

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 THE MONITOR**

October 20, 2010

**STIKEMAN ELLIOTT LLP**  
Barristers & Solicitors  
5300 Commerce Court West  
199 Bay Street  
Toronto, Canada M5L 1B9

**Ashley John Taylor** LSUC#: 39932E

Tel: (416) 869-5236

**Lesley Mercer** LSUC#: 54491E

Tel: (416) 869-6859

**Jennifer Imrie** LSUC#: 56812H

Tel: (416) 869-6853

Fax: (416) 947-0866

Lawyers for the Monitor, FTI Consulting  
Canada ULC

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**SERVICE LIST**

<b>SACK GOLDBLATT MITCHELL LLP</b> Barristers and Solicitors 20 Dundas Street West, Suite 1100 Toronto, ON M5G 2G8  <b>Lawyers for United Steelworkers</b>	<b>Darrell L. Brown</b> Tel: (416) 979-4050 Fax: (416) 591-7333 Email: <a href="mailto:dbrown@smglaw.com">dbrown@smglaw.com</a>
<b>GOODMANS LLP</b> Barristers and Solicitors 250 Yonge Street, Suite 2400 Toronto, ON M5B 2M6  <b>Lawyers for Sun Indalex Finance, LLC</b>	<b>Brian Empey</b> Tel: (416) 979-2211 Fax: (416) 979-1234 Email: <a href="mailto:bempey@goodmans.ca">bempey@goodmans.ca</a>  <b>Fred Myers</b> Tel: (416)-5975923 Fax: (416) 979-1234 Email: <a href="mailto:fmyers@goodmans.ca">fmyers@goodmans.ca</a>
<b>KOSKIE MINSKY LLP</b> 20 Queen Street West, Suite 900 Toronto, Ontario M5H 3R3  <b>Lawyers for Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Wladron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith Robert Leckie and Fred Granville</b>	<b>Andrew J. Hatney</b> Tel: (416) 595-2083 Fax: (416) 204-2872 Email: <a href="mailto:ahatnay@kmlaw.ca">ahatnay@kmlaw.ca</a>  <b>Andrea McKinnon</b> Tel: (416) 595-2150 Fax: (416) 204-2874 Email: <a href="mailto:amckinnon@kmlaw.ca">amckinnon@kmlaw.ca</a>  <b>Demetrios Yiokaris</b>

	<p>Tel: (416) 595-2130  Fax: (416) 204-2810  Email: <a href="mailto:dyiokaris@kmlaw.ca">dyiokaris@kmlaw.ca</a></p>
<p><b>FINANCIAL SERVICES COMMISSION OF ONTARIO</b>  Legal Services Branch  5160 Young Street  17<sup>th</sup> Floor, Box 85  Toronto, ON M2N 6L9</p>	<p><b>Mark Bailey</b>  Tel: (416) 590-7555  Fax: (416) 590-7556  Email: <a href="mailto:mark.bailey@fsco.gov.on.ca">mark.bailey@fsco.gov.on.ca</a></p>
<p><b>CAVALLUZZO HAYES SHILTON MCINTYRE &amp; CORNISH LLP</b>  Barristers and Solicitors  474 Bathurst Street  Suite 300  Toronto, ON M5T 2S6</p> <p>Lawyers for the Intervenor, Morneau Sobeco</p>	<p><b>Hugh O'Reilly</b>  Tel: (416) 964-5514  Fax: (416) 964-5895  Email: <a href="mailto:horeilly@cavalluzzo.com">horeilly@cavalluzzo.com</a></p> <p><b>Amanda Darrach</b>  Tel: (416) 964-5511  Fax: (416) 964-5895  Email: <a href="mailto:adarrach@cavalluzzo.com">adarrach@cavalluzzo.com</a></p>

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**RESPONDING FACTUM OF THE MONITOR**

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**RESPONDING FACTUM OF THE MONITOR**

**PART I - OVERVIEW**

1. This factum responds to two appeals: (a) an appeal by certain members of the United Steelworkers (the "**USW**") with Court of Appeal File No. M38582; and (b) an appeal by certain retired executives (the "**Retirees**") of Indalex Limited ("**Indalex**") with Court of Appeal File No. M38599 (together, the "**Appeals**"), of the decision of the Honourable Mr. Justice Campbell dated February 18, 2010.

2. In the underlying motions (the "**Deemed Trust Motions**"), the USW and the Retirees sought determinations from Campbell J. that certain funds of the Applicants (as defined below) were subject to a deemed trust for any wind up deficiency associated with the Retirement Plan for Salaried Employees of Indalex Limited and Associated Companies (the "**Salaried Plan**") and the Retirement

Plan for Executive Employees of Indalex Limited and Associated Companies (the “**Executive Plan**”) pursuant to subsection 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the “**PBA**”). The Salaried Plan and the Executive Plan collectively shall be referred to herein as the “**Plans**”. The USW and the Retirees also sought an order that the Plans be paid in priority to and in advance of the DIP Lenders (as defined below) who, pursuant to the Initial Order (as defined below), were granted a super-priority charge by the court.

3. The Deemed Trust Motions were heard on August 28, 2009. In reasons released on February 18, 2010, Campbell J. dismissed the motions and held, *inter alia*, that no deemed trusts arose with respect to wind up deficiencies under either of the Plans.

4. In the Appeals, the Retirees and the USW seek:

- (a) An order allowing the Appeals and declaring that the deemed trust provisions of the PBA apply to the Undistributed Proceeds (as defined below) currently being held in reserve by the Monitor (as defined below) and ordering payment of those proceeds to the Plans;
- (b) In the alternative, an order allowing the Appeals and declaring that Indalex as administrator of the Plans breached its fiduciary duties to the Plans’ beneficiaries and ordering damages payable to the Plans or, alternatively, to the beneficiaries directly;

- (c) A declaration that the wind up deficiencies be paid to the Plans and not be distributable to other creditors of Indalex, including the DIP Lenders; and
- (d) Costs of the Appeals.

5. The Monitor submits that Campbell J. did not err in his decision and that, as a result, the Appeals must be dismissed. In the alternative, the Monitor submits that even if Campbell J. did err in his interpretation of the PBA, the result is correct and neither the Retirees nor the USW is entitled to any of the relief sought on the Appeals.

## **PART II - THE FACTS**

### **Insolvency Proceedings**

6. Indalex's parent company and certain US affiliates (collectively, the "**US Debtors**") commenced 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, Compendium of the Monitor, Tab 1

7. On April 3, 2009, Indalex, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc. (collectively, the "**Applicants**") made an application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**") and an Initial Order was made by the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) granting, *inter alia*, a stay of

proceedings against the Applicants and appointing FTI Consulting Canada ULC as monitor (the “**Monitor**”).

Cooper Affidavit at paras. 5 and 6, Compendium of the Monitor,  
Tab 1

8. On April 8, 2009, Morawetz J. granted the Amended and Restated Initial Order which, *inter alia*, authorized Indalex to borrow funds (the “**DIP Loan**”) pursuant to a debtor-in-possession credit agreement (the “**DIP Credit Agreement**”) among the US Debtors, the Applicants and a syndicate of lenders (the “**DIP 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. The Initial Order, the Amended and Restated Initial Order and all amendments thereto shall collectively be referred to herein as the “**Initial Order**”.

Cooper Affidavit at paras. 7 and 12, Compendium of the Monitor,  
Tab 1

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

Cooper Affidavit at para. 8, Compendium of the Monitor, Tab 1  
Amended and Restated Initial Order at para. 45, Exhibit “A” to the  
Cooper Affidavit, Compendium of the Monitor, Tab 1A



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

Cooper Affidavit at paras. 9 and 10, Compendium of the Monitor,  
Tab 1

### **The Sale of Indalex**

11. On July 20, 2009, the sale of substantially all of the assets and business of the Applicants and US Debtors to SAPA Holdings AB (the "**Sapa Transaction**") was approved by the Court pursuant to an order of Campbell J. (the "**Approval and Vesting Order**").

Cooper Affidavit at para. 16, Compendium of the Monitor, Tab 1  
Order of Campbell J., dated July 20, 2009 ("**Approval and Vesting Order**"), Compendium of the Monitor, Tab 9

12. The Approval and Vesting Order required that the proceeds of sale (the "**Canadian Sale Proceeds**") be paid to the Monitor and the Monitor was ordered and directed to make a distribution to the DIP Lenders in satisfaction of the Applicants' obligations to the DIP Lenders, subject to a reserve that the Monitor considered to be appropriate in the circumstances (the "**Undistributed Proceeds**").

