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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

Applicants

REPLY FACTUM OF THE PENSIONERS

(Motion by retirees re: Deemed Trust, returnable August 28, 2009)

August 27, 2009

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TO: THE SERVICE LIST

REPLY FACTUM

1. This Factum is filed by the Pensioners in support of their Deemed Trust motion returnable on August 28, 2009 and in reply to the Applicants' Factum.

2. This motion involves a dispute between the Pensioners of the Executive Plan and the Applicants over $3.2 million of the proceeds of the sale of the Applicants' Canadian assets to SAPA. The Executive Plan is underfunded on a wind up basis by approximately $3.2 million. The Pensioners assert a deemed trust over those amounts under section 57(4) of the Ontario *Pension Benefits Act* (PBA). The deemed trust in the PBA has priority over secured creditors under section 30(7) of the Ontario *Personal Property Security Act*.

3. The Applicants business has been sold to SAPA as a going concern. The Applicants' directors have resigned, there is no remaining business and they are "insolvent shells" (per affidavit of Keith Cooper sworn August 24, 2009, paras. 33 and 35).

4. The Executive Plan will be wound up. If it is wound up in its current underfunded state, then the Pensioners will have the pension benefits that they earned during years of employment with the Applicants, and upon which they depend for income for the rest of their lives, significantly reduced.

5. The Pensioners are opposed by the Applicants, however, as noted above, the Applicants have no management and no business. On August 12, 2009, following the sale to SAPA, the Applicants entered into a Shareholder Declaration granting full power and control of its management to Indalex Holdings Corp. ("Indalex U.S."), a U.S. company in parallel chapter 11 proceedings. Indalex U.S. now administers the Executive Plan.

6. Indalex U.S. has directed that Indalex Limited seek leave of this court to assign itself into bankruptcy as part of efforts to defeat the Pensioners' deemed trust claim. If the Pensioners' deemed trust claim is defeated, the amount held in reserve by the Monitor in

respect of the deemed trust motions will be used in a U.S. claims process to pay the claims of U.S. creditors.

Cross-examination of Keith Cooper, August 26, 2009

The Wind Up of the Executive Plan is a Certainty

7. According to the Affidavit of Keith Cooper sworn August 24, 2009 (a senior managing director with FTI Consulting Inc. and currently the chief restructuring officer of Indalex U.S.:

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

Due to the sale of the Applicants business and the request for leave to assign itself into bankruptcy, the wind up of the Executive Plan is a certainty.

8. A pension plan must be administered in the best interests of the members of the plan. As explained in the Pensioners main factum, the pension plan administrator owes a fiduciary duty to the members and former members of the plan. The administration of the plan and the decisions and acts performed by the administrator must be performed in the best interests of the members and former members. The fiduciary duty on a plan administrator has been confirmed in numerous authorities including the Ontario Court of Appeal in *Ivaco*.

9. The delay by Indalex U.S. to proceed with the wind up and instead seek an assignment in bankruptcy are manoeuvres designed to defeat the Pensioners' deemed trust claim and to channel the $3.2 million in reserve to the U.S. company which in turn will be used to pay U.S. creditors. Indalex U.S., the administrator of the Executive Plan, is in flagrant conflict of interest and breach of its fiduciary duty to the Pensioners. This Court should not permit that breach to occur.

10. As the Applicants are not proceeding with the wind up process on their own, then under section 69 of the PBA, the Superintendent of Financial Services will require the wind up of a pension plan as certain circumstances as set out below have occurred:

> 69.(1)The Superintendent by order may require the wind up of a pension plan in whole or in part if,
>
> (a) there is a cessation or suspension of employer contributions to the pension fund;
>
> (b) the employer fails to make contributions to the pension fund as required by this Act or the regulations;
>
> (c) the employer is bankrupt within the meaning of the Bankruptcy and Insolvency Act (Canada);
>
> (d) a significant number of members of the pension plan cease to be employed by the employer as a result of the discontinuance of all or part of the business of the employer or as a result of the reorganization of the business of the employer;
>
> (e) all or a significant portion of the business carried on by the employer at a specific location is discontinued; [or]
>
> (f) all or part of the employer's business or all or part of the assets of the employer's business are sold, assigned or otherwise disposed of and the person who acquires the business or assets does not provide a pension plan for the members of the employer's pension plan who become employees of the person;

11. In this case, the criteria in 69(1)(a)(d)(e) and (f) have all been met. The criteria in section 69 are disjunctive, meaning that only one of the criteria need be met to warrant the Superintendent to step in and require the wind up of a pension plan. In this case, four of the criteria are met.

12. The Applicants say that since the wind up process for the Executive Plan has not yet commenced, the deemed trust does not yet arise. The chief restructuring officer of Indalex U.S. who is now administering the Executive Plan, has deposed under oath that he does not disagree with the Monitor's statement in the letter attached to the Monitor's 7th Report that the Executive Plan will be wound up.

