans have been underfunded by Indalex. As a result of the underfunding, the Retirees have had their monthly pension benefits from the Executive Plan cut by 35%. Indalex also terminated the Retirees' supplemental pension benefits. Between the two cuts, the Retirees have lost between one-half and two-thirds of their pension benefits that they earned from Indalex. They have been severely prejudiced and are incurring financial hardship in their retirement years.

> Reasons for Decision of the Court of Appeal for Ontario: 2011 ONCA 265 [Court of Appeal Reasons] at para. 40, Response of the Respondent Retirees to the Application for Leave to Appeal by FTI Consulting Canada ULC, in its Capacity as the Monitor of Indalex Ltd. [Retirees' Record], Tab 3A.

Appeal #1 - For the Retirees, the Court of Appeal found on the basis of breach of fiduciary duty

4. In the Retirees' appeal, the Court of Appeal found that on the facts of the case that Indalex breached its fiduciary duty to the Retirees of the Executive Plan, under both the common law and section 22(4) of the Ontario *Pension Benefits Act,* R.S.O. 1990, c. P.8 ("PBA"). The Court of Appeal expressly declined to decide whether the deemed trust applied to the Executive Plan.

> Court of Appeal Reasons at paras. 112, 116 and 144, Retirees' Record, Tab 3A.

5. As a remedy for the breach of fiduciary duty, the Court of Appeal imposed a constructive trust over a portion of the proceeds from the sale of Indalex's assets being held in reserve by the Monitor in the amount of the wind-up deficit owing to the Executive Plan as a priority payment over the claim of Sun-Indalex, the guarantor to a previous lender to Indalex known as the DIP lender. The DIP lender has been previously re-paid in full. It is not participating in these proceedings, nor did it participate in the appeal below.

> Court of Appeal Reasons at para. 204, Retirees' Record, Tab 3A.

Appeal #2 - For the USW appeal, the Court of Appeal found on the basis of both breach of fiduciary duty and the PBA deemed trust

6. For the USW appeal, the Court of Appeal found in favour of the USW on two bases. First, that the deemed trust in section 57(4) of the PBA applied to the sale proceeds being held in reserve by the Monitor in the amount of the wind-up deficiency owing to the Salaried Plan. Second, the Court of Appeal made the same finding it made with respect to the Retirees of the Executive Plan i.e., that Indalex breached its fiduciary duty to the Salaried Plan members.

> Court of Appeal Reasons at paras. 109, 112 and 139, Retirees' Record, Tab 3A.

7. In their leave materials, the three Applicants appear to have overlooked the key distinction between the Retirees' appeal and the USW appeal in the Decision. There was no finding by the Court of Appeal of a deemed trust in respect of the Retirees and the Executive Plan.

The leave application should be dismissed

8. The Monitor's leave application should be dismissed because it does not raise an issue of public importance. Likewise for the leave applications of Sun Indalex and the U.S. Trustee. All three Applicants, including the Monitor, seek to re-litigate the well-settled law of fiduciary duty which has been correctly applied to the facts of this case. There is no suggestion that the law is in any need of change or reform. The Court of Appeal also considered and correctly applied this Court's recent decision in *Century Services*. In fact, the Applicants rely on the same law that the Court of Appeal applied. It is trite to say that in certain circumstances, that law will result in a finding of a breach of fiduciary duty. But the underlying law of fiduciary duty is settled. It is not in need of review or reform from this Court. There being no error in the legal test for fiduciary duty, leave to appeal should be dismissed.

9. On the facts of this particular case, a unanimous Court of Appeal found that Indalex breached its fiduciary duty to the Retirees. The facts clearly support the finding of a breach. Indalex was the administrator of the Executive Plan and as such had a duty to act in the best interests of the Retirees of the plan. Indalex commenced proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") knowing that the Executive Plan for the Retirees was underfunded and that unless additional funds were put into the plan, the Retirees' pension benefits would be reduced. Indalex did nothing to fund the deficit in the Executive Plan. It took no steps to protect the vested benefits of the plan members so they could continue to receive their full pension entitlements.

Court of Appeal Reasons at para. 139, Retirees' Record, Tab 3A.

10. Worse, Indalex actively undermined any possibility of additional funding to the Executive Plan (and the Salaried Plan). It applied for CCAA protection without notice to the Retirees. It obtained a CCAA order and covertly inserted a provision into the order that gave the DIP lender priority ahead of "statutory trusts", again without prior notice to the beneficiaries. It sold its assets without making any provision for the funding of the deficit in the Executive Plan. Indalex knew the purchaser was not taking over the Executive Plan. Indalex supported the disbursement of the sale proceeds of its assets in an attempt to ensure that no payment would be made to the underfunded Executive Plan. Once challenged in court

by the Retirees, Indalex U.S., who at this point was also the management of Indalex in Canada, directed Indalex to bring a bankruptcy motion with the intention of defeating the Retirees' deemed trust and to ensure that the amount in reserve with the Monitor would be transferred to Indalex U.S.

Court of Appeal Reasons at para. 139, Retirees' Record, Tab 3A.

11. Worse still, the Court of Appeal found that Indalex was in a conflict of interest. Indalex's duty as pension plan administrator was to act in the best interests of the Executive Plan beneficiaries. Indalex ignored this conflict. Instead, Indalex took active steps *against* the Retirees such as bringing a motion to try to bankrupt itself to block the Retirees from obtaining any recovery for the underfunded Executive Plan.

Court of Appeal Reasons at paras. 140-143, Retirees' Record, Tab 3A.

12. The Court of Appeal's findings that Indalex breached its fiduciary duty to the Retirees on these facts are unassailable. No case is made for leave. The law is settled that a finding by a court of a breach of fiduciary duty is a fact-specific determination. In finding that Indalex breached its fiduciary duty to the Retirees and by imposing a constructive trust, the Court of Appeal applied settled law from this Court to the facts of this case. There is no conflicting case law between courts of appeal of different provinces. This is no novel point of law. There is no issue of public importance that requires this Court's review. On the facts, Indalex's breach of fiduciary is well established, as was its conflict of interest. Leave to appeal should be dismissed.

