Court of Appeal File No. M38582
Court of Appeal File No. M38599
Superior Court File No. 09-CV-8122-00CL

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.

Applicants

RESPONDING FACTUM OF SUN INDALEX FINANCE, LLC
(Appeals by USW and Retirees)

October 28, 2010

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PART I - OVERVIEW

1. This factum is submitted by Sun Indalex Finance, LLC ("Sun"), the principal creditor advancing proven secured claims and the beneficiary of Court-ordered super-priority claims against the funds being held by the Monitor in this cross-border insolvency proceeding. The Appellants seek these same funds by asserting the existence and priority of deemed trusts under provincial law. Court Orders made in this proceeding, case law and recent amendments to bankruptcy legislation implemented by Parliament all make clear that no priority claim for pension deficits exists under both the applicable provincial and federal law. Even if the provincial deemed trusts sought by the Appellants arose in this case, the provincial priority scheme does not apply in federal insolvency proceedings and the deemed trusts do not have priority ahead of secured and Court-ordered super-priority creditors under the doctrine of paramountcy. As this Honourable Court noted in *Ivaco*, the contrary outcome sought would promote early bankruptcies instead of facilitating efforts to conclude going concern restructurings or sales, such as the one that occurred in this case, which save jobs and maximize realization.

PART II - THE FACTS

Insolvency Proceedings of Indalex Limited ("Indalex")

2. Indalex's parent company and certain U.S. affiliates (collectively, the "US Debtors") commenced bankruptcy proceedings under Chapter 11 of Title 11 of the *United States Bankruptcy Code* in the United States Bankruptcy Court, District of Delaware, on March 20, 2009.

> Affidavit of Keith Cooper sworn August 24, 2009 ("Cooper Affidavit") at para. 4, Monitor's Compendium, Tab 1

3. On April 3, 2009, Indalex, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc. (collectively, the "Canadian Debtors") made an application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). Morawetz J. granted this application and appointed FTI Consulting Canada ULC as monitor (the "Monitor").

> Cooper Affidavit at paras. 5 and 6, Monitor's Compendium, Tab 1

4. On April 8, 2009, Morawetz J. granted the Amended and Restated Initial Order, which, *inter alia*, authorized Indalex to borrow funds pursuant to a debtor-in-possession credit agreement (the "DIP Credit Agreement") among the US Debtors, the Canadian Debtors and a syndicate of lenders. The Amended and Restated Initial Order was subsequently amended to correct certain references and typographical errors and to increase the Canadian sub-facility borrowing limit (collectively, the "Initial Order").

> Cooper Affidavit at paras. 7 and 12, Monitor's Compendium, Tab 1

5. The Initial Order provides that the Canadian Debtors' obligation to repay their DIP loan is secured by a Court-ordered super-priority charge in favour of the lenders. The Order provides that this charge is in priority to all liens and encumbrances, expressly including deemed trusts and statutory liens.

> Cooper Affidavit at para. 8, Monitor's Compendium, Tab 1
>
> Initial Order at para. 45, Exhibit "A" to the Cooper Affidavit, Monitor's Compendium, Tab 1A

6. The DIP Credit Agreement contemplated that the DIP loan would be repaid from the proceeds derived from a going concern sale of Indalex's assets on or before August 1, 2009.

Cooper Affidavit at para. 9, Monitor's Compendium, Tab 1

7. The Canadian Debtors' obligation to repay their DIP loan was guaranteed by the US Debtors.

Cooper Affidavit at para. 10, Monitor's Compendium, Tab 1

Cross-Border Sale of Canadian and U.S. Business of Indalex

8. The Canadian Debtors and US Debtors jointly sold substantially all of their assets to SAPA Holdings AB (the "SAPA Transaction") in a going concern transaction that was approved by an Order made by Campbell J. dated July 20, 2009 (the "Approval and Vesting Order").

Cooper Affidavit at para. 16, Monitor's Compendium, Tab 1

Approval and Vesting Order, Monitor's Compendium, Tab 9

9. Although this CCAA proceeding was considered to be a "liquidating CCAA", in the sense that the Canadian Debtors did not remain the owners of the business, the SAPA Transaction was a sale of a going concern business and not a piecemeal liquidation of idle assets in bankruptcy. The going concern sale maximized recovery for creditors. It preserved value for suppliers and customers who can continue to do business with the enterprise now operated by the buyer. Most significantly, the SAPA Transaction preserved approximately 950 jobs of the Canadian Debtors' former employees in Canada.

Reasons for Decision of Justice Campbell dated February 18, 2010 ("Campbell Judgment") at para. 13, Monitor's Compendium, Tab 8

10. The Approval and Vesting Order that implemented the SAPA Transaction required that the proceeds of sale from the SAPA Transaction be paid to the Monitor. It also directed the Monitor to make a distribution to the DIP lenders subject to a reserve that the Monitor considered to be appropriate in the circumstances.

Cooper Affidavit at paras. 16 and 18, Monitor's Compendium, Tab 1

Approval and Vesting Order at para. 14, Monitor's Compendium, Tab 9

11. Paragraph 14 of the Approval and Vesting Order also provided that, to the extent that any indebtedness owing by the Canadian Debtors to the DIP lenders was satisfied by any of the US Debtors or their affiliates under their guarantee referred to in paragraph 7 above, the US Debtors are subrogated to the rights of the DIP lenders under the DIP Lenders Charge (as defined in the Initial Order) to the extent of such payment. There was no appeal of the Approval and Vesting Order and it too remains a valid and subsisting Order of the Court.

Approval and Vesting Order at para 14, Monitor's Compendium, Tab 9

12. The SAPA Transaction closed in Canada and the U.S. on July 31, 2009.

Cooper Affidavit at para. 24, Monitor's Compendium, Tab 1

13. The Canadian sale proceeds were insufficient to re-pay the DIP loan in full. Accordingly, the US Debtors paid US$10,751,247.22 to satisfy the obligations of the Canadian Debtors to their DIP lenders. Pursuant to paragraph 14 of the Approval and Vesting Order, the US Debtors are subrogated to the super-priority rights of the DIP lenders under the DIP Lenders Charge in the Initial Order for that amount.

Cooper Affidavit at paras. 23-25, Monitor's Compendium, Tab 1

Approval and Vesting Order at para. 14, Monitor's Compendium, Tab 9

Deemed Trust Allegations

14. At the Court hearing to approve the SAPA Transaction, certain retired executives of Indalex (the "Retirees") objected to the going concern sale altogether. Alternatively, they asserted a deemed trust claim over the Canadian sale proceeds and requested that $3.2 million, an amount representing an estimate of the wind up deficit in their pension plan (the "Executive Plan), be held in reserve by the Monitor. The United Steelworkers Union (the "USW" and together with the Retirees, the "Appellants") supported the SAPA Transaction and reserved its rights with respect to

any deemed trust claim it might bring with respect to its seven members' pension plan (the "Salaried Plan" and together with the Executive Plan, the "Plans").

Cooper Affidavit at paras. 17, 19 and 21, Monitor's Compendium, Tab 1

Plans

15. The Salaried Plan is in the process of being wound up with an effective wind up date of December 31, 2006. It is undisputed and was found by Campbell J. that all contributions to the Salaried Plan that were due prior to the effective date of the wind up were paid by the Canadian Debtors.

Cooper Affidavit at para. 21, Monitor's Compendium, Tab 1

Affidavit of Bob Kavanaugh sworn August 12, 2009 ("Kavanaugh Affidavit") at paras. 5-11, Monitor's Compendium, Tab 2

16. On the hearing date of the motions below (i.e. August 28, 2009), the Executive Plan had not been wound up. Indalex made all required contributions to the Executive Plan to date, including current service and special payments. No amounts are currently due or accruing to the Executive Plan.

Cooper Affidavit at para. 20, Monitor's Compendium, Tab 1

Kavanaugh Affidavit at paras. 15 and 16, Monitor's Compendium, Tab 2

17. The amount of $3.2 million the Retirees sought to have paid into the Executive Plan is derived from a letter provided by Morneau Sobeco. The letter says that the figure is subject to a number of caveats and qualifications and is only a "rough estimate" of the wind up deficit of the Executive Plan that might exist when the Executive Plan is wound up. The actual funded status of the Executive Plan in the event of a wind up can only be determined by an actuarial valuation performed after such wind up occurs.

Kavanaugh Affidavit at para. 18, Monitor's Compendium, Tab 2

Exhibit "G" to the Affidavit of Andrea McKinnon sworn July 17, 2009, Monitor's Compendium, Tab 3G

Funds Retained by the Monitor

18. Due in part to the above-noted reservations of rights and objections to the SAPA Transaction, the Monitor retained in excess of $6.75 million from the proceeds of sale of the assets of Indalex which the Appellants assert are covered by the alleged deemed trusts.

Cooper Affidavit at para. 22, Monitor's Compendium, Tab 1

19. Sun is the principal secured creditor of the US Debtors and asserts the Court-ordered super-priority of the US Debtors under the Initial Order and the subrogation provisions of the Approval and Vesting Order. Sun is also a lender to the Canadian Debtors and has filed a proof of claim against the Canadian Debtors advancing a secured claim in the amount of $38,049,926.54 that remains due and owing to Sun under the terms of its loans to the Canadian Debtors. As such, Sun has the principal economic interest in the funds being sought by the Appellants.

Motions Below

20. By August 28, 2009, one month after the closing of the SAPA Transaction, all that remained of the Canadian Debtors was cash in the hands of the Monitor. The Canadian Debtors are no longer carrying on business, have no active employees and no other assets. Their boards of directors have resigned. The Canadian Debtors are insolvent shells with nothing left to restructure. The Appellants brought motions asserting their claims for alleged deemed trusts. The Canadian Debtors responded by bringing a motion to file an assignment in bankruptcy to distribute the remaining cash to creditors in accordance with lawful priorities.

Cooper Affidavit at paras. 27 and 33, Monitor's Compendium, Tab 1

Canadian Debtors' Notice of Motion dated August 20, 2009, Monitor's Compendium, Tab 7

21. In reasons released on February 18, 2010, Campbell J. dismissed the motions below. With respect to the Salaried Plan, Campbell J. held that no deemed trust arose as no amounts were due or accruing due under the Salaried Plan. With respect to the Executive Plan, Campbell J. held that

no deemed trust arose as the Executive Plan had not been wound up, all required contributions had been made, and no amounts were due or accruing.

Campbell Judgment, Monitor's Compendium, Tab 8

22. In light of his findings that there were no deemed trusts, Campbell J. concluded that it was unnecessary to deal with the request for a bankruptcy of the Canadian Debtors at that time. However, Campbell J. left it open to parties to renew the request for bankruptcy relief at a later date.

Campbell Judgment at paras. 56-57, Monitor's Compendium, Tab 8

PART III - LAW AND ARGUMENT

23. Sun respectfully submits that, on the facts of this case, Campbell J. did not err in his decision in following law that is both well established and well founded. Sun respectfully submits that:

(a) The Initial Order provides that the DIP Lenders Charge has priority over all other security interests, including any deemed trusts created under the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the "PBA"). It remains a valid, subsisting, unappealed Order. The US Debtors are subrogated to the super-priority charge under the Approval and Vesting Order which also remains a valid, subsisting, unappealed Order. The funds held by the Monitor are subject to the super-priority DIP Lenders Charge regardless of whether deemed trusts exist or not. If provincial legislation would lead to an outcome that is inconsistent with the terms of the Orders made under the CCAA or the federal bankruptcy priority scheme, then the doctrine of paramountcy renders the provincial legislation inoperative;

(b) In any event, Campbell J. was correct in concluding that no deemed trusts arose with respect to wind up deficits in either of the Plans in accordance with a plain and ordinary reading of the deemed trust provisions of the PBA;

(c) In the alternative, and in the event that this Honourable Court determines that the Appellants' deemed trust claims apply to wind up deficits under either of the Plans, Sun submits that the priority scheme under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") applies in this CCAA proceeding to determine the priority of the Appellants' deemed trust claims. If necessary to seek an actual bankruptcy, Sun would bring back on for hearing the motion to bankrupt the Canadian Debtors to ensure that the BIA priorities scheme applies;

(d) The proposed interpretations urged by the Appellants, along with the Superintendent of Financial Services (the "Superintendent") and Morneau Sobeco Limited Partnership ("Morneau Sobeco" and together with the Superintendent, the "Intervenors"), are contrary to the statutory purpose of the CCAA to facilitate going concern restructuring and avoid the devastation of bankruptcy. Moreover, they would be harmful to public policy and Canadian credit markets; and

(e) The allegations that Indalex breached its fiduciary duties to the Appellants are irrelevant to the issues raised in the appeals and, in any event, would only amount to unsecured claims.