Cooper Affidavit at paras. 16 and 18, Compendium of the Monitor,  
Tab 1

Approval and Vesting Order at para. 14, Compendium of the  
Monitor, Tab 9

13. The Sapa Transaction closed in Canada and the U.S. on July 31, 2009.

Cooper Affidavit at para. 24, Compendium of the Monitor, Tab 1

#### **Increase in Monitor's Powers**

14. Following the closing of the Sapa Transaction, all of the directors of the Applicants resigned effective July 31, 2009. After that date, control of the Applicants was exercised by the U.S. court-appointed Chief Restructuring Officer of the US Debtors, a position filled by Mr. Keith Cooper, a Senior Managing Partner at FTI Consulting, Inc., an American affiliate of the Monitor. On October 14, 2009, the US Debtors' Chapter 11 proceedings were converted into Chapter 7 proceedings (analogous to a bankruptcy under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, in Canada). As a result, the Applicants were no longer under the control of the Chief Restructuring Officer from that date.

10<sup>th</sup> Report of the Monitor at paras. 21-23, Compendium of the Monitor, Tab 10

15. On October 27, 2009, the Court issued an order increasing the Monitor's powers and authorizing the Monitor to take all necessary steps to complete the CCAA Proceedings, including, *inter alia*, authorizing the Monitor to respond to the Appeals on behalf of the Applicants.

10<sup>th</sup> Report of the Monitor at paras. 24-26, Compendium of the Monitor, Tab 10

Order of Justice Morawetz, dated October 27, 2009, at para. 9, Compendium of the Monitor, Tab 11

### **The Deemed Trust Allegations**

16. At the sale approval hearing, the Retirees objected to the sale and asserted a deemed trust claim over the Canadian Sale Proceeds and requested that \$3.25 million, an amount representing an estimate of the wind up deficiency in the Executive Plan, be included in the Undistributed Proceeds pending further order of the Court. The USW, while it supported the Sapa Transaction, reserved its rights with respect to any deemed trust claim it might have with respect to the Salaried Plan.

Cooper Affidavit at paras. 19 and 21, Compendium of the Monitor,  
Tab 1

### **The Salaried Plan**

17. The Salaried Plan is in the process of being fully wound up with an effective wind up date of December 31, 2006. All contributions that were due to the Salaried Plan prior to the effective date of wind up were made. The wind up deficiency was calculated as at December 31, 2006, and annual payments to fund the wind up deficiency were made in 2007 (\$709,013.00), 2008 (\$875,313.00) and 2009 (\$601,000.00). The wind up deficiency calculated as at December 31, 2008 was \$1,795,600.00.

Cooper Affidavit at para. 21, Compendium of the Monitor, Tab 1  
Affidavit of Bob Kavanaugh, sworn August 12, 2009 ("Kavanaugh  
Affidavit"), at paras. 5-11, Compendium of the Monitor, Tab 2

18. On or about June 30, 2009, Indalex filed with the Financial Services Commission of Ontario ("FSCO") an actuarial valuation with respect to the

Salaried Plan with an effective date of December 31, 2008 that indicated that an additional "catch-up" payment of \$25,100.00, plus interest accruing from January 1, 2009, was required to fund the wind up deficiency. Pursuant to section 12 of the PBA Regulations, this payment was due 60 days after the filing of the valuation report (about the end of August 2009) - approximately five weeks after the approval of the Sapa Transaction, approximately one month after the closing of the Sapa Transaction, and after the date of the Deemed Trust Motions.

Kavanaugh Affidavit at para. 12 Compendium of the Monitor, Tab 2  
 Pension Benefits Act Regulations, R.R.O. 1990, Regulation 909  
 ("Regulation 909"), ss. 4, 12 and 32

### **The Executive Plan**

19. As of the date of the sale approval hearing and the hearing of the Deemed Trust Motions, the Executive Plan had not been wound up. Indalex had made all required contributions to the Executive Plan including, in particular, current service contributions and special payments, and no amounts were due to the Executive Plan as at the date of the Deemed Trust Motions.

Reasons for Decision of Campbell J., dated February 18, 2010  
 ("Reasons for Decision"), at paras. 23-24, Compendium of the  
 Monitor, Tab 8

Cooper Affidavit at para. 20, Compendium of the Monitor, Tab 1

Kavanaugh Affidavit at paras. 15 and 16, Compendium of the  
 Monitor, Tab 2

20. The amount of \$3.2 million which the Retirees sought to have paid into the Executive Plan is derived from a letter provided by the actuarial firm of Morneau Sobeco at the request of counsel to the Retirees. This letter is subject to

a number of caveats and qualifications and expressly states that the amount of \$3.2 million is a “rough estimate” of the wind up deficiency of the Executive Plan. 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, Compendium of the Monitor,  
Tab 1

Exhibit “G” to the Affidavit of Andrea MacKinnon, sworn July 16,  
2009, Compendium of the Monitor, Tab 3G

21. On November 4, 2009, FSCO appointed Morneau Sobeco as administrator to wind up the Executive Plan. On March 10, 2010, FSCO issued a Notice of Proposal to wind up the Executive Plan effective September 30, 2009.

Affidavit of Jenny Correia, sworn March 19, 2010 (“Correia  
Affidavit”), at para. 2, Compendium of the Monitor, Tab 4

Exhibit “A” to the Correia Affidavit, Compendium of the Monitor,  
Tab 4A

### **Funds Retained by the Monitor**

22. Due in part to the above-noted reservations of rights and objections to the sale, the Monitor retained Undistributed Proceeds in excess of the amounts asserted to be covered by deemed trusts.

Cooper Affidavit at para. 22, Compendium of the Monitor, Tab 1

23. Following the closing of the Sapa Transaction, the DIP Loan was not repaid in full. Accordingly, the DIP Lenders called on the guarantee granted by the US Debtors for the amount of the deficiency, US\$10,751,247.22, which the US

Debtors subsequently paid. The US Debtors are fully subrogated to the rights of the DIP Lenders under the DIP Lenders Charge (as defined in the Initial Order) for the amount of the payment under the guarantee. Accordingly, the US Debtors are now secured creditors with a super-priority charge against the Undistributed Proceeds in the amount of US\$10,751,247.22.

Cooper Affidavit at paras. 23-25, Compendium of the Monitor,  
Tab 1

Approval and Vesting Order at para. 14, Compendium of the  
Monitor, Tab 9

### **The Deemed Trust Motions**

24. The Deemed Trust Motions were heard on August 28, 2009. On that date, Campbell J. also heard a motion by the Applicants seeking leave to lift the stay of proceedings for the purpose of allowing one or more of the Applicants to file an assignment in bankruptcy.

Cooper Affidavit at para. 27, Compendium of the Monitor, Tab 1

Applicants' Notice of Motion, dated August 20, 2009, Compendium  
of the Monitor, Tab 7

25. The USW sought an order that: (a) Indalex account for and repay any deficiency in the Salaried Plan; and (b) Indalex hold funds in trust for the beneficiaries of the Salaried Plan equivalent to the amount of the deficiency in the Salaried Plan and that such funds not be distributed to any creditor of Indalex or its affiliates.

USW Notice of Motion, dated August 5, 2009, Compendium of the  
Monitor, Tab 5

26. Despite the fact that the Executive Plan had not been wound up, and therefore the existence and amount of any wind up deficiency had not crystallized or been calculated, the Retirees sought: (a) a declaration that \$3.2 million of the Undistributed Proceeds is subject to a deemed trust for the benefit of the beneficiaries of the Executive Plan and shall be paid into the Executive Plan, that such amounts are not distributable to other creditors and that such declarations survive any bankruptcy of the Applicants; and (b) in the alternative, an order directing the Monitor to pay \$3.2 million from the Undistributed Proceeds to the Executive Plan.

Retirees' Notice of Motion, dated August 5, 2009, Compendium of the Monitor, Tab 6

27. In reasons released on February 18, 2010, Campbell J. dismissed the Deemed Trust Motions. With respect to the Salaried Plan, Campbell J. held that as no amounts were due or payable under the Salaried Plan no deemed trust arose in respect of the remaining deficiency. With respect to the Executive Plan, Campbell J. held that as the plan had not been wound up and all due contributions which were due had been paid, no deemed trust arose.

Reasons for Decision at paras. 24 and 50, Compendium of the Monitor, Tab 8

28. Based on his decision on the Deemed Trust Motions, Campbell J. concluded that it was unnecessary to deal with the Applicants' application to lift the stay in order to allow them to file a voluntary assignment in bankruptcy.

