S.C.C. File No.
(C52187 & C52346)

IN THE SUPREME COURT OF CANADA
(APPLICATION FOR LEAVE TO APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

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

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

B E T W E E N :

SUN INDALEX FINANCE, LLC

APPLICANT
(Respondent)

- and -

UNITED STEELWORKERS, 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, FRED GRANVILLE, GEORGE L. MILLER, THE CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATES OF THE US INDALEX DEBTORS, and THE MONITOR, FTI CONSULTING CANADA ULC

RESPONDENTS
(Appellants/Respondents)

- and -

MORNEAU SOBECO LIMITED PARTNERSHIP and THE SUPERINTENDENT OF FINANCIAL SERVICES

INTERVENERS
(Interveners)

APPLICATION FOR LEAVE TO APPEAL OF THE APPLICANT, SUN INDALEX FINANCE, LLC
(pursuant to Sections 40 and 43 of the *Supreme Court Act*, R.S.C. 1985, c. S-26 and Rule 25 of the *Rules of Supreme Court of Canada*, SOR/2002-156)
VOLUME I OF II

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FROM THE COURT OF APPEAL FOR ONTARIO)**

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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.

BETWEEN:

SUN INDALEX FINANCE, LLC

**APPLICANT
(Respondent)**

- and -

UNITED STEELWORKERS, 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, FRED GRANVILLE, GEORGE L. MILLER, THE CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATES OF THE US INDALEX DEBTORS, and THE MONITOR, FTI CONSULTING CANADA ULC

**RESPONDENTS
(Appellants/Respondents)**

- and -

MORNEAU SOBECO LIMITED PARTNERSHIP and THE SUPERINTENDENT OF FINANCIAL SERVICES

**INTERVENERS
(Interveners)**

NOTICE OF APPLICATION FOR LEAVE TO APPEAL OF THE APPLICANT, SUN INDALEX FINANCE, LLC

(pursuant to Sections 40 and 43 of the *Supreme Court Act*, R.S.C. 1985, c. S-26 and Rule 25 of the *Rules of Supreme Court of Canada*, SOR/2002-156)

TAKE NOTICE that the Applicant, Sun Indalex Finance, LLC ("Sun"), hereby applies for leave to appeal to the Court, pursuant to sections 40 and 43 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, and Rule 25 of the *Rules of Supreme Court of Canada*, SOR/2002-156, from the judgment of the Court of Appeal for Ontario in Court File Nos. C52187 & C52346 (the "Decision"), made on April 7, 2011, for an order granting leave to appeal from the Decision, along with costs of this application, or any further or other order that the Court may deem appropriate;

AND FURTHER TAKE NOTICE that this application for leave is made on the following grounds:

1. The Court of Appeal's Decision departs from previous authority and creates substantial uncertainty. This Court ought to grant leave to appeal to review the Decision, as the proposed appeal raises at least the following issues of national and public importance requiring intervention of this Court:

(a) Whether the Court of Appeal for Ontario erred in holding that s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P-8 ("PBA") provides a deemed trust for solvency deficiencies or unfunded liabilities;

(b) Whether the Court of Appeal erred in holding that a *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") debtor is a fiduciary to pensioners when making decisions to borrow money under a "debtor in possession" ("DIP") loan and to sell its assets, both pursuant to Court Orders, and that a constructive trust with super-priority can be granted as a remedy for alleged breaches of fiduciary duties in liquidating CCAA proceedings to avoid the application of federal bankruptcy priorities;

(c) Whether the Court of Appeal erred in holding that when made the Initial Order and subsequent Orders that granted a DIP loan super-priority were required to and failed to sufficiently invoke paramountcy, so as to entitle the Court to later conclude that there was no operational conflict between: (a) recognition of the provincial priority for deemed trusts; and (b) the requirements of federal priority

and the Orders made under the CCAA for the payment of the same money to others; and

(d) Whether the Court of Appeal erred in failing to follow the decision of this Honourable Court in *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 and the decision of the Court of Appeal for Ontario in *Ivaco Inc., Re* (2006), 83 O.R. (3d) 108 (C.A.) providing that priorities at the end of a liquidating CCAA proceeding are determined under the federal scheme of priorities as established under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 under which deemed trusts created by provincial statues are not recognized as valid.

2. Sun respectfully submits that the foregoing issues, as further delineated in its Memorandum of Argument, warrant the consideration of this Honourable Court.

Dated at Toronto, Ontario, this 3rd day of June, 2011.

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Lawyers for George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the US Indalex Debtors

NOTICE TO THE RESPONDENTS: A respondent may serve and file a memorandum in response to this application for leave to appeal within 30 days after service of the application. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration pursuant to section 43 of the *Supreme Court Act.*

TAB 2

S.C.C. File No.
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IN THE SUPREME COURT OF CANADA

(APPLICATION FOR LEAVE TO APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

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MORNEAU SOBECO LIMITED PARTNERSHIP and THE SUPERINTENDENT OF FINANCIAL SERVICES

INTERVENERS
(Interveners)

CERTIFICATE (COUNSEL OF THE APPLICANT)
FORM 25B

I, Benjamin Zarnett, counsel for Sun Indalex Finance, LLC, hereby certify that:

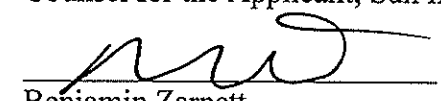
1. There is no sealing or confidentiality order in effect in the file from a lower court or the Court and no document filed includes information that is subject to a sealing or confidentiality order or that is classified as confidential by legislation;

2. There is no ban, pursuant to an order or legislation, on the publication of evidence or the names or identity of a party or witness, and no document filed includes information that is subject to any ban; and

3. There is no information, pursuant to legislation, that is subject to limitations on public access and no document filed includes information that is subject to those limitations.

Dated at Toronto, this 3rd day of June, 2011.

Counsel for the Applicant, Sun Indalex Finance, LLC



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TAB 3

TAB A

2010 CarswellOnt 893, 2010 ONSC 1114, [2010] W.D.F.L. 1375, [2010] W.D.F.L. 1374, 79 C.C.P.B. 301

2010 CarswellOnt 893, 2010 ONSC 1114, [2010] W.D.F.L. 1375, [2010] W.D.F.L. 1374, 79 C.C.P.B. 301

Indalex Ltd., Re

In The Matter of The Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36, as amended

In The Matter of a Plan of Compromise or Arrangement of Indalex Limited, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc. (the "Applicants")

Ontario Superior Court of Justice [Commercial List]

C. Campbell J.

Heard: July 20, 2009; August 28, 2009
Judgment: February 18, 2010[FN*]
Docket: CV-09-8122-00CL

Counsel: Katherine McEachern, Linc Rogers, J.A. Prestage for Applicants

Ashley Taylor, Lesley Mercer for Monitor, FTI Consulting

Andrew Hatnay, Demetrios Yiokaris for various employees

Darrell Brown for United Steelworkers

Mark Bailey for Superintendent of Financial Services

Fred Myers, Brian Empey for Sun Indalex Finance, LLC

Subject: Insolvency; Estates and Trusts; Family; Property; Corporate and Commercial; Civil Practice and Procedure

Bankruptcy and insolvency --- Property of bankrupt — Trust property — Miscellaneous

Pensions — Debtor company entered protection in United States and in Canada under Companies' Creditors Arrangement Act — Debtor company secured debtor in possession loans — Assets were sold — Monitor held certain funds in reserve due to unresolved claims — Applicants purported that certain funds were held in trust under salaried and executive pensions — Salaried plan had been wound up, executive plan had not — Pension claimants brought motion for declaration of trust in sale funds — Motion dismissed — Debtor in possession lenders had priority under pension claimants — Neither pension subject to trust — No deficiencies in executive pension up to date of motion — Court did not have discretion, and priority was set by insolvency legislation — Contributions to rectify deficiencies in salaried plan were not due and payable at time of transfer of assets under Pension Benefits Act (PBA) — Future

payments required under PBA were halted by stay.

Bankruptcy and insolvency --- Property of bankrupt — Pension funds

Trusts — Debtor company entered protection in United States and in Canada under Companies' Creditors Arrangement Act — Debtor company secured debtor in possession loans — Assets were sold — Monitor held certain funds in reserve due to unresolved claims — Applicants purported that certain funds were held in trust under salaried and executive pensions — Salaried plan had been wound up, executive plan had not — Pension claimants brought motion for declaration of trust in sale funds — Motion dismissed — Debtor in possession lenders had priority under pension claimants — Neither pension subject to trust — No deficiencies in executive pension up to date of motion — Court did not have discretion, and priority was set by insolvency legislation — Contributions to rectify deficiencies in salaried plan were not due and payable at time of transfer of assets under Pension Benefits Act (PBA) — Future payments required under PBA were halted by stay.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Lifting of stay.

Cases considered by *C. Campbell J.*:

Ganong, Re (1940), [1941] S.C.R. 125, [1941] 1 D.L.R. 433, 1940 CarswellNB 34 (S.C.C.) — considered

Ivaco Inc., Re (2006), 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 2006 CarswellOnt 6292, 56 C.C.P.B. 1, 26 B.L.R. (4th) 43 (Ont. C.A.) — considered

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 7383, 2009 ONCA 833, 59 C.B.R. (5th) 23, 77 C.C.P.B. 161, (sub nom. *Sproule v. Nortel Networks Corp.*) 2010 C.L.L.C. 210-005 (Ont. C.A.) — considered

Toronto Dominion Bank v. Usarco Ltd. (1991), 42 E.T.R. 235, 1991 CarswellOnt 540 (Ont. Gen. Div.) — considered

Statutes considered:

Bankruptcy Code, 11 U.S.C.

Chapter 11 — referred to

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

Generally — referred to

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

Generally — referred to

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

Generally — referred to

s. 57 — considered

s. 57(3) — considered

s. 57(4) — considered

s. 75 — considered

s. 75(2) — considered

Regulations considered:

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

General, R.R.O. 1990, Reg. 909

Generally — referred to

s. 28 — considered

s. 31 — considered

s. 31(1) — considered

s. 31(2) — considered

MOTION by pension claimants for declaration of trust interest in funds from sale of debtor corporation's assets.

***C. Campbell J.*:**

1 On July 20, 2009, this Court heard a motion for approval of a sale and for a Vesting Order in a joint cross-border hearing with Justice Walsh of the United States Bankruptcy Court for the District of Delaware.

Background

2 On March 20, 2009, Indalex US commenced reorganization proceedings under Chapter 11 of Title 11 of the United States Bankruptcy Code before the U.S. Court.

3 On April 3, 2009, the Applicants commenced parallel proceedings and filed for and obtained protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, as amended (the "*CCAA*") pursuant to an order of Morawetz J. (the "Initial Order") Pursuant to the Initial Order, FTI Consulting Canada ULC was appointed as Monitor of the Applicants.

4 On April 8, 2009, the Initial Order was amended and restated to, *inter alia*, authorize the Applicants to exercise certain restructuring powers and authorize Indalex Limited to borrow funds (the "DIP Borrowings") pursuant to a debtor-in-possession credit agreement among Indalex US, title Applicants and a syndicate of lenders (the "DIP Lenders") for which JPMorgan Chase Bank, N.A. is administrative agent (the "DIP Agent")

5 The Applicants' obligation to repay the DIP Borrowings was guaranteed by Indalex US. The guarantee by

Indalex US was a condition to the extension of credit by the DIP Lenders to the Applicants.

6 On April 22, 2009, this Court granted an Order which, inter alia, extended the stay of proceedings to June 26, 2009, and approved a marketing process.

7 By Order dated July 20, 2009 (the "Approval and Vesting Order"), this Court approved the sale of the Applicants' assets as a going concent to SAPA Holding AB (including any assignees, "SAPA"), and ordered that upon closing of the SAPA transaction, the proceeds of sale (the "Canadian Sale Proceeds") were to be paid to the Monitor.

8 Pursuant to the Approval and Vesting Order, the Monitor was ordered and directed to make a distribution to the DIP Lenders, from the Canadian Sale Proceeds, 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.")

9 At the sale approval hearing, both the Former Executives and the United Steel Workers (USW) asserted deemed trust claims over the Canadian Sale Proceeds in respect of underfunded pension liabilities in connection with certain pension plans administered by Indalex Limited, and requested that an amount representing their estimate of the under-funded deficiencies be included in the amount retained by the Monitor as Undistributed Proceeds, pending further order of the Court.

10 As a result of the Former Executives and USW's reservation of rights, the Monitor has retained the amount of $6.75 million as Undistributed Proceeds, in addition to other amounts reserved by the Monitor.

11 On July 31, 2009, the sale of Indalex's assets to SAPA closed. A total payment of US$17,041,391.80 was made from the Canadian Sale Proceeds by the Monitor, on behalf of the Applicants, to the DIP Agent As this resulted in a deficiency of US$10,751,247.22 in respect of the DIP Borrowings, the DIP Agent called on the guarantee granted to the DIP Lenders by Indalex US for the amount of the deficiency (the "Guarantee Payment") and Indalex US has" satisfied the obligation of the Applicants.

12 The approval motion was either supported or unopposed by all parties except for an issue raised on behalf of certain retirees under pension plans of the Company. Pursuant to paragraph 14 of the Approval and Vesting Order, Indalex US is fully surrogated to die rights of the DIP Lenders under the DIP Lenders' Charge for the amount of the Guarantee Payment.

13 Counsel for the retirees objected to the sale on the basis that the liquidation values set forth in the 7th Monitor's Report would, it was suggested, provide greater return for unsecured creditors than would the proposed sale, That objection was dismissed on the basis that there was no clear evidence to support the proposition and in any event the transaction as approved did preserve value for suppliers, customers and preserve approximately 950 jobs of the Applicants' plant employees in Canada.[FN1]

14 The second objection by certain retirees and employees involves a claim based on a statutory deemed trust said to be in respect of certain funds held by the Monitor proposed to be reserved from the funds for distribution on closing to the DIP Lenders.

15 At the July 20, 2009 hearing, the Court expressed concern that the position of the retirees and employees, which was brought only at the time of the approval motion, if it were to be dealt with at all, without an adjournment of the approval hearing, should be dealt with promptly as part of the overall approval process.

16 Following the submissions of counsel, it was agreed that an expedited hearing process on the retirees' and employees' positions would be undertaken promptly, and that the funds on hand with the Monitor would be sufficient if required to satisfy retirees' alleged trust claims.

17 The motion in respect of the deemed trust came on for hearing on August 28, 2009. The position of the retirees was opposed by the Applicants and the purchaser. Submissions were also made by counsel for "the Superintendent under the Ontario *Pension Benefits Act*, R.S.O. 1990 c. P-8 ("*PBA*") This decision was then reserved pending the November 26,2009 ruling of the Court of Appeal rendered in *Nortel Networks Corp., Re*, reported, 2009 ONCA 833 (Ont. C.A.).

18 There are two groups of retired employees at issue in this matter. Those represented by Mr. Hatnay and his colleagues seek a declaration that the amount of $3.2 million, which represents the wind up liability said to be owing by the Applicants to the Retirement Plan for Executive Employees of Indalex Canada and Associated Companies (the "Executive Plan") and which is currently held in reserve by the Monitor, is subject to the deemed trust for the benefit of the beneficiaries of the Executive Plan under section 57(4) of the *PBA*. The Pensioners further seek an order that such amounts are not distributable to other creditors of the Applicants and are to be paid into the fund of the Executive Plan and that such orders and declarations survive any subsequent bankruptcy of the Applicants.

19 There were, as of January 1, 2008, eighteen members of the Executive Plan, none of whom are active employees.

20 The second group of pension claimants are members of the United Steel Workers, who seek recovery from the sale proceeds based on deemed trust of a pension plan in wind-up of an amount equal to the deficiency in the Retirement Plan for Salaried Employees of Indalex and Associated Companies ("Salaried Plan.") The deficiency in the Salaried Plan is said to be $1,795,600 as of December 31, 2008.

The Issues

1. Do the deemed trust provisions of s. 57 and s. 75 of the *PBA* apply to the funds currently held in reserve by the Monitor in respect of:

    a. The Executive Plan;

    b. The Salaried Plan?

2. Should the stay currently in place under the *CCAA* be lifted to permit the Applicants to file for bankruptcy under the *BIA*?

21 There are several differences between the Executive Plan and the Salaried Plan. The Salaried Plan contains both a defined benefit and defined contribution component Indalex and members of the Salaried Plan were required to make joint contributions to the Salaried Plan.

22 The Salaried Plan is in the process of being fully wound up with an effective wind-up date, of December 31, 2006. No pensions have accrued since that date. The wind-up deficiency in the Salaried Plan at December 31, 2008 was $1,795,600, has been subject to special payments to deal with that deficiency, of $709,013 in 2007, $875,313 in 2008 and $601,000 in 2009, all of which have been made. The last special payment was scheduled to be made on December 31, 2009.

The Executive Plan

23 The Executive Plan has not been wound up. The material filed with the Court exhibits an intention on the part of the Applicants to wind up that Plan. The uncontested evidence of Bob Kavanagh on behalf of the Applicants in his

affidavit sworn August 12, 2009 is to the following effect:

> 16. Indalex has made all required contributions to the Executive Plan to date and no amounts are currently due or owing to the Executive Plan, including special payments.
>
> 17. As at January 1, 2008, the Executive Plan had an estimated deficiency of $2,996,400 determined on a wind-up basis. In 2008, Indalex made total special payments of $897,000 to the Executive Plan. No further special payments are due to be made to the Executive Plan until 2011.
>
> 18. If the Executive Plan were to be fully wound up, the funded status of the plan as of the wind-up date could only be determined by an actuarial valuation of the plan performed after the wind-up date once the plan's assets and liabilities have been determined. No actuarial valuation of the Executive Plan has been prepared since the valuation performed with an effective date of January 1, 2008.
>
> 19. Sixteen individuals with benefit entitlements under the Executive Plan were last employed by Indalex in Ontario and two individuals with benefit entitlements under the Executive Plan were last employed by Indalex in Alberta.
>
> 20. There is currently one member of the Executive Plan who is on long term disability and continues to accrue benefits under the plan.
>
> 21. Currently, approximately 80% of the assets of the Executive Plan are invested in fixed income securities and approximately 20% of the assets of the Executive Plan are invested in equities.
>
> 22. The market value of the assets of the Executive Plan as at June 30, 2009 was $5,022,940. Attached hereto as Exhibit "C" is a copy of the Statement of Net Assets Available for Benefits as of June 30, 2009.

24 The affidavit of Keith Carruthers exhibits a letter of July 13, 2009 on behalf of the Monitor confirming the intention of the Applicants to wind up the Executive Plan in accordance with the provisions of the *PBA*. There are no deficiencies in payments under the Executive Plan as of July 20, 2009. The Executive Plan is not wound up. Given the analysis that follows in respect of the Salaried Plan, I see no basis for a deemed trust of any amount at this time in respect of the Executive Plan.

The Salaried Plan

25 This motion essentially involves one aspect of the Salaried Plan of Indalex, namely the windup deficiency of the said plan. It is the position of the *CCAA* Applicants that prior to the sale of assets approved on July 20, 2009, all pension payments required under obligation to Indalex employees, both statutory and contractual, were met.

26 What is at issue here is the requirement for an annual deficiency payment that was established to be made when the Salaried Plan was wound up as at December 31, 2006.

27 The term "wind up" can be a misnomer unless understood in context. When a pension plan is "wound up," at the effective date it means that no new entrants are permitted. An actuarial calculation is then made of the assets to determine whether, based on certain actuarial assumptions, there will be sufficient monies available at the times required to pay the pension entitlement of employees who have and will retire.

28 If the assets as of the wind-up date are found to be insufficient, that deficiency will be required to be made up under the *PBA*. As in this case, the Plan may be permitted to have the deficiency rectified in a period of up to five years

by annual instalments.

29 The issue for this Court is whether or not under the *PBA* there is a requirement that the deficiency commencing at the wind up date be paid as at the date of closing of the sale and transfer of assets, namely July 20, 2009.

30 The issue is to be determined by analysis and application of the provisions of the *PBA*. The sections involved arc the following:

> 57.
>
> (3) An employer who is required to pay contributions to a pension fond 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.
>
> 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 mat would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee fund applies to the pension plan,
>
> (ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and
>
> (iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,
>
> exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario, R.S.O. 1990, c. P.8, s. 75 (1); 1997, c. 28, s. 200.
>
> (2) The employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times. R.S.O. 1990, c. P.8 s. 75 (2).

31 Section 75 of the *PBA* is amplified by sections of the regulations under the statute * * (see R.R.O. 1990 Regulation 909.) Section 28 and the following 144 pages of the Regulation deal with wind-up notices. Section 31(1) and (2) are as follows:

> 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. O. Reg. 712/92, s. 19.

(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). O. Reg. 712/92, s. 19.

32 The most pertinent of all of these sections are 57(4) and 75(2), as they apply to this windup situation. The submission on behalf of the Superintendent distinguished between the words "due" and "accruing due." The assertion is that the word "accrue" must be given meaning. The meaning suggested is that by virtue of the inclusion" of the word "accrue," the remaining deficiency payments become payable since they fall within the deemed trust provisions.

33 The distinction to be made between amounts that are accruing and amounts that are due is that, in the case of an amount accruing, it is not yet payable, while generally an amount that is due is payable.

34 The deemed trust provision of s. 57(4) requires the employer to accrue "to the date of the windup but not yet due." The windup in this case is December 31, 2006. In my view the section contemplates the calculation to be made as of the date of wind-up of the amounts required to make up the deficiency. If, as here, the regulator permits that deficiency to be made up over a period of years, the amount of the yearly payments does not become due until it is required to be paid. It is "payable annually in advance."

35 In *Ganong, Re* (1940), [1941] S.C.R. 125 (S.C.C.), it was held:

...the words 'all dividends accrued due' can surely only mean dividends which have become payable by the corporation to the shareholder, as the words "dividends accruing due" during any stated period can only mean dividends as they become payable by the corporation to the shareholder.

The court went on to say:

How can these dividends possibly be said to have 'accrued due' or to be 'accruing due' when no profits have been earned to provide for their payment and no declaration has been made by the directors fixing any date therefor? The shareholders acquire no right to payment of any dividends until there are net profits, out of which alone they can be paid and until such time as the directors determine they shall be paid.

36 The use of the word "accrue" connotes the ability to calculate a precise amount of money. The word "due" connotes that it is payable whether or not the time for payment has arrived. See *Black's Law Dictionary*, 6th ed., The West Group at p. 499, where it is noted that with respect to the word "due," "it imports a fixed and settled obligation or liability but with reference to the time for its payment, there is considerable ambiguity in the use of the term."

37 In *Toronto Dominion Bank v. Usarco Ltd.* (1991), 42 E.T.R. 235 (Ont. Gen. Div.), Farley J. dealt with the deemed trust provisions under what is now section 57(4) of the *PBA* in a context in which a declaration was sought prior to a bankruptcy petition. He said at paragraph 26:

> 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 of December 31, 1988), together with any regular or special payments that were 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 been required to be paid into the fund. Sadly, it is extremely unlikely there will be a surplus after taking care of the bank to allow the pension fund to be fully funded for this (the likelihood being that the wind-up valuation of assets and liabilities of the pension fund will show a deficiency.)

38 The issue was dealt with again in *Ivaco Inc., Re* (2006), 25 C.B.R. (5th) 176 (Ont. C.A.), J. Laskin J.A. speaking for the Court of Appeal noted at paragraph 38 that "in a series of cases, the Supreme Court of Canada has repeatedly said that a province cannot, by legislating a deemed trust, alter the scheme of priorities under the federal statute."

39 Paragraph 44 of that decision states:

> 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.

40 In the text "Essentials of Canadian Law-Pension Law" (Toronto: IrwinLaw, 2006) author Ari N. Kaplan at page 396 states:

> The *PBA* does not expressly state whether a 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.

41 The author goes on in the next paragraph:

> 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 windup of the pension plan.

The *Usarco* decision referred to above is the foundation for that statement.

42 In his paper given at an Insight Conference, "Pension Management in Insolvency and Restructuring: What Is At Stake?" September 20, 2005, Gregory J. Winfield at page 29 states:

> Of particular note to secured creditors will be the fact that the courts have determined that the deemed trust created under that *OPBA* does not extend to the unfunded pension liability upon the windup 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 wind up, at present this is an unsecured claim on the assets of the debtor. [Reference omitted]

43 The difficulty in reconciling the requirements of the pension statute with the regime of the *CCAA* is that a

company such as Indalex is entitled to carry on business and to make payments in the ordinary course of such business including those that may be required under the initial order which may well, as here, include certain ongoing pension obligations while in *CCAA*.

44 Were it not for the provisions in s. 31 of the Regulations, Indalex would have had under s. 75 of the *PBA* to pay in as of the date of wind-up any Plan deficiency. Section 31 of the Regulation as anticipated in s. 75 of the Act spreads that into five equal annual instalments.

45 One obvious purpose behind the provision in s. 31 of the Regulation is to case the burden on the Company to enable it to have the funds to operate its normal business operations while it earns the revenue to make up the deficiency.

46 The pension issues that have arisen given the nature of the recent recession, as here, are often complex and pit as adversaries creditors of a corporation who most often having advanced funds under security which creditors assert give them priority as to the repayment, as against employees many of whom are long-term or even retired who have seen the assets supporting their pensions decrease in value, risking the payments to which the employees are otherwise entitled by the terms of the plan of which they are members.

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

48 Employees or retired employees are entitled to pensions in accordance with the contractual terms of their pension plan. In certain circumstances those contractual terms will be augmented by the provisions of the *PBA* to the extent that they do not conflict with federal insolvency legislation. In some of these circumstances, a "deemed trust" will arise.

49 In this case I have concluded there is no conflict between the federal and provincial legislation. I find that as of the date of closing and transfer of assets there were no amounts that were "due" or "accruing due" on July 20, 2010. On that date, Indalex was not required under the *PBA* or the Regulations thereunder to pay any amount into the Plan. There was an annual payment that would have become payable as at December 31, 2009 but for the stay provided for in the Initial Order under the *CCAA*.

50 Since as of July 20, 2009, there was no amount due or payable, no deemed trust arose in respect of the remaining deficiency arising as at the date of wind-up.

51 Since under the initial order priority was given to the DIP Lenders, they are entitled to be repaid the amounts currently held in escrow. Those entitled to windup deficiency remain as of that date unsecured creditors.

Motion To Lift Stay

52 The Applicants and Indalex US, in addition to disputing the validity of the deemed trust claim, sought to file a voluntary assignment in bankruptcy to ensure the priority regime they urged as the basis for resisting the deemed trust.

53 In support of that position, it was urged that since the Applicants no longer carried on business, have no active employees and no tangible assets apart from tax refunds (other than the cash sale proceeds associated with the above motion), and no directors (they having resigned), an assignment in bankruptcy is appropriate. The stay granted under the Initial Order, it is urged, should be lifted for that purpose.

54 The decision on the voluntary assignment was reserved pending a decision in the main motion above, since to allow the bankruptcy to proceed might have deprived employees of an argument under the *CCAA*.

55 Given that disposition, the question of bankruptcy assignment might well be moot. In my view, a voluntary assignment under the *BIA* should not be used to defeat a secured claim under valid Provincial legislation, unless the Provincial legislation is in direct conflict with the provisions of Federal Insolvency Legislation such as the *CCAA* or the *BIA*. For that reason I did not entertain the bankruptcy assignment motion first.

56 I conclude that it is not necessary to deal with the issue of the voluntary assignment, at least on the basis sought by the Applicants at this time. I did not find conflict between the federal and provincial regimes.

57 Should the Applicants wish to renew the request for bankruptcy relief, the motion can be scheduled through the Commercial List.

Motion dismissed.

FN* A corrigendum issued by the court on March 12, 2010 has been incorporated herein.

FN1 Monitor's 7th Report, July 15, 2009, p. 13, paragraphs 34(c)(d)

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TAB B

2011 CarswellOnt 2458, 2011 ONCA 265

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2011 CarswellOnt 2458, 2011 ONCA 265

Indalex Ltd., Re

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

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/Respondents

Ontario Court of Appeal

E.E. Gillese J.A., J.C. MacPherson J.A., R.G. Juriansz J.A.

Heard: November 23-24, 2010
Judgment: April 7, 2011
Docket: CA C52187, CA C52346

Proceedings: Reversed, 2010 CarswellOnt 893, 2010 ONSC 1114, 79 C.C.P.B. 301, [2010] W.D.F.L. 1374, [2010] W.D.F.L. 1375 (Ont. S.C.J. [Commercial List])

Counsel: Andrew J. Hatnay, Demetrios Yiokaris, for Appellants, Former Executives

Darrell L. Brown, for Appellants, United Steelworkers

Mark Bailey, for Superintendent of Financial Services

Hugh O'Reilly, Adam Beatty, for Intervenor, Morneau Sobeco Limited Partnership

Fred Myers, Brian Empey, for Sun Indalex Finance, LLC

Ashley Taylor, Lesley Mercer, for Monitor, FTI Consulting Canada ULC

Harvey Chaiton, George Benchetrit, for George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the US Indalex Debtors

Subject: Insolvency; Corporate and Commercial

Bankruptcy and insolvency.