A. DIP Lenders Charge has Super-Priority Over Deemed Trusts

24. Sun submits that Campbell J. correctly applied the terms of the Initial Order to the facts of this case. In that regard, Campbell J. correctly stated:

> Since under the initial order priority was given to the DIP Lenders, they are entitled to be repaid the amounts currently held in escrow. Those entitled to windup deficiency remain as of that date unsecured creditors.
>
> Campbell Judgment at para. 51, Monitor's Compendium, Tab 8

25. Paragraph 45 of the Initial Order provides:

> THIS COURT ORDERS that each of the Administration Charge, the Directors' Charge and the DIP Lenders Charge (all as constituted and defined herein) shall constitute a charge on the Property and such Charges **shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or**

> **otherwise** (collectively "Encumbrances") in favour of any Person. [Emphasis added]
>
> Initial Order at para. 45, Exhibit "A" to the Cooper Affidavit, Monitor's Compendium, Tab 1A

26. The Appellants did not oppose or appeal from the Initial Order. They did not take advantage of the "comeback clause" in paragraph 56 of the Initial Order to seek to vary or amend the super-priority DIP Lenders Charge. The Appellants submit instead that the deemed trusts should be paid in priority to the DIP Lenders Charge pursuant to subsection 30(7) of *the Personal Property Security Act*, R.S.O. 1990, c. P.10 (the "PPSA"), which gives priority to deemed trusts over claims of secured creditors to certain types of collateral. This argument amounts to an impermissible collateral attack against an unappealed Order of the Court.

> PPSA, s. 30(7)

27. In a CCAA proceeding, the supervising CCAA Court has the jurisdiction to make an Order that has the effect of overriding provincial legislation, including the PBA, under the doctrine of paramountcy. In *Collins & Aikman Automotive Canada Inc. (Re)*, Spence J. stated:

> ...the Court has the jurisdiction under the CCAA to make an order under the CCAA which conflicts with, and overrides, provincial legislation. There is no apparent reason why this principle would not apply to an order made under the CCAA which conflicts with the PBA.
>
> *Collins & Aikman Automotive Canada Inc.(Re)*, [2007] O.J. No. 4186 (S.C.J.) ("*Collins & Aikman*") at paras. 42 and 87, Sun's Book of Authorities, Vol. I, Tab 1
>
> *Nortel Networks Corp. (Re)*, [2009] O.J. No. 4967 (C.A.) at paras. 44 and 47, Sun's Book of Authorities, Vol. I, Tab 2

28. In the *Asset-Backed Commercial Paper* case, this Honourable Court expressed the constitutional principle as follows:

> [103] ... It has long been established that the CCAA is valid federal legislation under the federal insolvency power: *Reference re: Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659. As the Supreme Court confirmed in that case (p. 661), citing Viscount Cave L.C. in *Royal Bank of Canada v. Larue* [1928] A.C. 187, "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament." Chief Justice Duff elaborated:

> Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.
>
> [104] That is exactly the case here. The power to sanction a plan of compromise or arrangement that contains third-party releases of the type opposed by the appellants is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action – normally a matter of provincial concern – or trump Quebec rules of public order is constitutionally immaterial. The CCAA is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the CCAA governs. To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount. Mr. Woods properly conceded this during argument.
>
> *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, [2008] 92 O.R. (3d) 513 (C.A.) ("*Metcalfe & Mansfield*") at paras. 103-104, Sun's Book of Authorities, Vol. I, Tab 3

29. The jurisdiction to override provincial legislation includes the jurisdiction to grant a debtor-in-possession financing charge with super-priority. CCAA Courts throughout Canada have ordered that DIP financing charges shall rank ahead of both provincial statutory liens and CRA deemed trust claims.

> *Sulphur Corp. of Canada Ltd.(Re)*, [2002] A.J. No. 918 (Q.B.) at para. 16, Sun's Book of Authorities, Vol. I, Tab 4
>
> *Temple City Housing Inc. (Re),* [2007] A.J. No. 1489 (Q.B.) at paras. 6 and 14, Sun's Book of Authorities, Vol. I, Tab 5
>
> *AbitibiBowater Inc. (Re)*, [2009] Q.J. No. 16097 (S.C.) at paras. 14-18, Sun's Book of Authorities, Vol. I, Tab 6
>
> *Winnipeg Motor Express Inc. (Re)*, [2009] M.J. No. 284 (Q.B.) at para. 43, Sun's Book of Authorities, Vol. I, Tab 7

30. The DIP Lenders Charge in paragraph 45 of the Initial Order is consistent with the standard-form DIP charge under the Commercial List Model CCAA Initial Order, which has been approved by the Commercial List Users' Committee.

> Model CCAA Initial Order at para. 40, Sun's Book of Authorities, Vol. I, Tab 8

31. Lenders who advance money to insolvent debtors through DIP financing in CCAA proceedings require that such funds be subject to a super-priority charge that ranks in priority to

any encumbrances, including deemed trusts and statutory liens. DIP loans are required to keep insolvent companies "alive" pending restructuring or going concern sales efforts, such as those that occurred in this case. While super-priority DIP charges were available previously as a matter of statutory discretion under section 11 of the CCAA or in the exercise of the CCAA Court's inherent jurisdiction, the availability of super-priority charges for DIP loans has now been codified in recent amendments to the CCAA and represents the clearly expressed intention of Parliament.

CCAA, s. 11.2

32. The Appellants and the Intervenors proposed interpretation that the deemed trusts should be paid in priority to DIP lender charges put at risk DIP lenders' willingness to advance funds required by insolvent debtors to remain alive pending a going concern outcome. This interpretation is contrary to the intention and purpose of the CCAA to facilitate the restructuring of failing businesses to avoid bankruptcy and liquidations. An interpretation that is contrary to the purpose of a statute ought not to be accepted. The Court will prefer instead the interpretation that promotes the legislative intention of Parliament.

Metcalfe & Mansfield, supra, at paras. 44-49, Sun's Book of Authorities, Vol. I, Tab 3

Elan Corp. v. Comiskey, [1990] O.J. 2180 (C.A.) ("*Elan*") at paras. 22 and 56-60 (per Doherty J.A. in dissent, although not on this point), Sun's Book of Authorities, Vol. I, Tab 9

Ivaco (Re), [2006] O.J. No. 4152 (C.A.) ("*Ivaco*") at paras. 3 and 64, Sun's Book of Authorities, Vol. I, Tab 10

33. In addition, this case involves a cross-border proceeding in which the US Debtors guaranteed the Canadian DIP loan under the terms of the Initial Order and the Approval and Vesting Order. Such cross-border cooperation is to be encouraged. Foreign creditors and foreign Courts cannot be expected to allow their estates' assets to be utilized to assist Canadian going concern restructuring efforts if Orders requiring that foreign funds be repaid are not respected in accordance with their terms. The Appellants' collateral attack on the unappealed Orders ignores

comity and our international relations and obligations in cross-border proceedings.

34. Therefore, Sun submits that the priority provisions of Initial Order ought to apply regardless of whether the PBA deemed trusts would extend to the cash being held by the Monitor.

B. No Deemed Trusts under the PBA

i. Plain and Ordinary Meaning of the PBA

35. Sun submits that Campbell J. was correct in holding that the amount of the wind up deficit in the Salaried Plan and the estimated amount of the wind up deficit in the Executive Plan, respectively, are not subject to deemed trusts pursuant to subsection 57(4) of the PBA.

Campbell Judgment, Monitor's Compendium, Tab 8

36. Campbell J. correctly determined that, where, prior to a pension plan being wound up, an employer has paid all contributions due to the plan in accordance with the PBA and the general regulation promulgated under the PBA, being, R.R.O. 1990, Regulation 909 ("Regulation 909"), no deemed trust arises. Moreover, on the plain and ordinary meaning of the words used in section 57 of the PBA, there is also no deemed trust for the final wind up deficit that may arise after a plan is wound up.

37. The PBA contains a comprehensive regime governing the funding of registered pension plans. The PBA sets out separate and distinct obligations on the employer to fund a pension plan while the plan is ongoing and upon wind up.

The Plain and Ordinary Meaning of Section 57 of the PBA – It Applies Only to Contributions to Ongoing Plans

38. While a pension plan is ongoing, an employer generally has the obligation to make the two principal types of contributions (ignoring employee contributions that do not arise in this case):

(a) **Current service or "normal cost" contributions** - Employer contributions in respect of benefits that are accruing to members as a result of their ongoing

employment and participation in the plan as active employees must be made in monthly instalments within 30 days after the month to which they relate.

Regulation 909, s. 4(4)3

(b) **Special payments** - A plan administrator must file actuarial reports periodically valuing the plan on both a "going concern" basis (where it is assumed that the plan will continue to operate indefinitely) and a "solvency" basis (where it is assumed that the plan will be terminated or wound up on the date of the valuation). Where a triennial actuarial report concludes that the plan has either a "going concern deficiency" or a "solvency deficiency", the employer is generally required to make additional monthly contributions over a 15 or five-year period, respectively. It is important to note that there is no obligation on the employer to pay the "going concern deficiency" or the "solvency deficiency" identified by the actuary in an ongoing plan. The deficiencies are notional actuarial or accounting terms only. They are not amounts due or that accrue due to the plan by the employer. The "going concern deficiency" and the "solvency deficiency" are inputs in the calculation of the required monthly special payment contributions as determined periodically in actuarial reports. As future actuarial reports are filed, identifying changes to the value of the plan since the last filed report, the amount of future monthly required contributions will change.

Regulation 909, ss. 4(4)5, 5(1)(b) and 5(1)(e)

39. Subsection 58(1) of the PBA provides that contributions that an employer is required to pay into a pension plan accrue on a daily basis.

PBA, s. 58(1)

40. Subsections 57(3) and (4) of the PBA provide for deemed trusts to secure contributions required to be paid into a pension plan that is ongoing up to the date of wind up. Subsections 57(3) and (4) of the PBA state:

> 57. (3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.
>
> (4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.
>
> PBA, ss. 57(3)-(4)

41. Subsection 57(3) of the PBA creates a deemed trust for employer contributions that are due and are not paid into the plan. This subsection would apply to any current service contributions and any special payment contributions that were due and were not paid on a timely basis as were calculated and established in the most recent actuarial report. As noted above, it is only the contributions as calculated by the actuary that come due and not the going concern or solvency deficiencies on which such calculations were based. On the facts of this case, all contributions required by the actuary's reports were paid and, therefore, no deemed trust arose under this subsection.

> PBA, s. 57(3)

42. Subsection 57(4) of the PBA creates a deemed trust for employer contributions that have accrued to the date of wind up but are not yet due at that date. On the plain meaning of its words, this subsection applies to any current service contributions and any special payment contributions that had accrued on a daily basis under section 58 of the PBA between the date of the last contribution payment and prior to the date of wind up. This deemed trust arises only when such contributions have accrued but were not yet due because the next monthly payment date had not occurred as at the date of the wind up.

PBA, s. 57(4)

Toronto-Dominion Bank v. Usarco Ltd., [1991] O.J. No. 1314 (Gen. Div.) ("*Usarco*"), Sun's Book of Authorities, Vol. I, Tab 11

Ivaco, *supra*, Sun's Book of Authorities, Vol. I, Tab 10

43. In this case, all required contributions for current service costs and special payments had been made to the date of the winding up of the Salaried Plan. The Executive Plan has not been wound up. Accordingly, Campbell J. was correct in holding that no deemed trusts could have arisen in respect of either of the Plans under subsection 57(4) of the PBA.

Wind up Obligations – There are No Deemed Trusts for the Wind Up Deficit under Paragraph 75(1)(b) of the PBA

44. Once a plan is wound up, the PBA imposes different obligations on the employer. The wind up of a pension plan includes both the termination of the plan and the distribution of the assets of the pension fund. As at the effective date of wind up, no new members may join the plan and existing members cease accruing benefits under the plan. No further normal cost or special payment contributions accrue under the provisions of the PBA governing the funding of ongoing plans cited above.

PBA, ss. 68-77

Regulation 909, ss. 28-37

45. When a wind up of a pension plan is triggered, there are additional responsibilities upon the employer and the administrator that must be completed as part of the wind up process once the effective date of the wind up is known. The administrator is required to file a wind up report prepared by an actuary in respect of the plan's assets and liabilities within six months of the effective date of wind up. If the wind up report (once prepared) discloses a deficiency in the pension plan, the employer has the additional obligation to fund the deficit by equal annual instalments over a five-year period. Appropriate plan amendments and corporate resolutions that effect the wind up must be filed with the Superintendent in conjunction with the wind up report.