**PART III - ISSUES AND THE LAW**

29. The Monitor submits that Campbell J. did not err in dismissing the Deemed Trust Motions. The deemed trust provisions of the PBA only apply to regular contributions and special payments that are due or have accrued to the date of wind up and remain unpaid.

30. The deemed trusts do not apply to the wind up deficiency or the special payments required to pay down the wind up deficiency. With respect to the Salaried Plan, Campbell J. was correct in holding that as no amounts due or accrued up to the date of wind up remained unpaid, no deemed trust existed.

31. With respect to the Executive Plan, Campbell J. was correct in holding that as the plan had not yet been wound up, and all required contributions that had come due as of the date of the Deemed Trust Motions had been paid, no deemed trust existed.

32. The following four issues need to be determined on the Appeals:

- (a) What is the appropriate standard of review?
- (b) Do the deemed trust provisions of the PBA apply to a wind up deficiency and, if so, do they apply to a future potential wind up deficiency of a pension plan that has not yet been wound up?



- (c) If a wind up deficiency is secured by the deemed trust provisions of the PBA, does the deemed trust enjoy priority over the DIP Loan notwithstanding the clear terms of the Initial Order?
- (d) Did Indalex breach its fiduciary duties to the Plans' members and, if so, should damages be awarded and paid in advance of the DIP Loan?

**A. Standard of Review**

33. The standard of review of a decision of the supervising judge under the CCAA is: (a) with respect to the exercise of discretion or in findings of fact, one of palpable and overriding error; and (b) with respect to errors of law, one of correctness.

*Resurgence Asset Management LLC v. Canadian Airlines Corp.*, [2000]  
A.J. No. 610 (C.A.) at para. 29, Book of Authorities of the Monitor  
("Monitor's Book of Authorities"), Vol. I, Tab 1

34. The Monitor submits that only the issue of the proper interpretation of the deemed trust provisions of the PBA is subject to a standard of correctness. For all of the remaining issues, which involve the exercise of discretion by the CCAA judge, the appropriate standard of review is that of palpable and overriding error.

**B. The Deemed Trust Provisions of the PBA do not Apply to Wind Up Deficiencies**

35. The established principles of statutory interpretation require that the words of an act be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the act, the object of the act and the intention of Parliament.

*Bell Express Vu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 26, Monitor's Book of Authorities, Vol. I, Tab 2

36. It is a basic rule of statutory interpretation that every word in a statute is supposed to have a meaning and a function. Accordingly, an interpretation which renders any part of the statute meaningless or redundant should be avoided. Indeed, the Legislature is presumed to have chosen its words carefully and purposively, with knowledge of the existing state of the law.

*Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, [2006] 1 S.C.R. 715, at para. 45, Monitor's Book of Authorities, Vol. I, Tab 3

37. The USW argues that the full amount of a wind up deficiency is subject to a deemed trust, pursuant to subsection 57(4) of the PBA, as such liability has "accrued to the date of wind up" irrespective of when the determination is made that a deficiency actually exists or when a payment in respect of such deficiency is due. The Retirees argue further that the deemed trust provision in subsection 57(4) applies to the full amount of any potential future wind up deficiency regardless of whether the plan has been wound up.

38. The Monitor submits that both the USW and the Retirees have misinterpreted the provisions of the PBA which, upon a clear and purposive reading of the statute, only provide for a deemed trust over current service contributions and “going concern unfunded liability” and “solvency deficiency” special payments (as described in subparagraph 41(c) hereof, and as opposed to a wind up deficiency special payment) that were due or had accrued to the date of wind up and remain unpaid.

39. As explained in more detail below, the PBA contains a comprehensive regime governing the funding of registered pension plans and sets out separate and distinct obligations on the employer to fund a pension plan while the plan is on-going and upon a wind up of the plan.

#### **Obligations to Fund On-going Pension Plans**

40. Sections 55-62 of the PBA (entitled “Contributions”) set out a comprehensive regime governing the funding of on-going registered pension plans.

PBA, ss. 55-62

41. While a pension plan is on-going, an employer generally has an obligation to remit the following three types of contributions:

- (a) Employee contributions - If the pension plan is a contributory plan, all sums received by the employer from an employee including payroll deductions must be remitted within thirty days following

the month in which the sum was received or deducted. Neither of the Plans was a contributing plan and therefore this obligation did not exist.

Regulation 909, s. 4(4)1

- (b) Current service or “normal cost” contributions - Employer contributions in respect of current service costs (i.e. in respect of benefits that are currently accruing to members as a result of their ongoing participation in the plan as active employees) must be made in monthly instalments within thirty days after the month to which they relate; and

Regulation 909, s. 4(4)3

- (c) Special payments - A plan administrator must file an actuarial report annually valuing the plan on both a “going concern” basis (where it is essentially assumed that the plan will continue to operate indefinitely) and a “solvency” basis (where it is essentially assumed that the plan will be terminated or wound up on the date of the valuation). Where the actuarial report concludes that the plan has a “going concern unfunded liability” and/or a “solvency deficiency” (as distinguished from a wind up deficiency such as is in issue in this case), the employer is generally required to make monthly special payments over a 15 or 5 year period, respectively, in order to amortize such liability or deficiency. As future actuarial

reports are filed identifying changes to the value of the plan since the last filed report the amount of future monthly special payments will change.

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

### **Obligations Subject to Deemed Trusts: Section 57 of the PBA**

42. The “Contributions” section of the PBA provides for a deemed trust (subsections 57(1), (3) and (4)) and a lien and charge (subsection 57(5)) to secure the periodic contributions required to be paid into an on-going pension plan.

Section 57 reads:

**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.

**(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.

**(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.

(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).

(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.

(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.

PBA, s. 57

43. Subsections 57(1) and (2) apply in respect of contributing plans where an employer receives money from an employee which is to be contributed into the plan and are not relevant to the present case.

PBA, ss. 57(1) and 57(2)

44. Subsection 57(3) creates a deemed trust over employer contributions that are due, but have not yet been paid into the plan. This subsection applies to any current service costs or special payments (as described in subparagraph 41 (b) and (c) hereof).

PBA, s. 57(3)

45. Subsection 57(4) creates a deemed trust for employer contributions that accrued during the period from the last ordinary course monthly payment until the date of wind up, which are not yet due. Pursuant to subsection 58(1) of the

PBA, money that an employer is required to pay into a pension plan accrues on a daily basis. Subsection 57(4) applies to any current service costs and special payments (as described in subparagraph 41 (b) and (c) hereof). On the clear language of subsection 57(4) the deemed trust does not apply to payments which accrue on or after the date of wind up, such as the special payments related to a wind up deficiency.

PBA, ss. 57(4) and 58(1)

46. The lien and charge provided by subsection 57(5) is granted in favour of the administrator of the plan (not the beneficiaries of the plan). As the dispute before the court is a priority fight between certain beneficiaries of the Plans and other creditors, the lien and charge is inapplicable and not relevant. Further, the lien and charge is restricted to the amount of any deemed trust. As all payments to which the deemed trusts could apply have been paid, there is nothing for the lien and charge to apply to.

PBA, s. 57(5)

### **Obligations to Fund Pension Plans on Wind up**

47. The PBA imposes additional and distinct obligations on the employer once a plan is wound up. Sections 68-77 of the PBA (entitled "Winding Up") sets out a comprehensive regime governing the funding of registered pension plans on wind up.

48. 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. In the months following the effective date, an actuary prepares a report in respect of the plan's assets and liabilities as at the effective date, the members' entitlements are settled, and, over time, the assets of the pension fund are distributed. At the conclusion of the distribution process, the plan ceases to exist.

PBA, ss. 68-77

Regulation 909, ss. 28-37

49. 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, which 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

50. Any payments required to fund the amounts stipulated by section 75 are required to be made by equal annual instalments, commencing at the effective date, over the five-year period following the wind up date.

PBA, s.75

Regulation 909, s. 31

51. Upon wind up of a pension plan, subsection 75(1)(a) of the PBA requires an employer to pay into the pension fund an amount equal to all payments that were due or had accrued to the date of wind up and that have not yet been paid into the fund. Subsection 75(1)(a) does not create an obligation to fund additional payments on wind up but rather ensures that the obligations to make contributions that existed prior to the wind up continue following the wind up. The obligations described under subsection 75(1)(a) capture current service costs

and special payments (as described in subparagraph 41 (b) and (c) hereof) that were either due prior to the effective date of wind up or had accrued prior to the effective date of wind up, and remain unpaid. These amounts are secured by the deemed trusts created by subsections 57(3) and (4).