Commercial law.

Business associations.

E.E. Gillese J.A.:

1 A Canadian company is insolvent. Its pension plans are underfunded and in the process of being wound up. The company is the administrator of the pension plans.

2 The company obtains protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (*CCAA*). A court order enables it to borrow funds pursuant to a debtor-in-possession (DIP) credit agreement. The order creates a "super-priority" charge in favour of the DIP lenders. The obligation to repay the DIP lenders is guaranteed by the company's U.S. parent company (the Guarantee).

3 The company is sold through the *CCAA* proceedings but the sale proceeds are insufficient to repay the DIP lenders. The U.S. parent company covers the shortfall, in accordance with its obligations under the Guarantee.

4 The *CCAA* monitor holds some of the sale proceeds in a reserve fund. The pension plan beneficiaries claim the money based on the deemed trust provisions in the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (*PBA*). The U.S. parent company claims the money based on its payment under the Guarantee.

5 Must the money in the reserve fund be used to pay the deficiencies in the pension plans in preference to the secured creditor? What fiduciary obligations, if any, does the company have in respect of its underfunded pension plans during the *CCAA* proceeding? These appeals wrestle with these difficult questions.

Overview

6 Indalex Limited was the sponsor and administrator of two registered pension plans: 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) (collectively, the Plans).

7 On March 20, 2009, Indalex's parent company and its U.S. based affiliates (collectively, Indalex U.S.) sought Chapter 11 protection in the United States.

8 On April 3, 2009, Indalex Limited, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc. (Indalex or the Applicants) obtained protection from their creditors under the *CCAA*. At that time, the Salaried Plan was in the process of being wound up. Both Plans were underfunded. FTI Consulting Canada ULC (the Monitor) was appointed as monitor.

9 On April 8, 2009, the court authorized Indalex to borrow funds pursuant to a DIP credit agreement. The court order gave the DIP lenders a super-priority charge on Indalex's property. Indalex U.S. guaranteed Indalex's obligation to repay the DIP lenders.

10 On July 20, 2009, Indalex moved for approval of the sale of its assets on a going-concern basis. It also moved for approval to distribute the sale proceeds to the DIP lenders, with the result that there would be nothing to fund the deficiencies in the Plans. Without further payments, the underfunded status of the Plans will translate into significant cuts to the retirees' pension benefits.

11 At the sale approval hearing, the United Steelworkers appeared on behalf of its members who had been employed by Indalex and are the beneficiaries of the Salaried Plan (the USW). In addition, a group of retired executives

appeared on behalf of the beneficiaries of the Executive Plan (the Former Executives).

12 Both the USW and the Former Executives objected to the planned distribution of the sale proceeds. They asked that an amount representing the total underfunding of the Plans (the Deficiencies) be retained by the Monitor as undistributed proceeds, pending further court order. Their position was based on, among other things, the deemed trust provisions in the *PBA* that apply to unpaid amounts owing to a pension plan by an employer.

13 The court approved the sale. However, as a result of the USW and Former Executives' reservation of rights, the Monitor retained an additional $6.75 million of the sale proceeds in reserve (the Reserve Fund), an amount approximating the Deficiencies.[FN1]

14 The sale closed on July 31, 2009. The sale proceeds were insufficient to repay the DIP lenders. Indalex U.S. paid the shortfall of approximately US$10.75 million, pursuant to its obligations under the Guarantee.

15 In accordance with a process designed by the *CCAA* court, the USW and the Former Executives brought motions returnable on August 28, 2009, based on their deemed trust claims. They claimed the Reserve Fund was subject to deemed trusts in favour of the Plans' beneficiaries and should be paid into the Plans in priority to Indalex U.S. They also claimed that during the *CCAA* proceedings, Indalex breached its fiduciary obligations to the Plans' beneficiaries.

16 Indalex then brought a motion in which it sought to lift the stay and assign itself into bankruptcy (the Indalex bankruptcy motion). This motion was directed to be heard on August 28, 2009, along with the USW and Former Executives' motions.

17 By orders dated February 18, 2010, (the Orders under Appeal), the *CCAA* judge dismissed the USW and Former Executives' motions on the basis that, at the date of sale, no deemed trust under the *PBA* had arisen in respect of either plan. He found it unnecessary to decide the Indalex bankruptcy motion.

18 The USW and the Former Executives (together, the appellants) appeal. They ask this court to order the Monitor to pay the Reserve Fund to the Plans.

19 On November 5, 2009, the Superintendent of Financial Services (Superintendent) appointed the actuarial firm of Morneau Sobeco Limited Partnership (Morneau) as administrator of the Plans.

20 Morneau was granted intervenor status. It supports the appellants.

21 The Superintendent also appeared. He, too, supports the appellants.

22 Sun Indalex, as the principal secured creditor of Indalex U.S., asks that the appeals be dismissed and the Reserve Fund be paid to it. As a result of its payment under the Guarantee, Indalex U.S. is subrogated to the rights of the DIP lenders. Its claim to the Reserve Fund is based on the super-priority charge.

23 The Monitor appeared. It supports Sun Indalex and asks that the appeals be dismissed. The Monitor and Sun Indalex will be referred to collectively as the respondents.

24 George L. Miller, the trustee of the bankruptcy estates of Indalex U.S., appointed under Chapter 7 of Title 11 of the United States Bankruptcy Code (the U.S. Trustee), was given leave to intervene. He joins with the Monitor and Sun Indalex in opposing these appeals.

25 For the reasons that follow, I would allow the appeals and order the Monitor to pay, from the Reserve Fund,

amounts sufficient to satisfy the deficiencies in the Plans. For ease of reference, the various statutory provisions to which I make reference can be found in the schedules at the end of these reasons.

Background

26 Indalex Limited is a Canadian corporation. It is the entity through which the Indalex group of companies operates in Canada. It is a direct wholly-owned subsidiary of its U.S. parent, Indalex Holding Corp., which in turn is a wholly-owned subsidiary of Indalex Finance.

27 Together, the group of companies referred to as Indalex and Indalex U.S. were the second largest manufacturer of aluminum extrusions in the United States and Canada. Aluminum is a durable, light weight metal that can be strengthened through the extrusion process, which involves pushing aluminum through a die and forming it into strips, which can then be customized for a wide array of end-user markets.

28 Indalex Limited produced a portion of the raw material used in the extrusion process, called aluminum extrusion billets, through its casting division located in Toronto. It also processed the raw extrusion billets into extruded product at its Canadian extrusion plants, for sale to end users. In 2008, Indalex Limited accounted for approximately 32% of the Indalex group of companies total sales to third parties.

29 Indalex Limited provided separate pension plans for its executives and salaried employees. The Plans were designed to pay pension benefits for the lives of the retirees and those of their designated beneficiaries. Indalex Limited was the sponsor and administrator of both Plans. The Plans were registered with the Financial Services Commission of Ontario (FSCO) and the Canadian Revenue Agency.

The Salaried Plan

30 The USW has several locals certified as bargaining agents on behalf of members employed with Indalex, including members who are beneficiaries of the Salaried Plan. It was certified to represent certain Indalex employees, seven of whom were members of the Salaried Plan and have deferred vested entitlements under that plan.

31 The Salaried Plan contains a defined benefit and defined contribution component.

32 Unlike the Executive Plan, the Salaried Plan was in the process of being wound up when Indalex began *CCAA* proceedings. The effective date of wind up is December 31, 2006. Special wind up payments were made in 2007 ($709,013), 2008 ($875,313) and 2009 ($601,000). As of December 31, 2008, the wind up deficiency was $1,795,600.

33 All current service contributions have been made to the Salaried Plan.

34 Article 4.02 of the Salaried Plan obligates Indalex to make sufficient contributions to the Salaried Plan. Article 14.03 of the Salaried Plan requires Indalex to remit "amounts due or that have accrued up to the effective date of the wind-up and which have not been paid into the Fund, as required by the Plan and Applicable Pension Legislation".

The Executive Plan

35 The Executive Plan is a defined benefit plan. Effective September 1, 2005, Indalex closed the Executive Plan to new members.

36 As of January 1, 2008, there were eighteen members of the Executive Plan, none of whom were active employees.

37 The Executive Plan is underfunded.

38 As of January 1, 2008, the Executive Plan had an estimated funding deficiency, on an ongoing basis, of $2,535,100. On a solvency basis, the funding deficiency was $1,102,800 and on a windup basis, the deficiency was $2,996,400. An actuarial review indicated that as of July 15, 2009, the wind up deficiency had increased to an estimated $3,200,000.

39 In 2008, Indalex made total special payments of $897,000 to the Executive Plan. No further special payments were due to be made to the Executive Plan until 2011. All current service contributions had been made.

40 Due to its underfunded status, the Former Executives' monthly pension benefits have already been cut by 30-40%. Unless money is paid into the Executive Plan, these cuts will become permanent. The Former Executives have also lost their supplemental pension benefits which were unfunded and terminated by Indalex after it obtained *CCAA* protection. Between the two cuts, the Former Executives have lost between one half and two-thirds of their pension benefits.

41 On June 26, 2009, counsel for the Former Executives sent a letter to counsel to Indalex and the Monitor, advising that the Former Executives reserved all rights to the deemed trust under s. 57(4) of the *PBA* in the *CCAA* proceedings. There was no response or objection to that letter from Indalex, the Monitor or any other party.

42 At the time the Orders under Appeal were made, the Executive Plan had not been wound up. However, a letter from counsel for the Monitor dated July 13, 2009, indicated that it was expected that the Executive Plan would be wound up.

43 On March 10, 2010, the Superintendent issued a Notice of Proposal to wind up the Executive Plan effective as of September 30, 2009. The wind up process is currently underway.

Pension and Corporate Governance During the CCAA Proceedings

44 Keith Cooper, the Senior Managing Director of FTI Consulting Inc., was a key advisor to the Indalex group of companies prior to and during the *CCAA* proceedings. On March 19, 2009, he was appointed the Chief Restructuring Officer for all of the Indalex U.S. based companies. However, he was responsible not only for Indalex U.S. but for the entire Indalex group of companies and subsidiaries, including the Applicants. Mr. Cooper described his role as being to maximize recovery for Indalex as a whole.

45 Mr. Cooper was the primary negotiator of the DIP credit agreement on behalf of Indalex. He does not recall discussing Indalex's pension obligations in respect of the Salaried and Executive Plans during the negotiation of the DIP credit agreement. He was aware that the Plans were underfunded and that pensions would be reduced if the shortfalls were not met.

46 FTI Consulting Inc., the company for which Mr. Cooper works, and the Monitor are affiliated entities. The Monitor (FTI Consulting Canada ULC) is a wholly-owned subsidiary of FTI Consulting Inc.

47 On July 31, 2009, all of the directors of Indalex resigned. On that same day, Indalex Holding Corp. (part of Indalex U.S.) became the management of Indalex. Thus, as of July 31, 2009, Indalex and Indalex U.S. formally had the same management.

48 On August 12, 2009, a Unanimous Shareholder Declaration was executed in which Mr. Cooper was appointed

to direct the affairs of all Indalex entities.

49 On August 13, 2009, Indalex (which was now under the management of Indalex U.S.) announced its intention to bring a motion to bankrupt the Canadian company.

The CCAA Proceedings

The Initial Order, as amended (April 3 and 8, 2009)

50 On April 3, 2009, pursuant to the order of Morawetz J., Indalex obtained protection from its creditors under the *CCAA* (the Initial Order). A stay of proceedings against Indalex was ordered.

51 On April 8, 2009, the Initial Order was amended to authorize Indalex to borrow funds pursuant to a DIP credit agreement among Indalex, Indalex U.S. and a syndicate of lenders (the DIP lenders). JP Morgan Chase Bank, N.A. was the administrative agent (the DIP Agent). 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.

52 Indalex's obligation to repay the DIP borrowings was guaranteed by Indalex U.S. The Guarantee was a condition to the extension of credit by the DIP lenders.

53 Paragraph 45 of the Initial Order, as amended, is the super-priority charge. It provides that the DIP lenders' charge "shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise", other than the Administration Charge and the Directors' Charge, as those terms are defined in the Initial Order.

The Initial Order is Further Amended (June 12, 2009)

54 On June 12, 2010, Morawetz J. heard and granted a motion by the Applicants for approval of an amendment to the DIP credit agreement to increase the borrowings by about $5 million, from US$24.36 million to US$29.5 million. This resulted in an order dated June 12, 2009, further amending the Initial Order (the June 12, 2009 order).

55 Counsel for the Former Executives was served with motion material on June 11, 2009, at 8:27 p.m. In response to an email from the Former Executives' counsel questioning the urgency of the motion, the Monitor's counsel responded that the motion was simply directed at obtaining more money under the DIP credit agreement.

56 At the hearing of the motion on June 12, 2010, the Former Executives initially sought to reserve their rights to confirm that the motion was about an increase to the DIP and nothing more. When that was confirmed, the Former Executives withdrew their reservation and the motion proceeded later that afternoon.

The Sale Approval Order (July 20, 2009)

57 Indalex brought two motions that were heard on July 20, 2009, by Campbell J. (the *CCAA* judge).

58 First, Indalex sought approval of a sale of its assets, as a going concern, to SAPA Holdings AB (SAPA). Total consideration for the sale of Indalex and Indalex U.S. was approximately US$151,183,000.00. The Canadian sale proceeds were to be paid to the Monitor.

59 As a term of the sale, SAPA assumed no responsibility or liability for the Plans.

60 Second, Indalex moved for approval of an interim distribution of the sale proceeds to the DIP lenders.

61 Both the Former Executives and the USW objected to the planned distribution of the sale proceeds. They asserted statutory deemed trust claims in respect of the underfunded pension liabilities in the Plans, arguing that preference was to be given for amounts owing to the Plans pursuant to ss. 57 and 75 of the *PBA*. They also relied on s. 30(7) of the Ontario *Personal Property Security Act*, R.S.O. 1990, c. P.10 (*PPSA*), which expressly gives priority to the deemed trust in the *PBA* over secured creditors.

62 The Former Executives and the USW further argued that Indalex had breached its fiduciary duty to the Plans' beneficiaries by failing to adequately meet its obligations under the Plans and by abdicating its responsibilities as administrator once *CCAA* proceedings had been undertaken.

63 The court approved the sale in an order dated July 20, 2009 (the Sale Approval order). However, as a result of the USW and Former Executives' reservation of rights, the Monitor retained an additional $6.75 million of the sale proceeds in reserve, an amount approximating the Deficiencies.

64 It was agreed that an expedited hearing process would be undertaken in respect of the USW and Former Executives' deemed trust claims and that the Reserve Fund held by the Monitor would be sufficient, if required, to satisfy the deemed trust claims.

The Guarantee is Called on

65 On July 31, 2009, the sale to SAPA closed. The sale proceeds available for distribution were insufficient to repay the DIP loan in full. The Monitor made a payment of US$17,041,391.80 to the DIP Agent. This resulted in a shortfall of US$10,751,247.22 in respect of the DIP borrowings. The DIP Agent called on the Guarantee for the amount of the shortfall, which Indalex U.S. paid.

The Orders under Appeal (August 28, 2009)

66 The USW and Former Executives brought motions to determine their deemed trust claims. The motions were set for hearing on August 28, 2009. Indalex then filed its bankruptcy motion, in which it sought to file a voluntary assignment in bankruptcy.

67 By orders dated February 18, 2010, the *CCAA* judge dismissed the USW and Former Executives' motions.

68 The *CCAA* judge found it unnecessary to deal with Indalex's bankruptcy motion.

The Reasons of the CCAA Judge

The Former Executives' Motion

69 The CCAA judge dismissed the Former Executives' motion on the basis that since the wind up of the Executive Plan had not yet taken place, there were no deficiencies in payments to that plan as of July 20, 2009. As there were no deficiencies in payments, there was no basis for a deemed trust.

The USW Motion

70 Because the Salaried Plan was in the process of being wound up, the CCAA judge dismissed the USW motion for different reasons.

71 The CCAA judge saw the issue raised on the USW motion to be whether the *PBA* required Indalex to pay the windup deficiency in the Salaried Plan as at the date of closing of the sale and transfer of assets, namely, July 20, 2009. In resolving the issue, the *CCAA* judge considered ss. 57 and 75 of the *PBA*. He called attention to the words "accrued to the date of the wind up but not yet due" in s. 57(4).

72 The *CCAA* judge also considered ss. 31(1) and (2) of R.R.O. 1990, Reg. 909 (the Regulations). He concluded that because s. 31 of the Regulations permitted Indalex to make up the deficiency in the Salaried Plan over a period of years, the amount of the yearly payments did not become due until it was required to be paid. Were it not for s. 31 of the Regulations, the *CCAA* judge stated that Indalex would have had an obligation under the *PBA* to pay in any deficiency as of the date of wind up.

73 The CCAA judge concluded:

> [49] ... I find that as of the date of closing and transfer of assets there were no amounts that were "due" or "accruing due" on July 20, 2010. On that date, Indalex was not required under the *PBA* or the Regulations thereunder to pay any amount into the [Salaried] Plan. There was an annual payment that would have become payable as at December 31, 2009 but for the stay provided for in the Initial Order under the CCAA.
>
> [50] Since as of July 20, 2009, there was no amount due or payable, no deemed trust arose in respect of the remaining deficiency arising as at the date of wind-up.
>
> [51] Since under the initial order priority was given to the DIP Lenders, they are entitled to be repaid the amounts currently held in escrow. Those entitled to windup deficiency remain as of that date unsecured creditors.

The Indalex Bankruptcy Motion

74 Having found that the deemed trust claims failed, the *CCAA* judge considered that the question of Indalex's assignment into bankruptcy might be moot. He went on, in para. 55 of his reasons for decision, to state:

> [55] ... In my view, **a voluntary assignment under the *BIA* should not be used to defeat a secured claim under valid Provincial legislation**, unless the Provincial legislation is in direct conflict with the provisions of Federal Insolvency Legislation such as the *CCAA* or the *BIA*. For that reason I did not entertain the bankruptcy assignment motion first.
>
> [Emphasis added.]

75 He found no conflict between the federal and provincial legislative regimes and allowed the Applicants to renew their request for bankruptcy relief in a further motion.

The Issues

76 The central issue raised on these appeals is whether the *CCAA* judge erred in his interpretation of s. 57(4) of the *PBA* and, specifically, in finding that no deemed trust existed with respect to the Deficiencies as at July 20, 2009.

77 The USW and the Former Executives ask the court to decide a second issue: whether during the *CCAA* proceedings Indalex breached the fiduciary obligations that it owed to the Plans' beneficiaries by virtue of being the Plans' administrator.[FN2]

78 The U.S. Trustee's submission raises two additional issues. Does the collateral attack rule bar the appellants' deemed trust motions? Do the principles of cross-border insolvencies apply to these appeals?

79 The final issue that arises is that of remedy: how is the Reserve Fund to be distributed?

80 Given the centrality of the wind up process to these appeals, I will briefly outline the salient aspects of the wind up process before turning to a consideration of each of these issues.

Winding UP a Pension Plan

81 To understand the wind up process, one must first understand how the pension plan operates while it is on-going.

82 A pension plan to which the employees contribute is called a contributory plan. In the case of contributory plans, the employer is obliged to remit the employee contributions, including payroll deductions, within a specified time frame. This aspect of an employer's obligations does not arise in these appeals.

83 In addition to remitting the employee contributions, if any, while a defined benefit pension plan is ongoing, the employer must make two types of contributions to ensure that the plan is adequately funded and capable of paying the promised pension benefits.

> 1. *Current service or "normal cost" contributions* — the employer contributions necessary to pay for current service costs in respect of benefits that are currently accruing to members as a result of their ongoing participation in the plan as active employees. These must be made in monthly instalments within 30 days after the month to which they relate.
>
> 2. *Special payments* — a plan administrator must file an actuarial report annually in which the pension plan is valued on two different bases: a "going-concern" basis, where it is assumed the plan will continue to operate indefinitely; and a "solvency" basis, where it is assumed that the employer will discontinue its business and wind up its plan. If the actuarial report discloses a going-concern liability, the employer is required to make monthly special payments over a 15 year period to fund the unfunded liability. If the actuarial report discloses a solvency deficiency, the employer is required to make monthly special payments over a 5 year period to fund the deficiency.

84 It is important to understand that the solvency valuation is not the same thing as a wind up report. To repeat, the solvency valuation is prepared while the pension plan is ongoing. A solvency valuation is required while the plan is ongoing because it is crucial that there be adequate funds with which to pay pensions if the company becomes insolvent and the plan is wound up.

85 The wind up of a pension plan is defined in the *PBA* as "the termination of the pension plan and the distribution of the assets of the pension fund" (s. 1(1)). At the effective date of wind up, the plan members cease to accrue further entitlements under the plan. Naturally, no new members may join the plan after the wind up date. The pension fund of a plan that is wound up continues to be subject to the *PBA* and the Regulations until all of the assets of the fund have been disbursed (s. 76).

86 Winding up a pension plan must be distinguished from closing the plan, which simply means that no new entrants are permitted to join the plan.

87 Under the *PBA*, there are two ways that a pension plan can be wound up. First, s. 68(1) recognizes that an

employer[FN3] can voluntarily wind up the pension plan. Second, under s. 69(1), in certain circumstances, the Superintendent may order the wind up of the plan.

88 The *PBA* contains a detailed statutory scheme that must be followed when a pension plan is to be wound up. This scheme imposes obligations on the employer and plan administrator, including the following:

- The administrator has to give written notice of proposal to wind up to various people, including the Superintendent, and the notice must contain specified information (s. 68(2) and (4));

- A wind up date must be chosen and the administrator must file a wind up report showing, among other things, the plan's assets and liabilities as at that date (s. 70(1));

- No payments can be made out of the pension fund until the Superintendent has approved the wind up report (s. 70(4));

- Plan members with a certain combination of age and years of service or membership in the plan are entitled to additional benefits on wind up (grow-ins) (s. 74).

89 Importantly, s. 75 requires an employer to make two different categories of payment on plan wind up. Sections 75(1)(a) and (b) read as follows:

> **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.

90 Section 75(1)(a) requires the employer to make all payments that are due immediately or that have accrued and not been paid into the pension fund. Any unpaid current service costs and unpaid special payments are caught by this subsection. In other words, by virtue of this subsection, any payments that the employer had to make while the plan was ongoing must be paid. It will be recalled that while the plan was ongoing, some special payments could be made over time.

91 Section 75(1)(b) requires the employer to pay additional amounts into the pension fund if there are insufficient assets to cover the value of the pension benefits in the three categories set out in s. 75(1)(b).

92 It will be apparent that on wind up, an employer will often be faced with having to make significant additional contributions under s. 75(1)(b), in addition to being required to bring all contributions up to date because of s. 75(1)(a). Section 75(2) stipulates that "the employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times." Section 31 of the Regulations prescribes the manner and timing for the s. 75 wind up payments. It provides that the amounts an employer is to contribute under section 75 shall be by annual special payments, commencing at the effective date of the wind up, over not more than five years.

The PBA Deemed Trust

93 The central issue in these appeals is whether the *CCAA* judge erred in his interpretation of s. 57(4) of the *PBA*. Section 57(4) reads as follows:

> 57. (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.**
>
> [emphasis added]

94 The modern approach to statutory construction dictates that in interpreting s. 57(4), the words must 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.[FN4]

95 Section 57(4) deems an employer to hold in trust an amount equal to the contributions "accrued to the date of wind up but not yet due under the plan or regulations". The question is: what employer contributions are caught by s. 57(4) and, thus, are subject to the deemed trust?

96 The introductory words of s. 57(4) refer to where a pension plan is "wound up". Therefore, to answer this question, one must refer to the wind up regime created by the *PBA* and Regulations, a summary of which is set out above.

97 It will be recalled that when a pension plan is wound up, an actuarial calculation is made of the assets and liabilities, as of the wind up date. Because the plan liabilities relate to service that was provided up to the wind up date and not beyond, it is clear that all plan liabilities are accrued as of the wind up date. Put another way, no additional liability can accrue following the wind up because all events crystallize on the windup date — all pension benefit accruals by members cease and all amounts that an employer is required to pay into a pension plan are calculated as of the wind up date. For the same reason, the amounts that s. 75 requires an employer to contribute to the pension fund, on wind up, are accrued to the date of wind up. The required contributions are the amounts that an employer must make to the pension fund so that the accrued pension benefits of the plan members can be paid.

98 It will be further recalled that s. 31 of the Regulations gives the employer up to five years in which to make all of the required s. 75 contributions. However, the fact that an employer is given time in which to pay the requisite contributions into the pension fund does not change the fact that the liabilities accrued by the wind up date.

99 This point is reinforced when one distinguishes amounts that are "accrued" from amounts that are "not yet

due". In *Hydro-Electric Power Commission (Ontario) v. Albright* (1922), 64 S.C.R. 306, at para. 23, the Supreme Court of Canada explains that money is "due" when there is a legal obligation to pay it, whereas payments are "accrued" when the rights or obligations are constituted and the liability to pay exists, even if the payment does not need to be made until a later date (*i.e.* is not "due" until a later date).

100 Thus, just as s. 57(4) contemplates, while the amounts that the employer must contribute to the pension fund pursuant to s. 75 "accrued to the date of wind up", because of s. 31 those contributions are "not yet due under the ... regulations".

101 There is nothing in the wording of s. 57(4) to suggest that its scope is confined to the amounts payable under only s. 75(1)(a), as the respondents contend. On the contrary, the words of s. 57(4), given their grammatical and ordinary meaning, contemplate that all amounts owing to the pension plan on wind up are subject to the deemed trust, even if those amounts are not yet due under the plan or regulations. Therefore, the deemed trust in s. 57(4) applies to all employer contributions that are required to be made pursuant to s. 75. In short, the words "employer contributions accrued to the date of wind up but not yet due" in s. 57(4) include all amounts owed by the employer on the wind up of its pension plan.

102 This interpretation accords with a contextual analysis of s. 57(4).

103 As these appeals demonstrate, during the five-year "grace" period permitted by s. 31 of the Regulations, the rights of plan beneficiaries are at risk. Sections 57(4) and (5) provide some protection to the plan beneficiaries during that period. The employees' interest is in receiving their full pension entitlements. For that to happen, all s. 75 employer contributions must be made into the pension fund. The employer, on the other hand, has an interest in having a reasonable period of time within which to make the requisite s. 75 contributions. Section 31 of the Regulations gives the employer up to five years to make the contributions, during which time the deemed trust in s. 57(4) and the lien and charge in s. 57(5) provide a measure of protection for the employees over the amount of the unpaid employer contributions, contributions that had *accrued* to the date of wind up *but [were] not yet due under the regulations*.

104 Further, this interpretation is consistent with the overall purpose of the *PBA*, which is to establish minimum standards,[FN5] safeguard the rights of pension plan beneficiaries,[FN6] and ensure the solvency of pension plans so that pension promises will be fulfilled.[FN7] As the Supreme Court of Canada said in *Monsanto*, at para. 38:

> The Act is public policy legislation that recognizes the vital importance of long-term income security. As a legislative intervention in the administration of voluntary pension plans, its purpose is to establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans (citations omitted).

105 Much reference has been made to the two cases in which s. 57(4) has been discussed: *Re Ivaco* (2005), 12 C.B.R. (5th) 213 (Ont. S.C.), aff'd (2006), 83 O.R. (3d) 108 (C.A.), and *Toronto-Dominion Bank v. Usarco* (1991), 42 E.T.R. 235 (Ont. Ct. (Gen. Div.)). In my view, these decisions are of little assistance in deciding this issue.

106 Factually, *Ivaco* and *Usarco* differ from the present case. In *Ivaco* and *Usarco*, the prospect of bankruptcy was firmly before the court whereas in this case, at its highest, there is a motion to lift the stay and file for bankruptcy.

107 Moreover, there are conflicting statements in *Ivaco* and *Usarco* regarding the applicability of the deemed trust to wind up deficiencies. In *Usarco*, a bankruptcy petition had been filed but no steps had been taken to proceed with the petition. The company was not under *CCAA* protection. In that context, Farley J., the motion judge, held that the deemed trust provision referred only to the regular contributions together with special contributions that were to have been made but had not been.[FN8] In *Ivaco*, the major financers and creditors wished to have the *CCAA* proceeding, which was functioning as a liquidation, transformed into a bankruptcy proceeding. The case was focused

primarily on whether there was a reason to defeat the bankruptcy petition. In *Ivaco*, Farley J. took a different view of the scope of the s. 57(4) deemed trust, stating that in a non-bankruptcy situation, the company's assets were subject to a deemed trust on account of unpaid contributions and wind up liabilities.[FN9] On appeal, although this court indicated that it thought that Farley J.'s statement in *Usarco* was correct, it found it unnecessary to decide the matter. Accordingly, these decisions are not determinative of the scope of the deemed trust created by s. 57(4) of the *PBA*.

108 The *CCAA* judge concluded that because Indalex had made the going-concern and special payments to the Salaried Plan at the date of closing, there were no amounts due to the Salaried Plan. Therefore, there could be no deemed trust. Respectfully, I disagree. As I have explained, the deemed trust in s. 57(4) is not limited to the payment of amounts contemplated by s. 75(1)(a). It applies to all payments required by s. 75(1), including payments mandated by s. 75(1)(b).

