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:**

**SUN INDALEX FINANCE, LLC**

**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 THE MONITOR, FTI CONSULTING CANADA ULC**

**RESPONDENTS**
**(Appellants/Respondents)**

**- and –**

**MORNEAU SOBECO LIMITED PARTNERSHIP and THE SUPERINTENDENT OF FINANCIAL SERVICES**

**PROPOSED INTERVENERS**
**(Interveners)**

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# MEMORANDUM OF ARGUMENT OF THE RETIREES IN RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL BY SUN INDALEX FINANCE, LLC

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## MEMORANDUM OF ARGUMENT OF THE RETIREES IN RESPONSE TO SUN INDALEX

## 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 ("Sun-Indalex") 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 Sun-Indalex'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 Sun Indalex [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 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 did 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's appeal in the Decision. The Court of Appeal expressly declined to decide whether the PBA deemed trust applied in respect of the Retirees and the Executive Plan.

> Court of Appeal Reasons at para. 112, Retirees' Record, Tab 3A.

***The leave applications should be dismissed***

8. Sun-Indalex's leave application should be dismissed because it does not raise an issue of public importance. All three Applicants, including Sun-Indalex, 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, all of 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") proceedings 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.

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.

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's beneficiaries. Indalex ignored this conflict. It instead took active steps *against* the Retirees to try and stop them from obtaining any recovery for their underfunded Executive Plan.

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

12. The Court of Appeal's finding that Indalex breached its fiduciary duty to the Retirees on these facts is unassailable. No case is made for leave. The application should be dismissed.

13. 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.

14. 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 Sun-Indalex 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.

15. The Retirees repeat and rely upon the facts as set out in their responding memorandum to the leave application of the Monitor and continue with any previously defined terms. The fact section of this memorandum will address a number of mischaracterizations by Sun-Indalex in its leave memorandum. In addition to these mischaracterizations, Sun-Indalex makes numerous assertions contrary to the findings of the Court of Appeal.

***Inaccuracies and mischaracterizations in Sun-Indalex's memorandum***

***a) There are no "competing appellate decisions" as alleged by Sun-Indalex***

16. At paragraphs 2 and 5, Sun-Indalex misinterprets *Toronto-Dominion Bank v. Usarco Ltd.* and *Re Ivaco* and states:

> 5 ...The Court of Appeal's decision **departs from previous authority**... In light of the Court of Appeal's decision in this case, there are **now competing appellate decisions on the issues – including *Ivaco Inc.*** ...
>
> *Toronto-Dominion Bank v. Usarco Ltd.*, [1991] O.J. No. 1314, 42 E.T.R. 235 (Gen. Div.) [*Usarco*], Application for Leave to Appeal of Sun Indalex Finance, LLC [Sun-Indalex's Application Record], Tab 7.
>
> *Ivaco (Re)* (2005), 12 C.B.R. (5th) 213 (Ont. S.C.), aff'd (2006), 83 O.R. (3d) 108 (C.A.) [*Ivaco*], Sun-Indalex's Application Record, Tab 5.

17. There are no "competing appellate decisions". *Ivaco* is a decision of the Ontario Court of Appeal, was considered by the Court of Appeal in the Decision and held not to apply. Further, Sun-Indalex made this argument to the Court of Appeal which was 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].

***b) Sun-Indalex mischaracterizes the June 12, 2009 motion to increase the DIP***

18. At paragraph 11 of its memorandum, Sun-Indalex writes:

> 11 Counsel to certain retirees who were members of Indalex's Executive Plan (defined below) (the "Retirees") had been served in the abridged time available, sought to reserve rights ***with respect to the priority of further advances sought under the DIP Loan***, but the Court refused to reserve rights because they were inconsistent with the nature of a DIP Loan and the priority of the DIP Charge and those requests were dropped. [emphasis added]

19. The statement in italics above is false. Counsel to Sun-Indalex was not even in attendance in court at this motion. Retirees' counsel did not reserve rights "with respect to the priority of...the DIP Loan". Given the extreme short service of the motion, counsel to the Retirees sought to reserve its rights on Indalex's motion so that it could determine what the motion was for. Once it was confirmed that the motion was solely for a DIP increase, the reservation was revoked. The facts as found by the Ontario Court of Appeal tell the correct story:

> [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.***
>
> Court of Appeal Reasons at paras. 54-56, Retirees' Record, Tab 3A [emphasis added].