PBA, ss. 57(3), 57(4) and 75(1)(a)

52. Pursuant to subsection 75(1)(b), if the wind up report discloses a deficiency in the pension fund, the employer has an additional obligation to pay the amount necessary to fund the “wind up deficiency”. The obligations imposed on an employer under subsection 75(1)(b) of the PBA are neither due nor accrued to the date of the wind up. The opposite interpretation, argued by the USW and the Retirees, would mean that subsection 75(1)(b) is redundant, and the principles of statutory interpretation require a purposive approach that actively avoids redundancy.

PBA, s. 75(1)(b)

53. This statutory interpretation of the deemed trust provisions of the PBA has been repeatedly endorsed by the courts and pension experts. In *Toronto-Dominion Bank v. Usarco Ltd.*, Usarco had failed to remit regular and special payments to the plan prior to wind up. The administrator brought a motion seeking an order directing the receiver to pay those amounts payable but not yet paid into the pension fund. The Honourable Mr. Justice Farley held that the deemed trust provisions of subsections 58(3) and 58(4) [now subsections 57(3)

and 57(4)] of the PBA only refer to the normal cost contributions and special payments which were due but were not paid, together with such contributions that had accrued to the date of wind up. The court found that the deemed trust provisions did not apply to the payments required to be made to fund the wind up deficiency under subsection 76(1) [now subsection 75(1)]. In this regard, Farley J. stated:

It therefore appears to me that the deemed trust provisions of subs. 58(3) and (4) only refer to the regular contributions together with those special contributions which were to have been made but were not. In this situation that would be the regular and special payments that should have been made but were not (as reflected in the report as of December 31, 1988), together with any regular or special payments that scheduled to have been made by the wind up date, July 13, 1990, but were not made. This is contrasted with the obligation of Usarco to fully fund its pension obligations as of the wind up date pursuant to s. 76(1). It is recognized in these circumstances, however, that the Bank will have a secured position which will prevail against these additional obligations as to the special payments which have not yet required to be paid into the fund. Sadly, it is extremely unlikely there will be a surplus after taking care of the Bank to allow the pension fund to be fully funded for this (the likelihood being that the wind-up valuation of assets and liabilities of the pension fund will show a deficiency). [Emphasis added]

*Toronto-Dominion Bank v. Usarco Ltd.*, [1991] O.J. No. 1314 (Gen. Div.) at pp. 10 and 11 (Q.L.), Monitor's Book of Authorities, Vol. I, Tab 4

54. In their factum, the USW refers to a comment made by Farley J. in the subsequent case of *Ivaco Inc. (Re)* where His Honour appeared to suggest, without reasons or reference to *Usarco*, that the deemed trust provisions of section 57 also applied to wind up deficiencies. However, this comment by Farley J. was addressed by a unanimous Court of Appeal which stated:

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

*Ivaco (Re)*, [2006] O.J. No. 4152 (C.A.) at para. 44, Monitor's Book of Authorities, Vol. I, Tab 5

55. As recognized by Campbell J. in his Reasons for Decision, the absence of any deemed trust securing future payments in respect of a wind up deficiency 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 and owing to the pension fund on wind up, but which have not been paid.

There are a number of important limitations on the application of the statutory deemed trust. First, the deemed trust only extends to "accrued"

contributions. This includes the regular, “normal cost”, contributions together with any “special payment” (that is, contributions required to fund a plan deficit) which were required to have been made by the employer, but were not. 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. [Emphasis added]

Ari N. Kaplan, *Pension Law* (Toronto: Irwin Law, 2006) at p. 396, Monitor’s Book of Authorities, Vol. I, Tab 6

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 employer, and an obligation exists under the OPBA to fund this 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 p. 29, Monitor’s Book of Authorities, Vol. I, Tab 7

56. This interpretation is also consistent with the fact that the wind up deficiency cannot be said to have “accrued” until, at the earliest, the effective date of wind up. In *Ontario Hydro-Electric Power Commission v. Albright*, the Supreme Court of Canada interpreted the word “accrued” as meaning “completely constituted”.

*Ontario Hydro-Electric Power Commission v. Albright*, 1922 CarswellOnt 134 (S.C.C.) at para. 23, Monitor's Book of Authorities, Vol. I, Tab 8

57. As stated in *Collins & Aikman Automotive Canada Inc. (Re)*, "post-wind-up special payments to address a wind up deficit are based on an actuarial estimate of the position of the plan as of the wind up date". The actual liabilities of the pension plan are not determined until benefits are settled and the funds in the plan are needed to actually purchase annuities from an insurance company (at the prevailing annuity rates) to provide the monthly pension benefits to the member. The financial situation of the pension plan at wind up may be significantly different from that set forth in the last prior report.

*Toronto-Dominion Bank v. Usarco Ltd.*, [1991] O.J. No. 1314 (Gen. Div.) at p. 10 (Q.L.), Monitor's Book of Authorities, Vol. 1, Tab 5

*Collins & Aikman Automotive Canada Inc.(Re)*, [2007] O.J. No. 4186 (S.C.J.) at para. 15, Monitor's Book of Authorities, Vol. 1, Tab 9

PBA, s. 75(1)(b)

58. As the existence or amount of a potential wind up deficiency under subsection 75(1)(b) cannot begin to be calculated until after the effective date of wind up and as the employer is under no obligation to make payments to fund the wind up deficiency prior to the date of wind up, the obligation cannot be said to be completely constituted until, at the earliest, the effective date of wind up. Therefore the payments required to fund any such deficiency cannot have accrued prior to that date.

59. This interpretation of the deemed trust provisions of the PBA also strikes a reasonable balance between the rights of employees, the rights of employers

and the rights and reasonable expectations of secured creditors. As acknowledged by numerous commentators, the consequences of expanding the super-priority to cover the wind up deficiency could have wide-ranging effects, including: (a) the tightening of credit to borrowers with defined benefit plans; (b) a reduction in the number of employers willing to sponsor defined benefit plans; and (c) an increase in bankruptcies and a related decrease in restructurings as a result of secured lenders seeking to avoid the super-priority granted to potential pension plan funding deficits through a bankruptcy.

Hugh O'Reilly, "Broken Promises" (April 1, 2010), online: Benefits Canada <<http://www.benefitscanada.com>>, Monitor's Book of Authorities, Vol. I, Tab 10

Canadian Association of Insolvency and Restructuring Professionals, "Review of Bills C-476, C-487, C-502, S-214 and S-216 (40<sup>th</sup> Parliament)" (June 25, 2010), online: <<http://www.cairp.ca>>, at pp. 2-4, Monitor's Book of Authorities, Vol. I, Tab 11

60. Had the Legislature wished to grant super-priority to plan beneficiaries for unknown and unquantifiable future payments to fund a potential wind up deficiency, it could easily have done so using plain language. It is submitted that the decision not to extend the deemed trust to future payments to fund a wind up deficiency reflects a rational policy choice by the Legislature.

61. All contributions due and accrued to the date of wind up of the Salaried Plan had been made to the Salaried Plan as of the date of the Deemed Trust Motions. All contributions due to the Executive Plan as of the date of the motion to approve the SAPA Transaction and the date of the Deemed Trust Motions had been made. Accordingly, no deemed trust existed with respect to either Plan.

The additional “catch-up” payment of \$25,100.00 due to the Salaried Plan, referred to in paragraph 18 hereof was a clause 75(1)(b) payment required to fund the wind up deficiency and therefore is not captured by the deemed trust provisions of the PBA.

62. The Monitor submits that Campbell J. correctly determined that no deemed trust existed in respect of either the Salaried Plan or the Executive Plan.

**C. The DIP Lenders have Priority over any Deemed Trust**

63. The Monitor submits that even if the deemed trust provisions of the PBA do apply to wind up deficiencies, the DIP Lenders Charge has priority over any deemed trust pursuant to the terms of the Initial Order.

64. The Appellants argue that Campbell J. erred by not deleting the provision of the Initial Order that granted priority to the DIP Lenders and seek a declaration that the deemed trusts should be paid in priority to the DIP Lenders Charge on the basis of subsection 30(7) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 (the “PPSA”).

65. The Appellants’ argument ignores: (a) well-established law that authorizes the court to grant super-priority to DIP lenders in CCAA proceedings; and (b) the fact that subsection 30(7) of the PPSA only speaks to accounts and inventory and there is no evidence on the record as to the value of the Applicants’ accounts and inventory.



66. In *Re Nortel Networks Corp.*, this Honourable Court held that the doctrine of paramountcy applies either where a provincial and a federal statutory provision are in conflict and cannot both be complied with, or where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament.