109 Accordingly, the deficiency in the Salaried Plan had accrued as of the date of wind up (December 31, 2006) and, pursuant to s. 57(4) of the *PBA*, was subject to a deemed trust. The *CCAA* judge erred in holding that no deemed trust existed with respect to that deficiency as at July 20, 2009. The consequences that flow from this conclusion are explored in the section below on how the Reserve Fund is to be distributed.

110 Are the unpaid liability payments owing to the Executive Plan also subject to the s. 57(4) deemed trust? The Former Executives, Superintendent and Morneau all contend that they are. On the plain wording of s. 57(4), I find it difficult to accept this argument — the introductory words of the provision speak to "where a pension plan is wound up". In other words, wind up of the pension plan appears to be a requirement for s. 57(4) to apply. If that is so, no deemed trust could arise unless and until a plan wind up occurred. As has been noted, the Executive Plan had not been wound up at the relevant time.

111 Having said this, I am troubled by the notion that Indalex can rely on its own inaction to avoid the consequences that flow from wind up. In its letter of July 13, 2009, counsel for the Monitor confirmed that the Executive Plan would be wound up. Indeed, the *CCAA* judge acknowledged that the material filed with the court showed an intention on the part of the Applicants to wind up the plan. If the deemed trust does not extend to the Executive Plan, in the circumstances of this case, it appears that the result would be a triumph of form over substance.

112 In the end, however, the question that drives these appeals is whether the Monitor should be directed to distribute the Reserve Fund to the Plans. As I explain below in the section on how the Reserve Fund should be distributed, in my view, such an order should be made. Consequently, it becomes unnecessary to decide whether the deemed trust applies to the deficiency in the Executive Plan and I decline to do so. It is a question that is best decided in a case where the result depends on it and a fuller record would enable the court to appreciate the broader implications of such a determination.

Did Indalex Breach Its Fiduciary Obligation?

113 The appellants say that Indalex, as administrator of the Plans, owed a fiduciary duty to the Plans' members and beneficiaries. Both appellants list a number of actions that Indalex took or failed to take during the *CCAA* proceedings that they say amounted to breaches of its fiduciary obligation. They contend that the appropriate remedy for those breaches is an order requiring the Reserve Fund to be paid into the Plans.

114 The Monitor acknowledges that pension plan administrators have both a statutory and common law duty to act in the best interests of the plan beneficiaries and to avoid conflicts of interest, and that these duties are "fiduciary in nature". However, the Monitor contends that Indalex took all of the impugned actions in its role as employer and, therefore, could not have breached the fiduciary duties it owed to the Plans' beneficiaries as administrator. In any event, the Monitor adds, the issue is moot because any such breaches would merely give rise to an unsecured claim outside the ambit of the deemed trusts created by the *PBA*.

115 Sun Indalex echoes the Monitor's latter argument and says that the allegations of breach of fiduciary duty are irrelevant in these appeals. Its submission on this issue is summarized in para. 79 of its factum:

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

116 For the reasons that follow, I accept the appellants' submission that Indalex breached its fiduciary obligations as administrator during the *CCAA* proceedings. I deal with the question of what flows from that finding when deciding the issue of remedy.

117 It is clear that the administrator of a pension plan is subject to fiduciary obligations in respect of the plan members and beneficiaries.[FN10] These obligations arise both at common law and by virtue of s. 22 of the *PBA*.

118 The common law governing fiduciary relationships is well known. A fiduciary relationship will be held to exist where, given all the surrounding circumstances, one person could reasonably have expected that the other person in the relationship would act in the former's best interests.[FN11] The key factual characteristics of a fiduciary relationship are: the scope for the exercise of discretion or power; the ability to exercise that power unilaterally so as to affect the beneficiary's legal or practical interests; and, a peculiar vulnerability on the part of the beneficiary to the exercise of that discretion or power.[FN12]

119 It is readily apparent that these characteristics exist in the relationship between the pension plan administrator and the plan members and beneficiaries. The administrator has the power to unilaterally make decisions that affect the interests of plan members and beneficiaries as a result of its responsibility for the administration of the plan and management of the fund. Those decisions affect the beneficiaries' interests. The plan members and beneficiaries reasonably rely on the administrator to ensure that the plan and fund are properly administered. And, as these appeals demonstrate, they are peculiarly vulnerable to the administrator's exercise of its powers. Thus, at common law, Indalex as the Plans' administrator owed a fiduciary duty to the Plans' members and beneficiaries to act in their best interests.

120 Section 22 of the *PBA* also imposes a fiduciary duty on the administrator in the administration of the plan and fund. As well, it expressly prohibits the administrator from knowingly permitting its interest to conflict with its duties in respect of the pension fund. The relevant provisions in s. 22 read as follows:

> **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.
>
> . . .

Conflict of interest

(4) An administrator ... shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

121 In Ontario, an employer is expressly permitted to act as the administrator of its pension plan: see ss. 1 and 8 of the *PBA*.[FN13] It is self-evident that the two roles can conflict from time to time. In *Imperial Oil Ltd. v. Ontario (Superintendent of Pensions)* (1995), 18 C.C.P.B. 198 (*Imperial Oil*), the Pension Commission of Ontario (PCO) grappled with this statutorily sanctioned conflict in roles.

122 In that case, the employer Imperial Oil was the administrator of two employee pension plans. Imperial Oil sought to file amendments to the pension plans with the PCO. Prior to the amendments, a plan member with 10 or more years of service with Imperial Oil whose employment was terminated for efficiency reasons was entitled to an enhanced early retirement annuity (the enhanced benefit). The effect of the amendments was to deny such an employee the enhanced benefit unless the employee would have been able to retire within five years of termination. Put another way, after the amendments, in addition to the other requirements, an employee had to be 50 years of age or older at the time his or her employment was terminated for efficiency reasons in order to receive the enhanced benefit.

123 The Superintendent accepted the amendments for registration.

124 Some six months after the amendments were passed, Imperial Oil terminated the employment of a large number of employees for efficiency reasons. A number of the affected employees had 10 or more years of service but, because they had not reached the age of 50, they were denied the enhanced benefit.

125 A group of former employees (the Entitlement 55 Group) objected to the registration of the amendments. They brought an application to the PCO, seeking a declaration that the amendments were void and an order compelling Imperial Oil to administer the pension plans according to the terms of the plans in place before the amendments were passed.

126 Among other things, the Entitlement 55 Group argued that when Imperial Oil amended the plans, it was acting in both its capacity as employer and its capacity as administrator of the plans. Thus, they contended, Imperial Oil placed itself in a conflict of interest situation prohibited by s. 22(4) of the *PBA* because in its role as employer it wished to reduce pension fund liabilities but in its role as administrator it had a duty to protect the interests of the beneficiaries who had reached the 10 year service qualification and thereby "qualified" for the enhanced benefit.

127 The PCO dismissed the application. In so doing, it rejected the submission that Imperial Oil had contravened s. 22(4) by passing the amendments. It held that Imperial Oil had acted solely in its capacity as employer when it passed the amendments.

128 The PCO acknowledged that the *PBA* allows an employer to wear "two hats" — one as employer and the other as administrator. However, at para. 33 of its reasons, the PCO explained that an employer plays a role in respect of the pension plan that is distinct from its role as administrator:

> Its role as employer permits it to make the decision to create a pension plan, to amend it and to wind it up. Once the plan and fund are in place, it becomes an administrator for the purposes of management of the fund and administration of the plan. If we were to hold that an employer was an administrator for all purposes once a plan was established, of what use would a power of amendment be? An employer could never use the power to amend the plan in a way that was to its benefit, as opposed to the benefit of the employees. Section 14 presupposes this power is with an employer as it created parameters around the exercise of a power of amendment.

129 The "two hats" analogy in *Imperial Oil* assists in understanding the parameters of the dual roles of an employer who is also the administrator of its pension plan. The employer, when managing its business, wears its corporate hat. Although the employer *qua* corporation must treat all stakeholders fairly when their interests conflict, the directors' ultimate duty is to act in the best interests of the corporation: see *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560, at paras. 81-84. On the other hand, when acting as the pension plan administrator, the employer wears its fiduciary hat and must act in the best interests of the plan's members and beneficiaries.

130 The question raised by these appeals is whether, as the respondents contend, Indalex wore only its corporate hat during the *CCAA* proceedings. In my view, it did not. As I will explain, during the *CCAA* proceedings, in the unique circumstances of this case, Indalex wore both its corporate and its administrator's hats.

131 I begin from the position that Indalex had the right to make the decision to commence *CCAA* proceedings wearing solely its corporate hat. That decision is not part of the administration of the pension plan or fund nor does it necessarily engage the rights of the beneficiaries of the pension plan. For example, an employer might sell its business under *CCAA* protection, with the purchaser agreeing to continue the pension plan. In that situation, there should be no effect on the payment of pension benefits. Similarly, if the pension plan were fully funded, *CCAA* proceedings should have no effect on pension entitlements.

132 However, just because the initial decision to commence *CCAA* proceedings is solely a corporate one that does not mean that all subsequent decisions made during the proceedings are also solely corporate ones. In the circumstances of this case, Indalex could not simply ignore its obligations as the Plans' administrator once it decided to seek *CCAA* protection. Shortly after initiating *CCAA* proceedings, Indalex moved to obtain DIP financing, in which it agreed to give the DIP lenders a super-priority charge. At the same time, Indalex knew that the Plans were underfunded and that unless more funds were put into the Plans, pensions would have to be reduced. The decisions that Indalex was unilaterally making had the potential to affect the Plans beneficiaries' rights, at a time when they were particularly vulnerable. The peculiar vulnerability of pension plan beneficiaries was even greater than in the ordinary course because they were given no notice of the *CCAA* proceedings, had no real knowledge of what was transpiring and had no power to ensure that their interests were even considered — much less protected — during the DIP negotiations.

133 In concluding that Indalex was subject to its fiduciary duties as administrator as well as its corporate obligations during the *CCAA* proceedings, two points need to be made.

134 First, it is significant that Indalex is unclear as to what it thinks happened to its role as administrator during the *CCAA* proceedings. When cross-examined on this matter, Mr. Cooper gave various responses as to whom he believed filled that role: Indalex, a combination of him and the Monitor, and a combination of him and his staff. This confusion is understandable, given the number of roles that Mr. Cooper played in these proceedings. It will be recalled that prior to the commencement of the *CCAA* proceedings, he became the Chief Restructuring Officer for Indalex U.S., a position which included responsibility for the Canadian group of Indalex companies. In this position, he served as Indalex's primary negotiator of the DIP credit agreement. But, at the same time, he worked for FTI Consulting Inc. The Monitor is a wholly-owned subsidiary of FTI Consulting Inc. This blending of roles no doubt contributed to the apparent disregard for the obligations owed by the Plans' administrator.

135 In any event, it is not apparent to me that Indalex could ignore its role as administrator or divest itself of those obligations without taking formal steps through the Superintendent, plan amendment, the courts, or some combination thereof, to transfer that role to a suitable person. However, I will not consider this particular question further because it was not squarely raised and argued by the parties and, in any event, even if Mr. Cooper became the administrator, through his various roles, including as Chief Restructuring Officer for Indalex U.S., he is so clearly allied in interest with Indalex that the following analysis remains applicable.

136 Second, the respondents' submission that Indalex wore only its corporate hat during the proceedings is implicitly premised on the notion that an employer will wear its corporate hat or its administrator's hat, but never both. I do not accept this premise. Nor do I accept that the reasoning in *Imperial Oil*, which the respondents rely on, supports this submission.

137 In *Imperial Oil*, the PCO had to decide whether certain acts taken in respect of a pension plan were those of the employer or the administrator. Because the provision of pension plans is voluntary in Canada, the employer has the right to decide questions of plan design, including whether to offer a pension plan and, if it does, whether to end it. In part because of the wording of s. 14 of the *PBA* and in part because the amendments at issue in *Imperial Oil* were a matter of plan design, the PCO concluded that the employer was found to be acting solely in its corporate role when it passed the amendments. There is nothing in *Imperial Oil* to suggest that an employer cannot find itself in a position where it is wearing both hats at the same time.

138 I turn next to the question of breach.

139 As previously noted, when Indalex commenced *CCAA* proceedings, it knew that the Plans were underfunded and that unless additional funds were put into the Plans, pensions would be reduced. Indalex did nothing in the *CCAA* proceedings to fund the deficit in the underfunded Plans. It took no steps to protect the vested rights of the Plans' beneficiaries to continue to receive their full pension entitlements. In fact, Indalex took active steps which undermined the possibility of additional funding to the Plans. It applied for *CCAA* protection without notice to the Plans' beneficiaries. It obtained a *CCAA* order that gave priority to the DIP lenders over "statutory trusts" without notice to the Plans' beneficiaries. It sold its assets without making any provision for the Plans. It knew the purchaser was not taking over the Plans.[FN14] It moved to obtain orders approving the sale and distributing the sale proceeds to the DIP lenders, knowing that no payment would be made to the underfunded Plans. And, Indalex U.S. directed Indalex to bring its bankruptcy motion with the intention of defeating the deemed trust claims and ensuring that the Reserve Fund was transferred to it. In short, Indalex did nothing to protect the best interests of the Plans' beneficiaries and, accordingly, was in breach of its fiduciary obligations as administrator.

140 Further, in my view, Indalex was in a conflict of interest position. As has been mentioned, Indalex's corporate duty was to treat all stakeholders fairly when their interests conflicted, but its ultimate duty was to act in the best interests of the corporation. Indalex's duty as administrator was to act in the Plans' beneficiaries best interests. It is apparent that in the circumstances of this case, these duties were in conflict.

141 The common law prohibition against conflict of interest is not confined to situations where the fiduciary's personal interest conflicts with those of the beneficiaries. It also precludes the fiduciary from placing itself in a position where it acts for two parties who are adverse in interest: *Davey v. Woolley, Hames, Dale & Dingwall* (1982), 35 O.R. (2nd) 599 (C.A.), at para. 8. In *Davey*, a solicitor who acted for both sides of a business transaction was found to be in breach of his fiduciary obligations. Wilson J.A., writing for this court, explained that the conflict arose because the solicitor could not fulfill his duties in respect of both clients at the same time. At para. 18, she concluded that the solicitor was bound to refuse to act for the plaintiff in the circumstances.

142 The prohibition against a fiduciary being in a position of conflicting duties governs the situation in which Indalex found itself in during the *CCAA* proceedings.

143 Indalex was not at liberty to resolve the conflict in its duties by simply ignoring its role as administrator. A fiduciary relationship does not end simply because it becomes impossible of performance. At the point where its duty to the corporation conflicted with its duties as administrator, it was incumbent on Indalex to take steps to address the conflict.

144 Even if I am in error in concluding that Indalex was in breach of its common law fiduciary obligations, I would find that its actions amounted to a breach of s. 22(4) of the *PBA*. Section 22(4) prohibits an administrator from knowingly permitting its interest to conflict with its duties and powers in respect of the pension fund. Under s. 57(5) of the *PBA*, as administrator, Indalex had a lien and charge on its assets for the amount of the deemed trust. Any steps that it might have taken pursuant to s. 57(5), as administrator, would have been in respect of the pension fund. Thus, if nothing else, Indalex's actions during the *CCAA* proceedings demonstrate that it permitted its corporate interests to conflict with the administrator's duties and powers that flow from the lien and charge.

145 Having found that Indalex breached its fiduciary obligations to the Plans' beneficiaries, the question becomes: what flows from such a finding? I address that question below when considering the issue of how to distribute the Reserve Fund. At that time I will return to the arguments of the Monitor and Sun Indalex to the effect that such a finding is largely irrelevant in these proceedings.

Does the Collateral Attack Rule Bar the Deemed Trust Motions?

146 The U.S. Trustee submits that even if the *PBA* creates a deemed trust for any wind up deficiencies in the Plans, the appeals should be dismissed because the underlying motions are an impermissible collateral attack on previous orders made in the *CCAA* proceedings. His argument runs as follows.

147 The Initial Order, the June 12, 2009 order and the Sale Approval order (the "Court Orders") are all valid, enforceable court orders. The Court Orders gave super-priority rights to the DIP lenders and Indalex U.S. is subrogated to those rights. None of the Court Orders were appealed and no party sought to have them set aside or varied. As the appellants' motions seek to alter the priorities established by the Court Orders, they should be barred because they are an impermissible collateral attack on those orders.

148 I do not accept this submission for three reasons, the first two of which can be shortly stated.

149 First, this submission is an attack on the underlying motions. As such, it ought to have been raised below. The Former Executives say that the collateral attack doctrine was raised for the first time on appeal. Certainly, if it was raised below, the *CCAA* judge makes no reference to it. As a general rule, it is not appropriate to raise an issue for the first time on appeal. The exceptions to this general rule are very limited and do not apply in this case: see *Cusson v. Quan*, [2009] 3 S.C.R. 712, at paras. 36-37.

150 Second, the USW and the Former Executives raised the matter of the deemed trusts in the *CCAA* proceedings. The *CCAA* judge designed a process by which their claims would be resolved. They followed that process. The USW and Former Executives can scarcely be faulted for complying with a court-designed process. Further, the Sale Approval order acknowledged the deemed trust issue in that it required the Monitor to hold funds in reserve that were sufficient to satisfy the deemed trust claims. That acknowledgment is inconsistent with a subsequent claim of impermissible collateral attack.

151 Third, as I will now explain, an appreciation of the *CCAA* regime makes it apparent that the collateral attack rule does not apply in the circumstances of this case.

152 The collateral attack rule rests on the need for court orders to be treated as binding and conclusive unless they are set aside on appeal or lawfully quashed. Court orders may not be attacked collaterally. That is, a court order may not be attacked in proceedings other than those whose specific object is the reversal, variation, or nullification of the order. See *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at para. 8.

153 The fundamental policy behind the rule against collateral attacks is "to maintain the rule of law and to preserve the repute of the administration of justice": see *R. v. Litchfield*, [1993] 4 S.C.R. 333, at para. 22. If a party could

avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it: see *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, at para. 72.

154 The *CCAA* regime is designed to deal with all matters during an insolvent company's attempt to reorganize. The court-ordered stay of proceedings ensures that there is only one forum where parties can put forth their arguments and claims. By pre-empting other legal proceedings, the stay gives a corporation breathing space, which promotes the opportunity for reorganization.

155 The *CCAA* regime is a flexible, judicially supervised reorganization process that allows for creative and effective decisions: see *Century Services Ltd. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379, at para. 21. The *CCAA* judge is accorded broad discretion because the proceedings are a fact-based exercise that requires ongoing monitoring and because there is often a need for the court to act quickly. There is an underlying assumption, however, that the *CCAA* proceedings will provide an opportunity for affected persons to participate in the proceedings.

156 This assumption finds voice in para. 56 of the Initial Order, as amended, which permits any interested party to apply to the *CCAA* court to vary or amend the Initial Order (the come-back clause). That is precisely what the appellants did. As interested parties, they went to the *CCAA* court to ask that the super-priority charge be varied or amended so that their claims could be properly recognised.

157 Moreover, I do not accept that the appellants failed to act promptly in asserting their claims. It was only when Indalex brought a motion for approval of the sale of its assets to SAPA and for a distribution of the sale proceeds to the DIP lenders that it became clear that Indalex intended to abandon the Plans in their underfunded states. The appellants immediately took steps to assert their claims in the very forum in which all of the Court Orders had been made, namely, the *CCAA* court.

158 The U.S. Trustee's argument that the Court Orders were never appealed is not persuasive. In *Algoma Steel Inc. Re* (2001), 147 O.A.C. 291, at paras. 7-9, this court stated that it is premature to grant leave to appeal from an initial order — brought on an urgent basis to deal with seemingly desperate circumstances — when the order specifically opens the proceeding to all interested parties and invites dissatisfied parties to bring their concerns to the court on a timely basis using a come-back provision.

159 As the Former Executives point out, had the appellants sought to advance their deemed trust claims by bringing a motion challenging the paragraph of the Initial Order that established the DIP super-priority charge, it is likely that they would have been met by a response that their motions were premature. Depending on the amount paid for the company and/or the arrangements made in respect of the Plans, the interests of the Plans' beneficiaries might not have been affected by a sale. Indeed, on July 2, 2009, when Indalex brought a motion to have the bidding procedures approved for the asset sale and the Former Executives objected because of concerns that the Plans were underfunded, the *CCAA* judge endorsed the record as follows: "The issues can be raised by the retirees on any application to approve a transaction — but that is for another day."

160 The appellants followed that direction. When Indalex moved to have the sale transaction approved and the jeopardy to the appellants' interests became apparent, they went to the *CCAA* court and raised the deemed trust issue.[FN15]

161 Thus, as I have said, I do not view the deemed trust motions as collateral attacks on the Court Orders. The motions were raised in a timely manner in the same court in which the orders were made. They can scarcely be termed attempts to circumvent decisions rendered against the USW and the Former Executives when no decision had ever been rendered in which their claims had been squarely raised and addressed. The process the USW and the Former Executives followed is exactly that which is contemplated in *CCAA* proceedings and, specifically, the come-back

clause.

162 Even if the collateral attack rule were applicable, however, this is not a case for its strict application.

163 In *Litchfield*, the Supreme Court of Canada recognized that there will be situations in which the collateral attack rule should not be strictly applied. In that case, a physician had been charged with a number of counts of sexual assault on his patients. On motion, a judge (not the trial judge) ordered that the counts be severed and divided and three different trials be held. After one trial, the physician was acquitted. The Crown appealed. One of the grounds of appeal related to the pre-trial severance order. The question arose as to whether the Crown's challenge to the validity of the severance order violated the collateral attack rule.

164 At paras. 16-19 of *Litchfield*, Iacobucci J., writing for the majority, explains that "some flexibility" is needed in the application of the rule against collateral attacks. Strictly applied, the rule would prevent the trial judge from reviewing the severance order because the trial was not a proceeding whose specific object was the reversal, variation or nullification of the severance order. However, Iacobucci J. noted, the rule is not intended to immunize court orders from review. He reiterated the powerful rationale behind the rule: to maintain the rule of law and preserve the repute of the administration of justice. This promotes certainty and finality, key aspects of the orderly and functional administration of justice. However, he concluded that flexibility was warranted because permitting a collateral attack on the severance order did not offend the underlying rationale for the rule.

165 Similarly, in *R. v. Domm* (1996), 31 O.R. (3d) 540, at para. 31, Doherty J.A., writing for this court, states that if a collateral attack can be taken without harm to the interests of the rule of law and the repute of the administration of justice, the rule should be relaxed. At para. 36 of *Domm*, he says that the rule must yield where a person has "no other effective means" of challenging the order in question.

166 I acknowledge that certainty and finality are necessary to the proper functioning of the legal system. And, I recognize that permitting the appellants' motions to proceed has generated some degree of uncertainty as to the priorities established by the Court Orders. However, in the circumstances of this case, there was no other effective means by which the appellants could assert their claims to a deemed trust. As has been mentioned, it was only when Indalex brought a motion for approval of the sale of its assets to SAPA and for a distribution of the sale proceeds to the DIP lenders that it became clear that Indalex intended to abandon the Plans in their underfunded states. The appellants immediately took steps to assert their claims in the very forum in which all of the Court Orders had been made, namely, the *CCAA* court. By permitting their motions to be heard, the *CCAA* judge did not damage the repute of the administration of justice. On the contrary, he strengthened it. He enabled the sale to proceed while ensuring that the competing claims to the Reserve Fund would be decided on the merits and expeditiously.

167 Nor can it be said, for the reasons already given about the nature of *CCAA* proceedings, that the deemed trust motions jeopardize the rule of law. Given the nature of a *CCAA* proceeding, the court must often make orders on an urgent and expedited basis, with little or no notice to creditors and other interested parties. Its processes are sufficiently flexible that it can accommodate situations such as the one that arose here. A strict application of the rule would preclude the appellants from having the opportunity to meaningfully challenge the super-priority charge in the Initial Order, as amended. In my view, that result would be a fundamental flaw in the *CCAA* process, one in which procedure triumphed over substance. As Iacobucci J. said in *Litchfield*, at para. 18, such a result cannot be accepted.

168 Accordingly, in my view, while the collateral attack rule does not apply, even if it did, there are compelling reasons in this case to relax its strict application.

Do The Principles of Cross-Border Insolvencies Apply?

169 The U.S. Trustee also submits that the principles of cross-border insolvencies should be applied when de-

ciding these appeals. He contends that notwithstanding that separate proceedings were commenced in Canada and the U.S., those principles apply because the Applicants were direct and indirect subsidiaries of certain of the U.S. debtors, who commenced proceedings under Chapter 11 of Title 11 of the United States Bankruptcy Code in March 2009. Further, the U.S. Trustee contends that if the appellants' claims were to succeed, it would seriously undermine the basic principles underlying cross-border insolvencies and the confidence of foreign creditors and courts in the Canadian insolvency system.

170 While this argument provides context for the U.S. Trustee's collateral attack submission, I do not see it as disclosing any legal grounds relevant to these appeals. By order dated May 12, 2009, Morawetz J. approved a cross-border protocol in these proceedings that stipulates that the U.S. and Canadian courts retain exclusive jurisdiction over the proceedings in their respective jurisdictions. Furthermore, there is no evidence to support the U.S. Trustee's claim that allowing these appeals would impair future lending practices by U.S. companies. Finally, nothing has been raised which supports the notion that upholding valid provincial law in the circumstances of these appeals will undermine the principles of cross-border insolvencies.

How Is the Reserve Fund to Be Distributed?

The Salaried Plan

171 Having concluded that a deemed trust exists with respect to the deficiency in the Salaried Plan as at July 20, 2009, the question becomes whether the Monitor should be ordered to pay the amount of that deficiency, from the Reserve Fund, into the Salaried Plan.

172 The USW argues, on behalf of the beneficiaries of the Salaried Plan, that the deemed trust ranks in priority to all secured creditors and, therefore, the order should be made. Its argument rests on s. 30(7) of the *PPSA*, which reads as follows:

> **30. (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.***
>
> [emphasis added]

173 The USW contends that as s. 30(7) gives priority to the *PBA* deemed trust and no finding of paramountcy was made in these proceedings, it must be given effect.

174 The respondents argue that the super-priority charge has priority over any deemed trusts and, therefore, the Reserve Fund should be paid to Sun Indalex, as the principal secured creditor of Indalex U.S. They point to well-established law that authorizes the court to grant super-priority to DIP lenders in *CCAA* proceedings and argue that without such a charge, DIP lenders will no longer provide financing to companies under *CCAA* protection. Without DIP funding they say, many companies under *CCAA* protection will be unable to continue in business until a compromise or arrangement has been worked out. Consequently, companies will file for bankruptcy where deemed trusts have no priority. This, they say, will frustrate the very purpose of the *CCAA*, which is to facilitate the making of compromises or arrangements between insolvent debtor companies and their creditors.

175 There is a great deal of force to the respondents' submissions. Indeed, in general, I agree with them. It is important that the courts not address the interests of pension plan beneficiaries in a manner that thwarts or even discourages DIP funding in future *CCAA* proceedings. Nonetheless, in the circumstances of this case, it is my view that the Monitor should be ordered to pay the amount of the deficiency, from the Reserve Fund, into the Salaried Plan.

176 The *CCAA* court has the authority to grant a super-priority charge to DIP lenders in *CCAA* proceedings.[FN16] I fully accept that the *CCAA* judge can make an order granting a super-priority charge that has the effect of overriding provincial legislation, including the *PBA*. I also accept that without such a charge, DIP lenders may be unwilling to provide financing to companies under *CCAA* protection. However, this does not mean that the super-priority charge in question has the effect of overriding the deemed trust. To decide whether it does, one must turn to the doctrine of paramountcy.

177 Valid provincial laws continue to apply in federally regulated bankruptcy and insolvency proceedings absent an express finding of federal paramountcy. The onus is on the party relying on the doctrine of paramountcy to demonstrate that the federal and provincial laws are incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law: see *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, at para. 75 and *Nortel Networks Corp. (Re)* (2009), 99 O.R. (3d) 708 (C.A.), at para. 38, leave to appeal to S.C.C. refused, [2009] S.C.C.A. No. 531.

178 In this case, there is nothing in the record to suggest that the issue of paramountcy was invoked on April 8, 2009, when Morawetz J. amended the Initial Order to include the super-priority charge. The documents before the court at that time did not alert the court to the issue or suggest that the *PBA* deemed trust would have to be overridden in order for Indalex to proceed with its DIP financing efforts while under *CCAA* protection. To the contrary, the affidavit of Timothy Stubbs, the then CEO of Indalex, sworn April 3, 2009, was the primary source of information before the court. In para. 74 of his affidavit, Mr. Stubbs deposes that Indalex intended to comply with all applicable laws including "regulatory deemed trust requirements".