The administrator is also responsible for filing the Superintendent's Checklist for Compliance on Wind Up for Defined Benefit Plans. The administrator is required to provide a statement setting out the benefits and options available to each person entitled to a benefit or refund on the wind up of the pension plan. In addition, within six months of the effective date of wind up, the administrator must file all outstanding annual information returns, PBGF Assessment Certificates and any financial statements required for the pension plan. Once the Superintendent has approved the wind up report, the administrator must distribute the entitled benefits in accordance with the methods and entitlements set out in the plan, the wind up report and the PBA. This may include, for example, the purchase of annuities. The administrator is required to give the Superintendent written notice confirming the final distribution.

> Filing Requirements and Procedure on a Full or Partial Wind Up of a Pension Plan, FSCO Policy W100-102 (December 2004), Sun's Book of Authorities, Vol. I, Tab 12
>
> PBA, ss. 68-77
>
> Regulation 909, ss. 28-37

46. The obligations of an employer to make payments to a pension plan that has been wound up are set out in section 75 of the PBA. Section 75 of the PBA states:

> 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.
>
> (2) The employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times.
>
> PBA, s. 75

47. Pursuant to paragraph 75(1)(a) of the PBA, upon wind up of a pension plan, an employer must pay into the pension fund an amount equal to all contributions that had come due or accrued and that have not yet been paid into the fund as at the date of the wind up.

48. By contrast, pursuant to paragraph 75(1)(b) of the PBA, if the wind up report (once prepared) discloses a deficiency in the value of the assets held in pension fund to meet the total liabilities of the plan, the employer has the additional obligation to pay into the fund an amount necessary to fund this deficiency. This is the full wind up deficit. Until liability is established and quantified under paragraph 75(1)(b) of the PBA, the employer has no liability to pay the deficit. While the plan is ongoing, the employer's obligation is to make contributions as they are calculated and come due and are adjusted over time. The obligation to pay the full deficit arises only months or years into the wind up when the actuary and the administrator have determined the effective date of the wind up, completed the many steps noted above, and have valued the assets and liabilities in light of prevailing market conditions sufficiently to deliver the wind up report.

> *Collins & Aikman*, *supra*, Sun's Book of Authorities, Vol. I, Tab 1

49. The obligation imposed on an employer to pay a pension plan deficit under paragraph 75(1)(b) of the PBA does not arise until well after the effective date of the wind up. Subsection 57(4) of the PBA by its terms only captures contributions accrued to the date of wind up. Therefore, subsection 57(4) of the PBA does not create a deemed trust for the obligations created to pay a plan deficit in paragraph 75(1)(b) of the PBA.

> PBA, s. 75
>
> Regulation 909, s. 31

50. Subsection 57(4) of the PBA by its terms creates a deemed trust in respect of the obligation to pay outstanding contributions that accrued while the plan was ongoing. Those obligations are referenced in paragraph 75(1)(a) of the PBA. There is no equivalent provision anywhere in the PBA creating a deemed trust in respect of the obligation to fund a wind up deficit created by paragraph 75(1)(b) of the PBA. By restricting the scope of subsection 57(4) of the PBA to obligations covered by paragraph 75(1)(a) of the PBA (i.e. outstanding contributions accrued while the plan was ongoing), the Ontario Legislature has not provided a deemed trust in respect of the obligation to pay the full plan deficit created by paragraph 75(1)(b) of the PBA.

PBA, ss. 57(4) and 75(1)

51. This is consistent with subsection 58(1) of the PBA, which provides that "[m]oney that an employer is required to pay into a pension plan accrues on a daily basis." By including subsection 58(1) immediately following the use of the word "accrued" in subsection 57(4), the Ontario Legislature provides guidance on the intended scope of contributions that it intended to be protected by a deemed trust under subsection 57(4) and, it is submitted that wind up deficits are not among them. Subsection 58(1) confirms the plain meaning of accrual in the PBA. Accrual is a linear, chronological accumulation of monetary obligations on a daily basis. Accordingly, since wind up deficits are only determined later, and any obligation to pay them cannot arise before the date of wind up of a pension plan, the daily accrual contemplated under subsection 58(1) of the PBA simply cannot occur in respect of these monies before or to the date of wind up. As the obligation to pay a wind up deficit cannot have "accrued to the date of the wind up", no deemed trust can arise under subsection 57(4) of the PBA.

52. Therefore, Campbell J. correctly applied the plain and ordinary meaning of the deemed trust provisions of the PBA to the facts of this case.

ii. No Deemed Trusts under Existing Jurisprudence and Commentary

53. Sun submits that Campbell J.'s interpretation of the deemed trust provisions of the PBA is consistent with the existing jurisprudence and commentary.

54. In *Toronto-Dominion Bank v. Usarco Ltd.* ("*Usarco*") Farley J. held that the deemed trust created under subsection 58(4) [now subsection 57(4)] of the PBA is limited to the outstanding pension plan contributions that arise in the "stub" period only (i.e. between the date of the last monthly contribution and the date of the winding up). He found that the deemed trust provisions did not apply to those payments required to be made to fund the wind up deficit liability under subsection 76(1) [now subsection 75(1)] of the PBA. In that regard, Farley J. stated:

> It therefore appears to me that the deemed trust provision of subs. 58(3) and (4) only refer to the regular contributions together with those special contributions which were to have been made but were not. In this situation, that would be the regular and special payments that should have been made but were not (as reflected in the report as of December 31, 1998), together with any regular or special payments that should have been made by the wind up date, July 13, 1990, but were not made. This is contrasted with the obligation of Usarco to fully fund its pension obligations as of the wind-up date pursuant to s. 76(1). It is recognized in these circumstances, however, that the bank will have a secured position which will prevail against these additional obligations as to the special payments, which have not yet been required to be paid into the fund. Sadly it is extremely unlikely there will be a surplus after taking care of the bank to allow the pension fund to be fully funded for this (the likelihood being that the wind-up valuations of assets and liabilities of the pension fund will show a deficiency).
>
> *Usarco*, *supra*, at p. 9-10 (Q.L.), Sun's Book of Authorities, Vol. I, Tab 11

55. Campbell J. correctly determined the scope of subsection 57(4) of the PBA in distinguishing between the terms "accrued" and "due" in subsection 57(4) of the PBA in accordance with their plain and ordinary meanings. Campbell J. confirms that "the distinction to be made between amounts that are accruing and amounts that are due is that, in the case of an amount accruing, it is not yet payable, while generally an amount that is due is payable."

> Campbell Judgment at para. 33, Monitor's Compendium, Tab 8

56. The conclusions of Campbell J. regarding the terms "accrued" and "due" in subsection 57(4) of the PBA are confirmed by the interpretation of these same terms by Farley J. in *Usarco*.

In that regard, Farley J. stated:

> On that basis, I believe that there is merit in the bank's position that s. 58(4) takes into account those employee contributions (regular and special payments) which are developing, but not yet, but for that subsection, required to be paid into the pension plan. See Canadian Institute of Chartered Accountants, Terminology for Accountants, 3d ed. (C.I.C.A.: 1983), at p. 5, where "accrue" is defined as "in accounting, to record that which has accrued with the passage of time in connection with the rendering or receiving of service (e.g., interest, taxes, royalties, wages), but the payment of which is not enforceable at the time of recording." Section 59(1) states: "Money that an employer is required to pay into a pension fund accrues on a daily basis." Therefore, in my view the trust extends to the amount that Usarco was obligated to pay into the pension fund, prorated to July13, 1990.
>
> *Usarco*, *supra*, at p.10 (Q.L.), Sun's Book of Authorities, Vol. I, Tab 11

57. The decision of Farley J. in *Usarco* in respect of the deemed trust provisions of the PBA was commented upon positively by a unanimous panel of this Honourable Court in *Ivaco (Re)* ("*Ivaco*"). The USW and the Superintendent refer to a comment made by Farley J. in his decision in *Ivaco* where he appeared to suggest, without reasons or reference to his own earlier decision in *Usarco*, that the deemed trust provisions of section 57 of the PBA also applied to wind up deficits. However, this comment by Farley J. was doubted and the reasoning of Farley J. in *Usarco* was expressly preferred by this Honourable Court in *Ivaco*, stating:

> At para. 11 of his decision, the motions judge said that both unpaid contributions and wind-up liabilities are deemed to be held in trust under s. 57(3). In his earlier decision in *Toronto-Dominion Bank v. Usarco* (1991) 42 E.T.R. 235, Farley J. said, at para. 25, that the equivalent legislation then in force under the *Pensions Benefits Act, 1987*, S.O. 1987, c. 35 referred only to unpaid contributions, not to wind up liabilities. I think this statement in Usarco is correct, but I do not need to resolve this issue on this appeal.
>
> *Ivaco*, *supra*, at para. 44, Sun's Book of Authorities, Vol. I, Tab 10

58. The Retirees submit that, in essence, *Usarco* and *Ivaco* can be distinguished on the basis that these cases dealt with motions for deemed trusts for unpaid current service and special payments under subsection 57(3) of the PBA and not wind up deficits. *Ivaco* dealt expressly with the Superintendent's efforts to have the Court apply a deemed trust to a wind up deficit. As to *Usarco*, the Retirees raise a distinction without a difference. Farley J.'s analysis applies in exactly the same manner in each case. Both of these cases considered subsection 57(4) of the PBA (or the

predecessor thereof), are directly on point and dealt with the deemed trust issues raised in these appeals.

59. The Retirees submit that Campbell J. erred by holding that no deemed trust arose in respect of the Executive Plan on the basis that the wind up of the plan had not occurred at the time of the motions below. The Retirees submit that this conclusion was incorrect since, *inter alia*, subsection 57(4) of the PBA is prospective and aimed at attaching the deemed trust to amounts that will be owed to a pension plan on its wind up in the future and Campbell J. ignored the evidence that the Executive Plan is going to be wound up. It is submitted that this proposed interpretation ignores the key application requirement of subsection 57(4) of the PBA that no deemed trust under this provision can exist unless and until a plan wind up happens. Even then, the deemed trust that could arise would only catch contributions that had already accrued, but remained unpaid, up to the date of the wind up.

60. The Appellants and the Intervenors submit that Campbell J. erred by holding that the deemed trusts do not extend to wind up deficits on the basis that such an interpretation is inconsistent with the purpose of subsection 57(4) of the PBA and the broader purpose of the PBA to protect members of pension plans. The Appellants' and the Intervenors' contentions are inconsistent with the jurisprudence and the plain and ordinary meaning of the PBA as outlined above.

61. The Superintendent submits that, *inter alia,* special payments (including special payments in respect of wind up deficits) are contributions in respect of past services and, therefore, they have accrued at the date of wind up. The Superintendent's contentions ignore the distinctions between "going concern" and "solvency" special payments, which may accrue before the date of wind up, and special payments that are required to fund wind up deficits, which do not arise under section 75 of the PBA until after the date of wind up. Moreover, while many cases have dealt with

employers whose liability to make special payment contributions arose because of past events, there is nothing limiting special payment contributions to past events. The definition of special payment contributions in fact relates to the amount required to amortize notional valuation deficiencies that may exist for any number of reasons. The timing of underlying events that may, in some case, contribute to a notional deficiency arising in a particular actuarial report, has no bearing on the timing of accrual of the contributions for special payments required to be paid as set out in the actuarial report and under Regulation 909. This proposed interpretation also ignores that the payments required to fund the deficit determined by section 75 of the PBA do not all accrue or become due on the date of the wind up but are determined months or years later when the actuarial wind up report is prepared.

62. The absence of any deemed trust in respect of future payments of a wind up deficit under the PBA has also been recognized by commentators:

> The PBA does not expressly state whether the funding deficiency on the wind up of a pension plan is secured by the deemed trust, but it appears that the deemed trust is intended to apply to the deficiency to the extent it relates to employer contributions and remittances due to and owing to the pension fund on wind up but which have not been paid.
>
> ... The deemed trust does not extend to the obligation of an employer to fund pension obligations that have not yet become due or which "crystallize" only upon the wind up of the pension plan.
>
> Ari N. Kaplan, *Pension Law* (Toronto: Irwin Law, 2006) at 396, Sun's Book of Authorities, Vol. I, Tab 13
>
> ... **Of particular note to secured creditors will be the fact that the courts have determined that the deemed trust created under the OPBA [Ontario Pension Benefits Act] does not extend to the unfunded pension liability upon wind up of the plan, but is limited to the outstanding, unremitted contributions that are past due plus those arising in respect of the stub period.** Accordingly while the entirety of the pension fund shortfall remains an obligation of the deficiency over a period not exceeding five years from the date of windup, at present this is an unsecured claim on the assets of the debtor. [Emphasis added].
>
> Gregory Winfield, "Pension Management in Insolvency and Restructuring: What is at Stake?"(Insight, 2005) at 55, Sun's Book of Authorities, Vol. I, Tab 14

63. Therefore, in following Farley J.'s decision in *Usarco* (as endorsed by a unanimous decision of this Honourable Court in *Ivaco*), this Honourable Court's decision in *Ivaco* and the

commentary referred to above, Campbell J. correctly interpreted the deemed trust provisions of the PBA to the facts of this case.