20. Further, the Endorsement of the CCAA Judge from that motion states:

> 9. With respect to the retirees, counsel to the Applicants made the point that **the amendment increases the availability of funds.** It is hoped that the advance will improve the position of the stakeholders.
>
> 10. **Counsel to the retirees subsequently advised that, having had the opportunity, during a recess, to discuss this matter with counsel to the Applicants and his clients, his clients were no longer insisting on a reservation of rights.**
>
> Endorsement of the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) dated June 15, 2009, at paras. 9-10, Retirees' Record, Tab 3B [emphasis added].

*c) Sun-Indalex mischaracterizes the July 20, 2009 asset sale motion*

21. At paragraphs 13 to 15 of its memorandum, Sun-Indalex omits key facts relating to the July 20, 2009 motion by Indalex to approve the sale of its assets. The Ontario Court of Appeal made the following findings which are central to its determination that Indalex breached its fiduciary duty to the Retirees:

> [139] ... **[Indalex] 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.
>
> ...
>
> [166] ...**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....**

> Court of Appeal Reasons at paras. 139 and 166, Retirees' Record, Tab 3A [emphasis added].

***d) Sun-Indalex mischaracterizes the CCAA Judge's disposition of Indalex's bankruptcy motion***

22. With respect to Indalex's motion to lift the CCAA stay of proceedings to try and assign itself into bankruptcy, Sun-Indalex writes at paragraph 21 of its leave memorandum: "In light of these findings, he [the CCAA Judge] concluded that it was unnecessary to deal with the request for a bankruptcy of the CCAA Debtors at that time." This depiction fails to mention that it was *Indalex* who brought the bankruptcy motion, not Sun-Indalex, and not any other creditor. Both the CCAA Judge and the Ontario Court of Appeal were critical of the attempt by Indalex to assign itself into bankruptcy under the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA"), with the intent to defeat the Retirees' deemed trust claim under the PBA. The Court of Appeal held:

> [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 by the Ontario Court of Appeal]
>
> ...
>
> [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.**
>
> Court of Appeal Reasons at paras. 74 and 183, Retirees' Record, Tab 3A [emphasis added].

23. Furthermore, Indalex's attempt to bankrupt itself to defeat the deemed trust claim of the Retirees was one of the facts central to the Court of Appeal's finding that Indalex breached its fiduciary duty to the Retirees:

> [139]...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.
>
> Court of Appeal Reasons at para. 139, Retirees' Record, Tab 3A [emphasis added].

***e) Sun-Indalex mischaracterizes DIP financing***

24. At paragraph 1, Sun-Indalex makes a general statement that "A DIP lender will only advance such credit on the basis that repayment will be secured by a court-ordered "super priority" charge ranking above all claims against the debtor..." Sun-Indalex cites paragraph 62 of this Court's decision in *Century Services*, where this Court observes that the CCAA has been applied in the past to grant a super-priority to a DIP lender.

25. As of September 18, 2009, the authority of a CCAA court to grant a super-priority charge to a DIP lender was codified by Parliament in section 11.2 of the CCAA. Section 11.2 expressly requires a company to give prior notice of such a motion to all secured creditors. The definition of "secured creditor" under the CCAA includes beneficiaries of a trust, such as beneficiaries of the PBA deemed trust. Accordingly, all such motions must proceed with proper notice to affected secured creditors and trust beneficiaries. Obtaining a super-priority charge to a DIP lender covertly without notice to affected trust beneficiaries, as Indalex did, is impermissible.

> CCAA, s. 11.2.

## PART II - STATEMENT OF THE QUESTIONS IN ISSUE

26. In its leave application, Sun-Indalex proposes four issues for this Court:

> 1. Whether the Court of Appeal for Ontario erred in holding that s. 57(4) of the PBA provides a deemed trust for solvency deficiencies or unfunded liabilities;

2. Whether the Court of Appeal erred in holding that a CCAA debtor is a fiduciary to pensioners when making decisions to borrow money under a DIP loan and to settle its assets, both pursuant to Court Orders, and that a constructive trust with super-priority can be granted as a remedy for alleged breaches of fiduciary duties in liquidating CCAA proceedings to avoid the application of federal bankruptcy priorities;

3. Whether the Court of Appeal erred in holding that when made the Initial Order and subsequent Orders that granted the DIP Charge were required to and failed to sufficiently invoke paramountcy, so as to entitle the Court to later conclude that there was no operational conflict between: (a) recognition of the provincial priority for deemed trusts; and (b) the requirements of federal priority and the Orders made under the CCAA for the payment of the same money to others; and

4. Whether the Court of Appeal erred in failing to follow the decision of this Honourable Court in *Century Services* and the decision of the Court of Appeal for Ontario in *Ivaco* providing that priorities at the end of a liquidating CCAA proceeding are determined under the federal scheme of priorities as established under the BIA under which deemed trusts created by provincial statues are not recognized as valid.