*Nortel Networks Corp. (Re)*, [2009] O.J. No. 4967 (C.A.) at para. 38,  
Monitor's Book of Authorities, Vol. I, Tab 12

67. The purpose of the CCAA is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors, to the end that the business is able to continue. This purpose continues to exist regardless of whether a company is actually restructuring or is continuing operations during a sales process in order to maintain maximum value and achieve the highest price for the benefit of all stakeholders.

*Nortel Networks Corp. (Re)*, [2009] O.J. No. 3196 (S.C.J. [Comm. List]) at paras. 33-40, Monitor's Book of Authorities, Vol. I, Tab 13

*Nortel Networks Corp. (Re)*, [2009] O.J. No. 4967 (C.A.) at para. 46,  
Monitor's Book of Authorities, Vol. I, Tab 12

*Brainhunter Inc. (Re)*, [2009] O.J. No. 5207 (S.C.J. [Comm. List]) at  
paras. 12-14, Monitor's Book of Authorities, Vol. I, Tab 14

68. The purpose of the CCAA regime cannot be thwarted by the operation of provincial legislation and, as a result, a CCAA court has the jurisdiction and discretion to make an order that has the effect of overriding a provincial enactment, including the PBA. In *Collins & Aikman*, 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.

*Nortel Networks Corp. (Re)*, [2009] O.J. No. 4967 (C.A.) at paras. 44 and 47, Monitor's Book of Authorities, Vol. I, Tab 12

*Collins & Aikman Automotive Canada Inc.(Re)*, [2007] O.J. No. 4186 (S.C.J.) at paras. 42 and 87, Monitor's Book of Authorities, Vol. I, Tab 9

69. In most CCAA proceedings, the debtor requires DIP financing in order to continue its operations while it either restructures or conducts a sales process. It is a standard term of DIP financing agreements, as evidenced by the Commercial List Model Initial Order and numerous cases, that the DIP lender is granted a court-ordered charge that ranks in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise in favour of any person (other than certain other court-ordered charges).

*Companies' Creditors Arrangement Act Initial Order Form* (January 2010), online: <<http://www.ontariocourts.on.ca>> at paras. 32-37, Monitor's Book of Authorities, Vol. I, Tab 15

*Temple City Housing Inc. (Re)*, [2007] A.J. No. 1489 (Q.B.) at paras. 6 and 14, Monitor's Book of Authorities, Vol. I, Tab 16

*AbitibiBowater Inc. (Re)*, [2009] Q.J. No. 16097 (S.C.) at paras. 14-18, Monitor's Book of Authorities, Vol. I, Tab 17

*Sulphur Corp. of Canada Ltd.(Re)*, [2002] A.J. No. 918 (Q.B.) at para. 16, Monitor's Book of Authorities, Vol. I, Tab 18

70. That supervising courts have the discretion under the CCAA to grant Initial Orders that provide DIP financing charges with super-priority is entirely in keeping with the purpose of the CCAA. Without a super-priority charge, DIP lenders would no longer be willing to provide financing to companies under

CCAA protection. Without funding from DIP lenders, many companies under CCAA protection would be unable to continue in business in order to facilitate a compromise or arrangement (or a sales process) and would instead have to file for bankruptcy (where deemed trusts have no priority). This result would frustrate the very purpose of the CCAA.

*Ivaco (Re)*, [2006] O.J. No. 4152 (C.A.) at para. 64, Monitor's Book of Authorities, Vol. I, Tab 5

71. In the present case, the Initial Order specifically provides that the DIP Lenders Charge ranks in priority to any "Encumbrances", including deemed trusts and statutory liens. 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]

Amended and Restated Initial Order, Exhibit "A" to the Cooper Affidavit at para. 45, Compendium of the Monitor, Tab 1A

72. Therefore, even if a deemed trust could exist in respect of the wind up deficiencies under either of the Plans, the terms of the Initial Order expressly state that the DIP Lenders Charge has priority over such deemed trusts. The DIP Lenders relied on the Initial Order in providing the DIP Loan and no steps were taken to challenge or amend the priorities established in the Initial Order. Notably, neither the USW nor the Retirees sought to appeal the Initial Order or

take advantage of the comeback clause in paragraph 56 of the Initial Order. The Appellants' current attempt to override paragraph 45 of the Initial Order constitutes a collateral attack on the Initial Order.

Amended and Restated Initial Order, Exhibit "A" to the Cooper Affidavit at para. 56, Compendium of the Monitor, Tab 1A.

*Collins & Aikman Automotive Canada Inc.(Re)*, [2007] O.J. No. 4186 (S.C.J.) at para. 96, 100, 105 and 108, Monitor's Book of Authorities, Vol. I, Tab 9

73. This issue was addressed in *Collins & Aikman*. In that case, FSCO, the USW and the CAW brought a motion objecting to certain paragraphs of the Initial Order including, *inter alia*, the paragraph which provided that C&A was not required to make special payments ordinarily required by the PBA. The Court refused to grant that part of the moving parties' motion holding that: (a) the terms of the DIP financing precluded C&A from making any material disbursements not contemplated in the cash flow approved by the lender (special payments were not contemplated); (b) the Court had jurisdiction under the CCAA to approve an order which conflicted with and overrode provincial legislation; and (c) it was a proper exercise of the Court's discretion to approve the provision. The Court held that ordering C&A to make special payments would constitute a collateral attack on the Initial Order that approved the DIP financing and stated as follows:

So what remains is a request that the Court, in the exercise of its discretion under s. 11, should make an order that would be contrary to the reasonable expectations of the Applicant and the DIP Lender based on the steps already taken and the orders

already granted under the CCAA in this proceeding. That would be unfair and it would not contribute to the fair application of the CCAA in this case or as a precedent for others.

*Collins & Aikman Automotive Canada Inc.(Re)*, [2007] O.J. No. 4186 (S.C.J.) at para. 108, Monitor's Book of Authorities, Vol. I, Tab 9

74. As stated above, in the case at Bar neither the USW nor the Retirees sought to appeal the Initial Order and neither took advantage of the comeback clause in the Initial Order. The Monitor submits that if this Court were to negate the provision of the Initial Order granting super-priority to the DIP Lenders Charge, it would upset the ground rules established by the Initial Order, it would be contrary to the reasonable expectations of the Applicants and the DIP Lenders, and it would not contribute to the fair application of the CCAA.

**D. Indalex did not Breach its Fiduciary Duty**

75. Finally, and in the alternative, the USW and the Retirees submit that Indalex, in its capacity as pension plan administrator, breached fiduciary duties owed to the Plans' beneficiaries and that damages should be ordered to be payable to the Plans or, alternatively, to the Plan beneficiaries directly.

76. In particular, the Appellants allege that Indalex breached its fiduciary duties by: (a) negotiating the DIP Loan which gave the DIP Lenders a super-priority charge over the Canadian Sales Proceeds ahead of the deemed trusts and other encumbrances; (b) seeking an Initial Order confirming this super-priority; (c) actively opposing the Deemed Trust Motions; and (d) seeking a voluntary

assignment in bankruptcy in order to ensure the funds on reserve would be paid to Indalex US.

77. All actions taken by Indalex in negotiating the DIP Loans, seeking the Initial Order, opposing the Deemed Trust Motions and seeking an assignment in bankruptcy were taken in its position *qua* employer and therefore cannot involve a breach of the fiduciary duties owed by Indalex to the plan beneficiaries *qua* plan administrator.

### **Fiduciary Duties of a Plan Administrator**

78. A pension plan administrator has both a statutory and common law duty to act in the best interests of the plan beneficiaries and avoid conflicts of interest.

The duties are fiduciary in nature. Section 22 of the PBA states, in relevant part:

**22.(1)** The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

#### **Special knowledge and skill**

(2) The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.

#### **Conflict of interest**

(4) An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not

knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

PBA s. 22

*Ivaco (Re)*, [2006] O.J. No. 4152 (C.A.) at para. 51, Monitor's Book of Authorities, Vol. I, Tab 5 [cited for proposition that duties are fiduciary in nature].

79. The duties of a plan administrator focus on the administration and maintenance of the pension fund and include, *inter alia*, the duty to make decisions with respect to the enrolment of members, the calculation and payment of benefits under the plan and the investment of the assets of the plan.