C. Deemed Trusts Do Not Apply in Insolvency Proceedings

64. Even if deemed trusts arose under the PBA, Sun submits that the provincial priority scheme does not apply in insolvency proceedings and no priority for the Appellants' deemed trust claims can be recognized in this case.

65. Parliament has the exclusive constitutional authority to regulate insolvency proceedings. Only deemed trusts that are specifically referred to in subsections 67(2) and (3) of the BIA and section 18.3 of the CCAA or also meet the common law attributes of a trust (i.e. the three common law certainties) are applicable in federal insolvency proceedings. As noted above, provincial efforts to create "deemed trusts" are inconsistent with the federal scheme and inoperative. Therefore, the deemed trusts asserted by the Appellants would not apply to change the scheme of priorities in any event as they would be inoperative under the doctrine of paramountcy.

> BIA, ss. 67(1)(a), (2) and (3)
>
> CCAA, s. 18.3
>
> *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 ("*Henfrey Samson*"), Sun's Book of Authorities, Vol. II, Tab 15
>
> *Metcalfe v. Mansfield*, *supra*, Sun's Book of Authorities, Vol. I, Tab 3
>
> *Ivaco*, *supra*, Sun's Book of Authorities, Vol. I, Tab 10

66. In *Ivaco*, this Honourable Court heard an appeal by the Superintendent from Farley J.'s refusal to make an order directing that a portion of proceeds realized on the going concern sale of the debtor's business be used to satisfy Ivaco's outstanding pension obligations (including its wind up deficit) that the Superintendent alleged were subject to deemed trusts under subsections 57(3) and (4) of the PBA. This Honourable Court held that any such deemed trusts would not apply in a proceeding under the CCAA. In that regard, this Honourable Court held that the CCAA does not provide for the payment of pension amounts from sale proceeds as follows:

> The CCAA itself did not require the motions judge to execute the deemed trusts. The Superintendent cannot point to any section of the statute where a legal obligation to order payment of the past service contributions can be found. Moreover, in my view, absent an agreement, I doubt that the CCAA even authorized the motions judge to order this payment. Once restructuring was not possible and the CCAA proceedings were spent, as the motions judge found and all parties acknowledged, I question whether the court had any authority to order a distribution of the sale proceeds. See for example *United Maritime Fishermen Co-op., Re* (1988), 68 C.B.R. (N.S.) 170 (N.B. Q.B.), at 173.
>
> *Ivaco*, *supra*, at para. 60, Sun's Book of Authorities, Vol. I, Tab 10

67. The Canadian Debtors are no longer carrying on business, have no active employees or tangible assets (other than certain cash and tax refunds) and no board of directors. Accordingly, this CCAA proceeding is "spent". All that remains is a reserve of cash retained by the Monitor from the proceeds of sale of Indalex's assets for distribution.

> Cooper Affidavit at para. 33, Monitor's Compendium, Tab 1

68. In *Ivaco*, this Honourable Court held that the priority scheme under the BIA applies in CCAA proceedings to determine the claims of creditors against an insolvent company in order to avoid the artificial creation of a legislative gap.

> *Ivaco*, *supra*, at paras. 38, 63, 64 and 76, Sun's Book of Authorities, Vol. I, Tab 10

69. This Honourable Court's decision in *Ivaco* confirms that the CCAA and BIA are a complimentary and inter-related scheme that occupy the field and oust the application of provincial legislation. By doing so, the federal priority scheme applies in CCAA proceedings. In that regard, this Honourable Court stated:

> **Where a creditor seeks to petition a debtor company into bankruptcy at the end of CCAA proceedings, any claim under a provincial deemed trust must be dealt with in bankruptcy proceedings**. The CCAA and the BIA create a complementary and interrelated scheme for dealing with the property of insolvent companies, a scheme that occupies the field and ousts the application of provincial legislation. Were it otherwise, creditors might be tempted to forgo efforts to restructure a debtor company and instead put the company immediately into bankruptcy. That would not be a desirable result.
>
> Also, giving effect to the Superintendent's position, in substance, would allow a province to do indirectly what it is precluded from doing directly. Just as a province cannot directly create its own priorities or alter the scheme of distribution of property under the BIA, neither can it do so indirectly. See *Husky Oil*, supra, at paras. 32 and 39. At bottom the Superintendent seeks to alter the

> scheme for distributing an insolvent company's assets under the BIA. It cannot do so. [emphasis added]
>
> *Ivaco*, *supra*, at paras. 64 and 65, Sun's Book of Authorities, Vol. I, Tab 10

70. In this case, like *Ivaco*, the insolvent debtors' assets have been sold. All that remains is the distribution of the proceeds of sale. There is nothing left to restructure. The CCAA process is spent and a motion was properly brought to bankrupt the Canadian Debtors in order to distribute the cash proceeds of their assets to the creditors lawfully entitled to receive the funds. Under *Ivaco*, as quoted above, the priority scheme under the BIA applies in this CCAA proceeding to determine the claims of creditors. Under the BIA priority scheme, the Appellants' deemed trusts do not have priority ahead of secured creditors. Application of the provincial priorities would provide an inconsistent result – recognizing deemed trusts that Parliament has determined should not be recognized – and, therefore, the federal scheme prevails.

> *Henfrey Samson*, *supra*, Sun's Book of Authorities, Vol. II, Tab 15
>
> *Husky Oil Operations Ltd. v. Minister of National Revenue,* [1995] 3 S.C.R. 453, Sun's Book of Authorities, Vol. II, Tab 16
>
> *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, [2005] 74 O.R. (3d) 382 (C.A.), Sun's Book of Authorities, Vol. II, Tab 17
>
> *Ivaco*, *supra*, Sun's Book of Authorities, Vol. I, Tab 10

71. In the alternative, should this Honourable Court determine that the BIA priority scheme does not apply at this time, Sun would expect to bring back on for hearing the motion that was not dealt with by Campbell J. at the motions below to bankrupt the Canadian Debtors and render inoperative any priorities under provincial law. As this Honourable Court confirmed in *Ivaco*, it is entirely appropriate and perfectly proper for a bankruptcy application to be brought so as to ensure that Parliament's system of priorities under the BIA applies.

> *Ivaco*, *supra*, Sun's Book of Authorities, Vol. I, Tab 10
>
> *Bank of Nova Scotia v. Huronia Precision Plastics Inc.*, 2009 CarswellOnt 374 (S.C.J.), Sun's Book of Authorities, Vol. II, Tab 18

D. Proposed Interpretations of the PBA and the CCAA Urged by the Appellants and the Intervenors do not Accord with the Policy of the CCAA

72. Sun submits that the interpretation of the deemed trust provisions of the PBA adopted by Campbell J. accords with a plain and ordinary reading of the statute and strikes a reasonable balance between the rights of employees and the rights and reasonable expectations of secured creditors. If the Ontario Legislature chose to grant priority for future payments of a wind up deficit, they would have specifically done so in plain and clear language in the PBA. The natural consequences of doing so would include: (a) a refusal of lenders to advance funds to any employer facing a significant pension deficit; (b) a decision by secured lenders to put employers with potential pension deficits into bankruptcy as soon as problems emerge to ensure that the PBA provisions are inapplicable and the secured lenders' positions are protected; and (c) adverse effects and uncertainty in Canadian credit markets as lenders to companies with pension plans would have to consider the volatility of wind up deficits as part of their credit granting decisions. None of these results would be for the overall benefit of employees and businesses in Ontario and the legislative decision not to extend the deemed trust to future payments of a wind up deficit reflects a rational policy choice.

73. As to the CCAA, the CCAA is "remedial in the purest sense". Parliament's intention in enacting the CCAA was to facilitate the restructuring of failing businesses to avoid bankruptcy and liquidations:

> [The CCAA] provides a means whereby the devastating social and economic effects of bankruptcy or creditor-initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> *Elan*, *supra*, at para. 57, Sun's Book of Authorities, Vol. I, Tab 9
>
> *Metcalfe & Mansfield, supra*, at paras. 50-51, Sun's Book of Authorities, Vol. I, Tab 3

74. An interpretation recognizing priority in insolvency restructuring proceedings for pension wind up deficits is inappropriate and would lead to undesirable results by promoting bankruptcies

and liquidations instead of restructurings. Under the Appellants' and the Intervenors' proposed interpretations, secured creditors of employers with potential pension deficits would be motivated to put insolvent debtors into bankruptcy as soon as problems emerge to ensure that the deemed trusts are inapplicable and the secured lenders' positions are protected. This result is neither desirable nor in accordance with the intention and purpose of the CCAA to facilitate the restructuring of failing businesses to avoid bankruptcy and liquidations.

> *Metcalfe & Mansfield*, *supra,* at paras. 44-49, Sun's Book of Authorities, Vol. I, Tab 3
>
> *Elan*, *supra*, at paras. 22 and 56-60, Sun's Book of Authorities, Vol. I, Tab 9
>
> *Ivaco*, *supra*, at paras. 3 and 64, Sun's Book of Authorities, Vol. I, Tab 10

75. In *Ivaco*, this Honourable Court held that, if the rights of pension claimants are to be given greater priority, Parliament, not the Courts, must do so. In that regard, this Honourable Court stated:

> Because the federal legislative regime under the CCAA and the BIA determines the claims of creditors of an insolvent company, if the rights of pension claimants are to be given greater priority, Parliament, not the courts, must do so. And Parliament has at least signalled its intention to do so. Last year it passed the *Wage Earner Protection Program Act*, S.C. 2005 c.47. That Act would amend the BIA and give special priority to unpaid pension contributions of a bankrupt employer. This statute, however, has not been proclaimed in force. That it was passed perhaps shows that under the existing legislative regime, claims like that of the Superintendent must fail. I would reject this ground of appeal.
>
> *Ivaco*, *supra*, at para. 69, Sun's Book of Authorities, Vol. I, Tab 10

76. The amendments referred to by this Honourable Court in *Ivaco* have now been made by Parliament. In amendments to both the CCAA and the BIA, Parliament specifically chose to provide Canadian pensioners with a special priority for only going concern normal cost contributions. Not only is there no priority for wind up deficit amounts, but Parliament did not even grant a priority for ongoing contributions for special payments amortizing solvency deficiencies. Accordingly, Parliament has made a clear choice under the recently amended insolvency legislation that deemed trusts for pension deficits are not accorded priority under the

CCAA or the BIA as part of the restructuring of failing businesses.

> BIA, ss. 60(1.5), 81.5 and 81.6
>
> CCAA, s. 6(6)

77. Therefore, the proposed interpretations of the deemed trust provisions of the PBA advanced by the Appellants and the Intervenors are contrary to public policy and the goals of the CCAA to facilitate restructurings and were correctly dismissed by Campbell J.

E. Allegations of Breach of Fiduciary Duty and Equitable Subordination are Irrelevant

78. Sun submits that the Appellants' various allegations of a breach of fiduciary duty on the part of Indalex (and their related submissions that fairness and equity dictate that they have priority to the funds held by the Monitor) and equitable subordination are irrelevant to the issues in the appeals and were correctly dismissed by Campbell J.

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

80. Campbell J. correctly exercised his discretion in respect of the Appellants' allegations of a breach of fiduciary duty on the part of Indalex, and their related submissions that fairness and equity dictate that they have priority. In that regard, Campbell J. stated:

> In circumstances such as this, the Court does not have the mandate to exercise the discretion to do what it or any group might consider fair and equitable. The federal insolvency legislation in force (the CCAA and BIA) provide schemes of priority among creditors commencing with those who have security over the assets of the company. Pitted against those with security are those unsecured creditors who must share in whatever is left over after the secured creditors are paid.
>
> Campbell Judgment at para. 47, Monitor's Compendium, Tab 8

81. This Honourable Court has previously ruled that a trust cannot be imposed by a court for the purpose of avoiding the bankruptcy scheme of distribution among creditors. This would be to the unfair detriment of all other creditors and stakeholders of the Canadian Debtors, including Sun.