179 While the super-priority charge provides that it ranks in priority over trusts, "statutory or otherwise", I do not read it as taking priority over the deemed trust in this case because the deemed trust was not identified by the court at the time the charge was granted and the affidavit evidence suggested such a priority was unnecessary. As no finding of paramountcy was made, valid provincial laws continue to operate: the super-priority charge does not override the *PBA* deemed trust. The two operate sequentially, with the deemed trust being satisfied first from the Reserve Fund.

180 Does this conclusion thwart the purpose of the *CCAA* regime, which is to facilitate the restructuring of failing businesses to avoid bankruptcy and liquidation? It does not appear that would have happened in the present case. The granting of a stay in a *CCAA* proceeding provides a company with breathing space so that it can restructure. In this case, the stay of proceedings gave Indalex the breathing space it needed to effect a sale of its business. Recall that this was a "liquidating CCAA" from the outset. There was no restructuring of the company. There was no plan of compromise or arrangement prepared and presented to creditors. Within days of obtaining *CCAA* protection, Indalex began a marketing process to sell itself. Very shortly thereafter, it sold its business as a going-concern. There is nothing in the record to suggest that giving the deemed trust priority would have frustrated Indalex's efforts to sell itself as a going-concern business.

181 What of the contention that recognition of the deemed trust will cause DIP lenders to be unwilling to advance funds in *CCAA* proceedings? It is important to recognize that the conclusion I have reached does not mean that a finding of paramountcy will never be made. That determination must be made on a case by case basis. There may well be situations in which paramountcy is invoked and the record satisfies the *CCAA* judge that application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy. But, this depends on the applicant clearly raising the issue of paramountcy, which will alert affected parties to the risks to their interests and put them in a position where they can take steps to protect their rights. That, however, is not this case.

182 Nor am I persuaded by the argument that if the deemed trust is given effect in the unique circumstances of this case, companies will file for bankruptcy instead of moving for *CCAA* protection. This argument suggests that companies will act based on the desire to avoid their pension obligations. That motivation does not conform with the obligations that directors owe to the corporation. The obligation to act in the best interests of the corporation suggests that companies will choose the route that maximizes recovery for creditors. As the respondents point out, Indalex

sought a going-concern sale for exactly that reason. In addition, by selling its business as a going concern, Indalex preserved value for suppliers and customers who can continue to do business with the purchaser and preserved approximately 950 jobs for its former employees. Surely the desire to maximize recovery for their creditors — along with those other considerations — would have prevailed had Indalex known it would have to satisfy the deemed trust when considering whether to pursue bankruptcy or *CCAA* proceedings. In this regard, it is worth recalling that consideration for the sale exceeded $151 million, all DIP lenders were repaid in full, the Reserve Fund consists of undistributed proceeds, and the total deficiencies in the Plans appear to be approximately $6.75 million.

183 As for the suggestion that Indalex will pursue its bankruptcy motion in order to defeat the deemed trust, I would simply echo the comments of the *CCAA* judge that a voluntary assignment into bankruptcy should not be used to defeat a secured claim under valid provincial legislation. I would add this additional consideration: it is inappropriate for a *CCAA* applicant with a fiduciary duty to pension plan beneficiaries to seek to avoid those obligations to the benefit of a related party by invoking bankruptcy proceedings when no other creditor seeks to do so.

184 There is also the matter of Indalex U.S.'s apparent reliance on the super-priority charge when it gave the Guarantee. As explained more fully above, Indalex U.S. was fully aware of Indalex's obligations to the Plans when it entered into the Guarantee. Again as explained more fully above, there were a number of different steps that Indalex could have taken to deal with these obligations. It chose not to. This is not a case in which the secured creditor is an arm's length third party taken by surprise by the claims of the Plans' beneficiaries.

185 A final consideration that must be addressed at this stage arises from the recent decision of the Supreme Court of Canada in *Century Services*, which was released after the oral hearing of the appeals. The parties were invited to make written submissions on the impact of *Century Services*, if any, on these appeals. I am grateful for the excellence of those submissions, which mirrors the quality of the original submissions.

186 *Century Services* deals with conflicting provisions in two pieces of federal legislation: s. 222(3) of the *Excise Tax Act*, R.S.C. 1985, c. E-15, which gives the federal Crown a deemed trust for unpaid GST, and s. 18.3(1) (now s. 37) of the *CCAA*, which expressly excludes deemed trusts in favour of the Crown from applying in *CCAA* proceedings. Deschamps J., for the majority, conducted a comprehensive analysis of the two conflicting sections and held that s. 18.3(1) of the *CCAA* prevails. In sum, *Century Services* stands for the proposition that s. 18.3(1) of the *CCAA* excludes the deemed trust for unpaid GST created by s. 222 of the *Excise Tax Act* from applying in a *CCAA* proceeding.

187 It will be readily apparent that *Century Services* is distinguishable from the present case in a number of ways. Three significant differences between it and the present appeals are worthy of note.

188 First, in *Century Services*, reorganization efforts had failed and the company sought leave to make an assignment into bankruptcy. Liquidation on a piecemeal basis through bankruptcy was inevitable. The *CCAA* proceedings in the present case, on the other hand, were successful — they resulted in the sale of Indalex's assets and the continuation of the business, albeit through another entity. It is not a situation in which transition to the bankruptcy regime was inevitable because efforts under the *CCAA* had failed.

189 Second, *Century Services* deals with competing provisions in two federal statutes. The conflict between the two provisions was patent: one or the other had to prevail. They could not be read together. Section 18.3(1) was found to prevail, in part because of its wording, which expressly excludes a deemed trust in favour of the Crown. The present appeals involve a consideration of the doctrine of federal paramountcy and whether a deemed trust under provincial legislation applies to a charge granted in a *CCAA* proceeding. Significantly, unlike the situation in *Century Services*, there is nothing in the *CCAA* that expressly excludes the provincial deemed trust for unpaid pension contributions from applying in *CCAA* proceedings. In these appeals, exclusion of the provincial deemed trust is dependent on the *CCAA* judge engaging in a factual examination and a determination that preservation of pension rights through the deemed trust would frustrate the purpose of the *CCAA* proceeding. Moreover, it is difficult to see how a finding of

paramountcy would have been made on the record at the time the super-priority charge was made, given the evidence that Indalex intended to comply with all regulatory deemed trust requirements.[FN17]

190 Third, no issue of fiduciary duty arose in *Century Services*. In the present case, as discussed previously and again below, the impact of fiduciary duties during the *CCAA* proceeding plays a significant role.

191 The respondents contend that *Century Services* is crucial in the disposition of these appeals because it stands for the proposition that federal priorities under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*) apply in *CCAA* proceedings. If *Century Services* stood for that proposition, I would agree. In a series of cases, the Supreme Court of Canada has repeatedly said that a province cannot, by legislating a deemed trust, alter the scheme of priorities under the *BIA*: see, for example, *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24.

192 However, in my view, *Century Services* does not stand for that unqualified proposition. In *Century Services*, Deschamps J. explains that the *CCAA* and *BIA* are to be read in an integrated fashion but she is at pains to say that the *BIA* scheme of liquidation and distribution is the backdrop for what happens *if a CCAA reorganization is unsuccessful*.[FN18] Here, as I have noted, the *CCAA* proceedings were successful.

193 Moreover, Deschamps J. repeatedly distinguishes the two regimes on the basis that the *BIA* is "characterized by a rules-based approach"[FN19] whereas the *CCAA* "offers a more flexible mechanism with greater judicial discretion".[FN20] Permitting the *PBA* deemed trust to survive, absent an express finding of paramountcy, is consistent with both those key features of the *CCAA* proceedings — greater flexibility and greater judicial discretion on the part of the *CCAA* court. This flexibility and discretion on the part of the *CCAA* court enables it to meaningfully assess the baseline considerations of appropriateness, good faith and due diligence, referred to by Deschamps J. at para. 70 of *Century Services*.

194 The respondents point to paras. 47, 48 and 76 of *Century Services*, in which Deschamps J. notes the "strange asymmetry" that would occur if the *ETA* Crown priority were interpreted differently in *CCAA* proceedings than in *BIA* proceedings. She says this would encourage forum shopping in cases where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims. No "strange asymmetry" would occur in cases such as the present appeals. If the *CCAA* judge found that recognition of the *PBA* deemed trust would frustrate the purpose of the *CCAA* proceeding and paramountcy had been invoked, the *CCAA* judge would be free to make a super-priority charge that overrode the deemed trust. This approach leaves the *CCAA* court with greater flexibility and the ability to be "cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees".[FN21]

195 In para. 70 of her reasons, Deschamps J. exhorts the *CCAA* courts to be "mindful that chances for successful reorganizations are enhanced where participants achieve common ground and *all stakeholders are treated as advantageously and fairly as the circumstances permit*" [emphasis added]. The Plans' beneficiaries are stakeholders. And, once the deemed trust claims are recognized, they are not to be treated as mere unsecured creditors. If, as the respondents contend based on *Century Services*, the deemed trusts are automatically overridden, there will be no incentive for companies that are similarly situated to Indalex to attempt to deal with their underfunded pension plans. There will be no incentive to treat pension plan beneficiaries "as advantageously and fairly as the circumstances permit". The incentive will be to do as Indalex did — go to court without notice to the affected pension plan beneficiaries and negotiate as if the pension obligations did not exist.

196 Justice Deschamps also says that no "gap" should exist between the *BIA* and the *CCAA* and approves of Laskin J.A.'s reasoning to that effect at paras. 62-63 of *Ivaco*.[FN22] She explains that the gap is a situation "which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy". When the facts of the present case are considered carefully, it can be seen that a gap of this sort will not occur should the appeals be allowed. As I see it, the deemed trusts continued to exist during the *CCAA* proceedings

although no steps could be taken to enforce them during the proceedings because of the stay. By the time of the Sale Approval Order, the *CCAA* court had become aware of the deemed trust claims. It dealt with the deemed trust claims as part of the *CCAA* proceedings, by deciding whether the undistributed sales proceeds held by the Monitor should go to Indalex U.S. or to the Plans' beneficiaries. Thus, rather than being a situation in which property interests that would be lost in bankruptcy were enforced at the conclusion of the *CCAA* proceedings, the property interests were dealt with as part of the *CCAA* proceedings.

197 However, even if I am wrong in concluding that the deemed trust has priority over the secured creditor in this case, I would make the order on the basis that it is the appropriate remedy for the breaches of fiduciary obligation.

198 It is important to keep in mind that the contest over the Reserve Fund is not a fight between the DIP lenders and the pensioners. The DIP lenders have been paid in full. The dispute is between the pensioners and Sun Indalex, the principal secured creditor of Indalex U.S. It is in that context that the court must consider the competing equities.

199 The *CCAA* was not designed to allow a company to avoid its pension obligations. To give effect to Indalex U.S.'s claim would be to sanction Indalex's breaches of fiduciary obligation. In the circumstances of this case, such a result would work an injustice. The equities are not equal. The Plans' beneficiaries were vulnerable to the exercise of power by Indalex. They were not part of the negotiations for the DIP financing nor were they involved in the sale negotiations. They had no opportunity to protect their interests and, as a result of Indalex's actions, there was no one who fulfilled the administrator's role. Indalex, on the other hand, was fully aware of the Plans' underfunding and the result to the pensioners of a failure to inject additional funds. It was Indalex who advised the *CCAA* court that it intended to comply with "regulatory deemed trust requirements". To permit Sun Indalex to recover on behalf of Indalex U.S. would be to effectively permit the party who breached its fiduciary obligations to take the benefit of those breaches, to the detriment of those to whom the fiduciary obligations were owed.

200 I do not accept the respondents' argument that a finding that Indalex breached its fiduciary obligation is irrelevant because it would merely give rise to an unsecured claim and there is no basis for conferring a priority for such a claim. This view fundamentally misunderstands the rights of the pension plan beneficiaries. Even if there is no deemed trust, the Plans' beneficiaries are not mere unsecured creditors. They are unsecured creditors to whom Indalex owed a fiduciary duty by virtue of its role as the Plans' administrator. There is a significant difference, in my view, between being a mere unsecured creditor and being an unsecured creditor to whom a fiduciary duty is owed.

201 Further, the Supreme Court has repeatedly stated that equitable remedies are sufficiently flexible that they can be molded to meet the requirements of fairness and justice: see, for example, *Canson Enterprises v. Boughton & Co.*, [1991] 3 S.C.R. 534, at para. 86 and *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, at para. 34.

202 In *Soulos*, at para. 36, McLachlin J. (as she then was) writing for the majority, held that constructive trusts may be imposed where "good conscience requires" it. She went on to identify two different types of cases in which constructive trusts may be ordered: 1) those in which property is obtained by a wrongful act of the defendant, notably breach of fiduciary duty or breach of the duty of loyalty; and, 2) those in which there may not have been a wrongful act, but where there has been unjust enrichment. While the second type of case — one in which there is unjust enrichment — is not relevant to these appeals, the first is.

203 At para. 45 of *Soulos*, McLachin J. sets out four conditions that should "generally be satisfied" if a constructive trust based on wrongful conduct is to be ordered:

> (1) the defendant must have been under an equitable obligation in relation to the activities giving rise to the assets in his or her hands;
>
> (2) the assets in the hands of the defendant must be shown to have resulted from deemed or actual agency ac-

tivities of the defendant in breach of his or her equitable obligation to the plaintiff;

(3) the plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and

(4) there must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

204 As I have already explained, in the circumstances of this case, Indalex's fiduciary obligations as administrator were engaged in relation to the *CCAA* proceedings and it is those proceedings that gave rise to the asset (*i.e.* the Reserve Fund) (condition 1). The assets that would flow to Indalex U.S., absent the constructive trust, are directly connected to the process in which Indalex committed its breaches of fiduciary obligation (condition 2). Without the proprietary remedy, the Plans' beneficiaries have no meaningful remedy. Moreover, there must be some incentive to require employers who are also the administrators of their pension plans to remain faithful to their duties (condition 3). And, because Indalex U.S. is not an arm's length innocent third party, imposing a constructive trust in favour of the Plans' beneficiaries is not unjust (condition 4).

The Executive Plan

205 As I explained above, it is not clear to me that a deemed trust arose in respect of the underfunded amounts in the Executive Plan because it had not been wound up at the time of sale. However, based on the breaches of fiduciary duty, the court is entitled to consider the equities of the parties competing for the Reserve Fund. For the reasons given in respect of the Salaried Plan in respect of those equities, I would make the same order in respect of the Executive Plan, namely, that the Monitor pay the deficiency from the Reserve Fund to the Executive Plan in priority to those entitled under the super-priority charge.

206 In light of this conclusion, I find it unnecessary to deal with the Former Executives' submission that the doctrine of equitable subordination applies to remedy Indalex's breaches of fiduciary duty. In any event, I would decline to decide that issue as it was not argued below. It offends the general rule that appellate courts are not to entertain new issues on appeal.

Disposition

207 Accordingly, I would allow the appeals and declare that the claims of the USW and the Former Executives take priority over the claim asserted by Indalex U.S./Sun Indalex. I would order the Monitor to pay from the Reserve Fund into each of the Salaried Plan and the Executive Plan an amount sufficient to satisfy the deficiencies in each plan. I understand that the Reserve Fund is sufficient to satisfy the Deficiencies but if this proves problematic, the parties may return to the court for direction on that matter.

208 If the parties are unable to agree on costs, they may make brief written submissions on that matter. The appellants, Morneau and the Superintendent shall file their submissions within fifteen days of the date of release of these reasons. The respondents shall have a further seven days within which to file their submissions.

J.C. MacPherson J.A.:

I agree.

R.G. Juriansz J.A.:

I agree.

Schedule "A"

Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 1(1), 8, 14(1), 22, 57(1) - (5), 70(1), 74(1), 75(1), (2), 76

Definitions

1. (1) In this Act, ...

"administrator" means the person or persons that administer the pension plan; ...

"wind up" means the termination of a pension plan and the distribution of the assets of the pension fund;

Administrator

Requirement

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

Prohibition

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

Administrator

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

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

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

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

(ii) members of the pension plan;

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

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

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

(f) a corporation, board, agency or commission made responsible by an Act of the Legislature for the ad-

ministration of the pension plan;

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

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

Additional members

(2) A pension committee, or a board of trustees, that is the administrator of a pension plan may include a representative or representatives of persons who are receiving pensions under the pension plan.

Interpretation

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

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

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

Reduction of benefits

14. (1) An amendment to a pension plan is void if the amendment purports to reduce,

(a) the amount or the commuted value of a pension benefit accrued under the pension plan with respect to employment before the effective date of the amendment;

(b) the amount or the commuted value of a pension or a deferred pension accrued under the pension plan; or

(c) the amount or the commuted value of an ancillary benefit for which a member or former member has met all eligibility requirements under the pension plan necessary to exercise the right to receive payment of the benefit.

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).

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).

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.

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.

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.

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.

Schedule "B"

Pension Benefits Act, Regulation 909, R.R.O. 1990, s. 31(1), (2) and (3)

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.

FN1 The Monitor retained the Reserve Fund as part of the Undistributed Proceeds. The Undistributed Proceeds also

include amounts for the payment of cure costs, other costs associated with the completion of the SAPA transaction, legal and professional fees, and amounts owing under the DIP charge.

FN2 The appellants had raised this issue below but it had not been dealt with by the *CCAA* judge.

FN3 Or, in the case of a multi-employer plan, the administrator.

FN4 *Bell ExpressVu Limited Partnership v. Rex.*, [2002] 2 S.C.R. 559, at para. 26.

FN5 *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, at para. 13, relying on *Gencorp Canada Inc. v. Ontario (Superintendent of Pensions)* (1998), 158 D.L.R. (4th) 497 (Ont. C.A.), at p. 503.

FN6 *Ibid.*

FN7 *Bourdon v. Stelco Inc.*, [2005] S.C.R. 279, at para. 24.

FN8 At para. 26.

FN9 At para. 11.

FN10 *Burke v. Hudson's Bay Co.*, [2010] 2 S.C.R. 273, at paras. 39-41.

FN11 *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at para. 32.

FN12 *Ibid.*, at para. 30; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at p. 646.

FN13 In contrast, Quebec legislation requires that plan administration be entrusted to a pension committee of at least three persons, including a representative of each of the active and inactive members of the plan and an independent member. See *Supplemental Pension Plans Act*, R.S.Q. c. R-15.1, s. 147.

FN14 On advice of counsel, Mr. Cooper refused to answer questions about what, if any, steps were taken to have the purchaser take over the Plans.

FN15 To the extent that the U.S. Trustee suggests that the Former Executives raised the deemed trust issue at the motion heard on June 12, 2010, I reject this submission. As explained in the background portion of these reasons, the Former Executives' reservation of rights on June 12, 2010, was to obtain time to confirm that the motion related solely to an increase in the DIP loan amount.

FN16 See, for example, *InterTAN Canada Ltd.(Re)* (2009), 49 C.B.R. (5th) 232 (Ont. S.C.). And, the granting of super-priority charges is referred to with approval in *Century Services*, at para. 62.

FN17 See para. 178 of these reasons.

FN18 See, for example, para. 23.

FN19 At para. 13, for example.

FN20 See, for example, para. 14.

FN21 *Century Services*, at para. 60.

FN22 At para. 78.

END OF DOCUMENT

TAB C

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 Nos: C52187 & C52346

April 28, 2010
Interim stay granted pending the hearing of this motion with the consent of the responding party. Draft order to issue.
J.A.

COURT OF APPEAL FOR ONTARIO

MOTION RECORD OF
SUN INDALEX FINANCE, LLC
(Motion for Stay Pending Appeal)

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Lawyers for Sun Indalex Finance, LLC

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TAB D

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	FRIDAY, THE 18TH
	)	
JUSTICE CAMPBELL	)	DAY OF FEBRUARY, 2010

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

- and -

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

ORDER

THIS MOTION, made by the United Steelworkers (the "USW") who represent beneficiaries of The Retirement Plan for Salaried Employees of Indalex Limited and Associated Companies, Canada Revenue Agency Registration number 0533646, was heard July 20, 2009 and August 28, 2009 at 330 University Avenue, Toronto, Ontario, Reasons for Decision having been reserved to February 18, 2010 and sought (a) a declaration that a deemed trust equal in amount to the Deficiency of assets in the Salaried Plan is enforceable against the assets of Indalex; (b) an order that the amount of assets required to eliminate the Deficiency in the Salaried Plan be segregated from the general assets of Indalex; (c) an order that the amount of assets segregated pursuant to (b) be paid to the fund of the Salaried Plan; (d) an order for costs; and (e) such further and other relief as to this Honourable Court seems just.

ON READING the Motion Record of the USW, the USW's Notice of Motion, the Affidavit of Cathy Braker, sworn August 5, 2009, the Cross-Examination Transcripts of Keith Cooper on August 26, 2009 and the exhibits thereto; the Affidavit of Bob Kavanaugh sworn August 12, 2009; the Affidavit of Fred Fazio sworn June 29, 2009; the Motion Record of the Applicants, including the Notice of Motion, the Affidavit of Keith Cooper sworn August 24, 2009; the July 20, 2009 Endorsement of Justice Campbell; the July 27, 2009 Endorsement of Justice Campbell; the August 20, 2009 Factum of the USW; the August 24, 2009 Responding Factum of the Applicants; the August 24, 2009 Factum of the Applicants; the August 27, 2009 Reply Factum of the USW; the August 27, 2009 Responding Factum of the USW; the September 4, 2009 Written Submissions of the Superintendent of Financial Services; and the September 11, 2009 Supplementary Written Submissions of the Applicants filed, and upon hearing submissions for counsel from the members of The Retirement Plan for Executive Employees of Indalex Canada and Associated Companies, the United Steelworkers, the Applicants, the Superintendent of Financial Services, the Monitor, and Sun Indalex Finance LLC,

1. THIS COURT ORDERS that the motion is dismissed.

Rm. Ittleman 2010/04/08

R. Ittleman, Registrar
Superior Court of Justice

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

APR 0 8 2010

PER / PAR: ✓

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,
R.S.C. 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.

Superior Court File No: CV-09-8122-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

ORDER

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TAB E

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	FRIDAY, THE 18TH
	)	
JUSTICE CAMPBELL	)	DAY OF FEBRUARY, 2010

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

- and -

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

ORDER

THIS MOTION, made by Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Richard Smith, Robert Leckie, Neil Fraser and Fred Granville (the "Retirees") who are members of The Retirement Plan for Executive Employees of Indalex Canada and Associated Companies, Canada Revenue Agency Registration number 0455626, was heard July 20, 2009 and August 28, 2009 at 330 University Ave., Toronto, Ontario, Reasons for Decision having been reserved to February 18, 2010.

ON READING the Motion Record of the Retirees, the Retirees Notice of Motion, the Affidavit of Keith Carruthers, sworn June 23, 2009, the Affidavit of Andrea McKinnon, sworn July 17, 2009, the Affidavit of Keith Carruthers sworn August 15, 2009, the Affidavit of Max Degen sworn August 6, 2009, the Affidavit of Mari Trainor sworn September 3, 2009, the Cross-

Examination Transcripts of Keith Cooper on August 26, 2009 and the exhibits thereto; the Affidavit of Bob Kavanaugh sworn August 12, 2009, the Motion Record of the Applicants, including the Notice of Motion, the Affidavit of Keith Cooper sworn August 24, 2009; the Monitor's Eighth Report, dated July 28, 2009; the July 20, 2009 Endorsement of Justice Campbell, the July 27, 2009 Endorsement of Justice Campbell, the August 20, 2009 Factum of the Retirees; the August 24, 2009 Factum of the Applicants; the August 24, 2009 Responding Factum of the Applicants; the August 27, 2009 Reply Factum of the Retirees; the September 4, 2009 Written Submissions of the Superintendent of Financial Services; and the September 11, 2009 Supplementary Written Submissions of the Applicants filed, and upon hearing submissions for counsel from the Retirees, United Steelworkers, the Applicants, the Superintendent of Financial Services, the Monitor, and Sun Indalex Finance LLC,

1. **THIS COURT ORDERS** that the motion is dismissed.

G. Argyropoulos, Registrar
Superior Court of Justice

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

APR 0 8 2010

PER / PAR:

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*.

R.S.C. 1985, c. C-36 AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF INDALEX LIMITED et al. the Applicants

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

ORDER

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Lawyers for Keith Carruthers, Leon Kozierok, Bertram McBride, Max Degen, Eugene D'Iorio, Richard Smith, Robert Leckie, Neil Fraser, Ken Waldron, Fred Granville, John Faveri, John Rooney and Richard Benson (the "Retirees")

TAB F

Court of Appeal File Nos. C52187 & C52346

COURT OF APPEAL FOR ONTARIO

THE HONOURABLE JUSTICE JURIANSZ) THURSDAY, THE 28TH DAY OF
)
) APRIL, 2011

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.

ORDER

THIS MOTION, made by Sun Indalex Finance, LLC ("Sun"), for an order pursuant to section 65.1 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, as amended, staying (the "Stay") the Order of the Court of Appeal for Ontario dated April 7, 2011 (the "Order"), prohibiting Morneau Sobeco Limited Partnership ("Morneau") as the administrator of the Retirement Plan for Executive Employees of Indalex Limited and Associated Companies (the "Executive Plan") from filing a wind up report regarding the Executive Plan pursuant to section 70(1) of the *Pension Benefits Act*, R.S.O. 1990, c. P-8 (the "PBA"), and prohibiting Morneau as the administrator of the Executive Plan and the Retirement Plan for Salaried Employees of Indalex Limited and Associated Companies (the "Salaried Plan", and together with the Executive Plan, collectively the "Plans") from making any requests for payments from the Monitor, pending the outcome of Sun's intended application for leave to appeal to the Supreme Court of Canada (the

"Motion"), will be heard, on a date to be set, at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

ON READING the consent of counsel for the parties and pending the hearing of the motion for a Stay on the merits pursuant to a schedule to be agreed upon by counsel to all parties:

1. THIS COURT ORDERS that the Order is stayed.

2. THIS COURT ORDERS that with respect to the Executive Plan, Morneau as the administrator of the Executive Plan shall not file a wind up report pursuant to section 70(1) of the PBA.

3. THIS COURT ORDERS that Morneau as the administrator of the Plans shall not make any requests for payment from the Monitor.

4. THIS COURT ORDERS that this Order shall terminate and cease to have effect upon the conclusion of the hearing of the motion for a Stay subject to any further Order that the Judge hearing the motion for a stay may make at that time.

Registrar
COURT OF APPEAL FOR ONTARIO

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

APR 2 8 2011

PER / PAR:

Court of Appeal File Nos: C52187 & C52346

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 FOR ONTARIO

ORDER

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Lawyers for Sun Indalex Finance, LLC

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TAB G

Court of Appeal File No. C52346

COURT OF APPEAL FOR ONTARIO

THE HONOURABLE JUSTICE MACPHERSON	)	THURSDAY, THE 7th
THE HONOURABLE JUSTICE GILLESE	)	
THE HONOURABLE JUSTICE JURIANSZ	)	DAY OF APRIL, 2011

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/Respondents

ORDER

THIS APPEAL, made by the appellant, the United Steelworkers (the "United Steelworkers"), from the Order of the Honourable Justice Campbell of the Ontario Superior Court of Justice, dated February 18, 2010 (the "February 18th Order"), by which Appeal the United Steelworkers seeks to set aside the February 18th Order and substitute an Order requiring FTI Consulting Canada ULC in its capacity as Monitor (the "Monitor") to pay the amount of the wind-up liability owing (the "Deficiency") to the Retirement Plan for the Salaried Employees (the "Salaried Plan") of Indalex Limited and Associated Companies ("Indalex Canada") currently held in reserve (the "Deficiency Reserve") by the Monitor, was heard this day at Osgoode Hall, 130 Queen Street West, Toronto, Ontario.

ON READING the February 18th Order, the Orders of Justice Campbell, dated July 20, 2009 and October 27, 2009, the Handwritten Endorsement of Justice Campbell, dated July 20, 2009,

the Timetable of Justice Campbell dated July 27, 2009, the Orders of Justice Morawetz, dated April 3, 2009, April 8, 2009, May 12, 2009, June 12, 2009 and July 2, 2009, the Amended & Restated Initial Order of Justice Morawetz, dated May 12, 2009, the Endorsements of Justice Morawetz dated April 17, 2009 and June 15, 2009, the Handwritten endorsement of Justice Morawetz, dated July 2, 2009, the Reasons for Decision of Justice Campbell, dated February 18, 2010, the Affidavit of Cathy Braker, sworn August 5, 2009 (with exhibits thereto), the Affidavit of Bob Kavanaugh, sworn August 12, 2009 (with exhibits thereto), the Affidavit of Fred Fazio, sworn June 29, 2009 (with exhibits thereto), the Affidavit of Keith Cooper, sworn August 24, 2009 (with exhibits thereto), the Affidavit of Jalo Edwards, sworn November 19, 2010 (with exhibits thereto), the Affidavit of Demetrios Yiokaris, sworn November 19, 2010, the Affidavit of Andrea McKinnon, sworn July 17, 2009 (with exhibits thereto), the Affidavit of Jenny Correia, sworn March 19, 2010 (with exhibit thereto), the Cross-Examination Transcript of Keith Cooper (with exhibits thereto), the Unanimous Shareholder Declaration, dated August 12, 2009, the Certificate of Evidence, dated July 2, 2010, the Tenth Report of the Monitor, dated October 21, 2009, the Pre-Filing Report to Court submitted by the proposed Monitor, FTI Consulting Canada ULC, on April 3, 2009, the facta and briefs of authorities filed on behalf of the parties, and on hearing the submissions of counsel for the parties and the intervenors to this appeal, and reasons (the "OCA Reasons") being reserved until this day:

1. **THIS COURT ORDERS** that all capitalized terms not otherwise defined in this Order shall have the meanings ascribed to them in the OCA Reasons.