13. The following additional factors also militate against granting leave:

(a) as noted, the Decision granting relief to the Retirees is based solely on a finding of breach of fiduciary duty. The standard of appellate review for a finding of breach of fiduciary duty is high, that of palpable and overriding error;

(b) this Court very recently released *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, a comprehensive decision involving the CCAA and the deemed trust for GST. *Century Services* was considered and correctly applied by the Court of Appeal in the Decision. There is no need for this Court to re-visit the CCAA at this time;

(c) many of the arguments raised by the Monitor and the other Applicants are now moot given the recent amendments to the CCAA that took effect on September 18, 2009; and

(d) the Decision is plainly right.

Indalex's actions against the Retirees

14. On March 20, 2009, the Applicants' U.S.-based affiliates comprised of Indalex Holdings Finance, Inc., Indalex Holdings Corp. ("Indalex Holding"), Indalex Inc., Caradon Lebanon, Inc., and Dolton Aluminum Company, Inc. ("Indalex U.S.") commenced reorganization proceedings in the United States under Chapter II of the *United States Code*. On April 3, 2009, the Applicants applied for and obtained protection from their creditors under the CCAA. The application was brought before the CCAA Judge without notice to the Retirees. On April 3, 2009, the CCAA court issued an Initial CCAA Order.

Court of Appeal Reasons at paras. 7-8, Retirees' Record, Tab 3A.

15. On April 8, 2009, the Applicants moved again before the CCAA Judge, again without notice to the Retirees, for an order amending the Initial CCAA order to, *inter alia,* insert a priority recovery to the DIP lender over "trusts...statutory or otherwise." In so doing, the Applicants covertly inserted a broadly-worded provision into the previously issued order that purported to reverse the priority of the PBA deemed trust in favour of the DIP lender. Furthermore, the Applicants represented to the court in their materials for this motion that the company would comply with "all statutory trusts".

Court of Appeal Reasons at paras. 51-53, Retirees' Record, Tab 3A.

16. The Court of Appeal in the Decision correctly criticized the manner in which Indalex inserted a provision into the Initial CCAA Order to give priority to the DIP lender over the PBA deemed trust:

> [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...
>
> ...
>
> [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".
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> Court of Appeal Reasons at paras. 139 and 178, Retirees' Record, Tab 3A.

17. The Applicants mailed out letters to the Retirees dated April 9, 2009 notifying them for the first time that the company was under CCAA protection and that their supplemental monthly pension benefits would stop being paid effective immediately. There was no mention in the letter of the underfunding in the Executive Plan, nor that the company had by that time and without notice to the retirees already obtained a court order that contained a provision that reversed the PBA deemed trust priority in favour of a priority to the DIP lender.

> Court of Appeal Reasons at paras. 40 and 139, Retirees' Record, Tab 3A.
>
> Affidavit of Keith Carruthers, sworn June 23, 2009 [Carruthers Affidavit] at paras. 4-5 and Exhibit "A", Retirees' Record, Tab 4A.

18. The CCAA Court authorized Indalex to borrow funds pursuant to a DIP credit agreement among Indalex US, the Applicants and a syndicate of lenders (the "DIP Lenders") for which JPMorgan Chase Bank, N.A. was the administrative agent (the "DIP Agent"). The Applicants' obligation to repay the DIP loan was guaranteed by Indalex U.S.

> Court of Appeal Reasons at paras. 51-53, Retirees' Record, Tab 3A.

19. After receiving the April 9, 2009 letter the Retirees sought and retained counsel who, *inter alia*, requested that the Retirees be given notice of all future proceedings.

20. On June 11, 2009, at 8:27 p.m., counsel to the company sent an e-mail to the Service List, which now included counsel to the Retirees, with notice of a motion returnable the next

morning seeking court approval of an increase to the DIP loan. When Retirees' counsel asked what the motion was for that evening, counsel to the Monitor responded that the motion was simply to obtain more money under the existing DIP credit agreement. The motion proceeded the next day and the court approved an increase to the DIP loan. The Monitor's characterization of the "reservation of rights" in paragraph 17 of the Monitor's memorandum of argument is incorrect. Given the extreme short service of the company's motion, Retirees' counsel initially sought to reserve its rights on the motion until it was confirmed that the motion was brought solely to increase the DIP loan and nothing more. There was no "reservation of rights" in respect of the priority of the DIP loan over statutory trusts as stated by the Monitor. Indeed, by the time of this motion, the priority reversal giving the DIP lender priority over statutory trusts had already been covertly obtained by Indalex. Further, there was no mention of the subordination of the PBA deemed trust priority in the motion materials filed by the company, nor in the applicable Monitor's Report, nor in the Endorsement of the CCAA Judge.

> Endorsement of the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) dated June 15, 2009 (Re the Motion to Amend the DIP Credit Agreement), Retirees Record, Tab 3B.
>
> Court of Appeal Reasons at paras. 55-56, Retirees' Record, Tab 3A.

21. Retirees' counsel subsequently obtained the last filed actuarial report for the Executive Plan which revealed that the plan had a substantial wind up deficiency. The Retirees retained their own actuary who estimated the current wind-up deficit in the Executive Plan to be $3.2 million. With the confirmation of a wind up deficit in the Executive Plan, on June 26, 2009, counsel to the Retirees sent a letter to counsel for Indalex and the Monitor with a copy to the entire Service List advising that the Retirees reserve all rights to the deemed trust under section 57(4) of the PBA in the company's CCAA proceedings. There was no response or objection to that letter from the company, the Monitor or any other party.

> Court of Appeal Reasons at para. 41, Retirees' Record, Tab 3A.

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

> As discussed at the July 2, 2009 Court hearing, it is unlikely that any bidder will elect to absorb obligations owing Indalex that provides no corresponding benefit to such bidder. ***Accordingly, it is expected that the Executive Plan will be fully wound up in accordance with the requirements of the Pension Benefits Act (Ontario).***
>
> Court of Appeal Reasons at para. 42, Retirees' Record, Tab 3A [emphasis added].