> *Barnabe v. Touhey*, [1995] 26 O.R. (3d) 477 (C.A.), Sun's Book of Authorities, Vol. II, Tab 19

82. Section 8 of the PBA recognizes that a company may wear "two hats" in respect of pension plans (i.e. administrator and employer) and it is self-evident that these two roles may come into conflict from time to time. A company in the role of *qua* administrator is required to act in the best interests of plan beneficiaries, while a company in the role of *qua* employer does not owe fiduciary duties to plan beneficiaries. The Appellants' various allegations relating to Indalex breaching its fiduciary duties to the Plans' beneficiaries were all taken by Indalex acting in its role as *qua* employer. Therefore, Indalex did not breach its fiduciary duties to the Plans' beneficiaries in its role as *qua* administrator.

> PBA, s. 8
>
> *Imperial Oil Ltd. v. Ontario (Superintendent of Pensions)*, 1995 CarswellOnt 2252 (Pension Commission), Sun's Book of Authorities, Vol. II, Tab 20
>
> *OMERS Sponsors Corp. v. OMERS Administration Corp.*, 2008 CarswellOnt 561 (S.C.J.), Sun's Book of Authorities, Vol. II, Tab 21

83. The Retirees submit that the doctrine of equitable subordination applies in this case to remedy Indalex's alleged breach of fiduciary duty. This issue was not argued before Campbell J. at the motions below and offends the general rule that appellate courts not entertain entirely new issues on appeal.

> *767269 Ontario Ltd. v. Ontario Energy Savings L.P.,* [2008] O.J. No. 1711 (C.A.), Sun's Book of Authorities, Vol. II, Tab 22
>
> *Kaiman v. Graham*, [2009] O.J. No. 324 (C.A.), Sun's Book of Authorities, Vol. II, Tab 23

84. In any event, the doctrine of equitable subordination does not apply in this case as the Retirees cannot satisfy the requirements of this doctrine as summarized by Pepall J. in *I. Waxman & Sons Ltd. (Re)*. The Retirees have not alleged any kind of inequitable conduct on the part of the claimants to the funds held by the Monitor (i.e. Sun, the DIP lenders or any other creditors of the US Debtors) and applying the doctrine of equitable subordination in this case would be inconsistent with the bankruptcy statutes as described above.

> *I. Waxman & Sons Ltd. (Re)*, [2008] O.J. No. 885 (S.C.J.), Sun's Book of Authorities, Vol. II, Tab 24

85. Therefore, the Appellants' various allegations of a breach of fiduciary duty on the part of Indalex and equitable subordination are irrelevant to the issues in the appeals and, where applicable, were correctly dismissed by Campbell J.

PART IV - RELIEF REQUESTED

86. For the reasons outlined above, Sun respectfully requests:

(a) an order dismissing the appeals;

(b) a declaration that all of the proven secured claims and super-priority DIP claims advanced by Sun against the funds being held by the Monitor be paid in priority to the Appellants' deemed trust claims; and

(c) costs payable to Sun on an appropriate scale.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of October, 2010.

_____

Goodmans LLP

Lawyers for Sun Indalex Finance, LLC

CERTIFICATE OF COUNSEL

I, Fred Myers, lawyer for Sun Indalex Finance, LLC , certify that:

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

2. The estimated time of my oral argument is one hour.

October 28, 2010

Goodmans LLP
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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Collins & Aikman Automotive Canada Inc. (Re)*, [2007] O.J. No. 4186 (S.C.J.)
2. *Nortel Networks Corp. (Re)*, [2009] O.J. No. 4967 (C.A.)
3. *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, [2008] 92 O.R. (3d) 513 (C.A.)
4. *Sulphur Corp. of Canada Ltd. (Re)*, [2002] A.J. No. 918 (Q.B.)
5. *Temple City Housing Inc. (Re)*, [2007] A.J. No. 1489 (Q.B.)
6. *AbitibiBowater Inc. (Re)*, [2009] Q.J. No. 16097 (S.C.)
7. *Winnipeg Motor Express Inc. (Re)*, [2009] M.J. No. 284 (Q.B.)
8. Commercial List Model CCAA Initial Order (January 2010), online: http:// www.ontariocourts.on.ca/scj/en/commerciallist/
9. *Elan Corp. v. Comiskey*, [1990] O.J. 2180 (C.A.)
10. *Ivaco (Re)*, [2006] O.J. No. 4152 (C.A.)
11. *Toronto-Dominion Bank v. Usarco Ltd.*, [1991] O.J. No. 1314 (Gen. Div.)
12. Filing Requirements and Procedure on a Full or Partial Wind Up of a Pension Plan, FSCO Policy W100-102 (December 2004)
13. Ari N. Kaplan, *Pension Law* (Toronto: Irwin Law, 2006)
14. Gregory Winfield, "Pension Management in Insolvency and Restructuring: What is at Stake?" (Insight, 2005)
15. *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24
16. *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453
17. *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, [2005] 74 O.R. (3d) 382 (C.A.)
18. *Bank of Nova Scotia v. Huronia Precision Plastics Inc.*, 2009 CarswellOnt 374 (S.C.J.)
19. *Barnabe v. Touhey*, [1995] 26 O.R. (3d) 477 (C.A.)
20. *Imperial Oil Ltd. v. Ontario (Superintendent of Pensions)*, 1995 CarswellOnt 2252 (Pension Commission)

21. *OMERS Sponsors Corp. v. OMERS Administration Corp.,* 2008 CarswellOnt 561 (S.C.J.)

22. *767269 Ontario Ltd. v. Ontario Energy Savings L.P.,* [2008] O.J. No. 1711 (C.A.)

23. *Kaiman v. Graham,* [2009] O.J. No. 324 (C.A.)

24. *I. Waxman & Sons Ltd. (Re)*, [2008] O.J. No. 885 (S.C.J.)

SCHEDULE "B"

RELEVANT STATUTES

***Pension Benefits Act*, R.S.O. 1990, c. P.8**

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

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

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

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

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

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

(ii) members of the pension plan;

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

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

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

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

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

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

Additional members
(2) A pension committee, or a board of trustees, that is the administrator of a pension plan may

include a representative or representatives of persons who are receiving pensions under the pension plan.

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

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

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

...

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

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

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

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

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

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

Money to be paid to insurance company
(7) Subsections (1) to (6) apply with necessary modifications in respect of money to be paid to an insurance company that guarantees pension benefits under a pension plan.

Accrual
58. (1) Money that an employer is required to pay into a pension fund accrues on a daily basis.

Interest
(2) Interest on contributions shall be calculated and credited at a rate not less than the prescribed rates and in accordance with prescribed requirements.

...

Winding Up

68. (1) The employer or, in the case of a multi-employer pension plan, the administrator may wind up the pension plan in whole or in part.

Same, jointly sponsored pension plans
(1.1) The following rules apply, and subsection (1) does not apply, with respect to jointly sponsored pension plans:

1. If a jointly sponsored pension plan is also a multi-employer pension plan, the administrator may wind up the plan in whole or in part unless the documents that create and support the plan authorize another person or entity to do so. In that case, the authorized person or entity may wind up the plan in whole or in part.

2. If a jointly sponsored pension plan is not a multi-employer pension plan, the administrator or another person or entity may wind up the plan in whole or in part if the documents that create and support the plan authorize the administrator, person or entity to do so.

Notice
(2) The administrator shall give written notice of proposal to wind up the pension plan to,

(a) the Superintendent;

(b) each member of the pension plan;

(c) each former member of the pension plan;

(d) each trade union that represents members of the pension plan;

(e) the advisory committee of the pension plan; and

(f) any other person entitled to a payment from the pension fund.

Notice of partial wind up
(3) In the case of a proposal to wind up only part of a pension plan, the administrator is not required to give written notice of the proposal to members, former members or other persons entitled to payment from the pension fund if they will not be affected by the proposed partial wind up.

Information
(4) The notice of proposal to wind up shall contain the information prescribed by the regulations.

Effective date
(5) The effective date of the wind up shall not be earlier than the date member contributions, if any, cease to be deducted, in the case of contributory pension benefits, or, in any other case, on the date notice is given to members.

Order by Superintendent
(6) The Superintendent by order may change the effective date of the wind up if the Superintendent is of the opinion that there are reasonable grounds for the change.

Winding up order by Superintendent
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;

(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;

(g) the liability of the Guarantee Fund is likely to be substantially increased unless the pension plan is wound up in whole or in part;

(h) in the case of a multi-employer pension plan,

(i) there is a significant reduction in the number of members, or

(ii) there is a cessation of contributions under the pension plan or a significant reduction in such contributions; or

(i) any other prescribed event or prescribed circumstance occurs.

Date and notice
(2) In an order under subsection (1), the Superintendent shall specify the effective date of the wind up, the persons or class or classes of persons to whom the administrator shall give notice of the order and the information that shall be given in the notice.

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

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

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

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

(d) such other information as is prescribed.

Payments out of pension fund after notice of proposal to wind up
(2) No payment shall be made out of the pension fund in respect of which notice of proposal to wind up has been given until the Superintendent has approved the wind up report.

Application of subs. (2)
(3) Subsection (2) does not apply to prevent continuation of payment of a pension or any other benefit the payment of which commenced before the giving of the notice of proposal to wind up the pension plan or to prevent any other payment that is prescribed or that is approved by the Superintendent.

Approval
(4) An administrator shall not make payment out of the pension fund except in accordance with the wind up report approved by the Superintendent.

Refusal to approve
(5) The Superintendent may refuse to approve a wind up report that does not meet the requirements of this Act and the regulations or that does not protect the interests of the members and former members of the pension plan.

Rights and benefits on partial wind up
(6) On the partial wind up of a pension plan, members, former members and other persons entitled to benefits under the pension plan shall have rights and benefits that are not less than the rights and benefits they would have on a full wind up of the pension plan on the effective date of the partial wind up.

Appointment of administrator to wind up
71. (1) If a pension plan that is to be wound up in whole or in part does not have an administrator or the administrator fails to act, the Superintendent may act as or may appoint an administrator.

Costs of administration on winding up
(2) The reasonable administration costs of the Superintendent or of the administrator appointed by the Superintendent may be paid out of the pension fund.

Termination
(3) The Superintendent may terminate the appointment of an administrator appointed by him or her if the Superintendent considers it reasonable to do so.

Notice of entitlement upon wind up and election
72. (1) Within the prescribed period of time, the administrator of a pension plan that is to be wound up, in whole or in part, shall give to each person entitled to a pension, deferred pension or other benefit or to a refund in respect of the pension plan a statement setting out the person's entitlement under the plan, the options available to the person and such other information as may be prescribed.

Election
(2) If a person to whom notice is given under subsection (1) is required to make an election, the person shall make the election within the prescribed period of time or shall be deemed to have elected to receive immediate payment of a pension benefit, if eligible therefor, or, if not eligible to receive immediate payment of a pension benefit, to receive a pension commencing at the earliest date mentioned in clause 74 (1) (b).

Payment
(3) Within the prescribed period of time, the administrator shall make payment in accordance with the election or deemed election.

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

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

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

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

Transfer rights on wind up
(2) A person entitled to a pension benefit on the wind up of a pension plan, other than a person who is receiving a pension, is entitled to the rights under subsection 42 (1) (transfer) of a member who terminates employment and, for the purpose, subsection 42 (3) does not apply.

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

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

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

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

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

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

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

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

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

Notice of termination of employment
(5) Membership in a pension plan that is wound up in whole or in part includes the period of notice of termination of employment required under Part XV of the *Employment Standards Act, 2000*.

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

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

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

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

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

Liability of employer on wind up
75. (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

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

Exception, jointly sponsored pension plans
(3) This section does not apply with respect to jointly sponsored pension plans.

Liability on wind-up, jointly sponsored pension plans
Employers, etc.
75.1 (1) Where a jointly sponsored pension plan is wound up in whole or in part, the employer or the person or entity required to make contributions under the plan on behalf of the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the plan, are payable by the employer or by the person or entity on behalf of the employer, that are due or have accrued and that have not been paid into the pension fund; and

(b) any additional amounts that, under the documents that create and support the plan, are payable in the circumstances by the employer or the person or entity on behalf of the employer.

Members
(2) Where a jointly sponsored pension plan is wound up in whole or in part, the members shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the plan, are payable by the members, that are due or have accrued and that have not been paid into the pension fund; and

(b) any additional amounts that, under the documents that create and support the plan, are payable in the circumstances by the members.

Payments
(3) The payments required by subsections (1) and (2) shall be made in the prescribed manner and at the prescribed times.