27. For the reasons set out below, none of the issues raised by Sun-Indalex are of public importance that warrant this Court's review. Sun-Indalex's arguments are a re-crafting of its arguments before the Court of Appeal which in comprehensive reasons were rejected. The leave application of Sun-Indalex and the other Applicants should be dismissed.

## PART III - STATEMENT OF ARGUMENT

### *Issue #1 – Section 57(4) of the PBA creates a deemed trust over the amount of the wind up deficiency*

28. Issue #1 of Sun-Indalex has no application to the Retirees. As noted earlier, the Court of Appeal declined to decide whether the PBA deemed trust applied to the Retirees' Executive Plan. The Retirees were successful on the basis of the Court of Appeal's finding on the facts of this case that Indalex breached its fiduciary duty to the Retirees under both the common law and section 22(4) of the PBA. All of the Applicants overlook this distinction in their leave memoranda.

***There is no conflicting caselaw on the amount covered by the PBA deemed trust***

29. Nevertheless, some comments are warranted. At paragraph 26 of its memorandum, Sun-Indalex argues that the Decision "represents the first time in Canada that a wind-up or solvency

deficit has been held to give rise to a deemed trust under provincial legislation." suggesting that there is conflicting caselaw. As noted earlier, there is no conflicting caselaw.

30. Even if the Decision is the "first time" that the PBA wind-up deemed trust has been comprehensively analyzed and applied, this does not result in any public importance. It is trite that the Ontario Court of Appeal's Decision does not bind the courts of other provinces. No review of the Decision by this Court is required.

***Issue #2 - This Court has confirmed that a pension plan administrator owes a fiduciary duty to pension plan members***

31. 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].

32. 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.

33. Sun-Indalex admits in its memorandum of argument 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" (paragraph 36). There is no doubt that Indalex as plan administrator owed a fiduciary duty to the members of the Executive Plan.

34. 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].

35. 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].

36. 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.

37. 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].

38. The Court of Appeal reviewed the conduct of Indalex and found on the facts of this 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].

***Sun-Indalex misstates the caselaw settled by this Court relating to breach of fiduciary duty and constructive trusts***

39. At paragraphs 39 to 44, Sun-Indalex states that the "imposition of a remedy requires conduct which prejudiced the beneficiary of the duty" and cites this Court's decision in *Hodgkinson v. Simms* (at paragraph 39). "Prejudice" is not a factor mentioned by this Court in *Hodgkinson* as a prerequisite to a finding of breach of fiduciary duty. Nor is "prejudice" an appropriate factor in analyzing whether a breach of fiduciary duty exists or whether to impose a constructive trust. In any event, there is no debate in this case that the Retirees have been severely prejudiced by the loss of one-half and two-thirds of their monthly pension benefits due to the underfunding by Indalex of the Executive Plan.

> *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 [*Hodgkinson*], Book of Authorities of Sun-Indalex at Tab 14.

40. At paragraph 40, Sun-Indalex argues that "the pensioners would have been no better off" had there been no DIP Charge. This statement is unsupported speculation. It also misses the

point of the importance of a fiduciary duty. What is certain is that the Court of Appeal found that Indalex breached its fiduciary duty to the Retirees and acted with intent to cause the Retirees prejudice by trying to stop them from recovering an amount for the underfunded Executive Plan.

41. Sun-Indalex relies on *Barnabe v. Touhey* and *Canada (Attorney General) v. Confederation Life*. These cases are not applicable to the facts of this case. Both cases deal with unjust enrichment. Furthermore, Sun-Indalex misapplies these authorities.

> *Barnabe v. Touhey* (1995), 26 O.R. (3d) 477 (C.A.) [*Barnabe*], Book of Authorities of Sun-Indalex at Tab 16.
>
> *Canada (Attorney General) v. Confederation Life Insurance Co.* (1995), 24 O.R. (3d) 717 (Gen. Div.), affd (1997), 32 O.R. (3d) 102 (C.A.) [Confederation Life], Book of Authorities of Sun-Indalex at Tab 15.