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

Court of Appeal Reasons at para. 20, Retirees' Record, Tab 3A.

24. The Retirees opposed the Sale Approval and Distribution Motion on the basis that there was no provision in the sale for the purchaser to continue the administration of the Executive Plan and also because Indalex sought to distribute all the sale proceeds to its lenders without making any payment to the underfunded Executive Plan. The Retirees again advanced the PBA deemed trust.

Court of Appeal Reasons at para. 12, Retirees' Record, Tab 3A.

25. At the July 20, 2009 court attendance, the CCAA Judge approved the sale to SAPA and approved a cash distribution to the DIP Lender from the sale proceeds to pay the company's obligations to the DIP Lender. However, the CCAA Judge directed that $3.2 million representing the wind-up deficit in the Executive Plan, plus the amount of the wind-up deficit of the Salaried Plan, plus an amount for the administrative costs of the Monitor, (for a total of $6.75 million) be held back by the Monitor pending the disposition of the deemed trust motions by the Retirees and the USW.

Court of Appeal Reasons at paras. 10, 13, Retirees' Record, Tab 3A.

26. On July 31, 2009, the sale of the company's assets to SAPA closed. A total payment of US $17,041,391.80 was made from the Canadian Sale Proceeds by the Monitor, on behalf of the Applicants, to the DIP Agent. This resulted in a shortfall of U.S. $10,751,247.22 in respect of the DIP loan. The DIP Agent then called on the guarantee granted to the DIP

Lenders by Indalex U.S. for the shortfall. Indalex U.S. paid the shortfall amount to the DIP lender. The DIP Lender has been paid in full and has no interest in this proceeding. It did not appear at the appeal.

Court of Appeal Reasons at para. 65, Retirees' Record, Tab 3A.

27. On July 31, 2009, all the directors of Indalex in Canada resigned. Also on that date, pursuant to a Unanimous Shareholders Declaration, Indalex Holding Corp. (part of Indalex U.S.) became the management of Indalex in Canada. Thus, as of July 31, 2009 Indalex U.S. and Indalex had the same management. Indalex U.S. was also the administrator of the Executive Plan. The Court of Appeal found that Indalex as administrator of the Executive Plan was in a flagrant conflict of interest.

Court of Appeal Reasons at paras. 47-48, 140-147, Retirees' Record, Tab 3A.

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

Court of Appeal Reasons at paras. 15-17, Retirees' Record, Tab 3A.

29. Keith Cooper deposed under cross-examination on August 26, 2009 that he was the administrator of the Indalex pension plans. He also confirmed that he was the primary negotiator of the DIP Credit Agreement on behalf of the Indalex group of companies. Under cross-examination he further admitted that:

- He and his staff acted as the administrator of the Executive Plan.
- As the chief restructuring officer of Indalex U.S. he "was basically a co-CEO of the company [Indalex U.S.]" whose main duties were to "manage and direct" Indalex U.S. in the restructuring and eventual bankruptcy.

- He was a senior managing director of FTI Consulting Inc., of which the Monitor in the Canadian CCAA proceedings, FTI Consulting Canada ULC, is a subsidiary.
- He knew the Executive Plan was underfunded on a wind up basis.
- He knew the Retirees would have their pension benefits reduced if the Executive Plan was wound up in its underfunded state.
- He refused to answer questions about what steps the company took to have the purchaser of the company take over the administration of the Executive Plan. The inference being that the company took no such steps or even contrary steps.
- He was the pension plan administrator and directing mind of the company at the time the company sought to assign itself into bankruptcy to defeat the Retirees' deemed trust motion.
- He knew that if the deemed trust motions were defeated in the Canadian court then the money held in reserve by the Monitor "would be distributed to Indalex Inc. [Indalex U.S.]".

> Cross-Examination Transcript of Keith Cooper, August 26, 2009 [Cooper Transcript] at questions 2-3, 15, 31, 33, 54-55, 62-63, 65-66, 70, 75-80, 83-86, and 91-98, Retirees' Record, Tab 4B.

30. On November 4, 2009, given that Indalex had abandoned the Executive Plan and was taking no steps to wind it up, the Ontario Superintendent of Financial Services appointed the actuarial firm of Morneau Sobeco ("Morneau") as plan administrator to proceed with the wind up of the Executive Plan. On March 2010, based on the recommendation of Morneau, the Superintendent issued a Notice of Proposal to wind up the Executive Plan effective as of September 30, 2009. The wind up process is currently underway.

> Court of Appeal Reasons at para. 43, Retirees' Record, Tab 3A.

PART II - STATEMENT OF THE QUESTIONS IN ISSUE

31. In its leave application, the Monitor proposes three issues for this Court:

(a) Can a super priority charge, granted by 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?

32. None of the issues raised by the Monitor have public importance that warrant this Court's review. Issue (b) does not even apply to the Retirees for the reasons stated above. Leave to appeal to this Court should be dismissed.

PART III - STATEMENT OF ARGUMENT

Issue (a) – The "collateral attack" argument was comprehensively disposed of by the Court of Appeal

33. First, this issue has no application to the Court of Appeal's finding that Indalex breached its fiduciary duty to the Retirees under both the common law and section 22(4) of the PBA.

34. Second, this issue is in substance a procedural complaint relating to the practice in this case before the Ontario Supreme Court of Justice (Commercial List). It has no public importance.

35. Third, the Monitor argues that once the Initial CCAA order was issued, despite being obtained without notice to the Retirees and with a covertly obtained super-priority to the DIP lender over the statutory trusts, then the only mechanism to seek a change to that order is for the Retirees to file an appeal. Under sections 13 and 14 of the CCAA and the Ontario *Rules of Civil Procedure* this would actually require a motion for leave to appeal to the Ontario Court of Appeal to be filed within 21 days from the date the Order was issued. If leave is granted, then an appeal can proceed. The procedure suggested by the Monitor would take at a minimum, several months to resolve and at a considerable cost. The proposed process is unrealistic and unfair to not only the Retirees but other creditors as well. It also would undermine the function of the "comeback clause" in the Initial CCAA Order, the purpose of

which is to allow any person with a complaint against the CCAA order to return to the CCAA court for relief. This is precisely the process that the Retirees followed.