2. **THIS COURT ORDERS** that the Appeal is hereby allowed.

3. **THIS COURT DECLARES** that the claim of the United Steelworkers takes priority over the claim asserted by Indalex Holding Corp., Indalex Finance and their U.S. based affiliates and Sun Indalex Finance, LLC.

4. **THIS COURT ORDERS** that the Monitor pay from the Deficiency Reserve fund into the Salaried Plan an amount sufficient to satisfy the Deficiency, and in the event that the Deficiency Reserve is insufficient to satisfy the Deficiency, the parties may return to this Court for direction on that matter.

5. **THIS COURT ORDERS** that ● pay costs of the within appeal to ● in the fixed amount of $●, both awards inclusive of disbursements and applicable taxes.

Registrar

THIS ORDER BEARS INTEREST at the rate of 3% per year commencing on April 7, 2011.

Court of Appeal File No: C52346

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/Respondents

DRAFT

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

ORDER

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TAB H

Court of Appeal File No. C52187

COURT OF APPEAL FOR ONTARIO

THE HONOURABLE JUSTICE MACPHERSON THE HONOURABLE JUSTICE GILLESE THE HONOURABLE JUSTICE JURIANSZ	)))	THURSDAY, THE 7th DAY OF APRIL, 2011

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/Respondents

ORDER

THIS APPEAL, made by the appellants, the Former Executives, from the Order of the Honourable Justice Campbell of the Ontario Superior Court of Justice (Commercial List), dated February 18, 2010 (the "February 18th Order"), by which Appeal the Former Executives seeks to set aside the February 18th Order and substitute an order declaring that the wind-up liability owing (the "Deficiency") to the Retirement Plan for Executive Employees (the "Executive Plan") of Indalex Limited and Associated Companies ("Indalex Canada") currently held in reserve (the "Deficiency Reserve") by FTI Consulting Canada ULC in its capacity as Monitor ("the Monitor") is subject to a deemed trust for the benefit of the beneficiaries of the Executive Plan under section 57(4) of the *Pensions Benefits Act* R.S.O. c. P.8 ("*PBA*"), a declaration that Indalex Limited, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc. ("Indalex Canada") as pension plan administrator of the Executive Plan breached their fiduciary duties to the Former Executives, and an order directing that the Deficiency Reserve be paid into the fund

of the Executive Plan, was heard this day at Osgoode Hall, 130 Queen Street West, Toronto, Ontario.

ON READING the February 18th Order, the Orders of Justice Campbell, dated July 20, 2009 and October 27, 2009, the Handwritten Endorsement of Justice Campbell, dated July 20, 2009, the Timetable of Justice Campbell dated July 27, 2009, the Orders of Justice Morawetz dated April 3, 2009, April 8, 2009, May 12, 2009, June 12, 2009 and July 2, 2009, the Amended and Restated Initial Order of Justice Morawetz, dated June 12, 2009, the Endorsements of Justice Morawetz dated April 17, 2009 and June 15, 2009, the Handwritten Endorsement of Justice Morawetz, dated July 2, 2009, the Reasons for Decision of Justice Campbell, dated February 18, 2010, the Affidavits of Keith Carruthers, sworn June 23, 2009 and August 15, 2009 (with exhibits thereto), the Affidavit of Andrea McKinnon, sworn July 17, 2009 (with exhibits thereto), the Affidavit of Max Degen, sworn August 6, 2009, the Affidavit of Mari Trainor, sworn September 3, 2009 (with exhibits thereto), the Affidavit of Jenny Correia, sworn March 19, 2010 (with exhibits thereto), the Affidavit of Keith Cooper, sworn August 24, 2009 (with exhibits thereto), the Affidavit of Bob Kavanaugh, sworn August 12, 2009 (with exhibits thereto), the Affidavit of Jalo Edwards, sworn November 19, 2010 (with exhibits thereto), the Affidavit of Demetrios Yiokaris, sworn November 19, 2010, the Cross-Examination Transcript of Keith Cooper, dated August 26, 2009 (with exhibits thereto), the Unanimous Shareholder Declaration, dated August 12, 2009, the Certificate respecting Evidence of the Appellant Former Executives, dated June 1, 2010, the Tenth Report of the Monitor, dated October 21, 2009, the Pre-Filing Report to Court submitted by the proposed Monitor, FTI Consulting Canada ULC, on April 3, 2009, the facta and briefs of authorities filed on behalf of the parties, and on hearing the submissions of counsel for the parties and the intervenors to this appeal, and reasons (the "OCA Reasons") being reserved until this day:

1. **THIS COURT ORDERS** that all capitalized terms not otherwise defined in this Order shall have the meanings ascribed to them in the OCA Reasons.

2. **THIS COURT ORDERS** that the Appeal is hereby allowed.

3. **THIS COURT DECLARES** that the claim of the Former Executives takes priority over the claim asserted by Indalex Holding Corp., Indalex Finance and their U.S. based affiliates and Sun Indalex Finance, LLC.

4. **THIS COURT ORDERS** that the Monitor pay from the Deficiency Reserve fund into the Executive Plan an amount sufficient to satisfy the Deficiency, and in the event that the Deficiency Reserve is insufficient to satisfy the Deficiency, the parties may return to this Court for direction on that matter.

5. **THIS COURT ORDERS** that ● pay costs of the within appeal to ● in the fixed amount of $●, both awards inclusive of disbursements and applicable taxes.

Registrar

THIS ORDER BEARS INTEREST at the rate of 3% per year commencing on April 7, 2011.

Court of Appeal File No.: C52187

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/Respondents

DRAFT

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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TAB 4

S.C.C. File No.
(C52187 & C52346)

IN THE SUPREME COURT OF CANADA
(APPLICATION FOR LEAVE TO APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

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

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

B E T W E E N :

SUN INDALEX FINANCE, LLC

APPLICANT
(Respondent)

- and -

UNITED STEELWORKERS, 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, FRED GRANVILLE, GEORGE L. MILLER, THE CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATES OF THE US INDALEX DEBTORS, and THE MONITOR, FTI CONSULTING CANADA ULC

RESPONDENTS
(Appellants/Respondents)

- and -

MORNEAU SOBECO LIMITED PARTNERSHIP and THE SUPERINTENDENT OF FINANCIAL SERVICES

INTERVENERS
(Interveners)

MEMORANDUM OF ARGUMENT OF THE APPLICANT, SUN INDALEX FINANCE, LLC

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TABLE OF CONTENTS

PART I – THE FACTS

1. Overview

1. The *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"), together with the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 ("BIA"), form Parliament's integrated national insolvency regime.[1] While the BIA provides for the piecemeal liquidation of a debtor's assets, the CCAA encourages restructurings, including the sale of a business as a going concern, to avoid the devastating consequences of bankruptcy.[2] Insolvent companies restructuring under the CCAA often need "debtor in possession" ("DIP") financing, which involves fresh access to credit to allow the debtor to continue to operate. A DIP lender will only advance such credit on the basis that repayment will be secured by a court-ordered "super-priority" charge ranking above all claims against the debtor (subject to charges for CCAA process administrative expenses like Monitor's fees).[3] Without this super-priority an insolvent debtor would not have access to credit as it is, by definition, not credit-worthy. The consistent practice has been to provide that CCAA court-ordered DIP charges rank before any trusts, statutory or otherwise.

2. This case involves a contest for priority between a CCAA Court ordered super-priority DIP charge and members of two pension plans whose claims did not concern unpaid employer contributions, as there were none, but rather, who claimed priority for the "solvency deficiency" that might occur when the plans were wound-up and plan liabilities proved greater than their assets. Provincial laws protect pensioners by creating deemed trusts, but prior to the case at bar, courts in Ontario had interpreted such deemed trusts to be limited to unpaid contributions and not to extend to a solvency deficiency that might become a liability of the employer after a pension plan is wound up. Moreover, deemed trusts, whatever their extent, have clearly been found to be

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[1] *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 at para. 15 ("*Century Services*"), Book of Authorities of Sun Indalex Finance, LLC ("Authorities"), Tab 1

[2] *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 at paras. 50 and 117 ("*ABCP*"), Authorities, Tab 2; *Nortel Networks Corp., Re*, 2009 ONCA 833 at para. 46, Authorities, Tab 3

[3] *Century Services, supra* at para. 62, Authorities, Tab 1; Reasons of the Court of Appeal for Ontario, dated April 7, 2011 at paras. 51 and 176 ("Appeal Reasons"), Application for Leave to Appeal of Sun Indalex Finance, LLC ("Application Record"), Vol. I, Tab 3(B), pp. 28 and 44

ineffective in bankruptcy.[4] Moreover, Parliament has recently legislated to provide only limited protections for pensioners in bankruptcy that does not extend to providing special priority protection to pension plan solvency or wind-up deficits.

> Under this new legislation, the "normal cost" of plans – that is, arrears of current contributions as defined by federal regulations – is to be accorded priority over other claims under the BIA, **although unfunded liabilities and solvency deficiencies are not.**[5]

3. The Commercial List judge decided the priority contest in favour of the super-priority DIP charge ("DIP Charge"). He followed established jurisprudence giving effect to the DIP Charge and also held that pensioners had no deemed trust claims for solvency deficiencies. He held it was therefore unnecessary for the debtors to assign themselves into bankruptcy, which would have defeated any deemed trust found to exist.

4. The Court of Appeal reversed the Commercial List judge's priority decision. It held that a deemed trust applies not only to unpaid contributions but also to any future solvency deficiency. It further held that an insolvent employer owes a fiduciary duty to plan members which was breached when the employer obtained (by Court Order) a DIP loan secured by the DIP Charge and sold assets (by Court Order) without paying additional funds to the pensions. The remedy imposed for those breaches was a constructive trust over the proceeds of sale even in the absence of any evidence that the pensioners were harmed or that additional funds for the pension plans would have been available from a DIP lender or purchasers of assets. It held that the pensioners' deemed trust and constructive trust had priority over the DIP Charge notwithstanding it was stated to have priority over statutory and other trusts. Finally, it held that a CCAA debtor should not be allowed to assign itself into bankruptcy and be subject to Parliament's chosen priority regime where to do so would defeat pensioners' claims.[6]

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[4] *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 at 32, Authorities, Tab 4; *Ivaco Inc., Re* (2006), 83 O.R. (3d) 108 at para. 69 (C.A.), leave to appeal to S.C.C. granted, (2007), 370 N.R. 395 (note) (S.C.C.) ("*Ivaco*"), Authorities, Tab 5

[5] Ontario, *Expert Commission of Pensions, A Fine Balance: Safe Pensions, Affordable Plans, Fair Rules* (Toronto; Queen's Printer for Ontario, 2008) at s. 6.3.2 (emphasis added) (Commissioner: H.W. Arthurs) ("Arthurs Report"), Authorities, Tab 6 (see also *Wage Earner Protection Program Act*, S.C. 2005, c. 47)

[6] Appeal Reasons at paras. 101, 116, 132, 139, 176-80, 183 and 205, Application Record, Vol. I, Tab 3(B)

5. The Court of Appeal's decision departs from previous authority and creates substantial uncertainty in the law. Lower courts, employers, lenders, the legal community, and pension plan members and administrators require clarification and guidance from this Honourable Court on the questions in issue, which are national in scope. Pension legislation imposing deemed trusts and placing fiduciary duties on plan administrators exists in every province except Prince Edward Island.[7] How that legislation interacts with the CCAA, a federal statute, in the context of restructuring insolvent companies is an issue throughout Canada. In light of the Court of Appeal's decision in this case, there are now competing appellate decisions on the issues – including *Ivaco Inc.* ("*Ivaco*"), a case in which leave to appeal to this Court was granted but which settled prior to the hearing of the appeal. The decision of the Court of Appeal creates uncertainty about the scope and reach of this Court's decision in *Ted Leroy Trucking [Century Services] Ltd.* ("*Century Services*"), which held that priorities in CCAA proceedings are informed by BIA priorities.[8]

6. In an Affidavit delivered in support of the companion application for leave to appeal brought by the Monitor on behalf of the CCAA Debtors, the President of the Insolvency Institute of Canada (the "IIC") has sworn that the IIC is of the view that for reasons expanded upon in the Affidavit, this case has potentially far-reaching and profound consequences in the areas of: (a) credit granting and risk assessment, both within restructuring proceedings and in the ordinary course of lending in Canada; (b) practice and procedures to be used in insolvency and restructuring matters; and (c) priorities among creditors generally.[9]

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[7] *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32 (2nd Supp.), s. 8(1); *Employment Pension Plans Act*, R.S.A. 2000, c. E-8, ss. 51(3) and 52; *Pension Benefits Act*, R.S.N.S. 1989, c. 340, s. 46(4)-(5); *Pension Benefits Act*, S.N.B. 1987, c. P-5.1, s. 51(3) and (5); *Pension Benefits Act, 1997*, S.N.L. 1996, c. P-4.01, s. 32(3)-(4); *Pension Benefits Standards Act*, R.S.B.C. 1996, c. 352, s. 43.1; *Supplemental Pension Plans Act*, R.S.Q., c. R-15.1, s. 49; *The Pension Benefits Act*, C.C.S.M. c. P-32, s. 28(3); *Pension Benefits Act, 1992*, S.S. 1992, c. P-6.001, s. 43(3)

[8] *Ivaco, supra*, Authorities, Tab 5; *Century Services, supra*, at paras. 23-24, Authorities, Tab 1

[9] Affidavit of Jay Swartz sworn June 3, 2011, at paras. 2 and 13, Application Record of the Monitor on behalf of the CCAA Debtors

2. The Facts

A. Insolvency Proceedings of Indalex

7. On April 3, 2009, Indalex Limited and related companies ("Indalex" or the "CCAA Debtors") were granted CCAA protection on the grounds that they were insolvent and wished to restructure, and FTI Consulting Canada ULC was appointed as Monitor Several weeks previously, Indalex's parent company and certain of its U.S. affiliates ("Indalex US" or the "US Debtors") had obtained bankruptcy protection in the United States.[10]

8. On April 8, 2009, an Amended and Restated Initial Order (the "Initial Order") was granted, which authorized the CCAA Debtors to borrow funds (the "DIP Loan") from a syndicate of banks (the "DIP Lenders") who had also agreed to lend to the US Debtors. The Initial Order provides, as required by the terms of the DIP Loan, that the DIP Loan is secured by the DIP Charge that has priority over "all other security interests, **trusts**, liens, charges and encumbrances, **statutory or otherwise**". The DIP Lenders also required that the Canadian DIP Loan be guaranteed by the US Debtors and the US DIP loan be guaranteed by the CCAA Debtors. The United Steelworkers Union ("USW") was served with notice of this motion and did not object to the DIP Charge being granted.[11]

9. There was substantial evidence before the Court on April 8, 2009 that the DIP Loan was required because Indalex was "running out of cash" and "facing an immediate liquidity crisis". The status of Indalex's pension plans was fully disclosed to the Court.[12] The Monitor reported to the Court:

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[10] Appeal Reasons at paras. 7-8, Application Record, Vol. I, Tab 3(B), p. 24

[11] Amended and Restated Initial Order dated April 8, 2009 at para. 45 (emphasis added) ("Initial Order"), Application Record, Vol. II, Tab 5(E), p. 363; Appeal Reasons at paras. 2, 9-10 and 53, Application Record, Vol. I, Tab 3(B), pp. 24 and 28; Affidavit of Keith Cooper sworn August 24, 2009 at paras. 7 and 12 ("Cooper Affidavit"), Application Record, Vol. II, Tab 5(M), pp. 411-12

[12] Affidavit of Timothy R.J. Stubbs sworn April 3, 2009 at paras. 19, 23-25, 59-62, 66-67 and 77 ("Stubbs Affidavit") and Exhibit "H" thereto (Projected Cash Flow, which shows no provision for payment of pension deficits), Application Record, Vol. II, Tab 5(A), pp. 200-02, 212-15, 219 and 221; Affidavit of Patrick Lawlor sworn April 8, 2009 at paras. 25-29, 33 and 42 ("Lawlor Affidavit") and Exhibit "D" thereto (DIP Credit Agreement dated as of April 8, 2009) at ss. 2.21(b), 4.01(n) and (o), 5.02(b) and (g) and 5.04, Application Record, Vol. II, Tab 5(B), pp. 229-32, 235, 308, 319-20 and 323-25; Endorsement of Morawetz J. dated April 8, 2009 at paras. 7-9, Application Record, Vol. II, Tab 5(D), pp. 343-44

> If the [CCAA Debtors'] request for approval of the DIP Agreement is denied, the [CCAA Debtors] will be unable to continue in operations, most likely resulting in the forced liquidation of the assets to **the detriment of creditors, employees, suppliers and customers.**[13]

10. It is clear from a review of the terms of the Initial Order, the proposed DIP Loan and the CCAA Debtors' proposed cash flow forecasts as filed with the Court, that the CCAA Debtors were contemplating and were ordered by Morawetz J. to pay only normal contributions to the pension plans as they came due during the CCAA proceedings. The Initial Order expressly stayed and prohibited the CCAA Debtors from making payment towards other amounts owing as at the date of the Initial Order.[14]

11. On June 12, 2009, Indalex brought a motion to increase the DIP Loan because it urgently needed funds to meet ongoing expenses to continue the restructuring. The Court found urgency established. Counsel for the USW was served and did not object to the order sought. Counsel to certain retirees who were members of Indalex's Executive Plan (defined below) (the "Retirees") had been served in the abridged time available, sought to reserve rights with respect to the priority of further advances sought under the DIP Loan, but the Court refused to reserve rights because they were inconsistent with the nature of a DIP Loan and the priority of the DIP Charge and those requests were dropped.[15]

12. Neither the Initial Order nor the Order increasing the DIP Loan was appealed. Although the Initial Order provided that it could be varied on further application to the Court, it expressly provided that the super-priority for amounts advanced under the DIP Loan could not be affected by such a "come-back" motion:

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[13] First Report to the Court Submitted by FTI Consulting Canada ULC in its capacity as Monitor dated April 8, 2009 at para. 35 (emphasis added), Application Record, Vol. II, Tab 5(C), p. 337

[14] Exhibit "D" to the Lawlor Affidavit at paras. 5.02(g) and (h), 5.04 and 5.08 (which limited the use of DIP funds to permitted expenses), Application Record, Vol. II, Tab 5(B), pp. 324-26; Exhibit "H" to the Stubbs Affidavit (which shows small proposed payments toward "benefits" but nothing approaching pre-filing deficit amounts), Application Record, Vol. II, Tab 5(A), p. 221; Initial Order at paras. 7(a), 9(b) and 11(a), Application Record, Vol. II, Tab 5(E), pp. 349-51

[15] Fourth Report to the Court Submitted by FTI Consulting Canada ULC in its capacity as Monitor dated June 11, 2009 at paras. 18, 23 and 25, Application Record, Vol. II, Tab 5(F), pp. 373-75; Endorsement of Morawetz J. dated June 15, 2009 at paras. 6-14, Application Record, Vol. II, Tab 5(H), pp. 383-84

> 56 THIS COURT ORDERS that any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days notice, if any, as this Court may order; **provided however, the DIP Agent and the DIP Lenders shall be entitled to rely on this Order as issued for all advances made under the DIP Credit Agreement up to and including the date this Order may be varied or amended.**[16]

B. Sale of Canadian and U.S. Business

13. This CCAA proceeding was a "liquidating CCAA" involving a sale of the CCAA Debtors' business as a going concern (rather than shutting down and selling its plants in bankruptcy). The CCAA Court was satisfied that a going concern sale could maximize recovery for creditors, preserve value for suppliers and customers of the ongoing business and save the jobs of many of the CCAA Debtors' 950 employees.[17]

14. Indalex and Indalex US sold substantially all of their assets together in a going concern transaction that was approved at a joint hearing of the US Bankruptcy Court and by Order of the Ontario Court on July 20, 2009 (the "Approval and Vesting Order"). The purchaser did not assume pension liabilities. The Approval and Vesting Order provided that, to the extent that the Canadian DIP Loan was satisfied by the US Debtors under their guarantee, the US Debtors would be subrogated to the rights of the DIP Lenders under the DIP Charge. The Approval and Vesting Order was not appealed.[18]

15. Canadian sale proceeds were insufficient to re-pay the Canadian DIP Loan in full. Indalex US therefore paid US$10,751,247.22 under its guarantee to the DIP Lender and pursuant to the Approval and Vesting Order was subrogated to the DIP Charge for that amount. The Applicant herein, Sun Indalex Finance, LLC ("Sun"), had provided a secured loan to Indalex US well before any insolvency filings. It is also a secured creditor of the CCAA Debtors. In paragraph 198 of its decision, the Court of Appeal recognized Sun as "the principal secured

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[16] Initial Order at para. 56 (emphasis added), Application Record, Vol. II, Tab 5(E), p. 366

[17] Reasons for Decision of Campbell J. dated February 18, 2010 at para. 13 ("Motion Reasons"), Application Record, Vol. I, Tab 3(A), p. 15

[18] Approval and Vesting Order dated July 20, 2009 at para. 14 ("Approval and Vesting Order"), Application Record, Vol. II, Tab 5(J), pp. 395-96

creditor of [the US Debtors]" and that Sun asserted the DIP Charge under the Initial Order and the subrogation provisions of the Approval and Vesting Order. The US$10.75 million paid by the US Debtors represented proceeds that would otherwise be available for Sun. Sun is directly prejudiced as secured creditor of the CCAA Debtors and of the US Debtors if the pensioners' claims are recognized as having priority.[19]

C. Deemed Trust Allegations for the Pension Plans

16. The Retirees asserted a deemed trust claim for their pension plan (the "Executive Plan") and the USW asserted a deemed trust claim it on behalf of its members of the Indalex pension plan for salaried workers (the "Salaried Plan" and together with the Executive Plan, the "Plans").

17. Prior to the CCAA proceedings, the Salaried Plan was being wound-up with an effective wind-up date of December 31, 2006. Both Courts below found that the CCAA Debtors had paid all regular or current service and special payment contributions to the Salaried Plan that were due prior to the effective date of the wind-up and to the date of the hearing before the Commercial List judge.[20]

18. As of the hearing before the Commercial List judge, the Executive Plan had not been wound-up. As with the Salaried Plan, Indalex had made all required contributions to the Executive Plan to that date, including all current service and special payments.[21]

19. The amount of $3.2 million which the Retirees sought to be subject to a deemed trust as a solvency deficiency for the Executive Plan was a "rough estimate" by Morneau Sobeco, now the Administrator of the Executive Plan, of the wind-up deficit that might exist in the Executive Plan if and when a wind-up is completed. The estimate was subject to a number of caveats and

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[19] Fourteenth Report to the Court Submitted by FTI Consulting Canada ULC in its capacity as Monitor dated January 20, 2011 at para. 17, Application Record, Vol. II, Tab 5(N), pp. 423; Cooper Affidavit at paras. 23-25, Application Record, Vol. II, Tab 5(M), p. 415; Approval and Vesting Order at para. 14, Application Record, Vol. II, Tab 5(J), pp. 395-96

[20] Appeal Reasons at para. 33, Application Record, Vol. I, Tab 3(B), p. 26; Motion Reasons at para. 22, Application Record, Vol. I, Tab 3(A), p. 16

[21] Appeal Reasons at para. 39, Application Record, Vol. I, Tab 3(B), p. 27; Motion Reasons at para. 23, Application Record, Vol. I, Tab 3(A), pp. 16-17

qualifications. The actual funded status of the Executive Plan on a wind-up can only be determined by an actuarial valuation performed months or years after such wind-up occurs. Even the wind-up liability of the Salaried Plan, which started its winding-up process prior to the CCAA proceeding, was not finally known at the date of the hearings below.[22]

D. Motions Below

20. By August 28, 2009, all that remained of the CCAA Debtors was a cash pool of approximately $16 million held by the Monitor. The Retirees and the USW brought separate motions asserting deemed trust claims. The CCAA Debtors responded and brought a motion to file assignments in bankruptcy.

21. Campbell J. dismissed all three motions. With respect to the Salaried Plan, he held that no deemed trust arose as no contributions remained due or accruing due to the Salaried Plan. With respect to the Executive Plan, he held that no deemed trust arose as the Executive Plan had not been wound-up, all required contributions had been made, and no amounts remained due or or owing to it. In light of these findings, he concluded that it was unnecessary to deal with the request for a bankruptcy of the CCAA Debtors at that time.[23]

E. The Court of Appeal Decision

22. The Court of Appeal for Ontario allowed the Respondents' appeals. It interpreted s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P-8 (the "PBA") as creating deemed trusts for solvency and wind-up deficiencies. It held that Indalex breached its fiduciary obligations as administrator of the Plans during the CCAA proceedings, that Indalex wore "two hats" and its plan administrator duties conflicted with its corporate duties when it sought the DIP Loan with the DIP Charge and sold its assets all pursuant to Court Orders. The Court did not find that any

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[22] Affidavit of Bob Kavanaugh sworn August 12, 2009 at para. 18 (the "Kavanaugh Affidavit"), Application Record, Vol. II, Tab 5(K), p. 401; Letter from Morneau Sobeco dated July 16, 2009, being Exhibit "G" to the Affidavit of Andrea McKinnon sworn July 17, 2009, Application Record, Vol. II, Tab 5(I), pp. 386-89

[23] Motion Reasons at paras. 23-24, 49-50 and 54-56, Application Record, Vol. I, Tab 3(A), pp. 16-17 and 21-22

of these events prejudiced the pensioners in the case or that funds for them could have been available in a DIP Loan or sale.[24]

23. It also held the members of the Salaried Plan were entitled to be paid from the funds being held by the Monitor pursuant to a deemed trust, even though the DIP Loan granted a super-priority for the DIP Charge that expressly trumped trusts "statutory or otherwise". It held that the doctrine of paramountcy was not "invoked" when the DIP Charge was granted and therefore the provincial deemed trust continued to apply upon the distribution of the proceeds of the liquidation of Indalex.[25]

24. Regarding both Plans, the Court of Appeal held that the breaches of fiduciary duty by the CCAA Debtors also permitted the Respondents to recover in priority to Sun. The Court of Appeal held that it would not be unjust to impose a constructive trust for the Respondents' benefits, so as to deny the US Debtors and their creditors, including Sun, any benefits of the CCAA Debtors' breaches of fiduciary duty, despite the absence of any finding that the US Debtors or Sun in particular breached any fiduciary obligation or that the pensioners suffered any losses thereby.[26]

PART II – QUESTIONS IN ISSUE

25. Sun submits that the following are issues that warrant review by the Supreme Court of Canada under s. 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26:

> 1. Whether the Court of Appeal for Ontario erred in holding that s. 57(4) of the PBA provides a deemed trust for solvency deficiencies or unfunded liabilities;
>
> 2. Whether the Court of Appeal erred in holding that a CCAA debtor is a fiduciary to pensioners when making decisions to borrow money under a DIP loan and to sell its assets, both pursuant to Court Orders, and that a constructive trust with super-priority can be granted as a remedy for alleged breaches of fiduciary

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[24] Appeal Reasons at paras. 101, 109, 116, 130 and 139-40, Application Record, Vol. I, Tab 3(B), pp. 34-39

[25] Appeal Reasons at paras. 175-79, Application Record, Vol. I, Tab 3(B), pp. 43-44

[26] Appeal Reasons at paras. 199 and 204-05, Application Record, Vol. I, Tab 3(B), pp. 47-48

duties in liquidating CCAA proceedings to avoid the application of federal bankruptcy priorities;

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

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

PART III – ARGUMENT

ISSUE #1: ARE THERE DEEMED TRUSTS FOR SOLVENCY DEFICITS UNDER THE PBA

26. At paragraph 101 of its reasons, the Court of Appeal held that s. 57(4) of the PBA provides a deemed trust for amounts that an employer may owe on the wind-up of a pension plan rather than just for arrears of contributions that remained outstanding or that had accrued up to the date of the commencement of the winding-up. This represents the first time in Canada that a wind-up or solvency deficit has been held to give rise to a deemed trust under provincial pension legislation. This holding is inconsistent with prior authority and is highly problematic, as it fails to accord with the language of the PBA read in light of its context and the intention of the Legislature.