42. *Barnabe* (at paragraph 4) does not stand for the proposition asserted by Sun-Indalex that "a constructive trust should not be imposed for the purpose of avoiding the federal scheme of distribution." In that case, the court examined whether it was "appropriate in the circumstances" to impose the remedy of constructive trust. Furthermore, there is no scheme of distribution in the CCAA.

43. In *Confederation Life* (at paragraphs 196 and 208) (mis-cited by Sun-Indalex as 209 and 221), the court does not use the language used by Sun-Indalex that there "are limits" on the imposition of a constructive trust. Rather, the Ontario Court of Appeal in *Confederation Life* examined whether the constructive trust was an "appropriate remedy in the circumstances" of that case.

44. In the Decision, the Ontario Court of Appeal applied the settled law from this Court to the facts of Indalex's CCAA proceeding:

> [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.

...

[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).
>
> Court of Appeal Reasons at paras. 198-202, 204, Retirees' Record, Tab 3A [emphasis added].

***Issue #3 – The "collateral attack" argument was comprehensively disposed of by the Court of Appeal***

45. Like Issue # 1, 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.

46. 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.

47. Third, Sun Indalex's argument is that as soon as the Initial CCAA order was issued, despite being obtained without notice to the Retirees and with a covertly obtained super-priority charge to the DIP lender over statutory trusts, and once the DIP funds were advanced, then the super-priority in the order to the DIP lender must nevertheless be followed. The Retirees challenged the DIP priority with respect to their claims for the wind-up deficit owing to the Executive Plan. The Court of Appeal correctly rejected Sun-Indalex's argument indicating that the doctrine of paramountcy that has been settled by this Court was not followed:

> [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.
>
> Court of Appeal Reasons at paras. 179-181, Retirees' Record, Tab 3A.

48. Fourth, this issue is 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.

49. Fifth, at paragraph 46, Sun-Indalex argues that the Decision requires CCAA debtors to "think of everyone" who might possibly claim a statutory priority at some future date and "list them, notify them, and deal with them". First, this is an incorrect extrapolation of the Decision. Second, 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 super-priority over statutory trusts into the Initial CCAA Order is now covered in changes made by Parliament to the CCAA that came into force on September 18, 2009, as discussed earlier. 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, entirely independent of the Decision of the Court of Appeal, as of September 18, 2009, all companies under CCAA protection are expressly 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 the granting of a 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].

***Issue 4 - The Decision is consistent with this Court's recent decision in Century Services***

50. Sun-Indalex'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 Sun-Indalex refer to any conflicting caselaw. The Ontario Court of Appeal correctly rejected these arguments in paragraphs 191-194 of the Decision.

> Court of Appeal Reasons at paras. 191-194, Retirees' Record, Tab 3A.

51. Furthermore, section 23(1)(h) of the CCAA expressly recognizes that the two insolvency regimes, the CCAA and BIA, can 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).

## PART IV - SUBMISSIONS ON COSTS

52. 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

53. The Retirees respectfully request an order dismissing the Sun-Indalex's leave application with costs.

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

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Counsel for the Respondent Retirees

## 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**<br>**2. (1)** In this Act,...<br><br>"secured creditor"«*créancier garanti* »<br>"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**<br>**2.** (1) Les définitions qui suivent appliquent à la présente loi....<br><br>« créancier garanti »"*secured creditor*"<br>« 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**<br>**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. | **Financement temporaire**<br>**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 |

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| | prononcé de l'ordonnance. |
| **Priority — secured creditors** | **Priorité — créanciers garantis** |
| (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company. | (2) Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie. |
| **Priority — other orders** | **Priorité — autres ordonnances** |
| (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. | (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. |
| **Factors to be considered** | **Facteurs à prendre en considération** |
| (4) In deciding whether to make an order, the court is to consider, among other things, | (4) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants : |
| (*a*) the period during which the company is expected to be subject to proceedings under this Act; | *a*) la durée prévue des procédures intentées à l'égard de la compagnie sous le régime de la présente loi; |
| (*b*) how the company's business and financial affairs are to be managed during the proceedings; | *b*) la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures; |
| (*c*) whether the company's management has the confidence of its major creditors; | *c*) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants; |
| (*d*) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company; | *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*) the nature and value of the company's property; | *e*) la nature et la valeur des biens de la compagnie; |
| (*f*) whether any creditor would be materially prejudiced as a result of the security or charge; and | *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*) the monitor's report referred to in paragraph 23(1)(*b*), if any. | *g*) le rapport du contrôleur visé à l'alinéa 23(1)*b*). |
| 1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 36, s. 65. | 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, | **11.4** (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis |

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| 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. | 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**<br>(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. | **Obligation de fourniture**<br>(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**<br>(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. | **Charge ou sûreté en faveur du fournisseur essentiel**<br>(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**<br>(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company. | **Priorité**<br>(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**<br>**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 | **Biens grevés d'une charge ou sûreté en faveur d'administrateurs ou de dirigeants**<br>**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 |

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| against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act. | 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** | **Biens grevés d'une charge ou sûreté pour couvrir certains frais** |
| **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 | **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*) 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; | *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*) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and | *b*) ceux des experts dont la compagnie retient les services dans le cadre de procédures intentées sous le régime de la présente loi; |
| (*c*) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is | *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 |

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| necessary for their effective participation in proceedings under this Act.<br>**Priority**<br>(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.<br>2005, c. 47, s. 128; 2007, c. 36, s. 66. | sous le régime de la présente loi.<br>**Priorité**<br>(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.<br>2005, ch. 47, art. 128; 2007, ch. 36, art. 66. |
| **MONITORS**<br>**Duties and functions**<br>**23.** (1) The monitor shall<br>(*a*) except as otherwise ordered by the court, when an order is made on the initial application in respect of a debtor company,<br>(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<br>(ii) within five days after the day on which the order is made,<br>(A) make the order publicly available in the prescribed manner,<br>(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<br>(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;<br>(*b*) review the company's cash-flow statement as to its reasonableness and file a report with the court on the monitor's findings;<br>(*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;<br>(*d*) file a report with the court on the state of | **CONTRÔLEURS**<br>**Attributions**<br>**23.** (1) Le contrôleur est tenu:<br>*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 :<br>(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,<br>(ii) dans les cinq jours suivant la date du prononcé de l'ordonnance :<br>(A) de rendre l'ordonnance publique selon les modalités réglementaires,<br>(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,<br>(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;<br>*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;<br>*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 |

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| the company's business and financial affairs — containing the prescribed information, if any — | de déposer auprès du tribunal un rapport où il présente ses conclusions; |
| (i) without delay after ascertaining a material adverse change in the company's projected cash-flow or financial circumstances, | *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 : |
| (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 | (i) dès qu'il note un changement défavorable important au chapitre des projections relatives à l'encaisse ou de la situation financière de la compagnie, |
| (iii) at any other time that the court may order; | (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, |
| (*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; | (iii) à tout autre moment fixé par ordonnance du tribunal; |
| (*e*) advise the company's creditors of the filing of the report referred to in any of paragraphs (*b*) to (*d.1*); | *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; |
| (*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; | *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.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; | *f*) de déposer auprès du surintendant des faillites, selon les modalités réglementaires, de temps et autre, une copie des documents précisés par règlement; |
| (*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; | *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; |
| (*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* | 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 |

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| *Act*, so advise the court without delay after coming to that opinion; | nécessaire à l'exercice de ses attributions; |
| (*i*) advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the company and its creditors; | *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; |
| (*j*) make the prescribed documents publicly available in the prescribed manner and at the prescribed time and provide the company's creditors with information as to how they may access those documents; and | *i*) de conseiller le tribunal sur le caractère juste et équitable de toute transaction ou de tout arrangement proposés entre la compagnie et ses créanciers; |
| (*k*) carry out any other functions in relation to the company that the court may direct. | *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. |
| **Monitor not liable** | **Non-responsabilité du contrôleur** |
| (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. | (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, c. 47, s. 131; 2007, c. 36, s. 72 | 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. |
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| **Registration and Administration** | **Enregistrement et Administration** |
| **Care, diligence and skill** | **Soin, diligence et compétence** |
| **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). | 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). |
| **Special knowledge and skill** | **Connaissances et compétences particulières** |
| (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). | (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). |
| **Member of pension committee, etc.** | **Membre d'un comité de retraite** |
| (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. R.S.O. 1990, c. P.8, s. 22 (3). | (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 de la Législature confie l'administration d'un régime de retraite. L.R.O. 1990, chap. P.8, par. 22 (3). |
| **Conflict of interest** | **Conflit d'intérêts** |
| (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). | (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). |
| **Employment of agent** | **Emploi de mandataires** |
| (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 | (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 |

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.**

(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

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, 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.