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

Insufficient pension fund
77. Subject to the application of the Guarantee Fund, where the money in a pension fund is not sufficient to pay all the pension benefits and other benefits on the wind up of the pension plan in whole or in part, the pension benefits and other benefits shall be reduced in the prescribed manner.

Pension Benefits Act Regulations, R.R.O. 1990, Regulation 909

Funding of Pension Plans Payments – General

...

4.(4) The payments referred to in subsections (2) and (2.4) shall be made by the employer or, if a person or entity is required to make contributions on behalf of the employer, by that person or entity and, if applicable, by the members of the pension plan within the following time limits:

1. All sums received by the employer from an employee, including money withheld by payroll deduction or otherwise from the employee, as the employee's contribution to the pension plan, within thirty days following the month in which the sum was received or deducted.

2. Revoked.

3. In the case of a pension plan that provides defined benefits, employer contributions in respect of the normal costs reported under clause 13 (1) (a) or 14 (7) (a) for each period covered by a report beginning on or after the 1st day of January, 1988, in monthly instalments within thirty days after the month for which contributions are payable, the amount of the instalments to be either a total fixed dollar amount, a fixed dollar amount for each employee or member of the plan or a fixed percentage either of the portion of the payroll related to members of the plan or of employee contributions.

3.1 Where all the pension benefits provided under the plan are defined contribution benefits, employer contributions for the plan's fiscal year, in monthly instalments within 30 days after the month for which contributions are payable, the amount of the instalments to be either a total fixed dollar amount, a fixed dollar amount for each employee or member of the plan or a fixed percentage either of the portion of the payroll related to members of the plan or of employee contributions.

4. Revoked.

5. All special payments determined in accordance with section 5, subsection 31 (5) and subsection 35 (5), other than a payment made under paragraph 4, in equal monthly instalments in accordance with the times for payment set out in sections 5, 31 and 35.

6. All special payments determined in accordance with subsections 31 (1) and (2), section 32 and subsection 35 (3), by annual instalment in accordance with the times for payment set out in sections 31, 32 and 35.

...

Funding of Pension Plans Special Payments – General

5. (1) Except as otherwise provided in this section and in sections 4, 5.1 and 7, the special payments required to be made after the initial valuation date under clause 4 (2) (c) shall be not less than the sum of,

(a) any special payments remaining to be paid with respect to any initial unfunded liability or experience deficiency within the meaning of Regulation 746 of the Revised Regulations of Ontario, 1980 as it read on the 31st day of December, 1987, after reducing the sum of the initial unfunded liability and experience deficiency by the amount of any unused actuarial gains existing on the 31st day of December, 1987;

(b) with respect to any going concern unfunded liability not covered by clause (a), the special payments required to liquidate the liability, with interest at the going concern valuation interest rate, by equal monthly instalments over a period of fifteen years beginning on the valuation date of the report in which the going concern unfunded liability was determined;

(c) with respect to each solvency deficiency redetermined under subsection (3), the special payments required to liquidate the redetermined solvency deficiency, with interest at the rates used in calculating the solvency liabilities in the first report filed or submitted under section 3, 4 or 14 with a valuation date after the Regulation date, by equal monthly instalments over the period beginning on the valuation date of the report in which the solvency deficiency was determined and ending on the 31st day of December, 2002;

(d) with respect to each solvency deficiency arising before the Regulation date that is not redetermined under subsection (3), the special payments required to liquidate the solvency deficiency, with interest at the rates described in subsection (2), by equal monthly instalments over the period beginning on the valuation date of the report in which the solvency deficiency was determined and ending on the 31st day of December, 2002 or an earlier date; and

(e) with respect to any solvency deficiency arising on or after the Regulation date, the special payments required to liquidate the solvency deficiency, with interest at the rates described in subsection (2), by equal monthly instalments over the period beginning on the valuation date of the report in which the solvency deficiency was determined and ending on the 31st day of December, 2002, or five years, whichever is longer.

...

Wind Up Notices

28. (1) A notice of proposal to wind up a pension plan required under section 68 of the Act shall include,

(a) the name of the plan and its provincial registration number;

(b) the proposed date of wind up;

(c) notice that each member, former member or any other person entitled to a pension, deferred pension, any other benefit or a refund will be provided with an individual statement setting out entitlements and options under the plan; and

(d) where a plan provides contributory benefits, notice of the member's right to make contributions in respect of the period of notice of termination of employment required under Part XV of the *Employment Standards Act*, 2000.

(2) In addition to setting out the applicable person's entitlement under the plan and the options available to the person, the statement required by subsection 72 (1) of the Act must include,

(a) the name of the pension plan and its provincial registration number;

(b) the member's name and date of birth;

(c) the date of plan wind up;

(d) the date on which the member joined the plan, and, except in the case of multi-employer pension plans, the date the member was employed by the employer;

(e) the member's spouse as indicated on the records of the administrator;

(f) the amount of required contributions made to the pension fund by a member since the date of the last annual statement provided under section 27 of the Act;

(g) the accumulated amount of required contributions made to the pension fund by the member, including interest credited to such contributions, to the date of plan wind up;

(h) the amount of additional voluntary contributions made by the member to the pension fund since the date of the last annual statement provided under section 27 of the Act;

(i) the accumulated amount of additional voluntary contributions made by the member to the pension fund, including interest credited to such contributions, to the date of wind up;

(j) any amount transferred since the date of the last annual statement provided under section 27 of the Act from another pension plan on behalf of the member and the pension benefit under the plan attributable to that amount;

(k) in the case of a plan providing defined contribution benefits,

(i) the amount of employer contributions allocated to the member since the date of the last annual statement provided under section 27 of the Act, and

(ii) the accumulated amount of employer contributions, including interest credited to such contributions, allocated to the member on the plan records, to the date of wind up;

(l) in the case of a defined benefit plan,

(i) the member's years of employment for the purpose of the calculation of pension benefits including any period credited under subsection 74 (5) of the Act, and

(ii) where salary is a factor in determining a pension benefit, the salary level utilized for the purpose of determining the benefit;

(m) the rate of interest credited to contributions required to be made by the member since the date of the last annual statement required under section 27 of the Act;

(n) an explanation of any amendments made to the pension plan during the period covered by the statement for which an explanation has not previously been provided under section 41;

(o) the time period in which any option must be exercised;

(p) if there are insufficient assets to pay all pension benefits, a description of any reductions made to the person's benefits;

(q) Revoked.

(r) notice where copies of the wind up report are available and information on how copies of the report may be obtained;

(s) notice of the person the recipient of the statement may contact with respect to any questions arising out of the statement; and

(t) notice that the entitlements and options are subject to the approval of the Superintendent and of the Canada Revenue Agency, and may be adjusted accordingly.

(2.1) Subject to subsection (2.2), the statement required by subsection 72 (1) of the Act must be given to the specified persons within 60 days after the administrator receives notice that the Superintendent has approved the wind up report.

(2.2) If the Superintendent approves the payment of benefits under subsection 70 (3) of the Act, the statement required by subsection 72 (1) of the Act must be given to the persons affected by the approval within 60 days after the administrator receives notice of it.

(3) A recipient of a statement referred to in subsection (2) who is entitled to elect an option shall forward the election to the administrator within ninety days after receipt of the statement.

(4) Subject to subsection (4.1), the payment required by subsection 72 (3) of the Act must be made within 60 days after the later of,

(a) the day on which the administrator receives the applicable person's election under subsection (3) or, if no election is made, the day on which the person is deemed to have made the election; and

(b) the day on which the administrator receives notice that the Superintendent has approved the wind up report.

(4.1) If the Superintendent approves the payment of benefits under subsection 70 (3) of the Act, the payment required by subsection 72 (3) of the Act must be made within 60 days after the later of,

(a) the day on which the administrator receives the election under subsection (3) by the person affected by the approval or, if no election is made, the day on which the person is deemed to have made the election; and

(b) the day on which the administrator receives notice of the approval.

(5) A notice required under subsection 78 (2) of the Act for a plan that is being wound up shall contain,

(a) the name of the pension plan and its provincial registration number;

(b) the valuation date of the report provided with the application and amount of surplus in the pension plan;

(c) the surplus attributable to employee and employer contributions;

(d) the amount of surplus withdrawal requested;

(e) a statement that submissions may be made in writing to the Superintendent within thirty days of receipt of the notice;

(f) the contractual authority for surplus reversion; and

(g) notice that copies of the wind up report filed with the Superintendent in support of the surplus request are available for review at the offices of the employer and information on how copies of the report may be obtained.

(5.1) The employer shall file a copy of the notice required by subsection 78 (2) of the Act before transmitting it to the persons required by that subsection.

(6) An application by an employer for the consent of the Superintendent to a payment from a pension plan that is being wound up shall be accompanied by a certified copy of the notice referred to in subsection (5), a statement that subsection 78 (2) of the Act has been complied with, the date the last notice was distributed and details as to the classes of persons who received notice.

28.1 (1) This section applies if there is a surplus on the wind up of a pension plan in whole or in part.

(2) The administrator of the pension plan shall give to each person entitled to a pension, deferred pension or other benefit or to a refund in respect of the pension plan a statement setting out the following information:

1. The name of the pension plan and its provincial registration number.

2. The member's name and date of birth.

3. The method of distributing the surplus assets.

4. The formula for allocating the surplus among the plan beneficiaries.

5. An estimate of the amount allocated to the person.

6. The options available to the person concerning the method for distributing the amount allocated to the person and the period within which any election respecting the options must be made.

7. The method of distribution that will be used, if an election is not made within the specified period.

8. The name and details of the person to be contacted with respect to any questions arising out of the statement.

9. Notice that the allocation of surplus and the options available for distributing it are subject to the approval of the Superintendent and of the Canada Revenue Agency, and may be adjusted accordingly.

(3) The statement must be given to the specified persons within 60 days after the administrator receives notice that the Superintendent has approved the wind up report.

(4) A person who is entitled to elect an option described in the statement shall give the administrator his or her election within 90 days after the person receives the statement. If the person does not do so, he or she shall be deemed to have elected the method of distribution specified in the statement.

(5) The administrator shall make payment in accordance with the election or deemed election within 60 days after the later of,

(a) the day on which the administrator receives the applicable person's election or, if no election is made, the day on which the person is deemed to have made the election; and

(b) the day on which the administrator receives notice that the Superintendent has approved the wind up report.

Plan Wind Ups – General

29. (1) A wind up report required to be filed under subsection 70 (1) of the Act shall be prepared by a person authorized to prepare a report for the plan under section 15.

(2) If a pension plan is being wound up in whole or in part, the minimum commuted value of a pension, deferred pension or ancillary benefit in respect of a person who exercises his or her entitlement under subsection 73 (2) of the Act is the amount determined as of the effective date of the wind up in accordance with section 3800 of the Canadian Institute of Actuaries Standards of Practice, effective April 1, 2009, which is available to the public from the Canadian Institute of Actuaries at Suite 800, 150 Metcalfe Street, Ottawa, Ontario K2P 1P1 or electronically on its website.

(3) The administrator shall file the wind up report within six months following the effective date of the wind up of the plan in whole or in part.

(4) In addition to the wind up report required under subsection 70 (1) of the Act, the administrator of the plan shall file all outstanding annual information returns required to be filed up to the effective date of the wind up of the pension plan within six months after the effective date.

(5) In addition to the wind up report required under subsection 70 (1) of the Act, the administrator of a pension plan that is wound up and that provides a defined benefit shall provide the Superintendent with such information as the Superintendent requires to determine the persons whose pension benefits are guaranteed under section 84 of the Act, the amounts of such guaranteed benefits, the amounts to be contributed to the plan under section 75 of the Act and such other information as the Superintendent requires.

(6) Payments of refunds of employee contributions with interest to persons not entitled to a pension, deferred pension or ancillary benefit are prescribed for purposes of subsection 70 (3) of the Act.

(7) Subject to the requirements of subsection (8), the administrator of a pension plan,

(a) that is terminated;

(b) that provides defined benefits; and

(c) with respect to which no order has been made under subsection 83 (1) of the Act, may, after the wind up report required under subsection (1) has been approved by the Superintendent, pay prior to the completion of any additional funding required under section 75 of the Act,

(d) the accumulated value of any additional voluntary contributions;

(e) the accumulated value of required contributions made by a member or former member; and

(f) the value of any pension, deferred pension or ancillary benefits accrued as of the effective date of the wind up with respect to employment and remuneration until that date in accordance with the plan provisions, to the extent that such benefits have been funded and after appropriate adjustments for any payment made in accordance with clause (e).