> Court of Appeal Reasons at para. 156, Retirees' Record, Tab 3A.

36. Fourth, this issue is simply a re-crafting of the "collateral attack" argument that the respondents argued before the Court of Appeal (but not before the CCAA Judge) which was rejected in comprehensive reasons in paragraphs 146 to 161 of the Decision.

> Court of Appeal Reasons at paras. 146-151 and 154-161, Retirees' Record, Tab 3A.

37. Fifth, the criticisms of Indalex by the Court of Appeal that Indalex did not give the Retirees prior notice of the motion where Indalex inserted a provision into the Initial CCAA Order is now covered in the changes made by Parliament to the CCAA that came into force on September 18, 2009. Section 11.2(i) of the CCAA explicitly requires a company to give prior notice of a motion granting priority to a DIP lender "to the *secured creditors* who are likely to be affected by the security or charge". The definition of "secured creditor" in the CCAA includes "*a trust in respect of, all or any property of the debtor company.*" Therefore, independent of the Decision of the Court of Appeal, as of September 18, 2009, all companies under CCAA protection are required by section 11.2(i) to give notice to trust beneficiaries - such as pension plan beneficiaries who are entitled to a priority under a deemed trust under valid provincial law - of a motion seeking a super-priority to a DIP lender. As this issue has been dealt with by legislation, there is no issue of public importance for this court to review.

> CCAA, ss. 2(1), 11.2(1) (Note also that similar notices to secured creditors, including trusts, are also required under sections ss. 11.4(1), 11.51(1) and 11.52(2) of the CCAA) [emphasis added].

The Decision is consistent with this Court's recent decision in Century Services

38. The Monitor's argument that the Decision creates "asymmetry" between the BIA and CCAA and as such, is contrary to this Court's decision in *Century Services* is baseless. The Decision is the first CCAA appellate decision referencing *Century Services*. There is no conflict between appellate courts of different provinces, nor does the Monitor refer to any

conflicting caselaw. The Ontario Court of Appeal correctly rejected these arguments by the respondents:

> [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.* 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" whereas the *CCAA* "offers a more flexible mechanism with greater judicial discretion". 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 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 from 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.**
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> Court of Appeal Reasons at paras. 191-194, Retirees' Record, Tab 3A; see also paras. 195-196 [emphasis added].
>
> *Century Services Inc. v. Canada (Attorney General),* [2010] 3 S.C.R. 379 [*Century Services*], 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 [FTI's Application Record], Tab 7A [emphasis added].

39. Furthermore, section 23(1)(h) of the CCAA expressly recognizes that the two insolvency regimes, the CCAA and BIA, contemplate distinct recovery scenarios. Section 23(i)(h) requires a monitor to advise a CCAA Judge "without delay" if it is of the opinion that

it would be more beneficial to the company's creditors if proceedings were taken under the BIA.

CCAA, s. 23(1)(h).

Issue b) - Section 57(4) of the PBA creates a deemed trust over a wind up deficiency

40. As noted earlier, the Court of Appeal found that the PBA deemed trust applied to the Salaried Plan, but declined to decide whether the deemed trust applied to the Retirees' Executive Plan. The Retirees were successful on the basis of the Court of Appeal's finding that Indalex breached its fiduciary duty to the Retirees based on the facts of this case. All of the Applicants including the Monitor overlook this distinction in their leave applications.

No conflicting caselaw on the PBA deemed trust

41. Nevertheless, one aspect of the Monitor's argument on the deemed trust warrants a response herein. At paragraphs 49-53, the Monitor argues that the Decision is "inconsistent with prior decisions in this area, including a decision of the Ontario Court of Appeal". This was again argued by the respondents before the Court of Appeal and rejected:

> [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 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.***
>
> Court of Appeal Reasons at paras. 105-107, Retirees' Record, Tab 3A [emphasis added].

42. Furthermore, *Toronto-Dominion Bank v. Usarco Ltd.* and *Re Ivaco* are Ontario cases. Only *Ivaco* is an Ontario Court of Appeal decision. There is no conflicting caselaw from the courts of appeal of different provinces.

> *Toronto-Dominion Bank v. Usarco Ltd.*, [1991] O.J. No. 1314, 42 E.T.R. 235 (Gen. Div.) [*Usarco*], FTI's Application Record, Tab 7C.
>
> *Ivaco (Re)* (2005), 12 C.B.R. (5th) 213 (Ont. S.C.), aff'd (2006), 83 O.R. (3d) 108 (C.A.) [*Ivaco*], FTI's Application Record, Tab 7B.

The Swartz affidavit should be excluded and ignored

43. As part of its leave application, the Monitor filed a 91 page (with exhibits) affidavit of Mr. Jay Swartz. The affidavit is replete with unsupported speculative comments and *in terrorem* arguments of the purported impact of the Decision. On July 15, 2011, the Retirees filed a motion to strike out that affidavit. On August 16, 2011, Justice Cromwell decided that the Retirees' motion to strike out the affidavit is referred to the leave panel. The Retirees refer to and rely on their motion materials for their arguments to strike out the Swartz affidavit. The Swartz affidavit should be excluded and ignored.