13. There is a shortfall in the amount of assets in the Executive Plan to pay for pensions. The most recent actuarial valuation for the Executive Plan as of January 1, 2008 stated that the deficiency in the Executive Plan on a wind up basis was $2,996,400. In a more recent review of the funded status of Executive Plan conducted by the actuarial firm Morneau Sobeco, they estimate that the wind up liability for the Executive Plan if wound up as of July 15, 2009 is $3.2 million.

14. Section 57 of the PBA provides:

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

15. The deemed trust in section 57(4) captures amounts that are owing to a pension plan "that are not yet due under the plan or the regulations". Even though Indalex U.S. has not started the wind up process, it is inevitable that a wind up will occur and that there will be a shortfall. The best evidence before this court is that the wind up liability is $3.2 million as of July 15, 2009. According to the affidavit of Bob Kavanaugh sworn August 12, 2009 (para. 21) he states that "*currently, approximately 80% of the assets of the Executive Plan are invested in fixed income securities and approximately 20% of the assets of the Executive Plan are invested in equities.*" Accordingly, there will be no appreciable change to the funded status of the Executive Plan even if one were to consider recent market improvements. The plan will certainly be underfunded in the approximate amount of $3.2 million on its wind-up. The prospective language of section 57(4) captures that amount.

16. Further, section 58(1) is entitled "Accrual" and states that "Money that an employer is require to pay into a pension fund accrues on a daily basis". This means that all amounts that will have accrued to the date of the wind up are captured by the deemed trust in section 57(4).

PBA, section 58(1)

The Applicants proposed interpretation of the PBA is wrong

17. The *PBA* sets out a detailed process governing how an Ontario pension plan is to be wound-up. Section 75 of the *PBA* imposes a comprehensive liability on an employer to pay into the pension fund on its wind up all amounts that are required to be paid into the fund to provide the pension benefits that the plan is required to pay to its members. Section 75 states:

> Liability of employer on Wind Up
>
> 75. (1) Where a pension plan is wound up in whole or in part, ***the employer shall pay into the pension fund***,
>
> (a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued ***and that have not been paid into the pension fund; and***
>
> (b) an amount equal to the amount by which,
>
> (i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,
>
> (ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, ***and***
>
> (iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,
>
> exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario. R.S.O. 1990, c. P.8, s. 75 (1); 1997, c. 28, s. 200. [emphasis added]

18. Section 75 breaks out the different categories of required payments in its subsections, all of which are required to be paid into a pension plan by an employer as of the date of the plan wind up.

19. Section 75(1)(a) requires an employer to pay "an amount equal to the total of all payments that … are due or that have accrued and have not been paid into the pension fund." This subsection would capture, for example, the amount of all unpaid current service costs and unpaid special payments (i.e., payments that are required while the pension plan is in operation), as those amounts are either due for payment (and have not been paid) or they have accrued but are not yet due to be paid under the payment schedule for special payments in the PBA regulations. On wind up, those payments are captured under section 75(1)(a) for payment as of the wind up date.

20. But section 75 does not stop there. Section 75(1)(b) then requires a further calculation to determine an amount to be paid into the pension plan by an employer comprised of three additional categories in subsections 75(1)(b)(i)(ii) and (iii) that is based on a comparison of the benefits the plan is to provide to the amount of assets in the fund. Section 75(1)(b) calculates the difference and if there is a shortfall, then that shortfall is added to the liability calculated in section 75(1)(a) to arrive at the total employer wind up liability.

21. The Applicants argue in paragraph 17 of their factum that section 75(1)(b) "creates a separate funding obligation in respect to any deficiency that exists in a plan 'following' the wind up." and the amounts in section 75(1)(b) are not subject to the deemed trust in section 57(4). That proposed interpretation is incorrect and is not supported by the words of the PBA.

22. There is no additional liability that accrues "following" a wind up. The wind up liability of a plan is determined as of the wind up date. As noted in the Pensioner's main factum, the wind up date is governed by section 68(5) and (6) of the PBA. All events crystallize on the wind up date: all pension benefit accruals by members cease and all amounts that an employer is required to pay into an underfunded plan are calculated as of the wind up

date. There is no additional or separate wind up liability that develops over time "following" the wind up, as the Applicants suggest.

23. Section 75(1)(a) is differently worded than section 57(4) further eliminating any possible interpretation that section 57(4) only applies to section 75(1)(a) payments. Section 75(1)(a) does not include a reference to amounts accrued "to the date of wind up" which is referenced in section 57(4). The court must give meaning to all words used by the Legislature. In the Pensioners submission, the words accrued "to the date of wind up" are intended to import the wind up deficit into section 57(4) because the wind up deficit accrues as of the date of the wind up. The absence of these words in section 75(1)(a) reinforces the conclusion that section 75(1)(a)'s scope is smaller and only encompasses contributions which were required while the pension plan was in operation.

24. Further, if the Legislature intended that the deemed trust wind up provision in section 57(4) be restricted to amounts determined in section 75(1)(a) as opposed to all of section 75, it would have said so. This is not what the Legislature has done. The language in section 57(4) has no such restriction. The Applicants' proposed interpretation is unsupportable. Section 57(4) encompasses all amounts accrued "to the date of wind up" which, based on the above reasoning, must necessarily include the wind up deficit under section 75(1)(b).