(8) Where an employer is required to make payments into a pension plan under section 75 of the Act and all pensions and other benefits being funded under section 75 of the Act would not be guaranteed under section 84 of the Act,

(a) no funds of the pension plan shall be used to purchase a life annuity for any person entitled thereto; and

(b) where an election is made under clause 42 (1) (a) or (b) of the Act, the maximum portion of the commuted value of the deferred pension that may be transferred is the amount, if any, of the contributions the employee was required to make under the plan plus any additional voluntary contributions made by the employee,

until a report is filed under section 32 certifying that there is no further amount to be funded or an order is made under subsection 83 (1) of the Act with respect to the plan.

(9) Where a pension plan is wound up in whole or in part and the assets of the pension plan are not sufficient to pay all pensions, deferred pensions or ancillary benefits,

(a) where the employer is making payments in accordance with section 75 of the Act, pension benefits to which a person may be entitled but that had not vested under the terms of the plan shall be reduced to an amount proportionate to the extent that the benefits had been funded;

(b) in all cases, other than that referred to in clause (a), the pension, deferred pension or ancillary benefit to which a person would otherwise be entitled shall be reduced to an amount proportionate to the extent that the benefits had been funded; and

(c) where an order has been made under subsection 83 (1) of the Act, benefits attributable to the application of subsection 74 (7) of the Act shall not be included in the determination of a pension, deferred pension or ancillary benefit referred to in clause (a) or (b).

(10) For the purpose of calculating the Ontario wind up liability of a plan, the liability of the plan in respect of each member or former member who has benefits relating to employment in Ontario is the sum of the following liabilities of the plan:

1. The liability for each benefit and other amount guaranteed for the benefit of the member or former member by the Guarantee Fund, excluding the amount by which the contributions in respect of the member or former member for the benefits and other amounts, plus interest, exceed the liability of the plan for the benefits and other amounts.

2. The liability for each benefit that relates to employment in Ontario to which the member or former member is entitled under section 74 of the Act but that is not guaranteed by the Guarantee Fund.

3. The liability for each benefit that relates to the member's or former member's employment in Ontario that is vested on the effective date of the wind up under the terms of the plan, other than,

i. a benefit described in paragraph 1 or 2,

ii. a benefit that relates to employment in Ontario that is vested by virtue only of a provision of the Act or this Regulation respecting the termination or wind up of the plan, and

iii. a benefit that relates to employment in Ontario that is vested by virtue only of a provision of the plan respecting the termination or wind up of the plan.

4. The liability arising from subsection 39 (1), (2), (3) or (4) of the Act for each benefit that relates to the member's or former member's employment in Ontario, to the extent that the liability is not described in paragraph 1, 2 or 3.

5. If the employer is making payments under section 75 of the Act with respect to the plan, the liability for each benefit described in subparagraph 3 ii or iii, to the extent that the liability is not described in paragraph 1, 2 or 4.

(11) For the purposes of subsection (10), the liability of the plan in respect of each member or former member does not include the liability for a benefit to him or her under a qualifying annuity contract.

29.1 (1) The administrator shall file the following documents within six months after the effective date of the wind up for the period from the most recent fiscal year end to the effective date:

1. An annual information return under section 18.

2. Financial statements under section 76 for the pension fund or plan.

(2), (3) Revoked.

(4) Within thirty days after final distribution of the assets of a pension plan under section 70 of the Act, the administrator shall give the Superintendent written notice that all the assets of the plan have been so distributed.

Defined Benefit Plan Wind Ups

30. (1) This section applies to a pension plan that provides defined benefits guaranteed in whole or in part by the Guarantee Fund.

(2) A wind up report for a pension plan shall be prepared by,

(a) determining the value of any additional voluntary contributions, including interest on such contributions, and providing for the immediate payment from the pension fund to each member of the additional voluntary contributions made by the member plus interest;

(b) determining the liabilities for the commuted value of all benefits in respect of each member and former member under the plan including,

(i) accrued benefits for members not yet vested under the terms of the plan,

(ii) escalated adjustments that have been made before the effective date of the wind up,

(iii) plant closure benefits payable on plan wind up,

(iv) permanent layoff benefits payable on plan wind up,

(v) funded consent benefits,

(v.1) benefit enhancements resulting from the application of section 74 of the Act, and

(vi) funded special allowances,

but not including the value of,

(vii) amounts determined under clause (a),

(viii) escalated adjustments that have not been made as of the effective date of the wind up,

(ix) Revoked.

(x) prospective benefit increases, and

(xi) benefits provided under a guaranteed annuity contract or a contract issued under the *Government Annuities Act* (Canada) if the contract was issued before the 1st day of January, 1988;

(c) increasing the liabilities determined under clause (b) in respect of each member or former member so that the liabilities in respect of the member or former member are not less than the minimum value of the required contributions made by the member or former member to the plan;

(d) allocating the liabilities determined under clauses (b) and (c) among,

(i) employment in Ontario,

(ii) employment in each designated province, and employment for which pension benefits are provided in a plan registered under the *Pension Benefits Standards Act, 1985* (Canada), and

(iii) employment other than employment referred to in subclauses (i) and (ii);

(e) determining the difference between the solvency assets and the value of any additional voluntary contributions determined under clause (a), and allocating the difference among the categories of employment set out in clause (d) in proportion to the liabilities allocated under clause (d) to each of the categories;

(f) determining the Ontario wind up liability;

(g) if the Ontario assets exceed the Ontario wind up liability, first applying the Ontario assets to provide for the Ontario wind up liability and then applying any remaining Ontario assets to provide, on an equitable basis determined by the person preparing the report and acceptable to the Superintendent, for those benefits included in calculating the basic Ontario liabilities but not included in calculating the Ontario wind up liability;

(h) dealing with the portion of the plan assets allocated for the provision of benefits resulting from employment in each designated province in accordance with the laws of the province;

(i) dealing with the portion of the plan assets allocated for the provision of pension benefits provided in a plan registered under the *Pension Benefits Standards Act*, 1985 (Canada) in accordance with that Act; and

(j) dealing on an equitable basis with the portion of plan assets allocated for the provision of benefits from any other employment.

(3) A wind up report shall describe everything done under subsection (2).

(4) This section as it read immediately before the Regulation date continues to apply with respect to a pension plan with an effective date of wind up before the Regulation date.

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

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

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

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

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

(4) Subsection (5) applies to a qualifying plan or to a plan with the following history:

1. An election was made in respect of the plan under subsection 5.1 (1) or (2).

2. The election was rescinded in accordance with subsection 5.1 (12).

3. After the date of the election but within five years after the date on which the election was rescinded, the plan was wound up.

(5) For a qualifying plan or a plan with the history described in subsection (4), the liability to be funded under section 75 of the Act shall be funded by monthly special payments by the employer to the pension fund over a period of not more than one year beginning on the effective date of the wind up.

31.1 (1) Any liability to be funded under clause 75.1 (1) (b) or (2) (b) of the Act shall be funded by equal monthly instalments for five years or less or by payments determined in accordance with a schedule of payments.

(2) The instalments or payments required under subsection (1) shall be made to the pension fund by the employer or, if another person or entity is required to make payments on behalf of the employer, that person or entity and, if applicable, by the members of the pension plan, commencing on the effective date of the wind up.

(3) The schedule of payments referred to in subsection (1) shall be determined as follows:

1. The present value of the scheduled payments at the effective date of the wind up is equal to the liability to be funded.

2. The amortization period for the scheduled payments shall end not later than five years after the effective date of the wind up.

3. The present value of the scheduled payments is determined using the interest rates used in the wind up report.

32. (1) Until the employer's liability under section 75 of the Act is funded, the administrator of the plan shall annually cause the plan to be reviewed and a report to be prepared by a person authorized by section 15 and shall file the report within six months after the valuation date of the report.

(2) A report required under subsection (1) shall show,

(a) the gain or the loss in the pension plan since the valuation date of the immediately preceding report as a result of differences between the actual experience and the experience anticipated by the assumptions made in the previous report; and

(b) the increase or decrease in the remaining special payments that will liquidate the gain or loss referred to in clause (a) over the remainder of the five-year period commencing from the effective date of the wind up.

(3) Any special payments required as a result of a loss referred to in clause (2) (a) shall be included as payments required to be made by the employer under section 75 of the Act.

(4) Where a report made under this section shows that there is no further amount to be funded, any surplus may revert to the employer, subject to the requirements of section 79 of the Act.

32.1 (1) Until any liability under section 75.1 of the Act is funded, the administrator of a jointly sponsored pension plan shall annually cause the plan to be reviewed and a report to be prepared by a person authorized by section 15 and shall file the report within six months after the valuation date of the report.

(2) A report required under subsection (1) shall show,

(a) the gain or the loss in the pension plan since the valuation date of the immediately preceding report as a result of differences between the actual experience and the experience anticipated by the assumptions made in the previous report; and

(b) the increase or decrease in the remaining special payments that will liquidate the gain or loss referred to in clause (a) over the remainder of the five-year period commencing from the effective date of the wind up.

(3) Any special payments required as a result of a loss referred to in clause (2) (a) shall be included as payments required to be made according to section 75.1 of the Act.

(4) Where a report made under this section shows that there is no further amount to be funded, any surplus shall be dealt with according to the terms and conditions of the pension plan.

33. Where an order is made under subsection 83 (1) of the Act with respect to a pension plan that has been terminated or wound up and the employer is in the process of making the funding payments required under section 75 of the Act, the wind up funded ratio and the liability for benefits guaranteed by the Guarantee Fund shall be recalculated as of the date referred to in the order.

34. (1) Where an order has been made under subsection 83 (1) of the Act in respect of a plan where the effective date of the wind up is before the Regulation date and when the order is made the Ontario assets of the plan are less than its Ontario wind up liability, the administrator shall provide benefits under the plan in accordance with this section as it read immediately before the Regulation date.

(2) Where an order has been made under subsection 83 (1) of the Act in respect of a plan where the effective date of the wind up is on or after the Regulation date and when the order is made the Ontario assets of the plan are less than its Ontario wind up liability, the administrator shall provide benefits under the plan in accordance with this section.

(3) For purposes of this section,

"modified Ontario wind up liability" means the Ontario wind up liability excluding any liability for benefits described in subsection 47 (2).

(4) For purposes of this section,

"Guaranteed Benefit liability" means the total liability of the plan for benefits guaranteed by the Guarantee Fund and other amounts guaranteed by the Guarantee Fund, excluding the amount by which the contributions made by any member, plus interest, for such

guaranteed benefits and other amounts exceeds the liability for the member's guaranteed benefits and other amounts.

(5) If, on the date an order is made under subsection 83 (1) of the Act in respect of a plan, the Ontario assets of the plan are less than its Ontario wind up liability, the administrator shall pay to each person entitled on wind up to payment of benefits guaranteed by the Guarantee Fund or other amounts guaranteed by the Guarantee Fund, the greater of,

(a) the sum of,

(i) 100 per cent of the benefits and other amounts for the person included in the calculation of the Guaranteed Benefit liability, and

(ii) the amount, determined under subsection (6), related to all other benefits for the person included in the calculation of the Ontario wind up liability; and

(b) the value of the person's contributions to the plan plus interest.

(6) The amount referred to in subclause (5) (a) (ii) shall be determined as follows:

1. If the Ontario assets of a plan are less than its modified Ontario wind up liability, the amount to be used for purposes of subclause (5) (a) (ii) for the person shall be determined by,

i. calculating the ratio of the Ontario assets of the plan to its modified Ontario wind up liability, and

ii. multiplying the ratio obtained under subparagraph i by the value of 100 per cent of the benefits in respect of the person, included in the calculation of the modified Ontario wind up liability but not included in the calculation of the Guaranteed Benefit liability in respect of the person.

2. If the Ontario assets of a plan are equal to or exceed its modified Ontario wind up liability, the amount to be used for purposes of subclause (5) (a) (ii) for the person shall be the sum of,

i. 100 per cent of the benefits included in the calculation of the modified Ontario wind up liability in respect of the person but not included in the calculation of the Guaranteed Benefit liability for such person, and

ii. the total of the benefits referred to in subsection 47 (2) for the person, multiplied by the ratio of,

A. the amount by which the Ontario assets exceed the modified Ontario wind up liability,

to,

B. the amount by which the Ontario wind up liability exceeds the modified Ontario wind up liability.

(7) On application by the administrator, the Superintendent shall allocate from the Guarantee Fund and pay to the plan sufficient money to provide, together with the Ontario assets, for the benefits determined under this section.

35. (1) A wind up report in respect of a defined benefit pension plan that is wound up in part shall, where the assets allocated to the wind up are not sufficient to pay all pension benefits and the benefits included in the wind up, be prepared in accordance with the requirements of section 30 as if the pension plan were being wholly wound up.