*Imperial Oil Ltd. v. Ontario (Superintendent of Pensions)*, 1995 CarswellOnt 2252 (Pension Commission) at paras. 30-33, Monitor's Book of Authorities, Vol. II, Tab 19

*OMERS Sponsors Corp. v. OMERS Administration Corp.*, 2008 CarswellOnt 561 (S.C.J.) at para. 40, Monitor's Book of Authorities, Vol. II, Tab 20

PBA, ss. 12, 22(1), 25, 27, 28, 29, 56

### **Corporation as Administrator and Employer: The "Two Hats" Doctrine**

80. While pension plan administrators do owe plan beneficiaries certain duties, these duties are not exhaustive and do not apply in all instances. A pension plan administrator which also happens to be the employer (as is generally the case in single-employer pension plans in Ontario and as is expressly contemplated by section 8 of the PBA) does not owe fiduciary duties to plan beneficiaries when it is acting *qua* employer. A corporation is not an administrator for all purposes with regard to a plan it has established, and the role of the employer in respect of a pension plan is separate and apart from its role and duties as plan administrator.

*Imperial Oil Ltd. v. Ontario (Superintendent of Pensions)*, 1995 CarswellOnt 2252 (Pension Commission) at para. 30, Monitor's Book of Authorities, Vol. II, Tab 19

*Assoc. provinciale des retraités d'Hydro-Québec c. Hydro-Québec*, 2005 CarswellQue 13745 (C.A.) at para. 88, Monitor's Book of Authorities, Vol. II, Tab 21

PBA ss. 8 and 22

81. The seminal Ontario case on employer/administrator supposed "conflicts of interest" is *Imperial Oil Ltd. v. Ontario (Superintendent of Pensions)*, where it was recognized that the playing of different roles by the same entity is inherent in the PBA. In *Imperial Oil*, the Pension Commission of Ontario (as it then was) established that where a corporation acts in its capacity as employer, it is not subject to a fiduciary duty with respect to members of the pension plan, even though, in another capacity, the corporation is also the administrator of the plan. In other words, even where the sponsoring employer is also the administrator of the pension plan, the employer is not prevented merely by virtue of its status as administrator from acting as an employer with respect to the plans. This principle is commonly referred to as the "two hats" doctrine.

*Imperial Oil Ltd. v. Ontario (Superintendent of Pensions)*, 1995 CarswellOnt 2252 (Pension Commission) at para. 30, Monitor's Book of Authorities, Vol. II, Tab 19

82. Under the "two hats" doctrine, when a corporation acts in its capacity *qua* administrator, the corporation is subject to the statutory and common law fiduciary duties imposed on plan administrators. In contrast, when it is acting *qua* employer, the corporation may legitimately be involved in disputes with



pension plan beneficiaries and does not owe any fiduciary duties to the beneficiaries. As stated by the Ontario Superior Court of Justice:

In its role as plan sponsor, the employer decides whether to establish a plan and on its funding design. As plan sponsor, the employer owes no fiduciary duties to the plan members. In deciding whether to establish or terminate a plan, in defining the categories of employees who are eligible for membership, and in determining what benefits will be offered, the sponsor may act in its own interests and may prefer the company's interests over those of the employees. [Emphasis Added]

*OMERS Sponsors Corp. v. OMERS Administration Corp*, 2008 CarswellOnt 561 (S.C.J.) at para. 39, Monitor's Book of Authorities, Vol. II, Tab 20

*Imperial Oil Ltd. v. Ontario (Superintendent of Pensions)*, 1995 CarswellOnt 2252 (Pension Commission) at paras. 30-33, Monitor's Book of Authorities, Vol. II, Tab 19

83. When Indalex was negotiating the DIP Loan, seeking the Initial Order, opposing the Deemed Trust Motions or seeking a voluntary assignment in bankruptcy it was acting in its capacity *qua* employer. As such Indalex did not breach its fiduciary duties to the Plan beneficiaries *qua* administrator.

84. Additionally, the Monitor submits that the issue of whether there was a breach of fiduciary duty is moot as it would in any event merely give rise to an unsecured claim outside of the ambit of the deemed trusts created by the PBA.

**The Doctrine of Equitable Subordination was not raised on the Deemed Trust Motions**

85. The Retirees further argue that this Honourable Court can order damages for breach of fiduciary duty to be payable ahead of all secured

creditors, including the DIP Lenders, through application of the doctrine of equitable subordination. It should be noted that this issue did not form the basis of the relief sought with respect to the Deemed Trust Motions from which the USW and Retirees now appeal and was not before Campbell J. on those motions.

86. It is a general rule that appellate courts will not entertain entirely new issues on appeal. The reason for this rule is that it is unfair to spring a new argument on a party at the hearing of an appeal in circumstances where evidence might have been led at the original motion had it been known the matter would be an issue on appeal.

*767269 Ontario Ltd. v. Ontario Energy Savings L.P.*, [2008] O.J. No. 1711 (C.A.) at para. 3, Monitor's Book of Authorities, Vol. II, Tab 22

*Kaiman v. Graham*, [2009] O.J. No. 324 (C.A.) at para. 18, Monitor's Book of Authorities, Vol. II, Tab 23

87. The burden is on the appellant to persuade the appellate court that all the facts necessary to address the point are before the court as fully as if the issue had been raised on the underlying motion.

*Kaiman v. Graham*, [2009] O.J. No. 324 (C.A.) at para. 18, Monitor's Book of Authorities, Vol. II, Tab 23

88. The new issue of whether the doctrine of equitable subordination applies in the case at hand is a novel issue on appeal and, as a result, the Monitor submits that it is an inappropriate issue for the Appeals.

### The Doctrine of Equitable Subordination is not Applicable

89. In any event, and without prejudice to the foregoing, whether the doctrine of equitable subordination is even applicable in Canada is one of considerable debate. The Supreme Court of Canada has expressly refrained from ruling on this issue and has stated:

This Court also does not have the benefit of the insight of the courts below as to whether or not, in the first place, the doctrine of equitable subordination should become part of Canadian insolvency law. As I see the matter, however, it is not necessary in the circumstances of this case to answer the question of whether a comparable equitable doctrine should exist in Canadian law and I expressly refrain from doing so. Assuming, for the sake of argument only, that Canadian courts have the power in insolvency matters to subordinate otherwise valid claims to those of other creditors on equitable grounds relating to the conduct of these creditors inter se, this Court has been presented with insufficient grounds to justify the exercise of such a power in the case at bar. [Emphasis added]

*Canadian Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558 at para. 90, Monitor's Book of Authorities, Vol. II, Tab 24

90. In *I. Waxman & Sons Limited (Re)*, the Honourable Madam Justice Ppall reviewed the treatment in Canada of the doctrine of equitable subordination. Developed in American jurisprudence, the doctrine permits the claims of one creditor to be subordinated to the claims of other creditors of equal rank on the basis of the equitable jurisdiction of the court if three circumstances are met:

- (a) The claimant must have engaged in some kind of inequitable conduct;
- (b) The misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and
- (c) Equitable Subordination must not be inconsistent with the provisions of the bankruptcy statute.

In the end, Pepall J. concluded that it was far from clear whether the doctrine of equitable subordination exists under Canadian law and refused to apply it in that case.

*I. Waxman & Sons Ltd.*, [2008] O.J. No. 885 (S.C.J. [Comm. List]) at paras. 28-34; aff'd [2010] O.J. No. 2585 (C.A.), Monitor's Book of Authorities, Vol. II, Tab 25

91. Inequitable conduct in the context of the doctrine of equitable subordination (to the extent that this doctrine exists in Canada) requires the court to conduct a broad inquiry into the conduct of the parties to determine what is right and just in all the circumstances. The doctrine is not to be used to adjust the legally valid claim of an innocent party who asserts the claim in good faith merely because the court perceives the result as inequitable.

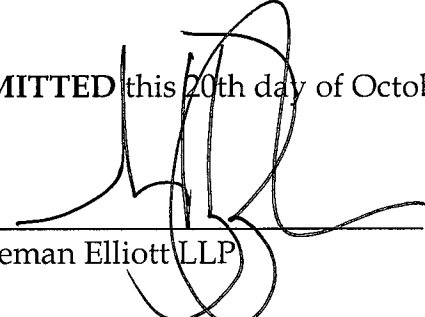
*Harbert Distressed Investment Fund, L.D. v. General Chemical Canada Ltd.*, [2006] O.J. No. 3087 (S.C.J. [Comm. List]) at para. 92; aff'd [2007] O.J. No. 3296 (C.A.), Monitor's Book of Authorities, Vol. II, Tab 26

92. There is no basis in this case for the application of the doctrine of equitable subordination. The claim which the Retirees seek to trump is the claim of the DIP Lender. The Retirees have not alleged any misconduct on the part of the DIP Lender or any conduct which is inconsistent with the behaviour of DIP lenders in every CCAA case. Instead the Retirees ask the Court to look past the DIP Lenders and focus on the conduct of the US Debtors, who now hold the claim of the DIP Lenders solely by virtue of their subrogation rights under the guarantee of the Applicants' obligations to the DIP Lenders - as the US Debtors paid the DIP Lenders in excess of US\$10.7 million on behalf of the Applicants pursuant to the guarantee which was granted by the US Debtors to the DIP Lenders for the benefit of the Applicants. However, the creditors that the Retirees are really in effect seeking to trump are the creditors of the US Debtors. As the US Debtors are currently in Chapter 7, having sold substantially all of their business as part of the Sapa Transaction, any recovery against Indalex by the US Debtors (pursuant to their rights of subrogation) will form a portion of the distributions to creditors of the US Debtors. However, the Retirees have not attempted to impugn the conduct of any of the creditors of the US Debtors, and there has been no allegation of conduct on behalf of the creditors of the US Debtors which would justify the application of the doctrine of equitable subrogation.