Issue c) - This Court has recently confirmed that a pension plan administrator owes a fiduciary duty to pension plan members

44. In the recent case of *Burke v. Hudsons' Bay Co.*, this Court confirmed that the administrator of a pension plan owes a fiduciary duty to the plan members. These obligations arise both at common law and under section 22 of the PBA:

> [40] At para. 55 of her reasons, Gillese J.A. found that HBC, as pension plan administrator, was a fiduciary. ...
>
> [41] Subject to the text of the plan, the terms of the trust agreement, and relevant statutes, there is no doubt that HBC had wide discretion with respect to the pension plan, which it could exercise unilaterally and which could affect the interests of the employees, and to which exercise of discretion the employees were vulnerable. ***Therefore, I agree with Gillese J.A. that in these circumstances HBC, as plan administrator,***

> ***was a fiduciary and that a fiduciary relationship existed between HBC as administrator and the employees/beneficiaries under the pension plan.***
>
> *Burke v. Hudsons' Bay Co.*, [2010] 2 S.C.R. 273 at paras. 39-41, Retirees' Book of Authorities, Tab 1 [emphasis added].

45. In the Decision, the Court of Appeal follows this law and applies it to the facts.

> Court of Appeal Reasons at paras. 117-120, Retirees' Record, Tab 3A.

46. Furthermore, in the memorandum of argument of the Applicant Sun Indalex, it is admitted that "An Administrator owes fiduciary duties to the members of the plan and cannot favour self-interest or the interests of anyone other than the plan's beneficiaries". There is no doubt that Indalex as pension plan administrator owed a fiduciary duty to the members of the Executive Plan.

47. The contention in the Monitor's third issue that it was "impossible" (para. 59 of Monitor's memorandum of argument) for Indalex to abide by its fiduciary duty to the pension plan members is untenable. This also is a re-crafting of the respondents' submissions to the Court of Appeal which were rejected. In its leave memorandum, the Monitor attempts to elevate this argument to one of public importance. There is no public importance

48. The Monitor does not cite any other cases where a company subject to CCAA protection was found to be in breach of its fiduciary duty to pension plan members. There is no conflicting caselaw on this issue from courts of appeal of different provinces. The Monitor is simply speculating that since Indalex was found to have breached its fiduciary duty to plan members on the facts of this case, then it will be impossible for other companies under CCAA protection and with underfunded pension plans to abide by their fiduciary duty. This is a baseless extrapolation of the Court of Appeal's findings in the Decision.

49. A finding of a breach of fiduciary duty will always be based on the facts of each case. In *Etam Imports Ltd. v. Scottish & York Insurance Co.*, the Alberta Court of Appeal held:

> [17] Canadian courts have rejected a "category" approach to fiduciaries in favour of a more functional and fact-specific approach. The existence and ***breach of fiduciary duties are highly fact intensive inquiries...***
>
> *Etam Imports Ltd. v. Scottish & York Insurance Co.*, 2007 ABCA 410 at para. 17, Retirees' Book of Authorities, Tab 2 [emphasis added].

50. The British Columbia Court of Appeal similarly held:

> 18. [I]t is apparent that both the extent of the continuing fiduciary duty of loyalty, and whether it has been breached, ***turn on the particular facts of the case...***
>
> *Greater Vancouver Regional District v. Melville* (2007), 71 B.C.L.R. (4th) 29 (C.A.) at para. 18, Retirees' Book of Authorities, Tab 3 [emphasis added].

51. Finally, this Court very recently released a decision discussing the law of fiduciary duty. The Decision is consistent with that decision. No review of the law of fiduciary duty is required.

> *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, Retirees' Book of Authorities, Tab 4.

52. The Court of Appeal's criticism of Indalex's conduct as pension plan administrator was in the context of its unique CCAA proceeding. These findings do not flow into the circumstances of other CCAA cases.

> [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.
>
> Court of Appeal Reasons at paras. 133-135, Retirees' Record, Tab 3A [emphasis added].

53. The Court of Appeal reviewed the conduct of Indalex and found on the facts of the case that Indalex breached its fiduciary duty under both the common law and section 22(4) of the PBA to the Executive Plan members. Again, the breach found in this case does not flow into the circumstances of other CCAA cases.

> [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. 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 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.
>
> ...
>
> [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.***
>
> Court of Appeal Reasons at paras. 138-140 and 142-144, Retirees' Record, Tab 3A [emphasis added].

54. Although the finding of a breach of fiduciary duty by Indalex under the common law and section 22(4) of the PBA for the Retirees of the Executive Plan is based on the particular facts of the case, the Court of Appeal's comprehensive Decision is a positive development in the law. It also has the potential to assist vulnerable retirees and pensioners who find themselves in similar factual situations. This is another reason that the leave applications of the Monitor and the other Applicants should be dismissed.

> Affidavit of Robert F. Hilton, sworn September 1, 2011, Retirees' Record, Tab 4C.

PART IV - SUBMISSIONS ON COSTS

55. The Retirees are elderly and have had their pension benefits significantly reduced. They respectfully request their costs of this application in any event of the cause.

PART V - ORDERS SOUGHT

56. The Retirees respectfully request an order dismissing the Monitor's leave application, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of September, 2011.

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PART VI - TABLE OF AUTHORITIES

PART VII - STATUTORY PROVISIONS

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36	*Loi sur les arrangements avec les créanciers des compagnies*, L.R.C., 1985, ch. C-36
Definitions **2.** (1) In this Act,... "secured creditor"«*créancier garanti* » "secured creditor" means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds;	**Définitions** **2.** (1) Les définitions qui suivent appliquent à la présente loi.... « créancier garanti »"*secured creditor*" « créancier garanti » Détenteurd'hypothèque, de gage, charge, nantissement ou privilègesur ou contrel'ensemble ou unepartie des biensd'unecompagniedébitrice, ou tout transport, cession ou transfert de la totalité ou d'unepartie de cesbiens, à titre de garantied'unedette de la compagniedébitrice, ou un détenteur de quelque obligation d'unecompagniedébitricegarantie par hypothèque, gage, charge, nantissement ou privilègesur ou contrel'ensemble ou unepartie des biens de la compagniedébitrice, ou un transport, une cession ou un transfert de tout ou partie de cesbiens, ou unefiducie à leurégard, quecedétenteur ou bénéficiaireréside ou soitdomicilié au Canada ou à l'étranger. Un fiduciaire en vertu de tout acte de fiducie ou autre instrument garantissantces obligations est réputé un créanciergaranti pour toutes les fins de la présenteloisauf la votation à uneassemblée de créanciersrelativement à ces obligations.
Interim financing **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	**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

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.