25. The interpretation proposed by the Applicants is not only not inconsistent with the words of the PBA, it is also an interpretation that would not protect pensioners, particularly in a wind up of an underfunded pension plan, where the pensioners are especially vulnerable and need the protection in the PBA. The Applicants' proposed interpretation is entirely contrary to the purpose of the PBA that has been enunciated by the Supreme Court of Canada and numerous other cases. The Applicants' proposed interpretation must be rejected.

Payment of the amounts determined by section 75

26. Once the win dup liability amount has been calculated under section 75, the employer is required to pay that amount into the pension plan. The process by which an employer does so is described in FSCO Bulletin W100-102:

> 3.2 If the wind up report reveals that the plan does not have sufficient assets to pay the liabilities on wind up, the employer must pay into the pension fund amounts required under section 75 of the PBA.
>
> The amount of the deficit to be funded pursuant to clause 75(1)(b) of the PBA is the amount by which the Ontario wind up liability, exclusive of the unfunded portion of non-plan-vested benefits, exceeds the value of plan assets allocated for payment of pension benefits accrued with respect to employment in Ontario. Pursuant to clause 29(9)(a) of the Regulation, where payments are being made in accordance with section 75 of the PBA, the employer is not liable to pay the unfunded portion (based on the wind up funded ratio) of non-plan-vested benefits.
>
> Where the employer funds the deficit by a lump sum payment and the actuary files a certification that the obligations under section 75 of the PBA have been fully funded, the benefits can be paid. As a minimum , the deficit must be funded in accordance with section 31 of the Regulation by annual special payments, payable annually in advance, over a maximum period of five years commencing at the effective date of wind up (for qualifying plans, by monthly special payments over one year).
>
> The administrator is required under section 32 of the Regulation to file a report annually until the employer's obligation under section 75 of the PBA has been fulfilled. This annual report must be prepared by an actuary and must satisfy all standards normally applicable to a valuation report. In addition, the report should provide a again and loss analysis since the last report filed and specify the special payments required to liquidate the remaining liability obligation under section 75 of the PBA. Where a report shows that no further amount is to be funded, subsection 32(4) of the Regulation provides that any surplus may revert to the employer, subject to the requirements of section 79 of the PBA.
>
> Subsection 29(7) and (8) of the Regulation set out the restrictions on cash out, transfers and annuity purchases prior to the plan being fully funded. For information, see policy W100-440 ("Restrictions on Payments in Deficit Situations").

27. The first wind up special payment is due to be paid by the employer on the effective date of the wind up and the balance of payments are due annually over a five year period.

This schedule is designed to ease the burden of making wind up payments by allowing an employer to pay wind up payments in instalments over 5 years. In this way, the required wind up payments are captured by the deemed trust in section 57(4) as they are "*accrued to the date of wind up but not yet due under the plan or regulations*.". If the wind up special payments that can be made in the future were not so captured then it would allow an employer to escape the deemed trust simply by following the 5 year payment schedule. That would undermine the entire purpose of section 57(4).

The Applicants rely on cases that do not deal with the wind up deemed trust

28. The Applicants rely on the *Usarco* and *Ivaco* decisions. The motions before the courts in those cases were not seeking wind up deemed trust under section 57(4) of the PBA. Those cases dealt with motions for deemed trusts for unpaid current service and special payments.

> ***Ivaco*** **(2006) 83 O.R. (3d)108 (C.A.) affirming *Ivaco Inc.*, 2005 CanLII 27605 (Ont.S.C.)**
>
> ***Usarco Limited*** **(1991) 42 E.T.R. 235 (Ont. Gen. Div.)**

29. It is inappropriate for the Applicants rely upon Justice Laskin's *obiter* in Ivaco as determinative of the issue on this motion. Justice Laskin wrote:

> 44. At paragraph 11 of his Decision, the Motions Judge said that both unpaid contributions and Wind Up liabilities are deemed to be held in Trust ***under section 57(3)***. In his earlier Decision, *Toronto Dominion Bank v. Usarco* (1991), 42 E.T.R. 235, Farley J. said, that at para. 25, that the equivalent legislation then in force under the *Pension Benefits Act*, 1987 S.O. 1987 the c.35 referred only to unpaid contributions not to Wind Up liabilities. ***I think that the statement in Usarco is correct but I do not need to resolve this issue on this appeal***. [emphasis added]
>
> ***Re: Ivaco*** **(2006) 83 O.R. (3d)108 (C.A.) affirming [2005] O.J No. 3337 (O.S.C.J.).**

30. Justice Laskin only refers to section 57(3), the "Accrued Contributions" deemed trust provision, not section 57(4), the wind up deemed trust provision. Further, Justice Laskin states that his comments are *in obiter* and not binding. It is clear that Justice Laskin never considered this matter at length, nor did he have to.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of August, 2009.

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