**PART IV - RELIEF REQUESTED**

93. For the reasons outlined above, the Monitor requests that this Court dismiss the USW's and Retirees' Appeals.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 20th day of October, 2010.



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Stikeman Elliott LLP

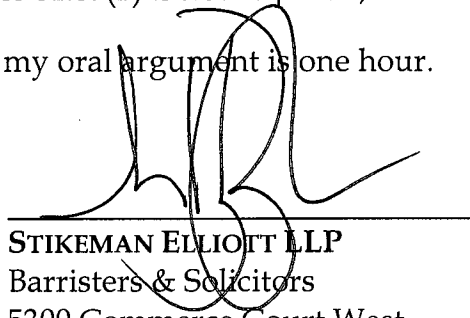
Lawyers for the Monitor,  
FTI Consulting Canada ULC

## Certificate of Counsel

I, Ashley John Taylor, lawyer for FTI Consulting Canada ULC, the Court-appointed Monitor, 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 20, 2010



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STIKEMAN ELLIOTT LLP  
Barristers & Solicitors  
5300 Commerce Court West  
199 Bay Street  
Toronto, Canada M5L 1B9

Ashley John Taylor LSUC#: 39932E  
Tel: (416) 869-5236  
Lesley Mercer LSUC#: 54491E  
Tel: (416) 869-6859  
Jennifer Imrie LSUC#: 56812H  
Tel: (416) 869-6853  
Fax: (416) 947-0866

Lawyers for the Monitor, FTI Consulting  
Canada ULC

**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

1. *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, [2000] A.J. No. 610 (C.A.).
2. *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559.
3. *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, [2006] 1. S.C.R. 715.
4. *Toronto-Dominion Bank v. Ursarco Ltd.*, [1991] O.J. No. 1314 (Gen. Div.).
5. *Ivaco (Re)*, [2006] O.J. No. 4152 (C.A.).
6. Ari N. Kaplan, *Pension Law* (Toronto: Irwin Law, 2006).
7. Gregory Winfield, "Pension Management in Insolvency and Restructuring: What is at Stake? (Insight, 2005).
8. *Ontario Hydro-Electric Power Commission v. Albright*, 1922 CarswellOnt 134 (S.C.C.).
9. *Collins & Aikman Automotive Canada Inc. (Re)*, [2007] O.J. No. 4186 (S.C.J.).
10. Hugh O'Reilly, "Broken Promises" (April 1, 2010), online: Benefits Canada <<http://www.benefitscanada.com>>.
11. Canadian Association of Insolvency and Restructuring Professionals, "Review of Bills C-476, C-487, C-502, S-214 and S-216 (40<sup>th</sup> Parliament)" (June 25, 2010), online: <<http://www.cairp.ca>>.
12. *Nortel Networks (Re)*, [2009] O.J. No. 4967 (C.A.).
13. *Nortel Networks (Re)*, [2009] O.J. No. 3169 (S.C.J. [Comm. List]).
14. *Brainhunter Inc. (Re)*, [2009] O.J. No. 5207 (S.C.J. [Comm. List]).
15. Companies' Creditors Arrangement Act Initial Order Form [Commercial List] (January 2010), online: <<http://www.ontariocourts.on.ca>>.
16. *Temple City Housing Inc. (Re)*, [2007] A.J. No. 1489 (Q.B.).
17. *AbitibiBowater Inc. (Re)*, [2009] Q.J. No. 10697 (S.C.).
18. *Sulphur Corp. of Canada Ltd. (Re)*, [2002] A.J. No. 918 (Q.B.).
19. *Imperial Oil Ltd. v. Ontario (Superintendent of Pensions)*, 1995 CarswellOnt 2252 (Pension Commission).



20. *OMERS Sponsors Corp. v. OMERS Administration Corp.*, 2008 CarswellOnt 561 (S.C.J.).
21. *Assoc. provinciale des retraités d'Hydro-Québec c. Hydro-Québec*, 2005CarswellQue 13745 (C.A.).
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. *Canadian Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558.
25. *Waxman & Sons Ltd. (Re)*, [2008] O.J. No. 885 (S.C.J.); aff'd [2010] O.J. No. 2585 (C.A.).
26. *Harbert Distressed Investment Fund, L.D. v. General Chemical Canada Ltd.*, [2006] O.J. No. 3087 (S.C.J. [Comm. List]); aff'd [2007] O.J. No. 3296 (C.A.).

**SCHEDULE "B"**  
**RELEVANT STATUTES**

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

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. 2010, c. 9, s. 3 (1).

**Administrator**

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

- (a) the employer or, if there is more than one employer, one or more of the employers;
- (b) a pension committee composed of one or more representatives of,
  - (i) the employer or employers, or any person, other than the employer or employers, required to make contributions under the pension plan, and
  - (ii) members of the pension plan;
- (c) a pension committee composed of representatives of members of the pension plan;
- (d) the insurance company that provides the pension benefits under the pension plan, if all the pension benefits under the pension plan are guaranteed by the insurance company;
- (e) if the pension plan is a multi-employer pension plan established pursuant to a collective agreement or a trust agreement, a board of trustees appointed pursuant to the pension plan or a trust agreement establishing the pension plan of whom at least one-half are representatives of members of the multi-employer pension plan, and a majority of such representatives of the members shall be Canadian citizens or landed immigrants;
- (f) a corporation, board, agency or commission made responsible by an Act of the Legislature for the administration of the pension plan;
- (g) a person appointed as administrator by the Superintendent under section 71; or
- (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. R.S.O. 1990, c. P.8, s. 8 (2).

**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.

...

**Application for registration of amendment**

12.(1) The administrator of a pension plan shall apply to the Superintendent, within sixty days after the date on which the pension plan is amended, for registration of the amendment.

...

**Care, diligence and skill**

22 (1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

**Special knowledge and skill**

(2) The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator’s profession, business or calling, ought to possess.

**Member of pension committee, etc.**

(3) Subsection (2) applies with necessary modifications to a member of a pension committee or board of trustees that is the administrator of a pension plan and to a member of a board, agency or commission made responsible by an Act of the Legislature for the administration of a pension plan.

**Conflict of interest**

(4) An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the administrator’s interest to conflict with the administrator’s duties and powers in respect of the pension fund.

**Employment of agent**

(5) Where it is reasonable and prudent in the circumstances so to do, the administrator of a pension plan may employ one or more agents to carry out any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund.

**Trustee of pension fund**

(6) No person other than a prescribed person shall be a trustee of a pension fund.

**Responsibility for agent**

(7) An administrator of a pension plan who employs an agent shall personally select the agent and be satisfied of the agent's suitability to perform the act for which the agent is employed, and the administrator shall carry out such supervision of the agent as is prudent and reasonable.

**Employee or agent**

(8) An employee or agent of an administrator is also subject to the standards that apply to the administrator under subsections (1), (2) and (4).

**Benefit by administrator**

(9) The administrator of a pension plan is not entitled to any benefit from the pension plan other than pension benefits, ancillary benefits, a refund of contributions and fees and expenses related to the administration of the pension plan and permitted by the common law or provided for in the pension plan.

**Member of pension committee, etc.**

(10) Subsection (9) applies with necessary modifications to a member of a pension committee or board of trustees that is the administrator of a pension plan and to a member of a board, agency or commission made responsible by an Act of the Legislature for the administration of a pension plan.

**Payment to agent**

(11) An agent of the administrator of a pension plan is not entitled to payment from the pension fund other than the usual and reasonable fees and expenses for the services provided by the agent in respect of the pension plan.

...