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;

g) le rapport du contrôleur visé à l'alinéa 23(1)*b*).

1997, ch. 12, art. 124; 2005, ch. 47, art. 128; 2007, ch. 36, art. 65.

Critical supplier	**Fournisseurs essentiels**
11.4 (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, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.	**11.4** (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 toute personne fournisseur essentiel de la compagnie s'il est convaincu que cette personne est un fournisseur de la compagnie et que les marchandises ou les services qu'elle lui fournit sont essentiels à la continuation de son exploitation.
Obligation to supply	**Obligation de fourniture**
(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.	(2) S'il fait une telle déclaration, le tribunal peut ordonner à la personne déclarée fournisseur essentiel de la compagnie de fournir à celle-ci les marchandises ou services qu'il précise, à des conditions compatibles avec les modalités qui régissaient antérieurement leur fourniture ou aux conditions qu'il estime indiquées.
Security or charge in favour of critical supplier	**Charge ou sûreté en faveur du fournisseur essentiel**
(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.	(3) Le cas échéant, le tribunal déclare dans l'ordonnance que tout ou partie des biens de la compagnie sont grevés d'une charge ou sûreté, en faveur de la personne déclarée fournisseur essentiel, d'un montant correspondant à la valeur des marchandises ou services fournis en application de l'ordonnance.
Priority	**Priorité**
(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.	(4) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.
1997, c. 12, s. 124; 2000, c. 30, s. 156; 2001, c. 34, s. 33(E); 2005, c. 47, s. 128; 2007, c. 36, s. 65.	1997, ch. 12, art. 124; 2000, ch. 30, art. 156; 2001, ch. 34, art. 33(A); 2005, ch. 47, art. 128; 2007, ch. 36, art. 65.

Security or charge relating to director's indemnification	**Biens grevés d'une charge ou sûreté en faveur d'administrateurs ou de dirigeants**
11.51 (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, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.	**11.51** (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 celle-ci sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, en faveur d'un ou de plusieurs administrateurs ou dirigeants pour l'exécution des obligations qu'ils peuvent contracter en cette qualité après l'introduction d'une procédure sous le régime de la présente loi.
Priority	**Priorité**
(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.	(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.
Restriction — indemnification insurance	**Restriction — assurance**
(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.	(3) Il ne peut toutefois rendre une telle ordonnance s'il estime que la compagnie peut souscrire, à un coût qu'il estime juste, une assurance permettant d'indemniser adéquatement les administrateurs ou dirigeants.
Negligence, misconduct or fault	**Négligence, inconduite ou faute**
(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.	(4) Il déclare, dans l'ordonnance, que la charge ou sûreté ne vise pas les obligations que l'administrateur ou le dirigeant assume, selon lui, par suite de sa négligence grave ou de son inconduite délibérée ou, au Québec, par sa faute lourde ou intentionnelle.
2005, c. 47, s. 128; 2007, c. 36, s. 66.	2005, ch. 47, art. 128; 2007, ch. 36, art. 66.

Court may order security or charge to cover certain costs **11.52** (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of (*a*) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties; (*b*) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and (*c*) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act. **Priority** (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company. 2005, c. 47, s. 128; 2007, c. 36, s. 66.	**Biens grevés d'une charge ou sûreté pour couvrir certains frais** **11.52** (1) Le tribunal peut par ordonnance, sur préavis aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie débitrice sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, pour couvrir : *a*) les débours et honoraires du contrôleur, ainsi que ceux des experts — notamment en finance et en droit — dont il retient les services dans le cadre de ses fonctions; *b*) ceux des experts dont la compagnie retient les services dans le cadre de procédures intentées sous le régime de la présente loi; *c*) ceux des experts dont tout autre intéressé retient les services, si, à son avis, la charge ou sûreté était nécessaire pour assurer sa participation efficace aux procédures intentées sous le régime de la présente loi. **Priorité** (2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie. 2005, ch. 47, art. 128; 2007, ch. 36, art. 66.
Leave to appeal **13.** Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs. R.S., 1985, c. C-36, s. 13; 2002, c. 7, s. 134.	**Permission d'en appeler** **13.** Sauf au Yukon, toute personne mécontente d'une ordonnance ou décision rendue en application de la présente loi peut en appeler après avoir obtenu la permission du juge dont la décision fait l'objet d'un appel ou après avoir obtenu la permission du tribunal ou d'un juge du tribunal auquel l'appel est porté et aux conditions que prescrit ce juge ou tribunal concernant le cautionnement et à d'autres égards. L.R. (1985), ch. C-36, art. 13; 2002, ch. 7, art. 134.

Court of appeal	**Cour d'appel**
14. (1) An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.	**14.** (1) Cet appel doit être porté au tribunal de dernier ressort de la province où la procédure a pris naissance.
Practice	**Pratique**
(2) All appeals under section 13 shall be regulated as far as possible according to the practice in other cases of the court appealed to, but no appeal shall be entertained unless, within twenty-one days after the rendering of the order or decision being appealed, or within such further time as the court appealed from, or, in Yukon, a judge of the Supreme Court of Canada, allows, the appellant has taken proceedings therein to perfect his or her appeal, and within that time he or she has made a deposit or given sufficient security according to the practice of the court appealed to that he or she will duly prosecute the appeal and pay such costs as may be awarded to the respondent and comply with any terms as to security or otherwise imposed by the judge giving leave to appeal.	(2) Tous ces appels sont régis autant que possible par la pratique suivie dans d'autres causes devant le tribunal saisi de l'appel; toutefois, aucun appel n'est recevable à moins que, dans le délai de vingt et un jours après qu'a été rendue l'ordonnance ou la décision faisant l'objet de l'appel, ou dans le délai additionnel que peut accorder le tribunal dont il est interjeté appel ou, au Yukon, un juge de la Cour suprême du Canada, l'appelant n'y ait pris des procédures pour parfaire son appel, et à moins que, dans ce délai, il n'ait fait un dépôt ou fourni un cautionnement suffisant selon la pratique du tribunal saisi de l'appel pour garantir qu'il poursuivra dûment l'appel et payera les frais qui peuvent être adjugés à l'intimé et se conformera aux conditions relatives au cautionnement ou autres qu'impose le juge donnant la permission d'en appeler.
R.S., 1985, c. C-36, s. 14;2002, c. 7, s. 135.	L.R. (1985), ch. C-36, art. 14;2002, ch. 7, art. 135.