27. While a pension plan is ongoing, an employer generally has the obligation to make two types of contributions. The first, current service or "normal cost" contributions are payments towards benefits that are accruing to members as a result of their ongoing employment and must be made in monthly instalments within 30 days after the month to which they relate.[27] The second type of contributions are special payments. A plan administrator must file actuarial

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[27] R.R.O. 1990, Reg. 909, s. 4(4)3

reports every three years valuing the plan on both a "going concern" basis (where it is assumed that the plan will continue to operate indefinitely) and a "solvency" basis (where it is assumed that the plan will be terminated or wound-up on the date of the valuation). Where a report concludes that the plan has either a "going concern deficiency" or a "solvency deficiency", the employer is generally required to make additional "special" monthly contributions over a 15 or five-year period, respectively. However, there is no obligation on the employer to pay the "going concern deficiency" or the "solvency deficiency". They are not amounts due or that accrue due to the plan by the employer. They are notional actuarial or accounting inputs into the calculation of the required monthly special payment contributions as determined periodically in actuarial reports. As future actuarial reports are filed, they may identify changes to the value of the plan's assets or liabilities since the last filed report, and the amount of future monthly contributions may change.[28]

28. The requirement to pay contributions is to be distinguished from the liability an employer has, after a plan is wound-up, to pay any deficiency in the proceeds of the assets of the plan to meet the liabilities of the plan determined under s. 75 of the PBA. That requirement is not called a contribution in the PBA, and is not found in ss. 55 to 62 under the heading "Contributions".[29]

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

30. Subsection 57(3) of the PBA provides a deemed trust for pension contributions that had become due but were not paid into the plan. There were clearly none in this case. Subsection 57(4) creates a deemed trust for contributions that have accrued to the date of wind-up but are not yet due at that date. As interpreted in the previous case law, this subsection applies to any contributions that had accrued on a daily basis under s. 58 of the PBA from the date of the last contribution payment to the date of wind-up (because the next monthly payment date had not occurred as at the date of the wind-up). However, the deemed trust does not apply

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[28] R.R.O. 1990, Reg. 909, ss. 4(4)5, 5(1(b) and 5(1)(e)

[29] PBA, ss. 55-62

to the wind-up liability, as that liability only arises under s. 75(1)(b) of the PBA when the wind-up of a plan has taken place.[30]

31. *Usarco* held that the deemed trust created under the predecessor of s. 57(4) of the PBA is limited to the outstanding pension plan contributions that accrued during the period between the date of the last monthly contribution and the date of the wind-up. The deemed trust provisions were held to not apply to the wind-up liability under what is now s. 75(1) of the PBA.[31] The decision in *Usarco* was commented upon positively by a unanimous panel of the Court of Appeal in *Ivaco* although it did not have to finally decide the issue in that case:

> 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*, Farley J. said that the equivalent legislation then in force under the *Pensions Benefits Act, 1987* referred only to unpaid contributions, not to wind-up liabilities. I think that the statement in *Usarco Ltd.* is correct, but I do not need to resolve this issue on this appeal.[32]

32. However, in the case at bar, the Court of Appeal, at paragraph 101 of its decision, held that all liabilities that may become due upon or after a wind-up are "contributions accrued to the date of the wind up" under s. 57(4). Not only is this contrary to the wording of s. 57(4) as interpreted by the cases, it is problematic as the liability payable under s. 75(1)(b) after wind-up is not a contribution and it certainly was not accrued "to" the date of the wind-up. This Honourable Court held in *Ontario Hydro-Electric Power Commission v. Albright* that "accrued" means "completely constituted".[33] Wind-up liabilities under s. 75(1)(b) are not completely constituted until years after the date of the wind-up as the facts in this case demonstrate.

33. The absence of any deemed trust in respect of a wind-up liability or solvency deficiency under the PBA and the lack of protection of such amounts in bankruptcy have been recognized by numerous commentators including in the authoritative Arthurs Report that is quoted in

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[30] PBA, ss. 57(3)-(4), 58 and 75(1)(b); *Toronto-Dominion Bank v. Usarco Ltd.* (1991), 42 E.T.R. 235 (Ont. Gen. Div.) ("*Usarco*"), Authorities, Tab 7; *Ivaco, supra*, Authorities, Tab 5

[31] *Usarco, supra* at paras. 23-26, Authorities, Tab 7; PBA, s. 75(1)(b)

[32] *Ivaco, supra*, at para. 44 (citations omitted), Authorities, Tab 7

[33] *Ontario Hydro-Electric Power Commission v. Albright* (1922), 64 S.C.R. 306 at 312, Authorities, Tab 8

paragraph 2 above. The Ontario Legislature amended the PBA to take into account many of the recommendations contained in the Arthurs Report, but made no changes to s. 57(4).[34] Subsequent to *Ivaco*, amendments were made by Parliament to the CCAA and BIA. Parliament specifically chose to provide Canadian pensioners with a special priority for only going concern normal cost contributions; not for special payment contributions described in paragraph 27 above; and certainly not for solvency deficits.[35]

34. To the extent the Court of Appeal's decision is an effort to enhance protection for pensioners in insolvencies beyond what the Legislature and Parliament have done, it is problematic. Substantial efforts have been made to study, and amendments have been made to Canada's insolvency legislation in respect of pensions over the past decade. In *Ivaco*, the Court of Appeal for Ontario held that, if the rights of pension claimants are to be given greater priority, Parliament, not the Courts, must do so.[36]

ISSUE #2: <u>IS A CCAA DEBTOR A FIDUCIARY TO PENSIONERS IN MAKING DECISIONS TO BORROW MONEY UNDER A DIP LOAN AND TO SELL ITS ASSETS UNDER COURT ORDERS, AND SHOULD A CONSTRUCTIVE TRUST WITH SUPER-PRIORITY BE GRANTED AS A REMEDY TO AVOID THE FEDERAL SCHEME OF PRIORITIES</u>

35. At paragraph 139 of its decision, the Court of Appeal held that Indalex breached its fiduciary duty as administrator of the Plans by borrowing under the DIP Loan with the DIP Lenders receiving the DIP Charge and in selling its assets in the manner approved by Court Order, all without ensuring payments into the Plans. If allowed to stand, this approach will have chilling effects on the efforts by insolvent corporations to restructure.

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[34] Bill 120, *An Act to amend the Pension Benefits Act and the Pension Benefits Amendment Act, 2010*, 2d Sess., 39th Leg., Ontario, 2010 (assented to 8 December 2010), S.O. 2010, c. 24; Bill 236, An Act to amend the *Pension Benefits Act*, 2d Sess., 39th Leg., Ontario, 2010 (assented to 18 May 2010), S.O. 2010, c. 9

[35] BIA, ss. 60(1.5), 81.5 and 81.6; CCAA, s. 6(6); Ari N. Kaplan, *Pension Law* (Toronto: Irwin Law, 2006) at 396, Authorities, Tab 9; Greg Winfield, "Pension Management in Insolvency and Restructuring: What is at Stake?" (Paper presented to Insight 3rd Edition Commercial Insolvency & Restructuring, September 2005) at 55, Authorities, Tab 10

[36] *Ivaco, supra* at para. 69, Authorities, Tab 5

36. An employer functions as administrator of a pension plan under the PBA when it manages or administers the pension plan. An employer cannot readily resign as administrator under the PBA.[37] An administrator owes fiduciary duties to the members of the plan and cannot favour its self-interest or the interests of anyone other than the plan's beneficiaries. However, it has been recognized that in making corporate decisions that are not the administration of the plan, the employer is not functioning as administrator nor is it bound by fiduciary duties to act solely in the interests of the members of the plan. Were that not the case, a corporation could not advance its interests or those of any of its other stakeholders.[38]

37. In paragraph 132 of its decision, the Court of Appeal held that whenever an employer makes decisions that have "the potential to affect the Plans' beneficiaries' rights" it takes those decisions **both** as employer and as administrator/fiduciary. Thus, the Court of Appeal held that in exercising business judgment to borrow DIP funds to stave off a corporate liquidity crisis and to sell corporate assets to save jobs and maximize value for all stakeholders, the boards of directors of the CCAA Debtors were bound by fiduciary duties to pensioners to somehow inject funds into the Plans regardless of lawful priorities or subsisting Court Orders; even though no payments were then due to the Plans, and despite the fact that the DIP funds were advanced to pay for new goods, services and payroll that the CCAA Debtors needed to stay in operation and prevent a catastrophic failure.

38. The determination that an employer is a fiduciary when not acting to administer a pension plan but rather in making a business decision to restructure conflicts with the holdings of this Honourable Court in cases such as *People's Department Stores Ltd. (1992) Inc.* and *BCE Inc.*, which both provide that directors owe a duty to the corporation to act in its best interests, even where there are multiple stakeholders with diverging interests.[39] Such a determination is also contrary to the purpose of the CCAA to facilitate restructurings, because it will impair or impede

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[37] PBA, ss. 8 and 71

[38] *Imperial Oil Ltd. v. Ontario (Superintendent of Pensions)* (1995), 18 C.C.P.B. 198 at paras. 29-30 and 33 (Ont. Pension Comm.), Authorities, Tab 11

[39] *People's Department Stores Ltd. (1992) Inc., Re*, 2004 SCC 68 at paras. 35, 42 and 46-47, Authorities, Tab 12; *BCE Inc., Re*, 2008 SCC 69 at paras. 83-84 and 87-88, Authorities, Tab 13

debtors' restructuring efforts by requiring that the debtors' only or primary focus be on pension plans rather than on the best interests of the corporation and all of its stakeholders.

39. The finding of a breach of fiduciary duty and the imposition of a remedy requires conduct which prejudiced the beneficiary of the duty. In *Hodgkinson v. Simms* this Honourable Court said that relief will not be given if the fiduciary shows there was no prejudice to the beneficiary.[40] Here there was no prejudice and no finding of it in either Court below. The Court of Appeal did not articulate how the pensioners were prejudiced by the advance of funds with the DIP Charge or by the asset sale, as there was no evidence at all that the DIP Lenders would have advanced funds without a super-priority charge – nor that such advances made the pensioners worse off. Without the DIP Loan the same solvency deficiencies would have existed but the company would have failed instead of being sold as a going concern, and creditors and employees would have suffered catastrophic losses. As such, there was no basis for the Court of Appeal to base a remedy that required there to have been prejudice.

40. Had there been no DIP Charge or going concern sale in this case, then on a shutdown and liquidation of Indalex, secured creditors would have suffered greater losses, 950 employees would have lost their jobs, suppliers across the country would have lost a customer, Indalex's customers would have lost their supplier, provinces and towns would have lost rate paying businesses in their communities, **and the pensioners would have been no better off.** The pension deficiencies would not have changed and nothing done or not done by Indalex increased those claims.

41. In cases of breach of fiduciary duty, remedial constructive trusts may be ordered to prevent unjust enrichment in an insolvency setting, but it has been always been understood that there are limits to doing so.[41] In *Barnabe v. Touhey*, the Court of Appeal for Ontario held that a constructive trust should not be imposed for the purpose of avoiding the federal scheme of

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[40] *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 440-41 and 444-45, Authorities, Tab 14

[41] *Canada (Attorney General) v. Confederation Life Insurance Co.* (1995), 24 O.R. (3d) 717 at paras. 209 and 221 (Gen. Div.), aff'd (1997) 32 O.R. (3d) 102 (C.A.), Authorities, Tab 15

distribution.[42] Here the Court of Appeal expressly utilized a constructive trust in favour of pensioners with no deemed trusts so as to grant them recovery "in priority to those entitled under the super-priority charge."[43] Moreover, the Court of Appeal seems to have granted the Retirees more rights and even greater priority than is provided to PBA deemed trusts by the Ontario Legislature under s. 30(7) of the *Personal Property Security Act*, R.S.O. 1990, c. P-10, which limits deemed trust priority to proceeds of the debtors' inventory and accounts. Here, the liquidated assets of the CCAA Debtors included factories, land and plants located in Ontario and in several provinces outside of Ontario. There is no evidence as to whether any, or what proportion of the funds held by the Monitor, were proceeds of inventory or accounts in Ontario as distinct from equipment or land in Ontario or any assets elsewhere in Canada.[44]

42. This case expands fiduciary duties beyond those recognized in prior cases and then imposes remedial constructive trusts in the absence of prejudice to alter and expand priorities. In this case, there was no undertaking of fiduciary responsibility by the board of directors of the CCAA Debtors that in making restructuring decisions it would act solely in the interests of pensioners rather than in the interests of the corporation and all of its stakeholders.[45] The board of directors ought to have been entitled to seek to maximize recovery for creditors under lawful priorities and protect the jobs of employees, customers and suppliers where doing so did not prejudice the claims of pensioners as unsecured creditors. There was no conduct that involved taking of money away from the pensioners or evidence that money that could have been available to the pensioners was diverted.

43. In any event, the insolvency of the CCAA Debtors, the super-priority DIP Charge granted by the CCAA Court, and the provisions of the Initial Order prohibiting preferential payments are juridical bases to prevent a finding of unjust enrichment. A DIP lender (or person subrogated to it) cannot be unjustly enriched by being paid back money advanced to an insolvent company on a

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[42] *Barnabe v. Touhey* (1995), 26 O.R. (3d) 477 at para. 4 (C.A.), Authorities, Tab 16

[43] Appeal Reasons at para. 205, Application Record, Vol. I, Tab 3(B), p. 48

[44] Stubbs Affidavit at para. 19, Application Record, Vol. II, Tab 5(A), pp. 200-01; Approval and Vesting Order at paras. 4-10, Application Record, Vol. II, Tab 5(J), pp. 392-94

[45] *Perez v. Galambos*, 2009 SCC 48 at paras. 77-79, Authorities, Tab 17

super-priority basis in accordance with and in reliance upon Court Orders. The Court of Appeal provided no basis for disentitling Sun from recovering funds which would have been its secured recovery under the terms of a guarantee and super-priority approved by Court Orders made on both sides of the border. The Court of Appeal's decision that a constructive trust could retroactively oust Sun's entitlement to rely upon its Court ordered subrogation right is unprecedented and should be expected to cause foreign Courts and creditors to doubt the reliability of Canadian Court Orders.

44. Finally, the Court of Appeal's determination that the constructive trust did not yield to the bankruptcy law and that the CCAA Debtors could not assign themselves into bankruptcy to distribute the proceeds of their liquidation in accordance with the BIA is a very significant holding. It is not against public policy to distribute funds realized on a liquidation of an insolvent under the priorities in the BIA, the federal statute which governs exactly that. As this Honourable Court stated in *Century Services*: "Source deductions deemed trusts aside, **the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable.**"[46]

ISSUE #3: SUPERSEDING THE DIP LOAN PRIORITY

45. Regardless of the extent of any deemed or constructive trust claims of pensioners, the DIP Loan had a super-priority. The Court of Appeal recognized, in paragraph 176 of its decision, that a CCAA Court could grant a priority to a DIP charge over statutory deemed trusts, but held that here the Order creating the super-priority could be retroactively interpreted or varied so as not to provide such priority. This approach is not supported by any case law, and contradicts both the need for certainty and the basic concept of paramountcy – that provincial law yields whenever there is an express operational conflict with federal law.[47]

46. In paragraph 199 of its decision, the Court of Appeal relied on two facts: that pensioners were not notified that the DIP Loan was granted a specific priority over **their** deemed trusts, and

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[46] *Century Services, supra* at para. 80 (emphasis added), Authorities, Tab 1; *Ivaco, supra* at para. 75, Authorities, Tab 5; *Bank of Nova Scotia v. Huronia Precision Plastics Inc.* (2009), 50 C.B.R. (5th) 58 at para. 19 (Ont. S.C.J.), Authorities, Tab 18

[47] *Canadian Western Bank v. Alberta*, 2007 SCC 22 at para. 71 ("*Canadian Western Bank*"), Authorities, Tab 19

that the CCAA Debtors had filed evidence that they intended to comply with "regulatory deemed trust requirements". The first should have been irrelevant. At the time that the Initial Order was made and contained the super-priority DIP Charge, there was no way to know if the proceedings would be successful or not, and whether the business could be sold to a buyer who would assume the pensions or would pay enough that all creditors could be paid in full. The Court of Appeal seems to require that CCAA debtors think of everyone who might possibly claim a statutory priority at some future date, list them, notify them, and deal with them expressly in the urgency surrounding the application for the Initial Order despite the fact that no conflict might ever arise. Accordingly, the general language that created priority over any deemed trust was appropriate and, as expected by all in the industry, including the Retirees and the Judge at first instance, clearly by its terms intended that the super-priority DIP Charge be operative over deemed or constructive trusts for pensioners. In any event, the USW was notified before the DIP Charge was granted and both the USW and the Retirees were represented when it was increased.

47. The second item was likewise irrelevant. Prior to the Court of Appeal's decision below, deemed trusts did not extend to solvency deficits or wind-up liabilities, so the evidence cannot be read to mean the CCAA Debtors were going to fund such amounts. The DIP Loan documents and Initial Order provided to the contrary as discussed in paragraph 10 above. The CCAA Debtors were merely indicating that they intended to pay pension contributions that came due in the ordinary course and they did so.

48. The Initial Order required payment to the DIP Lenders notwithstanding any trust, statutory or otherwise. If a provincial statutory trust later required payment to someone else, then an operational conflict arose at that time between provincial law and an order made under federal law and such conflict is to be resolved by the doctrine of paramountcy rendering the provincial law inoperative.[48] Denying the DIP Lenders priority in favour of a provincial priority would frustrate the purpose of the CCAA. The retroactive invalidation of orders granting super-priority despite the reliance of creditors, foreign courts and DIP lenders on such Orders

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[48] *ABCP*, *supra* at para. 104, Authorities, Tab 2

represents a new and limited conception of the doctrine of paramountcy at odds with the prior case law.[49]

49. The possibility of a conflict between pensioners' claims and the DIP Charge was recognized by the Court at the time of the Initial Order and in the Endorsement of June 8, 2009 in which Morawetz J. discussed the inappropriateness of parties, including Retirees under the Executive Plan and bondholders, seeking to reserve their rights to challenge the DIP Charge super-priority later. He held that such uncertainty was unhelpful to the process and contrary to the purpose of a DIP Charge within a CCAA proceeding to facilitate a successful restructuring. It was clear that the super-priority was essential at the time the Initial Order and the subsequent DIP increase were granted. An order that grants super-priority over all "trusts" statutory or otherwise is, by definition, anticipating a potential conflict and expressing that the DIP financing will have paramountcy in any event. For the same reasons, the DIP Charge should prevail over any constructive trust. Under the terms of paragraph 56 of the Initial Order and prevailing case law parties cannot challenge the DIP Charge super-priority after DIP funds are actually advanced.[50]

ISSUE #4: THE FEDERAL SCHEME OF PRIORITIES APPLIES TO DISTRIBUTE THE PROCEEDS REALIZED IN A LIQUIDATING CCAA PROCEEDING

50. In *Century Services*, Deschamps J. noted that if the BIA scheme of distribution did not apply to the distribution of the proceeds of the liquidation of a debtor's assets under the CCAA, "strange asymmetry" would defeat the purposes of the CCAA and provide "strong incentive to seek immediate bankruptcy".[51] That is the result if the decision below is allowed to stand; it encourages the race to bankruptcy.

51. In *Century Services* it was held that throughout a liquidating CCAA process federal priorities will apply on the distribution of the proceeds:

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[49] *Canadian Western Bank, supra* at para. 73, Authorities, Tab 19

[50] *Collins & Aikman Automotive Canada Inc., Re* (2007), 37 C.B.R. (5th) 161 at para. 100 and 108-09 (Ont. S.C.J.), Authorities, Tab 20

[51] *Century Services, supra* at paras. 23, 47-48 and 76, Authorities, Tab 1

> Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* **must** control the distribution of the debtor's assets once liquidation is inevitable...The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. **The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*.** Transition to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. **This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.**[52]

52. In paragraph 192 of its decision, the Court of Appeal below sought to distinguish *Century Services* and its prior decision in *Ivaco* that was to the same effect, in part by stating that this proceeding was "successful" unlike *Century Services* and *Ivaco*. But, just like *Ivaco*, this case involved a going concern sale of assets. Recovery in this case is less successful than in *Ivaco*, as unlike that case, here unsecured creditors stand to receive no recovery. But the issue is not whether there has been a subjectively determined "success" for one or more parties, but, rather which statutory scheme applies to the distribution of the pool of cash that is left after the assets of the insolvent debtor have been liquidated. On that issue, this Honourable Court and the Court of Appeal for Ontario have both previously ruled that the federal scheme of priorities must apply; thus the decision below requires review.

53. Sun submits that these are important issues that warrant review by this Honourable Court.

PART IV – ORDER AS TO COSTS

54. Sun seeks costs of this application, and ultimately of the appeal here and throughout the Courts below.

PART V – ORDER SOUGHT

55. Sun respectfully seeks an Order granting it leave to appeal to the Supreme Court of Canada from the decision of the Court of Appeal dated April 7, 2011, with costs.

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[52] *Century Services, supra* at para. 80 (emphasis added), Authorities, Tab 1

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Benjamin Zarnett

Fred Myers

Brian Empey

Counsel to the Applicant, Sun Indalex Finance, LLC

PART VI – TABLE OF AUTHORITIES	
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TAB A

Companies' Creditors Arrangement Act, RSC 1985, c C-36

Current version: in force since Jan 1, 2010

Link to the latest version : http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-36/latest/
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Currency: Last updated from the Justice Laws Web Site on 2011-05-26

Companies' Creditors Arrangement Act

C-36

An Act to facilitate compromises and arrangements between companies and their creditors

SHORT TITLE

Short title

1. This Act may be cited as the *Companies' Creditors Arrangement Act.*

R.S., c. C-25, s. 1.

INTERPRETATION

Definitions

2. (1) In this Act,

"aircraft objects"
« biens aéronautiques »

"aircraft objects" has the same meaning as in subsection 2(1) of the *International Interests in Mobile Equipment (aircraft equipment) Act*;

"bargaining agent"
« agent négociateur »

"bargaining agent" means any trade union that has entered into a collective agreement on behalf of the employees of a company;

"bond"
« obligation »

"bond" includes a debenture, debenture stock or other evidences of indebtedness;

"cash-flow statement"
« état de l'évolution de l'encaisse »

"cash-flow statement", in respect of a company, means the statement referred to in paragraph 10(2)(*a*) indicating the company's projected cash flow;

"claim"
« réclamation »

"claim" means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*;

"collective agreement"
« convention collective »

trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

R.S., c. C-25, s. 5.

Claims against directors — compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(*a*) relate to contractual rights of one or more creditors; or

(*b*) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

1997, c. 12, s. 122.

Compromises to be sanctioned by court

6. (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(*a*) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(*b*) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

Court may order amendment

(2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accord- ance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

Restriction — certain Crown claims

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(*a*) subsection 224(1.2) of the *Income Tax Act*;

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(*c*) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

Restriction — default of remittance to Crown

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

Restriction — employees, etc.

(5) The court may sanction a compromise or an arrangement only if

(*a*) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(*d*) of the *Bankruptcy and Insolvency Act* if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

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

Restriction — pension plan

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

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

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

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

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

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

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

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

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

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

Non-application of subsection (6)

(7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

Payment — equity claims

(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

R.S., 1985, c. C-36, s. 6; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 123; 2004, c. 25, s. 194; 2005, c. 47, s. 126, 2007, c. 36, s. 106; 2009, c. 33, s. 27.

Court may give directions

7. Where an alteration or a modification of any compromise or arrangement is proposed at any time after the court has directed a meeting or meetings to be summoned, the meeting or meetings may be adjourned on such term as to notice and otherwise as the court may direct, and those directions may be given after as well as before adjournment of any meeting or meetings, and the court may in its discretion direct that it is not necessary to adjourn any meeting or to convene any further meeting of any class of creditors or shareholders that in the opinion of the court is not adversely affected by the alteration or modification proposed, and any compromise or arrangement so altered or modified may be sanctioned by the court and have effect under section 6.

Loi sur les arrangements avec les créanciers des compagnies, LRC 1985, c C-36

Version courante : en vigueur depuis le 1 janv. 2010

Arrangements avec les créanciers des compagnies, Loi sur les

C-36

Loi facilitant les transactions et arrangements entre les compagnies et leurs créanciers

TITRE ABRÉGÉ

Titre abrégé

1. *Loi sur les arrangements avec les créanciers des compagnies.*

S.R., ch. C-25, art. 1.

DÉFINITIONS ET APPLICATION

Définitions

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

« accord de transfert de titres pour obtention de crédit »
" *title transfer credit support agreement* "

« accord de transfert de titres pour obtention de crédit » Accord aux termes duquel une compagnie débitrice transfère la propriété d'un bien en vue de garantir le paiement d'une somme ou l'exécution d'une obligation relativement à un contrat financier admissible.

« actionnaire »
" *shareholder* "

« actionnaire » S'agissant d'une compagnie ou d'une fiducie de revenu assujetties à la présente loi, est assimilée à l'actionnaire la personne ayant un intérêt dans cette compagnie ou détenant des parts de cette fiducie.

« administrateur »
" *director* "

« administrateur » S'agissant d'une compagnie autre qu'une fiducie de revenu, toute personne exerçant les fonctions d'administrateur, indépendamment de son titre, et, s'agissant d'une fiducie de revenu, toute personne exerçant les fonctions de fiduciaire, indépendamment de son titre.

« agent négociateur »
" *bargaining agent* "

« agent négociateur » Syndicat ayant conclu une convention collective pour le compte des employés d'une compagnie.

« biens aéronautiques »
" *aircraft objects* "

« biens aéronautiques » S'entend au sens du paragraphe 2(1) de la *Loi sur les garanties internationales portant sur des matériels d'équipement mobiles (matériels d'équipement aéronautiques).*

syndic en matière de faillite ou liquidateur de la compagnie, ordonner que soit convoquée, de la manière qu'il prescrit, une assemblée de ces créanciers ou catégorie de créanciers, et, si le tribunal en décide ainsi, des actionnaires de la compagnie.

S.R., ch. C-25, art. 5.

Transaction — réclamations contre les administrateurs

5.1 (1) La transaction ou l'arrangement visant une compagnie débitrice peut comporter, au profit de ses créanciers, des dispositions relativement à une transaction sur les réclamations contre ses administrateurs qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de celle-ci dont ils peuvent être, ès qualités, responsables en droit.

Restriction

(2) La transaction ne peut toutefois viser des réclamations portant sur des droits contractuels d'un ou de plusieurs créanciers ou fondées sur la fausse représentation ou la conduite injustifiée ou abusive des administrateurs.

Pouvoir du tribunal

(3) Le tribunal peut déclarer qu'une réclamation contre les administrateurs ne peut faire l'objet d'une transaction s'il est convaincu qu'elle ne serait ni juste ni équitable dans les circonstances.

Démission ou destitution des administrateurs

(4) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la compagnie débitrice est réputé un administrateur pour l'application du présent article.

1997, ch. 12, art. 122.

Homologation par le tribunal

6. (1) Si une majorité en nombre représentant les deux tiers en valeur des créanciers ou d'une catégorie de créanciers, selon le cas, — mise à part, sauf ordonnance contraire du tribunal, toute catégorie de créanciers ayant des réclamations relatives à des capitaux propres — présents et votant soit en personne, soit par fondé de pouvoir à l'assemblée ou aux assemblées de créanciers respectivement tenues au titre des articles 4 et 5, acceptent une transaction ou un arrangement, proposé ou modifié à cette ou ces assemblées, la transaction ou l'arrangement peut être homologué par le tribunal et, le cas échéant, lie :

a) tous les créanciers ou la catégorie de créanciers, selon le cas, et tout fiduciaire pour cette catégorie de créanciers, qu'ils soient garantis ou chirographaires, selon le cas, ainsi que la compagnie;

b) dans le cas d'une compagnie qui a fait une cession autorisée ou à l'encontre de laquelle une ordonnance de faillite a été rendue en vertu de la *Loi sur la faillite et l'insolvabilité* ou qui est en voie de liquidation sous le régime de la *Loi sur les liquidations et les restructurations*, le syndic en matière de faillite ou liquidateur et les contributeurs de la compagnie.

Modification des statuts constitutifs

(2) Le tribunal qui homologue une transaction ou un arrangement peut ordonner la modification des statuts constitutifs de la compagnie conformément à ce qui est prévu dans la transaction ou l'arrangement, selon le cas, pourvu que la modification soit légale au regard du droit fédéral ou provincial.

Certaines réclamations de la Couronne

(3) Le tribunal ne peut, sans le consentement de Sa Majesté, homologuer la transaction ou l'arrangement qui ne prévoit pas le paiement intégral à Sa Majesté du chef du Canada ou d'une province, dans les six mois suivant l'homologation, de toutes les sommes qui étaient dues lors de la demande d'ordonnance visée aux articles 11 ou 11.02 et qui pourraient, de par leur nature, faire l'objet d'une demande aux termes d'une des dispositions suivantes :

a) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi ainsi que des intérêts, pénalités ou autres charges afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités ou autres charges afférents, laquelle somme :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale a institué un régime provincial de pensions au sens de ce paragraphe.

Défaut d'effectuer un versement

(4) Lorsqu'une ordonnance comporte une disposition autorisée par l'article 11.09, le tribunal ne peut homologuer la transaction ou l'arrangement si, lors de l'audition de la demande d'homologation, Sa Majesté du chef du Canada ou d'une province le convainc du défaut de la compagnie d'effectuer un versement portant sur une somme visée au paragraphe (3) et qui est devenue exigible après le dépôt de la demande d'ordonnance visée à l'article 11.02.