(2) The liability required to be funded under section 75 of the Act on the wind up in part of a pension plan providing defined benefits shall be the portion of the amount described in clause 75 (1) (b) of the Act as determined in the wind up report referred to in subsection (1) of this section attributable to members, former members and any other persons entitled to a benefit from the pension plan affected by the partial plan wind up.

(3) The liability determined under subsection (2) shall be funded by the employer by special payments payable in equal amounts annually in advance over a period not exceeding five years from the effective date of the partial plan wind up.

(4) Subsection (5) applies to a qualifying plan and to a plan with the following history:

1. An election was made in respect of the plan under subsection 5.1 (1) or (2).

2. The election was rescinded in accordance with subsection 5.1 (12).

3. After the date of the election but within five years after the date on which the election was rescinded, the plan was wound up in part.

(5) For a qualifying plan or a plan with the history described in subsection (4), the liability to be funded under section 75 of the Act shall be funded by monthly special payments by the employer to the pension fund over a period of not more than one year beginning on the effective date of the partial plan wind up.

36. Revoked.

37. (1) An employer who is required to make contributions to a pension plan providing defined benefits, other than a designated plan or a plan described in subsection 6 (1), shall, subject to subsection 7 (4), pay to the Guarantee Fund on or before each assessment date an annual assessment determined in accordance with subsections (3) to (12).

(1.1) Subsection (1) does not apply with respect to a jointly sponsored pension plan.

(2) For the purposes of this section, assessment dates shall be nine months after the last day of each fiscal year of the pension plan.

(3) Revoked.

(4) Except for a plan to which subsection (6) applies, the amount of the annual assessment shall be equal to the lesser of,

(a) the sum of,

(i) the lesser of,

(A) the sum of $1 for each person who is an Ontario plan beneficiary at the end of the plan fiscal year immediately preceding the assessment date plus the amount calculated under subsection (5), or

(B) $100 multiplied by the number of persons who were Ontario plan beneficiaries at the end of the plan fiscal year immediately preceding the assessment date, and

(ii) zero, or, if an election under subsection 5 (18) is in effect on the assessment date, 2 per cent of the amount by which,

(A) the additional liability that would result if, on the valuation date of the last report filed or submitted on or before the assessment date under any of section 3, section 4, subsection 5.3 (1) or section 14 for the plan, all plant closure benefits and permanent layoff benefits under the plan were payable for those members in Ontario who, on that date, met the age and service requirements for such benefits,

exceeds,

(B) the amount, if any, by which the amount determined under clause (b) in the definition of PBGF assessment base exceeds the PBGF liabilities, both determined as of the valuation date referred to in sub-subclause (A); and

(b) $4,000,000.

(5) The amount referred to in sub-subclause (4) (a) (i) (A) shall be the sum of,

(a) 0.5 per cent of any portion of the PBGF assessment base that is less than 10 per cent of the PBGF liabilities;

(b) 1 per cent of any portion of the PBGF assessment base that is 10 per cent or more but less than 20 per cent of the PBGF liabilities; and

(c) 1.5 per cent of any portion of the PBGF assessment base that is 20 per cent or more of the PBGF liabilities.

(6) If an election under subsection 5.1 (1) or (2) is in effect on the assessment date, the amount of the annual assessment shall be equal to the lesser of,

(a) the sum of,

(i) $1 for each person who is an Ontario plan beneficiary at the end of the plan fiscal year immediately preceding the assessment date,

(ii) 2.5 per cent of the PBGF assessment base, and

(iii) 2.5 per cent of the amount described in subclause 37 (4) (a) (ii); and

(b) $5,000,000.

(7) For the purposes of an assessment required under this section, the PBGF assessment base and the PBGF liabilities shall be as set out in the last report filed or submitted on or before the assessment date under any of section 3, 4, 13 or 14 for the plan.

(8) Despite subsection (7), where a payment is made in respect of an assessment under this section and a report is filed or submitted under section 3, 4, 13 or 14 after the payment date with a valuation date earlier than the assessment date, the amount of the assessment required under this section shall be recalculated with the PBGF assessment base and PBGF liabilities as set out in the report and shall be paid on that basis.

(9) Despite subsection (7), if a revised report under section 3, 13 or 14 is filed at the request of the Superintendent or is accepted by the Superintendent, the amount of the assessment required under this section shall be recalculated with the PBGF assessment base and PBGF liabilities as set out in the revised report and shall be paid on that basis.

(10) Where a report referred to in subsection (8) or (9) is filed, an increase in the assessment resulting from a recalculation based on the report is payable sixty days after the date on which the report is filed.

(11) A decrease in the assessment resulting from a recalculation shall be refunded.

(12) If between the valuation date of the last report filed or submitted and the assessment date the employer has made special payments in excess of the minimum special payments required in accordance with that report, the PBGF assessment base shall be decreased for the purposes of an assessment required under this section by the amount of the excess special payments.

(13) Despite subsections (3), (4) and (6), for a pension plan established less than three years earlier than the assessment date, excluding any plan that is a successor plan as described in subsection 80 (2) or section 81 of the Act, the amount of the assessment shall be zero.

(14) An employer who fails to pay an amount due under this section within the time provided by this section shall pay 120 per cent of the amount to the Guarantee Fund, together with interest on the 120 per cent calculated from the date the amount is due to the date of payment, at a rate equal to 3 per cent plus the chartered banks' rate on prime business loans as of the date the amount is due.

(15) For the purposes of subsection (14), the chartered banks' rate on prime business loans shall be determined from the Canadian Socio-Economic Information Management System (CANSIM) series V122495 compiled by Statistics Canada and available on the website maintained by the Bank of Canada.

(16) An employer need not pay an amount due under this section on or after the Regulation date of $25 or less.

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

Priorities
30. (1) If no other provision of this Act is applicable, the following priority rules apply to security interests in the same collateral:

1. Where priority is to be determined between security interests perfected by registration, priority shall be determined by the order of registration regardless of the order of perfection.

2. Where priority is to be determined between a security interest perfected by registration and a security interest perfected otherwise than by registration,

   i. the security interest perfected by registration has priority over the other security interest if the registration occurred before the perfection of the other security interest, and

   ii. the security interest perfected otherwise than by registration has priority over the other security interest, if the security interest perfected otherwise than by registration was perfected before the registration of a financing statement related to the other security interest.

3. Where priority is to be determined between security interests perfected otherwise than by registration, priority shall be determined by the order of perfection.

4. Where priority is to be determined between unperfected security interests, priority shall be determined by the order of attachment.

Idem
(2) For the purpose of subsection (1), a continuously perfected security interest shall be treated at all times as if perfected by registration, if it was originally so perfected, and it shall be treated at all times as if perfected otherwise than by registration if it was originally perfected otherwise than by registration.

Future advances
(3) Subject to subsection (4), where future advances are made while a security interest is perfected, the security interest has the same priority with respect to each future advance as it has with respect to the first advance.

Exception
(4) A future advance under a perfected security interest is subordinate to the rights of persons mentioned in subclauses 20 (1) (a) (ii) and (iii) if the advance was made after the secured party received written notification of the interest of any such person unless,

(a) the secured party makes the advance for the purpose of paying reasonable expenses, including the cost of insurance and payment of taxes or other charges incurred in obtaining and maintaining possession of the collateral and its preservation; or

(b) the secured party is bound to make the advance, whether or not a subsequent event of default or other event not within the secured party's control has relieved or may relieve the secured party from the obligation.

Proceeds
(5) For the purpose of subsection (1), the date for registration or perfection as to collateral is also the date for registration or perfection as to proceeds.

Reperfected security interests
(6) Where a security interest that is perfected by registration becomes unperfected and is again perfected by registration, the security interest shall be deemed to have been continuously perfected from the time of first perfection except that if a person acquired rights in all or part of the collateral during the period when the security interest was unperfected, the registration shall not be effective as against the person who acquired the rights during such period.

Same, extended time
(6.1) Despite subsection (6), where a security interest that is perfected by registration becomes unperfected between February 26, 1996 and April 3, 1996, the security interest shall be deemed to have been continuously perfected from the time of first perfection if the security interest is again perfected by registration by April 12, 1996.

Deemed trusts
(7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the *Employment Standards Act* or under the *Pension Benefits Act*.

Exception
(8) Subsection (7) does not apply to a perfected purchase-money security interest in inventory or its proceeds.

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36**

Restriction – pension plan
6(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

...

Interim financing
11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge – in an amount that the court considers appropriate – in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority – secured creditors
(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority – other orders
(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered
(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

...

Deemed trusts
18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

Exceptions
(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the

province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3**

Proposals by employers – prescribed pension plans
60 (1.5) No proposal in respect of an employer who participates in a prescribed pension plan for the benefit of its employees shall be approved by the court unless

(a) the proposal provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*; and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament; and

(b) the court is satisfied that the employer can and will make the payments as required under paragraph (a).

...

Property of bankrupt
67 (1) The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person;

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides;

(b.1) goods and services tax credit payments that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b);

(b.2) prescribed payments relating to the essential needs of an individual that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b); or

(b.3) without restricting the generality of paragraph (b), property in a registered retirement savings plan or a registered retirement income fund, as those expressions are defined in the *Income Tax Act*, or in any prescribed plan, other than property contributed to any such plan or fund in the 12 months before the date of bankruptcy,

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of the bankruptcy or that may be acquired by or devolve on the bankrupt before their discharge, including any refund owing to the bankrupt under the *Income Tax Act* in respect of the calendar year – or the fiscal year of the bankrupt if it is different from the calendar year – in which the bankrupt became a bankrupt, except the portion that

(i) is not subject to the operation of this Act, or

(ii) in the case of a bankrupt who is the judgment debtor named in a garnishee summons served on Her Majesty under the *Family Orders and Agreements Enforcement Assistance Act*, is garnishable money that is payable to the bankrupt and is to be paid under the garnishee summons, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

Deemed trusts
(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

Exceptions
(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the

province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

...

Security for unpaid amounts re prescribed pensions plan – bankruptcy
81.5 (1) If the bankrupt is an employer who participated or participates in a prescribed pension plan for the benefit of the bankrupt's employees, the following amounts that are unpaid on the date of bankruptcy to the fund established for the purpose of the pension plan are secured by security on all the assets of the bankrupt:

(a) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund;

(b) if the prescribed pension plan is regulated by an Act of Parliament,

(i) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

(ii) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*; and

(c) in the case of any other prescribed pension plan,

(i) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(ii) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament.

Rank of security
(2) A security under this section ranks above every other claim, right, charge or security against the bankrupt's assets, regardless of when that other claim, right, charge or security arose, except

(a) rights under sections 81.1 and 81.2;

(b) amounts referred to in subsection 67(3) that have been deemed to be held in trust; and

(c) securities under sections 81.3 and 81.4.

Liability of trustee
(3) If the trustee disposes of assets covered by the security, the trustee is liable for the amounts referred to in subsection (1) to the extent of the amount realized on the disposition of the assets, and is subrogated in and to all rights of the fund established for the purpose of the pension plan in respect of those amounts.

Security for unpaid amounts re prescribed pensions plan – receivership
81.6 (1) If a person who is subject to a receivership is an employer who participated or participates in a prescribed pension plan for the benefit of the person's employees, the following amounts that are unpaid immediately before the first day on which there was a receiver in relation to the person are secured by security on all the person's assets:

(a) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund;

(b) if the prescribed pension plan is regulated by an Act of Parliament,

(i) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

(ii) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*; and

(c) in the case of any other prescribed pension plan,

(i) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(ii) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament.

Rank of security
(2) A security under this section ranks above every other claim, right, charge or security against the person's assets, regardless of when that other claim, right, charge or security arose, except rights under sections 81.1 and 81.2 and securities under sections 81.3 and 81.4.

Liability of receiver
(3) If the receiver disposes of assets covered by the security, the receiver is liable for the amounts referred to in subsection (1) to the extent of the amount realized on the disposition of the assets, and is subrogated in and to all rights of the fund established for the purpose of the pension plan in respect of those amounts.

Definitions
(4) The following definitions apply in this section.

"person who is subject to a receivership" means a person any of whose property is in the possession or under the control of a receiver.

"receiver" means a receiver within the meaning of subsection 243(2) or an interim receiver appointed under subsection 46(1), 47(1) or 47.1(1).

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

Court of Appeal File No. M38582
Court of Appeal File No. M38599
Superior Court File No. 09-CV-8122-00CL

COURT OF APPEAL FOR ONTARIO
Proceeding commenced at Toronto

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