MONITORS	CONTRÔLEURS
Duties and functions	**Attributions**
23. (1) The monitor shall	**23.** (1) Le contrôleur est tenu:
(*a*) except as otherwise ordered by the court, when an order is made on the initial application in respect of a debtor company,	*a*) à moins que le tribunal n'en ordonne autrement, lorsqu'il rend une ordonnance à l'égard de la demande initiale visant une compagnie débitrice :
(i) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information, and	(i) de publier, sans délai après le prononcé de l'ordonnance, une fois par semaine pendant deux semaines consécutives, ou selon les modalités qui y sont prévues, dans le journal ou les journaux au Canada qui y sont précisés, un avis contenant les renseignements réglementaires,
(ii) within five days after the day on which the order is made,	(ii) dans les cinq jours suivant la date du prononcé de l'ordonnance :
(A) make the order publicly available in the prescribed manner,	(A) de rendre l'ordonnance publique selon les modalités réglementaires,
(B) send, in the prescribed manner, a notice to every known creditor who has a claim against the company of more than $1,000 advising them that the order is publicly available, and	(B) d'envoyer un avis, selon les modalités réglementaires, à chaque créancier connu ayant une réclamation supérieure à mille dollars les informant que l'ordonnance a été rendue publique,
(C) prepare a list, showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner;	(C) d'établir la liste des nom et adresse de chacun de ces créanciers et des montants estimés des réclamations et de la rendre publique selon les modalités réglementaires;
(*b*) review the company's cash-flow statement as to its reasonableness and file a report with the court on the monitor's findings;	*b*) de réviser l'état de l'évolution de l'encaisse de la compagnie, en ce qui a trait à sa justification, et de déposer auprès du tribunal un rapport où il présente ses conclusions;
(*c*) make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency and file a report with the court on the monitor's findings;	*c*) de faire ou de faire faire toute évaluation ou investigation qu'il estime nécessaire pour établir l'état des affaires financières et autres de la compagnie et les causes des difficultés financières ou de l'insolvabilité de celle-ci, et de déposer auprès du tribunal un rapport où il présente ses conclusions;
(*d*) file a report with the court on the state of the company's business and financial affairs — containing the prescribed information, if any —	*d*) de déposer auprès du tribunal un rapport portant sur l'état des affaires financières et autres de la compagnie et contenant les renseignements réglementaires :
(i) without delay after ascertaining a material adverse change in the company's projected cash-flow or financial circumstances,	(i) dès qu'il note un changement défavorable important au chapitre des projections relatives
(ii) not later than 45 days, or any longer period that the court may specify, after the day on which each of the company's fiscal quarters	

ends, and

(iii) at any other time that the court may order;

(*d.1*) file a report with the court on the state of the company's business and financial affairs — containing the monitor's opinion as to the reasonableness of a decision, if any, to include in a compromise or arrangement a provision that sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* do not apply in respect of the compromise or arrangement and containing the prescribed information, if any — at least seven days before the day on which the meeting of creditors referred to in section 4 or 5 is to be held;

(*e*) advise the company's creditors of the filing of the report referred to in any of paragraphs (*b*) to (*d.1*);

(*f*) file with the Superintendent of Bankruptcy, in the prescribed manner and at the prescribed time, a copy of the documents specified in the regulations;

(*f.1*) for the purpose of defraying the expenses of the Superintendent of Bankruptcy incurred in performing his or her functions under this Act, pay the prescribed levy at the prescribed time to the Superintendent for deposit with the Receiver General;

(*g*) attend court proceedings held under this Act that relate to the company, and meetings of the company's creditors, if the monitor considers that his or her attendance is necessary for the fulfilment of his or her duties or functions;

(*h*) if the monitor is of the opinion that it would be more beneficial to the company's creditors if proceedings in respect of the company were taken under the *Bankruptcy and Insolvency Act*, so advise the court without delay after coming to that opinion;

(*i*) advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the company and its creditors;

(*j*) make the prescribed documents publicly available in the prescribed manner and at the prescribed time and provide the company's

à l'encaisse ou de la situation financière de la compagnie,

(ii) au plus tard quarante-cinq jours — ou le nombre de jours supérieur que le tribunal fixe — après la fin de chaque trimestre d'exercice,

(iii) à tout autre moment fixé par ordonnance du tribunal;

d.1) de déposer auprès du tribunal, au moins sept jours avant la date de la tenue de l'assemblée des créanciers au titre des articles 4 ou 5, un rapport portant sur l'état des affaires financières et autres de la compagnie, contenant notamment son opinion sur le caractère raisonnable de la décision d'inclure dans la transaction ou l'arrangement une disposition prévoyant la non-application à celle-ci des articles 38 et 95 à 101 de la *Loi sur la faillite et l'insolvabilité*, et contenant les renseignements réglementaires;

e) d'informer les créanciers de la compagnie du dépôt du rapport visé à l'un ou l'autre des alinéas *b*) à *d.1*);

f) de déposer auprès du surintendant des faillites, selon les modalités réglementaires, de temps et autre, une copie des documents précisés par règlement;

f.1) afin de défrayer le surintendant des faillites des dépenses engagées par lui dans l'exercice de ses attributions prévues par la présente loi, de lui verser, pour dépôt auprès du receveur général, le prélèvement réglementaire, et ce au moment prévu par les règlements;