Restriction — employés, etc.

(5) Le tribunal ne peut homologuer la transaction ou l'arrangement que si, à la fois :

a) la transaction ou l'arrangement prévoit le paiement aux employés actuels et anciens de la compagnie, dès son homologation, de sommes égales ou supérieures, d'une part, à celles qu'ils seraient en droit de recevoir en application de l'alinéa 136(1)*d*) de la *Loi sur la faillite et l'insolvabilité* si la compagnie avait fait faillite à la date à laquelle des procédures ont été introduites sous le régime de la présente loi à son égard et, d'autre part, au montant des gages, salaires, commissions ou autre rémunération pour services fournis entre la date de l'introduction des procédures et celle de l'homologation, y compris les sommes que le voyageur de commerce a régulièrement déboursées dans le cadre de l'exploitation de la compagnie entre ces dates;

b) il est convaincu que la compagnie est en mesure d'effectuer et effectuera les paiements prévus à l'alinéa *a*).

Restriction — régime de pension

(6) Si la compagnie participe à un régime de pension réglementaire institué pour ses employés, le tribunal ne peut homologuer la transaction ou l'arrangement que si, à la fois :

a) la transaction ou l'arrangement prévoit que seront effectués des paiements correspondant au total des sommes ci-après qui n'ont pas été versées au fonds établi dans le cadre du régime de pension :

(i) les sommes qui ont été déduites de la rémunération des employés pour versement au fonds,

(ii) dans le cas d'un régime de pension réglementaire régi par une loi fédérale :

(A) les coûts normaux, au sens du paragraphe 2(1) du *Règlement de 1985 sur les normes de prestation de pension*, que l'employeur est tenu de verser au fonds,

(B) les sommes que l'employeur est tenu de verser au fonds au titre de toute disposition à cotisations déterminées au sens du paragraphe 2(1) de la *Loi de 1985 sur les normes de prestation de pension*,

(iii) dans le cas de tout autre régime de pension réglementaire :

(A) la somme égale aux coûts normaux, au sens du paragraphe 2(1) du *Règlement de 1985 sur les normes de prestation de pension*, que l'employeur serait tenu de verser au fonds si le régime était régi par une loi fédérale,

(B) les sommes que l'employeur serait tenu de verser au fonds au titre de toute disposition à cotisations déterminées au sens du paragraphe 2(1) de la *Loi de 1985 sur les normes de prestation de pension* si le régime était régi par une loi fédérale;

b) il est convaincu que la compagnie est en mesure d'effectuer et effectuera les paiements prévus à l'alinéa *a*).

Non-application du paragraphe (6)

(7) Par dérogation au paragraphe (6), le tribunal peut homologuer la transaction ou l'arrangement qui ne prévoit pas le versement des sommes mentionnées à ce paragraphe s'il est convaincu que les parties en cause ont conclu un accord sur les sommes à verser et que l'autorité administrative responsable du régime de pension a consenti à l'accord.

Paiement d'une réclamation relative à des capitaux propres

(8) Le tribunal ne peut homologuer la transaction ou l'arrangement qui prévoit le paiement d'une réclamation relative à des capitaux propres que si, selon les termes de celle-ci, le paiement intégral de toutes les autres réclamations sera effectué avant le paiement de la réclamation relative à des capitaux propres.

L.R. (1985), ch. C-36, art. 6; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 123; 2004, ch. 25, art. 194; 2005, ch. 47, art. 126, 2007, ch. 36, art. 106; 2009, ch. 33, art. 27.

Le tribunal peut donner des instructions

7. Si une modification d'une transaction ou d'un arrangement est proposée après que le tribunal a ordonné qu'une ou plusieurs assemblées soient convoquées, cette ou ces assemblées peuvent être ajournées aux conditions que peut prescrire le tribunal quant à l'avis et autrement, et ces instructions peuvent être données tant après qu'avant l'ajournement de toute ou toutes assemblées, et le tribunal peut, à sa discrétion, prescrire qu'il ne sera pas nécessaire d'ajourner quelque assemblée ou de convoquer une nouvelle assemblée de toute catégorie de créanciers ou actionnaires qui, selon l'opinion du tribunal, n'est pas défavorablement atteinte par la modification proposée, et une transaction ou un arrangement ainsi modifié peut être homologué par le tribunal et être exécutoire en vertu de l'article 6.

S.R., ch. C-25, art. 7.

Champ d'application de la loi

TAB B

Bankruptcy and Insolvency Act, RSC 1985, c B-3

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Bankruptcy and Insolvency Act

B-3

An Act respecting bankruptcy and insolvency

SHORT TITLE

Short title

1. This Act may be cited as the *Bankruptcy and Insolvency Act*.

R.S., 1985, c. B-3, s. 1; 1992, c. 27, s. 2.

INTERPRETATION

Definitions

2. In this Act,

"affidavit"
« affidavit »

"affidavit" includes statutory declaration and solemn affirmation;

"aircraft objects"
« biens aéronautiques »

"aircraft objects" has the same meaning as in subsection 2(1) of the *International Interests in Mobile Equipment (aircraft equipment) Act*;

"application"
Version anglaise seulement

"application", with respect to a bankruptcy application filed in a court in the Province of Quebec, means a motion;

"assignment"
« cession »

"assignment" means an assignment filed with the official receiver;

"bank"
« banque »

"bank" means

(*a*) every bank and every authorized foreign bank within the meaning of section 2 of the *Bank Act*,

(*b*) every other member of the Canadian Payments Association established by the *Canadian Payments Act*, and

(*c*) every local cooperative credit society, as defined in subsection 2(1) of the Act referred to in paragraph (*b*), that is a member of a central cooperative credit society, as defined in that subsection, that is a member of that Association;

"bankrupt"

(*a*) the insolvent person is deemed to have thereupon made an assignment;

(*b*) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(*b.1*) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(*c*) the trustee shall either

(i) forthwith call a meeting of creditors present at that time, which meeting shall be deemed to be a meeting called under section 102, or

(ii) if no quorum exists for the purpose of subparagraph (i), send notice, within five days after the day the certificate mentioned in paragraph (*b*) is issued, of the meeting of creditors under section 102,

and at either meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

R.S., 1985, c. B-3, s. 57; 1992, c. 27, s. 23; 1997, c. 12, s. 33; 2005, c. 47, s. 38.

Appointment of new trustee

57.1 Where a declaration has been made under subsection 50(12) or 50.4(11), the court may, if it is satisfied that it would be in the best interests of the creditors to do so, appoint a trustee in lieu of the trustee appointed under the notice of intention or proposal that was filed.

1997, c. 12, s. 34.

Application for court approval

58. On acceptance of a proposal by the creditors, the trustee shall

(*a*) within five days after the acceptance, apply to the court for an appointment for a hearing of the application for the court's approval of the proposal;

(*b*) send a notice of the hearing of the application, in the prescribed manner and at least fifteen days before the date of the hearing, to the debtor, to every creditor who has proved a claim, whether secured or unsecured, to the person making the proposal and to the official receiver;

(*c*) forward a copy of the report referred to in paragraph (*d*) to the official receiver at least ten days before the date of the hearing; and

(*d*) at least two days before the date of the hearing, file with the court, in the prescribed form, a report on the proposal.

R.S., 1985, c. B-3, s. 58; 1992, c. 1, s. 20, c. 27, s. 23; 1997, c. 12, s. 35.

Court to hear report of trustee, etc.

59. (1) The court shall, before approving the proposal, hear a report of the trustee in the prescribed form respecting the terms thereof and the conduct of the debtor, and, in addition, shall hear the trustee, the debtor, the person making the proposal, any opposing, objecting or dissenting creditor and such further evidence as the court may require.

Court may refuse to approve the proposal

(2) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.

Reasonable security

(3) Where any of the facts mentioned in section 173 are proved against the debtor, the court shall refuse to approve the proposal unless it provides reasonable security for the payment of not less than fifty cents on the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.

Court may order amendment

(4) If a court approves a proposal, it may order that the debtor's constating instrument be amended in accordance with the proposal to reflect any change that may lawfully be made under federal or provincial law.

R.S., 1985, c. B-3, s. 59; 1997, c. 12, s. 36; 2000, c. 12, s. 10; 2007, c. 36, s. 21.

Priority of claims

60. (1) No proposal shall be approved by the court that does not provide for the payment in priority to other claims of all claims directed to be so paid in the distribution of the property of a debtor and for the payment of all proper fees and expenses of the trustee on and incidental to the proceedings arising out of the proposal or in the bankruptcy.

Certain Crown claims

(1.1) Unless Her Majesty consents, no proposal shall be approved by the court that does not provide for the payment in full to Her Majesty in right of Canada or a province, within six months after court approval of the proposal, of all amounts that were outstanding at the time of the filing of the notice of intention or of the proposal, if no notice of intention was filed, and are of a kind that could be subject to a demand under

(*a*) subsection 224(1.2) of the *Income Tax Act*;

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

Idem

(1.2) No proposal shall be approved by the court if, at the time the court hears the application for approval, Her Majesty in right of Canada or a province satisfies the court that the debtor is in default on any remittance of an amount referred to in subsection (1.1) that became due after the filing

(*a*) of the notice of intention; or

(*b*) of the proposal, if no notice of intention was filed.

Proposals by employers

(1.3) No proposal in respect of an employer shall be approved by the court unless

(*a*) it provides for payment to the employees and former employees, immediately after court approval of the proposal, of amounts at least equal to the amounts that they would be qualified to receive under paragraph 136(1)(*d*) if the employer became bankrupt on the date of the filing of the notice of intention, or proposal if no notice of intention was filed, as well as wages, salaries, commissions or compensation for services rendered after that date and before the court approval of the proposal, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the bankrupt's business during the same period; and

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

Voting on proposal

(1.4) For the purpose of voting on any question relating to a proposal in respect of an employer, no person has a claim for an amount referred to in paragraph (1.3)(*a*).

Proposals by employers — prescribed pension plans

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

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

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

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

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

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

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

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

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

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

Non-application of subsection (1.5)

(1.6) Despite subsection (1.5), the court may approve a proposal that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

Payment — equity claims

(1.7) No proposal that provides for the payment of an equity claim is to be approved by the court unless the proposal provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

Payment to trustee

(2) All moneys payable under the proposal shall be paid to the trustee and, after payment of all proper fees and expenses mentioned in subsection (1), shall be distributed by him to the creditors.

Distribution of promissory notes, stock, etc., of debtor

(3) Where the proposal provides for the distribution of property in the nature of promissory notes or other evidence of obligations by or on behalf of the debtor or, when the debtor is a corporation, shares in the capital stock of the corporation, the property shall be dealt with in the manner prescribed in subsection (2) as nearly as may be.

Section 147 applies

(4) Section 147 applies to all distributions made to the creditors by the trustee pursuant to subsection (2) or (3).

Power of court

(5) Subject to subsections (1) to (1.7), the court may either approve or refuse to approve the proposal.

R.S., 1985, c. B-3, s. 60; 1992, c. 27, s. 24; 1997, c. 12, s. 37; 2000, c. 30, s. 144; 2005, c. 47, s. 39; 2007, c. 36, ss. 22, 99; 2009, c. 33, s. 22.

Annulment of bankruptcy

61. (1) The approval by the court of a proposal made after bankruptcy operates to annul the bankruptcy and to revest in the debtor, or in such other person as the court may approve, all the right, title and interest of the trustee in the property of the debtor, unless the terms of the proposal otherwise provide.

Non-approval of proposal by court

(2) Where the court refuses to approve a proposal in respect of an insolvent person a copy of which has been filed under section 62,

(*a*) the insolvent person is deemed to have thereupon made an assignment;

(*b*) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(*b.1*) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(*c*) the trustee shall, within five days after the day the certificate mentioned in paragraph (*b*) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

(3) [Repealed, 1992, c. 27, s. 25]

Costs when proposal refused

(4) No costs incurred by a debtor on or incidental to an application to approve a proposal, other than the costs incurred by the trustee, shall be allowed out of the estate of the debtor if the court refuses to approve the proposal.

R.S., 1985, c. B-3, s. 61; 1992, c. 27, s. 25; 1997, c. 12, s. 38; 2005, c. 47, s. 40.

Filing of proposal

62. (1) If a proposal is made in respect of an insolvent person, the trustee shall file with the official receiver a copy of the proposal and the prescribed statement of affairs.

Determination of claims

(1.1) Except in respect of claims referred to in subsection 14.06(8), where a proposal is made in respect of an insolvent person, the time with respect to which the claims of creditors shall be determined is the time of the filing of

(*a*) the notice of intention; or

(*b*) the proposal, if no notice of intention was filed.

Determination of claims re bankrupt

(7) A person who, in respect of a transaction, was not dealing at arm's length with a person who is subject to a receivership is not entitled to have a claim arising from that transaction secured by this section unless, in the opinion of the receiver, having regard to the circumstances — including the remuneration for, the terms and conditions of and the duration, nature and importance of the services rendered — it is reasonable to conclude that they would have entered into a substantially similar transaction if they had been dealing with each other at arm's length.

Proof by delivery

(8) A claim referred to in this section is proved by delivering to the receiver a proof of claim in the prescribed form.

Definitions

(9) The following definitions apply in this section.

"compensation"
« rémunération »

"compensation" includes vacation pay but does not include termination or severance pay.

"person who is subject to a receivership"
« personne faisant l'objet d'une mise sous séquestre »

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

"receiver"
« séquestre »

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

2005, c. 47, s. 67; 2007, c. 36, s. 38; 2009, c. 2, s. 356(F).

Security for unpaid amounts re prescribed pensions plan — bankruptcy

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

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

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

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

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

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

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

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

Rank of security

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

(*a*) rights under sections 81.1 and 81.2;

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

(*c*) securities under sections 81.3 and 81.4.

Liability of trustee

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

2005, c. 47, s. 67.

Security for unpaid amounts re prescribed pensions plan — receivership

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

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

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

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

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

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

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

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

Rank of security

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

Liability of receiver

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

Definitions

(4) The following definitions apply in this section.

"person who is subject to a receivership"
« personne faisant l'objet d'une mise sous séquestre »

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

"receiver"
« séquestre »

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

2005, c. 47, s. 67; 2007, c. 36, s. 39.

Trustee to have right to sell patented articles

82. (1) Where any property of a bankrupt vesting in a trustee consists of patented articles that were sold to the bankrupt subject to any restrictions or limitations, the trustee is not bound by the restrictions or limitations but may sell and dispose of the patented articles free and clear of the restrictions or limitations.

Right of manufacturer

(2) Where the manufacturer or vendor of the patented articles referred to in subsection (1) objects to the disposition of them by the trustee as provided by this section and gives to the trustee notice in writing of the objection before the sale or disposition thereof, that manufacturer or vendor has the right to purchase the patented articles at the invoice prices thereof, subject to any reasonable deduction for depreciation or deterioration.

R.S., 1985, c. B-3, s. 82; 1993, c. 34, s. 10(E).

Copyright and manuscript to revert to author

83. (1) Notwithstanding anything in this Act or in any other statute, the author's manuscripts and any copyright or any interest in a copyright in whole or in part assigned to a publisher, printer, firm or person becoming bankrupt shall,

(*a*) if the work covered by the copyright has not been published and put on the market at the time of the bankruptcy and no expense has been incurred in connection with that work, revert and be delivered to the author or their heirs, and any contract or agreement between the author or their heirs and the bankrupt shall then terminate and be void or, in the Province of Quebec, null;

Loi sur la faillite et l'insolvabilité, LRC 1985, c B-3

Version courante : en vigueur depuis le 1 janv. 2010

Lien vers la dernière version : http://www.canlii.org/fr/ca/legis/lois/lrc-1985-c-b-3/derniere/
Lien stable vers cette version : http://www.canlii.org/fr/ca/legis/lois/lrc-1985-c-b-3/78132/
Mise-à-jour : Dernière mise à jour effectuée depuis le Site Web des Lois du Canada le 2011-05-26

Faillite et l'insolvabilité, Loi sur la

B-3

Loi concernant la faillite et l'insolvabilité

TITRE ABRÉGÉ

Titre abrégé

1. *Loi sur la faillite et l'insolvabilité.*

L.R. (1985), ch. B-3, art. 1; 1992, ch. 27, art. 2.

DÉFINITIONS ET INTERPRÉTATION

Définitions

2. Les définitions qui suivent s'appliquent à la présente loi.

« accord de transfert de titres pour obtention de crédit »
" *title transfer credit support agreement* "

« accord de transfert de titres pour obtention de crédit » Accord aux termes duquel une personne insolvable ou un failli transfère la propriété d'un bien en vue de garantir le paiement d'une somme ou l'exécution d'une obligation relativement à un contrat financier admissible.

« actif à court terme »
" *current assets* "

« actif à court terme » Sommes en espèces, équivalents de trésorerie — notamment les effets négociables et dépôts à vue —, inventaire, comptes à recevoir ou produit de toute opération relative à ces actifs.

« actionnaire »
" *shareholder* "

« actionnaire » S'agissant d'une personne morale ou d'une fiducie de revenu assujetties à la présente loi, est assimilée à l'actionnaire la personne ayant un intérêt dans cette personne morale ou détenant des parts de cette fiducie.

« administrateur »
" *director* "

« administrateur » S'agissant d'une personne morale autre qu'une fiducie de revenu, toute personne exerçant les fonctions d'administrateur, indépendamment de son titre, et, s'agissant d'une fiducie de revenu, toute personne exerçant les fonctions de fiduciaire, indépendamment de son titre.

« affidavit »
" *affidavit* "

« affidavit » Sont assimilées à un affidavit une déclaration et une affirmation solennelles.

« agent négociateur »
" *bargaining agent* "

Audition préalable

59. (1) Avant d'approuver la proposition, le tribunal entend le rapport du syndic dans la forme prescrite quant aux conditions de la proposition et à la conduite du débiteur; en outre, il entend le syndic, le débiteur, l'auteur de la proposition, tout créancier adverse, opposé ou dissident, ainsi que tout témoignage supplémentaire qu'il peut exiger.

Le tribunal peut refuser d'approuver la proposition

(2) Lorsqu'il est d'avis que les conditions de la proposition ne sont pas raisonnables ou qu'elles ne sont pas destinées à avantager l'ensemble des créanciers, le tribunal refuse d'approuver la proposition; et il peut refuser d'approuver la proposition lorsqu'il est établi que le débiteur a commis l'une des infractions mentionnées aux articles 198 à 200.

Garantie raisonnable

(3) Lorsque l'un des faits mentionnés à l'article 173 est établi contre le débiteur, le tribunal refuse d'approuver la proposition, à moins qu'elle ne comporte des garanties raisonnables pour le paiement d'au moins cinquante cents par dollar sur toutes les réclamations non garanties prouvables contre l'actif du débiteur ou pour le paiement de tel pourcentage en l'espèce que le tribunal peut déterminer.

Modification des statuts constitutifs

(4) Le tribunal qui approuve une proposition peut ordonner la modification des statuts constitutifs du débiteur conformément à ce qui est prévu dans la proposition, pourvu que la modification soit légale au regard du droit fédéral ou provincial.

L.R. (1985), ch. B-3, art. 59; 1997, ch. 12, art. 36; 2000, ch. 12, art. 10; 2007, ch. 36, art. 21.

Priorité des réclamations

60. (1) Le tribunal ne peut approuver aucune proposition qui ne prescrive pas le paiement, en priorité sur les autres réclamations, de toutes les réclamations dont le paiement est ainsi ordonné dans la distribution des biens d'un débiteur, et le paiement de tous les honoraires et dépenses convenables du syndic relatifs et connexes aux procédures découlant de la proposition ou survenant dans la faillite.

Certaines réclamations de la Couronne

(1.1) Le tribunal ne peut, sans le consentement de Sa Majesté, approuver une proposition qui ne prévoit pas le paiement intégral à Sa Majesté du chef du Canada ou d'une province, dans les six mois suivant l'approbation, de tous les montants qui étaient dus lors du dépôt de l'avis d'intention ou, à défaut, de la proposition et qui sont de nature à faire l'objet d'une demande aux termes d'une des dispositions suivantes :

a) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Idem

(1.2) Le tribunal ne peut approuver la proposition si, lors de l'audition de la demande d'approbation, Sa Majesté du chef du Canada ou d'une province le convainc du défaut du débiteur d'effectuer un versement portant sur un montant visé au paragraphe (1.1) et qui est devenu exigible après le dépôt de l'avis d'intention ou, à défaut d'avis d'intention, après le dépôt de la proposition.

Propositions d'employeurs

(1.3) Le tribunal ne peut approuver la proposition visant un employeur que si, à la fois :

a) celle-ci prévoit que sera effectué le paiement aux employés — actuels et anciens —, dès son approbation, de sommes égales ou supérieures, d'une part, à celles qu'ils seraient en droit de recevoir en application de l'alinéa 136(1)*d*) si l'employeur avait fait faillite à la date du dépôt de l'avis d'intention ou, à défaut, de la proposition et, d'autre part, au montant des gages, salaires, commissions ou rémunérations pour services fournis entre cette date et celle de son approbation, y compris les sommes que le voyageur de commerce a régulièrement déboursées dans l'entreprise du failli ou relativement à celle-ci entre ces dates;

b) il est convaincu que l'employeur est en mesure d'effectuer, et effectuera, les paiements prévus à l'alinéa *a*).

Vote sur la proposition

(1.4) Aux fins du vote sur toute question relative à la proposition visant un employeur, personne n'a de réclamation à faire valoir pour les montants mentionnés à l'alinéa (1.3)*a*).

Propositions d'employeurs — régime de pension

(1.5) Le tribunal ne peut approuver la proposition visant un employeur qui participe à un régime de pension prescrit institué pour ses employés que si, à la fois :

a) la proposition prévoit que seront effectués des paiements correspondant au total des sommes ci-après qui n'ont pas été versées au fonds établi dans le cadre du régime de pension :

(i) les sommes qui ont été déduites de la rémunération des employés pour versement au fonds,

(ii) dans le cas d'un régime de pension prescrit régi par une loi fédérale :

(A) les coûts normaux, au sens du paragraphe 2(1) du *Règlement de 1985 sur les normes de prestation de pension*, que l'employeur est tenu de verser au fonds,

(B) les sommes que l'employeur est tenu de verser au fonds au titre de toute disposition à cotisations déterminées au sens du paragraphe 2(1) de la *Loi de 1985 sur les normes de prestation de pension*,

(iii) dans le cas de tout autre régime de pension prescrit :

(A) la somme égale aux coûts normaux, au sens du paragraphe 2(1) du *Règlement de 1985 sur les normes de prestation de pension*, que l'employeur serait tenu de verser au fonds si le régime était régi par une loi fédérale,

(B) la somme égale au total des sommes que l'employeur serait tenu de verser au fonds au titre de toute disposition à cotisations déterminées au sens du paragraphe 2(1) de la *Loi de 1985 sur les normes de prestation de pension* si le régime était régi par une loi fédérale;

b) il est convaincu que l'employeur est en mesure d'effectuer, et effectuera, les paiements prévus à l'alinéa *a*).

Non-application du paragraphe (1.5)

(1.6) Par dérogation au paragraphe (1.5), le tribunal peut approuver la proposition qui ne prévoit pas le versement des sommes mentionnées à ce paragraphe s'il est convaincu que les parties en cause ont conclu un accord sur les sommes à verser et que l'autorité administrative responsable du régime de pension a consenti à l'accord.

Paiement d'une réclamation relative à des capitaux propres

(1.7) Le tribunal ne peut approuver la proposition qui prévoit le paiement d'une réclamation relative à des capitaux propres que si, selon les termes de celle-ci, le paiement intégral de toutes les autres réclamations sera effectué avant le paiement de la réclamation relative à des capitaux propres.

Paiement au syndic

(2) Tout montant payable aux termes de la proposition est payé au syndic et, après le paiement de tous les honoraires et dépenses convenables mentionnés au paragraphe (1), distribué par lui aux créanciers.

Distribution de billets à ordre, d'actions, etc. du débiteur

(3) Lorsque la proposition prévoit la distribution des biens sous forme de billets à ordre ou d'autres titres d'obligations souscrites par le débiteur ou en son nom ou, si le débiteur est une personne morale, sous forme d'actions du capital social de la personne morale, ces biens sont traités dans la mesure du possible conformément au paragraphe (2).

L'art. 147 s'applique

(4) L'article 147 s'applique à toutes les distributions faites aux créanciers par le syndic conformément au paragraphe (2) ou (3).

Pouvoirs du tribunal

(5) Sous réserve des paragraphes (1) à (1.7), le tribunal peut approuver ou refuser la proposition.

L.R. (1985), ch. B-3, art. 60; 1992, ch. 27, art. 24; 1997, ch. 12, art. 37; 2000, ch. 30, art. 144; 2005, ch. 47, art. 39; 2007, ch. 36, art. 22 et 99; 2009, ch. 33, art. 22.

Annulation de faillite

61. (1) L'approbation par le tribunal d'une proposition faite après la faillite a pour effet d'annuler la faillite et de réattribuer au débiteur, ou à toute autre personne que le tribunal peut approuver, le droit, le titre et l'intérêt complets du syndic aux biens du débiteur, à moins que les conditions de la proposition n'en stipulent autrement.

Refus d'approuver une proposition

(2) Lorsque le tribunal refuse d'approuver une proposition visant une personne insolvable, proposition dont une copie a été déposée aux termes de l'article 62 :

a) celle-ci est réputée avoir fait dès lors une cession;

81.5 (1) Si le failli est un employeur qui participe ou a participé à un régime de pension prescrit institué p employés, les sommes ci-après qui, à la date de la faillite, n'ont pas été versées au fonds établi dans le cadr régime sont garanties, à compter de cette date, par une sûreté sur les éléments d'actif du failli :

a) les sommes qui ont été déduites de la rémunération des employés pour versement au fonds;

b) dans le cas d'un régime de pension prescrit régi par une loi fédérale :

(i) les coûts normaux, au sens du paragraphe 2(1) du *Règlement de 1985 sur les normes de prestation* que l'employeur est tenu de verser au fonds,

(ii) les sommes que l'employeur est tenu de verser au fonds au titre de toute disposition à cotisations d sens du paragraphe 2(1) de la *Loi de 1985 sur les normes de prestation de pension*;

c) dans le cas de tout autre régime de pension prescrit :

(i) la somme égale aux coûts normaux, au sens du paragraphe 2(1) du *Règlement de 1985 sur les norm prestation de pension*, que l'employeur serait tenu de verser au fonds si le régime était régi par une loi f

(ii) les sommes que l'employeur serait tenu de verser au fonds au titre de toute disposition à cotisations au sens du paragraphe 2(1) de la *Loi de 1985 sur les normes de prestation de pension* si le régime était loi fédérale.

Priorité

(2) La sûreté visée au présent article a priorité sur tout autre droit, sûreté, charge ou réclamation — peu i date à laquelle ils ont pris naissance — grevant les biens du failli, à l'exception :

a) des droits prévus aux articles 81.1 et 81.2;

b) des sommes mentionnées au paragraphe 67(3) qui sont réputées être détenues en fiducie;

c) de la sûreté prévue aux articles 81.3 et 81.4.

Responsabilité du syndic

(3) Le syndic qui dispose d'éléments d'actif grevés par la sûreté est responsable des sommes mentionnée: paragraphe (1) jusqu'à concurrence du produit de la disposition, et est subrogé dans tous les droits du fond: cadre du régime de pension jusqu'à concurrence des sommes ainsi payées.

2005, ch. 47, art. 67.

Sûreté relative aux régimes de pension prescrits — mise sous séquestre

81.6 (1) Si la personne faisant l'objet d'une mise sous séquestre est un employeur qui participe ou a part régime de pension prescrit institué pour ses employés, les sommes ci-après qui, à la date à laquelle le séque commence à agir, n'ont pas été versées au fonds établi dans le cadre de ce régime sont garanties, à compte date, par une sûreté sur les éléments d'actif de la personne :

a) les sommes qui ont été déduites de la rémunération des employés pour versement au fonds;

b) dans le cas d'un régime de pension prescrit régi par une loi fédérale :

(i) les coûts normaux, au sens du paragraphe 2(1) du *Règlement de 1985 sur les normes de prestation* que l'employeur serait tenu de verser au fonds,

(ii) les sommes que l'employeur est tenu de verser au fonds au titre de toute disposition à cotisations d sens du paragraphe 2(1) de la *Loi de 1985 sur les normes de prestation de pension*;

c) dans le cas de tout autre régime de pension prescrit :

(i) la somme égale aux coûts normaux, au sens du paragraphe 2(1) du *Règlement de 1985 sur les norm prestation de pension*, que l'employeur serait tenu de verser au fonds si le régime était régi par une loi f

(ii) les sommes que l'employeur serait tenu de verser au fonds au titre de toute disposition à cotisations au sens du paragraphe 2(1) de la *Loi de 1985 sur les normes de prestation de pension* si le régime était loi fédérale.

Priorité

(2) La sûreté visée au présent article a priorité sur tout autre droit, sûreté, charge ou réclamation — peu i date à laquelle ils ont pris naissance — grevant les biens de la personne, à l'exception des droits prévus aux et 81.2 et de la sûreté prévue aux articles 81.3 et 81.4.