**Information from administrator**

25.(1) The administrator of a pension plan shall provide in writing to each person who will be eligible or is required to become a member of the pension plan,

- (a) an explanation of the provisions of the plan that apply to the person;
- (b) an explanation of the person's rights and obligations in respect of the pension plan; and
- (c) any other information prescribed by the regulations.

**Time**

- (2) The administrator shall provide the information mentioned in subsection (1),
  - (a) to each person who becomes a member within the prescribed period of time after the date on which the pension plan is established;

(b) to a person who is likely to become eligible to become a member of the pension plan, within the prescribed period of time before the date on which the person is likely to become eligible;

(c) to each person who becomes eligible to become a member of the pension plan upon becoming employed by the employer, within the prescribed period of time after the date on which the person becomes so employed.

#### **Information from employer**

(3) The employer shall transmit to the administrator the information necessary to enable the administrator to comply with subsection (2) and shall transmit the information in sufficient time to enable the administrator to comply with the time limits set out in that subsection.

...

#### **Annual statement of pension benefits**

27. The administrator of a pension plan shall transmit annually to each member a written statement containing the prescribed information in respect of the pension plan, the member's pension benefits and any ancillary benefits.

#### **Statement of benefits**

28.(1) Where a member of a pension plan terminates employment with the employer or otherwise ceases to be a member, the administrator of the pension plan shall give to the member, or to any other person who as a result becomes entitled to a payment under the pension plan, a written statement setting out the prescribed information in respect of the benefits, rights and obligations of the member or other person.

#### **Multi-employer pension plan**

(2) Subsection (1) applies in respect of a multi-employer pension plan where a member ceases to be a member, but does not apply where a member terminates employment with an employer but continues to be a member.

#### **Inspection of administrator's records**

29. (1) On written request, the administrator of a pension plan shall make available the prescribed records about the pension plan and the pension fund for inspection without charge by,

- (a) a member;
- (b) a former member;
- (c) the spouse of a member or former member;
- (d) any other person entitled to pension benefits under the pension plan;
- (e) Repealed: 1999, c. 15, s. 3 (1).
- (f) a representative of a trade union that represents members of the pension plan;
- (g) an employer;

- (h) a person required to make contributions under the pension plan on behalf of an employer;
- (i) an agent of a person described in any of clauses (a) to (h) who is authorized in writing; or
- (j) such other persons as may be prescribed.

**Place of inspection**

- (2) The administrator shall make the prescribed records available,
- (a) for a member, at the premises of the employer where the member is employed;
  - (b) for a former member, at the premises where the former member was employed; or
  - (c) for a member, former member or any other person, at such other location as may be agreed upon by the administrator and the member, former member or other person making the request.

**Extracts or copies**

- (3) The administrator shall permit the person making the inspection to make extracts from or to copy the prescribed documents and information.

**Idem**

- (4) On request, the administrator shall provide the person making the inspection with copies of any of the prescribed documents or information upon payment to the administrator of a reasonable fee.

**Limitation**

- (5) A member, a former member, a spouse, another person, an agent or a trade union by a representative is entitled to make an inspection under subsection (1) not more than once in a calendar year.

...

## CONTRIBUTIONS

55. (1) A pension plan is not eligible for registration unless it provides for funding sufficient to provide the pension benefits, ancillary benefits and other benefits under the pension plan in accordance with this Act and the regulations.

**Payment by employers, etc.**

- (2) An employer required to make contributions under a pension plan, or a person or entity required to make contributions under a pension plan on behalf of an employer, shall make the contributions in accordance with the prescribed requirements for funding and shall make the contributions in the prescribed manner and at the prescribed times,
- (a) to the pension fund; or

(b) if pension benefits under the pension plan are paid by an insurance company, to the insurance company that is the administrator of the pension plan.

**Payment by members**

(3) Members of a pension plan that provides contributory benefits shall make the contributions required under the plan in the prescribed manner and at the prescribed times.

**Same, jointly sponsored pension plans**

(4) Members of a jointly sponsored pension plan shall make the contributions required under the plan, including contributions in respect of any going concern unfunded liability and solvency deficiency, in accordance with the prescribed requirements for funding and shall make the contributions in the prescribed manner and at the prescribed times.

**Duty re payment of contributions**

56.(1) The administrator of a pension plan and the agent, if any, of the administrator who is responsible for receiving contributions under the pension plan shall ensure that all contributions are paid when due.

**Notice**

(2) If a contribution is not paid when due, the administrator and the agent, if any, shall notify the Superintendent in the prescribed manner and within the prescribed period.

**Duty to pension fund trustees**

56.1 (1) The administrator shall give the persons who are prescribed for the purposes of subsection 22 (6) (trustee of pension fund) a summary of the contributions required to be made in respect of the pension plan, and shall do so in the prescribed manner and within the prescribed period.

**Exception**

(1.1) Subsection (1) does not apply if the administrator is also the trustee of the pension fund.

**Notice re summary**

(2) A person who is entitled to receive a summary shall notify the Superintendent in the prescribed manner and within the prescribed period if the person is not given the summary in accordance with subsection (1).

**Notice re contributions**

(3) A person who is entitled to receive a summary shall notify the Superintendent in the prescribed manner and within the prescribed period if a contribution is not paid when due.

**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.



### **Collection of contributions**

59. The administrator may commence proceedings in a court of competent jurisdiction to obtain payment of contributions due under the pension plan, this Act and the regulations.

### **Bond**

60. The administrator of a multi-employer pension plan may require a person who receives contributions to the pension fund or who administers or invests the pension fund to be bonded in an amount required by the administrator or in the prescribed amount.

### **Statement of employer's obligation**

61. An employer who is required to make contributions to a multi-employer pension plan shall transmit to the administrator of the plan a copy of the agreement that requires the employer to make the contributions or a written statement that sets out the contributions the employer is required to make and any other obligations of the employer under the pension plan.

### **Investment of pension fund**

62. Every person engaged in selecting an investment to be made with the assets of a pension fund shall ensure that the investment is selected in accordance with the criteria set out in this Act and prescribed by the regulations.

...

## **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.

## Pensions 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: O. Reg. 116/06, s. 4 (8).

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 installments within thirty days after the month for which contributions are payable, the amount of the installments 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 installments within 30 days after the month for which contributions are payable, the amount of the installments 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: O. Reg. 116/06, s. 4 (8).

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 installments 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 installment 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 installments 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 or submitted under section 3, 4 or 14 with a valuation date after the Regulation date, by equal monthly installments 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 installments 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 installments 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.

...

### **Contribution Requirements in Year of Report**

**12. (1)** This section applies in respect of a pension fund for a pension plan other than a jointly sponsored pension plan when a report required under section 3 or 14 is filed with the Superintendent or a report prepared under section 4 or 13 is submitted to the Superintendent.

**(2)** Within 60 days after the report is filed or submitted, the employer shall pay into the pension fund,

**(a)** all amounts due under the report on the date the report is filed or submitted; and

**(b)** interest on those amounts calculated at the going concern interest rate or the solvency valuation interest rate, whichever applies in the circumstances.

**(3)** The actuary who prepares the report shall calculate the amount of interest that is payable under clause (2) (b).

...

### **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: O. Reg. 144/00, s. 21 (2).

(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: O. Reg. 144/00, s. 24.

**(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 Plans Wind Up**

**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: O. Reg. 570/06, s. 6 (4).
    - (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 installments for five years or less or by payments determined in accordance with a schedule of payments.

**(2)** The installments 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. O. Reg. 116/06, s. 17.

**(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: O. Reg. 322/09, s. 3.

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: O. Reg. 413/07, s. 4 (2).

- (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.

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

**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.

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

**(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.

**(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.

**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.

**(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.

**(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.

**(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.

(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.

(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.

(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. 1996, c. 5, s. 2.

(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*.

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



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.

Court of Appeal File No. M38582  
Court of Appeal File No: M38599  
Superior Court File No: 09CV-8221-00CL

**COURT OF APPEAL FOR ONTARIO**

Proceeding commenced at Toronto

**RESPONDING FACTUM OF THE  
MONITOR  
(MOTION FOR LEAVE TO APPEAL)**

STIKEMAN ELLIOTT LLP  
Barristers & Solicitors  
5300 Commerce Court West  
199 Bay Street  
Toronto, Canada M5L 1B9

Ashley John Taylor LSUC#: 39932E  
Tel: (416) 869-5236  
Lesley Mercer LSUC#: 54491E  
Tel: (416) 869-6859  
Jennifer Imrie LSCU#:56812H  
Tel: (416) 869-6853  
Fax: (416) 947-0866

Lawyers for the Monitor, FTI Consulting  
Canada, ULC