g) d'assister aux audiences du tribunal tenues dans le cadre de toute procédure intentée sous le régime de la présente loi relativement à la compagnie et aux assemblées de créanciers de celle-ci, s'il estime que sa présence est nécessaire à l'exercice de ses attributions;

h) dès qu'il conclut qu'il serait plus avantageux pour les créanciers qu'une procédure visant la compagnie soit intentée sous le régime de la *Loi sur la faillite et l'insolvabilité*, d'en aviser le tribunal;

i) de conseiller le tribunal sur le caractère juste et équitable de toute transaction ou de tout arrangement proposés entre la compagnie et

creditors with information as to how they may access those documents; and (*k*) carry out any other functions in relation to the company that the court may direct. **Monitor not liable** (2) If the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(*b*) to (*d.1*), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report. 2005, c. 47, s. 131; 2007, c. 36, s. 72	ses créanciers; *j*) de rendre publics selon les modalités réglementaires, de temps et autres, les documents réglementaires et de fournir aux créanciers de la compagnie des renseignements sur les modalités d'accès à ces documents; *k*) d'accomplir à l'égard de la compagnie tout ce que le tribunal lui ordonne de faire. **Non-responsabilité du contrôleur** (2) S'il agit de bonne foi et prend toutes les précautions voulues pour bien établir le rapport visé à l'un ou l'autre des alinéas (1)*b*) à *d.1*), le contrôleur ne peut être tenu pour responsable des dommages ou pertes subis par la personne qui s'y fie. 2005, ch. 47, art. 131; 2007, ch. 36, art. 72.
***Pension Benefits Act*, R.S.O. 1990, c. P.8.**	***Loi sur les régimes de retraite*, L.R.O. 1990, C. P.8.**
Registration and Administration **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. R.S.O. 1990, c. P.8, s. 22 (1). **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. R.S.O. 1990, c. P.8, s. 22 (2). **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	**Enregistrement et Administration** **Soin, diligence et compétence** 22. (1) L'administrateur d'un régime de retraite apporte à l'administration et au placement 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. L.R.O. 1990, chap. P.8, par. 22 (1). **Connaissances et compétences particulières** (2) L'administrateur d'un régime de retraite apporte à l'administration du régime de retraite et à l'administration et au placement des fonds de la caisse de retraite toutes les connaissances et compétences pertinentes que l'administrateur possède ou devrait posséder en raison de sa profession, de ses affaires ou de sa vocation. L.R.O. 1990, chap. P.8, par. 22 (2). **Membre d'un comité de retraite** (3) Le paragraphe (2) s'applique avec les adaptations nécessaires à un membre d'un comité de retraite ou d'un conseil de fiduciaires qui est l'administrateur d'un régime de retraite et à un membre d'un conseil, d'une commission ou d'un organisme auquel une loi

for the administration of a pension plan. R.S.O. 1990, c. P.8, s. 22 (3).

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. R.S.O. 1990, c. P.8, s. 22 (4).

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. R.S.O. 1990, c. P.8, s. 22 (5).

Trustee of pension fund

(6) No person other than a prescribed person shall be a trustee of a pension fund. R.S.O. 1990, c. P.8, s. 22 (6).

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. R.S.O. 1990, c. P.8, s. 22 (7).

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). R.S.O. 1990, c. P.8, s. 22 (8).

Benefits of administrator

(9) The administrator of a pension plan is not entitled to any benefit from the pension plan other than pension benefits, ancillary benefits and a refund of contributions. 2010, c. 24, s. 7.

Benefits of members of pension committee, etc.

de la Législature confie l'administration d'un régime de retraite. L.R.O. 1990, chap. P.8, par. 22 (3).

Conflit d'intérêts

(4) L'administrateur, ou si l'administrateur est un comité de retraite ou un conseil de fiduciaires, un membre du comité ou du conseil qui est l'administrateur du régime de retraite ne permet pas sciemment que son intérêt entre en conflit avec ses attributions à l'égard du régime de retraite. L.R.O. 1990, chap. P.8, par. 22 (4).

Emploi de mandataires

(5) Si cela est raisonnable et prudent dans les circonstances, l'administrateur d'un régime de retraite peut employer un ou plusieurs mandataires pour accomplir les actes nécessaires à l'administration du régime de retraite, et à l'administration et au placement des fonds de la caisse de retraite. L.R.O. 1990, chap. P.8, par. 22 (5).

Fiduciaire d'une caisse de retraite

(6) Seule une personne prescrite peut être fiduciaire d'une caisse de retraite. L.R.O. 1990, chap. P.8, par. 22 (6).

L'administrateur répond du mandataire

(7) L'administrateur d'un régime de retraite qui emploie un mandataire le choisit personnellement et doit être convaincu de l'aptitude du mandataire à accomplir l'acte pour lequel il est employé. L'administrateur exerce sur son mandataire une surveillance prudente et raisonnable. L.R.O. 1990, chap. P.8, par. 22 (7).

Employé ou mandataire

(8) Les normes qui s'appliquent à l'administrateur en vertu des paragraphes (1), (2) et (4) s'appliquent également à un employé ou à un mandataire de l'administrateur. L.R.O. 1990, chap. P.8, par. 22 (8).

Prestations de l'administrateur

(9) L'administrateur d'un régime de retraite n'a pas droit à des prestations du régime de retraite autres que des prestations de retraite,

(10) Subsection (9) applies, with necessary modifications, to a member of a pension committee or board of trustees that is the administrator of a pension plan and to a member of a board, agency or commission made responsible by an Act for the administration of a pension plan. 2010, c. 24, s. 7	des prestations accessoires et un remboursement de cotisations. 2010, chap. 24, art. 7. **Prestations des membres d'un comité de retraite** (10) Le paragraphe (9) s'applique, avec les adaptations nécessaires, au membre d'un comité de retraite ou d'un conseil de fiduciaires qui est l'administrateur d'un régime de retraite et au membre d'un conseil, d'une commission ou d'un organisme auquel une loi confie l'administration d'un régime de retraite. 2010, chap. 24, art. 7.