Responsabilité du séquestre

(3) Le séquestre qui dispose d'éléments d'actif grevés par la sûreté est responsable des sommes mentioni paragraphe (1) jusqu'à concurrence du produit de la disposition, et est subrogé dans tous les droits du fond: cadre du régime de pension jusqu'à concurrence des sommes ainsi payées.

Définitions

(4) Les définitions qui suivent s'appliquent au présent article.

« personne faisant l'objet d'une mise sous séquestre »
" *person who is subject to a receivership* "

« personne faisant l'objet d'une mise sous séquestre » Personne dont tout bien est en la possession ou sous responsabilité d'un séquestre.

« séquestre »
" *receiver* "

« séquestre » Séquestre au sens du paragraphe 243(2) ou séquestre intérimaire nommé en vertu des parag 47(1) ou 47.1(1).

2005, ch. 47, art. 67; 2007, ch. 36, art. 39.

Le syndic a droit de vendre des marchandises brevetées

82. (1) Lorsque les biens d'un failli, attribués à un syndic, consistent en articles brevetés, qui avaient été failli sous réserve de restrictions ou limitations quelconques, le syndic n'est pas lié par ces restrictions ou lim peut vendre et aliéner ces articles brevetés, libres de ces restrictions ou limitations.

Droit du fabricant

(2) Lorsque le fabricant ou le vendeur de ces articles brevetés s'oppose à ce que le syndic les aliène comn présent article, et qu'il donne au syndic un avis écrit de cette opposition, avant qu'ils soient vendus ou aliéni fabricant ou vendeur a le droit d'acheter ces articles brevetés à leur prix de facture, sous réserve d'une déd raisonnable pour dépréciation ou détérioration.

L.R. (1985), ch. B-3, art. 82; 1993, ch. 34, art. 10(A).

Le droit d'auteur et les manuscrits retournent à l'auteur

83. (1) Nonobstant les autres dispositions de la présente loi ou toute autre loi, les manuscrits de l'auteur d'auteur ou intérêt dans un droit d'auteur totalement ou partiellement cédé à un éditeur, à un imprimeur, à une personne devenue en faillite :

a) retournent et sont remis à l'auteur ou à ses héritiers, si l'ouvrage que couvre ce droit d'auteur n'a pas mis dans le commerce au moment de la faillite et s'il n'a pas occasionné de dépenses; tout contrat ou con l'auteur ou ses héritiers et ce failli cesse alors et devient nul;

b) retournent et sont remis à l'auteur sur paiement des dépenses subies, si l'ouvrage que couvre ce droit complètement ou partiellement composé en typographie et a occasionné des dépenses au failli, et le prod dépenses est aussi remis à l'auteur ou à ses héritiers; tout contrat ou convention entre l'auteur ou ses hé failli cesse alors et devient nul; mais si l'auteur n'exerce pas, dans un délai de six mois à compter de la da faillite, la priorité que lui confère le présent alinéa, le syndic pourra mettre à exécution le contrat original;

c) retournent à l'auteur sans frais, si le syndic, après un délai de six mois à compter de la date de la faillit ne pas mettre le contrat à exécution; tout contrat ou convention entre l'auteur ou ses héritiers et ce failli devient nul.

Si des exemplaires de l'ouvrage sont dans le commerce

(2) Si, au moment de la faillite, l'ouvrage était publié et mis dans le commerce, le syndic a le pouvoir de v l'ouvrage publié ou d'en autoriser la vente ou la reproduction d'exemplaires, ou de représenter cet ouvrage autoriser la représentation, mais :

TAB C

Pension Benefits Act, RSO 1990, c P-8

This Act was amended by several enactments which came into force retroactively. This may cause some versions to contain changes which did not occur exactly at the dates shown.
Please note that amendments that are not included in the current version of this statute come into force on 2011-05-12 (SO 2011 c 9).
This version is not the latest.

Past version: in force between Jul 25, 2007 and Jun 4, 2009

Link to this version: http://www.canlii.org/en/on/laws/stat/rso-1990-c-p-8/1631/

Pension Benefits Act

R.S.O. 1990, CHAPTER P.8

Consolidation Period: From May 14, 2009 to the e-Laws currency date.

Last amendment: 2009, c. 11, ss. 41-50.

Interpretation
Definitions

1. (1) In this Act,

"additional voluntary contribution" means a contribution to the pension fund by a member of the pension plan beyond any amount that the member is required to contribute, but does not include a contribution in relation to which the employer is required to make a concurrent additional contribution to the pension fund; ("cotisation facultative supplémentaire")

"administrator" means the person or persons that administer the pension plan; ("administrateur")

"assets", in relation to an employer, means assets that in the ordinary course of business would be entered in books of account, whether or not a particular asset is entered in the books of account of the employer; ("actif")

"bridging benefit" means a periodic payment provided under a pension plan to a former member of the pension plan for a temporary period of time after retirement for the purpose of supplementing the former member's pension benefit until the former member is eligible to receive benefits under the *Old Age Security Act* (Canada) or is either eligible for or commences to receive retirement benefits under the *Canada Pension Plan* or the *Quebec Pension Plan*; ("prestation de raccordement")

"certified copy" means a copy certified to be a true copy; ("copie certifiée conforme")

"collective agreement" has the same meaning as in the *Labour Relations Act, 1995*; ("convention collective")

"Commission" means the Financial Services Commission of Ontario established under the *Financial Services Commission of Ontario Act, 1997*; ("Commission")

"commuted value" means the value calculated in the prescribed manner and as of a fixed date of a pension, a deferred pension, a pension benefit or an ancillary benefit; ("valeur de rachat")

APPLICATION

Crown bound

2.This Act binds the Crown. R.S.O. 1990, c. P.8, s. 2.

Employees in Ontario

3.This Act applies to every pension plan that is provided for persons employed in Ontario. R.S.O. 1990, c. P.8, s. 3.

Place of employment

4.(1)For the purposes of this Act, a person shall be deemed to be employed in the province in which the establishment of his or her employer is located and to which the person is required to report for work.

Idem

(2)A person who is not required to report for work at an establishment of his or her employer shall be deemed to be employed in the province in which is located the establishment of his or her employer from which the person's remuneration is paid. R.S.O. 1990, c. P.8, s. 4.

Greater pension benefits

5.The requirements of this Act and the regulations shall not be construed to prevent the registration or administration of a pension plan and related pension fund that provide pension benefits or ancillary benefits more advantageous to members than those required by this Act and the regulations. R.S.O. 1990, c. P.8, s. 5.

REGISTRATION AND ADMINISTRATION

Prohibition of administration of unregistered pension plan

6.(1)No person shall administer a pension plan unless a certificate of registration or an acknowledgment of application for registration of the pension plan has been issued by the Superintendent.

Application of subs. (1)

(2)Subsection (1) does not apply to prevent administration during the first ninety days after the establishment of the pension plan. R.S.O. 1990, c. P.8, s. 6.

Refusal or revocation

7.(1)No person shall administer a pension plan if registration of the pension plan has been refused or revoked by the Superintendent.

Exception

(2)Subsection (1) does not apply to prevent administration for the purpose of wind up of a pension plan. R.S.O. 1990, c. P.8, s. 7.

Administrator

8. (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. R.S.O. 1990, c. P.8, s. 8 (1); 1999, c. 15, s. 1; 2005, c. 31, Sched. 18, s. 2.

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. 2007, c. 7, Sched. 31, s. 2.

Application for registration

9.(1)Within the prescribed period of time, the administrator of a pension plan shall apply to the Superintendent for registration of the pension plan. 1999, c. 15, s. 2.

Requirements for registration

(2)An application for registration shall be made by paying the fee established by the Minister and filing,

(a) a completed application in the form approved by the Superintendent;

(b) certified copies of the documents that create and support the pension plan;

(c) certified copies of the documents that create and support the pension fund;

(d) a certified copy of any reciprocal transfer agreement related to the pension plan;

(e) a certified copy of the explanations and other information provided under subsection 25 (1);

(e.1) a certification in a form approved by the Superintendent and signed by the applicant in which the applicant attests that the pension plan complies with this Act and regulations; and

(f) any other prescribed documents. R.S.O. 1990, c. P.8, s. 9 (2); 1997, c. 28, s. 191.

Collective agreement

(3)For the purpose of subsection (2), "document" includes "collective agreement". R.S.O. 1990, c. P.8, s. 9 (3).

Contents of pension plan

10. (1) The documents that create and support a pension plan shall set out the following information:

1. The method of appointment and the details of appointment of the administrator of the pension plan.

2. The conditions for membership in the pension plan.

3. The benefits and rights that are to accrue upon termination of employment, termination of membership, retirement or death.

4. The normal retirement date under the pension plan.

5. The requirements for entitlement under the pension plan to any pension benefit or ancillary benefit.

(c) employment before the 1st day of January, 1987, in so far as it is dealt with in a pension plan established after the 31st day of December, 1986. R.S.O. 1990, c. P.8, s. 52.

Inflation protection

53.(1)Pension benefits, pensions or deferred pensions shall be adjusted in accordance with the established formula or formulas and in the prescribed manner to provide inflation-related increases.

Idem

(2)Any formula or formulas for any inflation related adjustments to pension benefits, pensions or deferred pensions shall be established only by amendment to this Act. R.S.O. 1990, c. P.8, s. 53.

C.P.P. / Q.P.P. offsets

54.(1)The reduction of a pension benefit that may be required by a pension plan in relation to payments under the *Canada Pension Plan*, the *Quebec Pension Plan* or the *Old Age Security Act* (Canada) shall not exceed the reduction calculated in accordance with the prescribed formula applied in the prescribed manner.

Idem

(2)The amount of the reduction of a member's pension benefit required under the pension plan in relation to payments mentioned in subsection (1) shall not be increased by reason of an increase in the payments after the date on which the member's employment is terminated.

Reduction re *Old Age Security Act* (Canada)

(3)A pension plan for registration of which application is made on or after the 1st day of January, 1988 shall not permit the reduction of a pension benefit based on a person's entitlement under the *Old Age Security Act* (Canada).

Application of subs. (3)

(4)Subsection (3) does not apply to a pension plan that is a successor of a pension plan registered under the *Pension Benefits Act*, being chapter 373 of the Revised Statutes of Ontario, 1980, that permitted such a reduction.

Idem

(5)A pension plan shall not permit reduction of a pension benefit based on a person's entitlement under the *Old Age Security Act* (Canada) in respect of a benefit accrued on or after the 1st day of January, 1987.

Bridging benefit

(6)Where a pension plan provides for the reduction of a member's or former member's bridging benefit by reason that the member or former member receives or is eligible to receive retirement benefits before attaining sixty-five years of age under the *Canada Pension Plan* or the *Quebec Pension Plan*, the reduction may only be made in the prescribed circumstances.

Variations based on other benefits

(7)Where a pension plan provides for the variation of a pension benefit by reason of benefits payable under the *Canada Pension Plan*, the *Quebec Pension Plan* or the *Old Age Security Act* (Canada), the variation shall be applied in the prescribed manner. R.S.O. 1990, c. P.8, s. 54.

CONTRIBUTIONS

Funding

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. R.S.O. 1990, c. P.8, s. 55 (1).

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. R.S.O. 1990, c. P.8, s. 55 (2); 2005, c. 31, Sched. 18, s. 6 (1).

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. 2005, c. 31, Sched. 18, s. 6 (2).

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. 2005, c. 31, Sched. 18, s. 6 (3).

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. 1999, c. 15, s. 10.

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. 1999, c. 15, s. 10.

Exception

(1.1) Subsection (1) does not apply if the administrator is also the trustee of the pension fund. 2005, c. 31, Sched. 18, s. 7.

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). 1999, c. 15, s. 10.

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. 1999, c. 15, s. 10.

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. R.S.O. 1990, c. P.8, s. 57.

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. R.S.O. 1990, c. P.8, s. 58.

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. R.S.O. 1990, c. P.8, s. 59.

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. R.S.O. 1990, c. P.8, s. 60.

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. R.S.O. 1990, c. P.8, s. 61.

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. R.S.O. 1990, c. P.8, s. 62.

LOCKING IN

Refunds

63.(1)No member or former member is entitled to a refund from a pension fund of contributions made in respect of employment in Ontario or a designated province on or after the qualification date.

Idem

(2)Subsection (1) does not prevent the refund of an additional voluntary contribution and interest thereon to a member or former member or a payment under subsection 39 (4) (entitlement to excess amount).

Refund related to past employment

(3)Despite subsection (1), a member whose employment is terminated and who is not entitled to a pension or to a deferred pension under section 36 (deferred pension for past service) is entitled to payment within the prescribed period of time of an amount equal to not less than the amount of the member's

(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. R.S.O. 1990, c. P.8, s. 69 (1); 2002, c. 18, Sched. H, s. 5 (1).

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. R.S.O. 1990, c. P.8, s. 69 (2).

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. R.S.O. 1990, c. P.8, s. 70.

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. R.S.O. 1990, c. P.8, s. 71.

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. 1999, c. 15, s. 13.

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. R.S.O. 1990, c. P.8, s. 74 (3).

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. R.S.O. 1990, c. P.8, s. 74 (4).

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*. R.S.O. 1990, c. P.8, s. 74 (5); 2004, c. 31, Sched. 31, s. 3.

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. R.S.O. 1990, c. P.8, s. 74 (6).

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. R.S.O. 1990, c. P.8, s. 74 (7).

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. 2005, c. 31, Sched. 18, s. 9.

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. R.S.O. 1990, c. P.8, s. 74 (8).

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). R.S.O. 1990, c. P.8, s. 74 (9).

Liability of employer on wind up

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

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

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

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

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

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

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario. R.S.O. 1990, c. P.8, s. 75 (1); 1997, c. 28, s. 200.

Payment

(2) The employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times. R.S.O. 1990, c. P.8, s. 75 (2).

Exception, jointly sponsored pension plans

(3) This section does not apply with respect to jointly sponsored pension plans. 2005, c. 31, Sched. 18, s. 10.

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. 2005, c. 31, Sched. 18, s. 11.

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. 2005, c. 31, Sched. 18, s. 11.

Payments

(3) The payments required by subsections (1) and (2) shall be made in the prescribed manner and at the prescribed times. 2005, c. 31, Sched. 18, s. 11.

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. R.S.O. 1990, c. P.8, s. 76.

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. R.S.O. 1990, c. P.8, s. 77.

SURPLUS

Payment out of pension fund to employer

78.(1) No money may be paid out of a pension fund to the employer without the prior consent of the Superintendent. R.S.O. 1990, c. P.8, s. 78 (1); 1997, c. 28, s. 200.

Application for payment

(2) An employer who applies to the Superintendent for consent to payment of money that is surplus to the employer out of a pension fund shall transmit notice of the application, containing the prescribed information, to,

(a) each member and each former member of the pension plan to which the pension fund relates;

Loi sur les Régimes de retraite, LRO 1990, c P-8

Cette loi a subi plusieurs modifications entrées en vigueur rétroactivement. Ceci peut faire en sorte que certaines versions comportent des changements qui n'ont pas eu lieu précisément aux dates indiquées. Veuillez noter que des modifications non incorporées à la version courante de cette loi entrent en vigueur le 2011-05-12 (LO 2011 c 9).
Cette version n'est pas la plus récente.

Version antérieure : en vigueur entre le 25 juil. 2007 et le 4 juin 2009

Lien vers cette version : http://www.canlii.org/fr/on/legis/lois/lro-1990-c-p-8/1631/

Loi sur les régimes de retraite

L.R.O. 1990, CHAPITRE P.8

Période de codification : Du 14 mai 2009 à la date à laquelle Lois-en-ligne est à jour.

Dernière modification : 2009, chap. 11, art. 41 à 50.

Interprétation
Définitions

1. (1) Les définitions qui suivent s'appliquent à la présente loi.

«accord réciproque de transfert» Accord relatif à deux régimes de retraite ou plus, qui prévoit le transfert de sommes d'argent ou de crédits d'emploi, ou des deux, à l'égard de participants individuels. («reciprocal transfer agreement»)

«actif» En ce qui concerne l'employeur, éléments d'actif qui, dans le cours normal des affaires, seraient consignés dans des livres de comptes, y compris ceux qui ne sont pas consignés dans les livres de compte de l'employeur. («assets»)

«administrateur» La ou les personnes qui administrent le régime de retraite. («administrator»)

«ancien participant» Personne qui a mis fin à son emploi ou à son affiliation à un régime de retraite et qui, selon le cas :

a) a droit à une pension différée payable par prélèvement sur la caisse de retraite;

b) touche une pension payable par prélèvement sur la caisse de retraite;

c) a le droit de commencer à recevoir des prestations de retraite prélevées sur la caisse de retraite dans l'année qui suit la cessation de l'emploi ou de l'affiliation;

d) a le droit de recevoir toute autre somme prélevée sur la caisse de retraite. («former member»)

«caisse de retraite» Fonds maintenu pour fournir des prestations prévues par le régime de retraite ou relatives au régime de retraite. («pension fund»)

«cessation» En ce qui concerne un emploi, comprend la retraite et le décès. («termination»)

«comité de retraite» Le comité qui est l'administrateur d'un régime de retraite. («pension committee»)

«Commission» La Commission des services financiers de l'Ontario créée aux termes de la *Loi de 1997 sur la Commission des services financiers de l'Ontario*. («Commission»)

Exceptions

(4) Malgré le paragraphe (3), un régime de retraite n'est pas un régime de retraite interentreprises pour l'application de la présente loi si, selon le cas :

a) tous les employeurs qui cotisent, ou au nom de qui des cotisations sont versées, à la caisse de retraite sont membres du même groupe au sens de la *Loi sur les sociétés par actions*;

b) les règlements précisent que le régime de retraite n'est pas un régime de retraite interentreprises. 2007, chap. 7, annexe 31, par. 1 (2).

CHAMP D'APPLICATION

La Couronne est liée

2. La présente loi lie la Couronne. L.R.O. 1990, chap. P.8, art. 2.

Employés en Ontario

3. La présente loi s'applique à tous les régimes de retraite offerts aux personnes qui sont employées en Ontario. L.R.O. 1990, chap. P.8, art. 3.

Lieu de travail

4. (1) Pour l'application de la présente loi, une personne est réputée employée dans la province où se trouve l'établissement de son employeur où elle est tenue de se présenter au travail.

Idem

(2) La personne qui n'est pas tenue de se présenter au travail à l'établissement de son employeur est réputée employée dans la province où se trouve l'établissement de son employeur d'où provient la rémunération de la personne. L.R.O. 1990, chap. P.8, art. 4.

Prestations de retraite plus élevées

5. Les exigences de la présente loi et des règlements n'ont pas pour effet d'empêcher l'enregistrement ou l'administration d'un régime de retraite et d'une caisse de retraite connexe qui offrent aux participants des prestations de retraite ou des prestations accessoires plus avantageuses que celles qu'exigent la présente loi et les règlements. L.R.O. 1990, chap. P.8, art. 5.

ENREGISTREMENT ET ADMINISTRATION

Administration d'un régime non enregistré interdite

6. (1) Nul ne doit administrer un régime de retraite sans que le surintendant n'ait délivré un certificat d'enregistrement ou un accusé de réception d'une demande d'enregistrement du régime de retraite.

Champ d'application du par. (1)

(2) Le paragraphe (1) n'a pas pour effet d'empêcher l'administration pendant les quatre-vingt-dix jours qui suivent l'établissement d'un régime de retraite. L.R.O. 1990, chap. P.8, art. 6.

Refus ou révocation

7. (1) Nul ne doit administrer un régime de retraite dont l'enregistrement a été refusé ou révoqué par le surintendant.

Exception

(2) Le paragraphe (1) n'a pas pour effet d'empêcher l'administration aux fins de la liquidation d'un régime de retraite. L.R.O. 1990, chap. P.8, art. 7.

Administrateur

8. (1) Un régime de retraite n'est admissible à l'enregistrement que s'il est administré par un administrateur qui est, selon le cas :

a) l'employeur ou, s'il y en a plus d'un, un ou plusieurs des employeurs;

b) un comité de retraite composé d'un ou de plusieurs représentants :

(i) de l'employeur ou des employeurs, ou des personnes, autres que l'employeur ou les employeurs, qui sont tenus de cotiser aux termes du régime de retraite,

(ii) des participants au régime de retraite;

c) un comité de retraite composé de représentants des participants au régime de retraite;

d) la compagnie d'assurance qui fournit les prestations de retraite aux termes du régime de retraite, si toutes les prestations de retraite aux termes du régime de retraite sont garanties par la compagnie d'assurance;

e) si le régime de retraite est un régime interentreprises établi conformément à une convention collective ou à un contrat de fiducie, un conseil de fiduciaires qui est constitué conformément au régime de retraite ou à un contrat de fiducie établissant le régime de retraite et dont au moins la moitié est constituée de représentants des participants au régime de retraite interentreprises. La majorité de ces représentants sont citoyens canadiens ou résidents permanents;

f) une personne morale, un conseil, une commission ou un organisme auquel une loi de la Législature confie l'administration du régime de retraite;

g) une personne nommée administrateur par le surintendant en vertu de l'article 71;

h) une autre personne ou entité prescrite. L.R.O. 1990, chap. P.8, par. 8 (1); 1999, chap. 15, art. 1; 2005, chap. 31, annexe 18, art. 2.

Participants supplémentaires

(2) Un comité de retraite, ou un conseil de fiduciaires, qui est l'administrateur d'un régime de retraite peut comprendre un ou plusieurs représentants de personnes qui touchent une pension aux termes du régime de retraite. L.R.O. 1990, chap. P.8, par. 8 (2).

Interprétation

(3) Pour l'application de l'alinéa (1) b), le terme «employeur» comprend les personnes et entités suivantes :

1. Les membres du même groupe au sens de la *Loi sur les sociétés par actions.*

2. Les autres personnes ou entités, ou catégories de personnes ou d'entités, prescrites. 2007, chap. 7, annexe 31, art. 2.

Demande d'enregistrement

9. (1) L'administrateur d'un régime de retraite présente une demande d'enregistrement de celui-ci au surintendant dans le délai prescrit. 1999, chap. 15, art. 2.

Exigences d'enregistrements

(2) La demande d'enregistrement se fait au moyen du paiement des droits fixés par le ministre et du dépôt des documents suivants :

a) une demande remplie selon la formule qu'approuve le surintendant;

b) des copies certifiées conformes des documents qui créent le régime de retraite et en justifient l'existence;

c) des copies certifiées conformes des documents qui créent la caisse de retraite et en justifient l'existence;

d) une copie certifiée conforme des accords réciproques de transfert, le cas échéant, qui se rapportent au régime de retraite;

e) une copie certifiée conforme des explications et des autres renseignements qui doivent être fournis en vertu du paragraphe 25 (1);

e.1) une attestation rédigée selon la formule qu'approuve le surintendant et signée par l'auteur de la demande, selon laquelle le régime de retraite est conforme à la présente loi et aux règlements;

f) les autres documents prescrits. L.R.O. 1990, chap. P.8, par. 9 (2); 1997, chap. 28, art. 191.

Convention collective

(3) Pour l'application du paragraphe (2), le terme «document» comprend l'expression «convention collective». L.R.O. 1990, chap. P.8, par. 9 (3).

COTISATIONS

Financement

55. (1) Un régime de retraite n'est pas admissible à l'enregistrement s'il ne prévoit pas de financement suffisant pour assurer les prestations de retraite, les prestations accessoires et les autres prestations aux termes du régime de retraite, conformément à la présente loi et aux règlements. L.R.O. 1990, chap. P.8, par.. 55 (1).

Paiement par les employeurs et autres

(2) Un employeur tenu de cotiser aux termes d'un régime de retraite, ou une personne ou entité tenue de cotiser aux termes d'un régime de retraite pour le compte d'un employeur, cotise conformément aux exigences prescrites pour le financement, de la manière prescrite et aux moments prescrits :

a) soit à la caisse de retraite;

b) soit à la compagnie d'assurance qui est l'administrateur du régime de retraite, si celle-ci paie les prestations de retraite prévues par le régime de retraite. L.R.O. 1990, chap. P.8, par. 55 (2); 2005, chap. 31, annexe 18, par. 6 (1).

Paiement par les participants

(3) Les participants à un régime de retraite qui offre des prestations contributives versent les cotisations exigées aux termes du régime de la manière prescrite et aux moments prescrits. 2005, chap. 31, annexe 18, par. 6 (2).

Idem : régimes de retraite conjoints

(4) Les participants à un régime de retraite conjoint versent les cotisations exigées aux termes du régime, y compris les cotisations à l'égard de tout passif à long terme non capitalisé et déficit de solvabilité, conformément aux exigences prescrites pour le financement et les versent de la manière prescrite et aux moments prescrits. 2005, chap. 31, annexe 18, par. 6 (3).

Obligation : paiement des cotisations

56.(1) L'administrateur d'un régime de retraite et, le cas échéant, son représentant chargé de recevoir les cotisations prévues par le régime veillent à ce que toutes les cotisations soient payées à leur date d'exigibilité.

Avis

(2) Si une cotisation n'est pas payée à sa date d'exigibilité, l'administrateur et, le cas échéant, le représentant en avisent le surintendant de la manière et dans le délai prescrits. 1999, chap. 15, art. 10.

Obligation envers les fiduciaires de la caisse de retraite

56.1 (1) L'administrateur remet, de la manière et dans le délai prescrits, aux personnes prescrites pour l'application du paragraphe 22 (6) (fiduciaire d'une caisse de retraite) un sommaire des cotisations qui doivent être versées à l'égard du régime de retraite. 1999, chap. 15, art. 10.

Exception

(1.1) Le paragraphe (1) ne s'applique pas si l'administrateur est également le fiduciaire de la caisse de retraite. 2005, chap. 31, annexe 18, art. 7.

Avis : sommaire

(2) La personne qui a le droit de recevoir un sommaire avise le surintendant de la manière et dans le délai prescrits s'il ne lui est pas remis conformément au paragraphe (1). 1999, chap. 15, art. 10.

Avis : cotisations

(3) La personne qui a le droit de recevoir un sommaire avise le surintendant de la manière et dans le délai prescrits si une cotisation n'est pas payée à sa date d'exigibilité. 1999, chap. 15, art. 10.

Biens en fiducie

57. (1) L'employeur qui reçoit de l'argent d'un employé en vertu d'un arrangement précisant que l'employeur versera cet argent à une caisse de retraite en tant que cotisation de l'employé aux termes du régime de retraite, est réputé détenir cet argent en fiducie pour l'employé jusqu'à ce que l'employeur verse cet argent à la caisse de retraite.

Sommes retenues

(2) Pour l'application du paragraphe (1), l'argent retenu des sommes payables à l'employé par l'employeur, que ce soit par retenues salariales ou autrement, est réputé être de l'argent que l'employeur a reçu de l'employé.

Cotisations accumulées

(3) L'employeur qui est tenu de cotiser à une caisse de retraite est réputé détenir en fiducie pour le compte des bénéficiaires du régime de retraite un montant égal aux cotisations de l'employeur qui sont dues et impayées à la caisse de retraite.

Liquidation

(4) Si un régime de retraite est liquidé en totalité ou en partie, l'employeur qui est tenu de cotiser à la caisse de retraite est réputé détenir en fiducie pour le compte des bénéficiaires du régime de retraite un montant égal aux cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements.

Privilège

(5) L'administrateur du régime de retraite a un privilège sur l'actif de l'employeur pour un montant égal aux montants réputés être détenus en fiducie en vertu des paragraphes (1), (3) et (4).

Champ d'application des par. (1), (3) et (4)

(6) Les paragraphes (1), (3) et (4) s'appliquent, que les sommes aient été ou non gardées à part des autres sommes ou biens de l'employeur.

Sommes devant être payées à la compagnie d'assurance

(7) Les paragraphes (1) à (6) s'appliquent, avec les adaptations nécessaires, à l'égard des sommes qui doivent être payées à une compagnie d'assurance qui garantit des prestations de retraite prévues par un régime de retraite. L.R.O. 1990, chap. P.8, art. 57.

Accumulation

58. (1) L'argent qu'un employeur est tenu de verser à une caisse de retraite s'accumule sur une base quotidienne.

Intérêt

(2) L'intérêt sur les cotisations est calculé et crédité à des taux qui ne sont pas inférieurs aux taux prescrits et conformément aux exigences prescrites. L.R.O. 1990, chap. P.8, art. 58.

Recouvrement des cotisations

59. L'administrateur peut introduire des instances devant un tribunal compétent pour obtenir le paiement des cotisations dues aux termes du régime de retraite, de la présente loi et des règlements. L.R.O. 1990, chap. P.8, art. 59.

Cautionnement

60. L'administrateur d'un régime de retraite interentreprises peut exiger qu'une personne qui reçoit les cotisations à la caisse de retraite ou qui administre la caisse ou fait des placements avec les fonds de la caisse fournisse un cautionnement pour le montant prescrit ou pour le montant qu'il exige. L.R.O. 1990, chap. P.8, art. 60.

Déclaration des obligations de l'employeur

61. L'employeur qui est tenu de cotiser à un régime de retraite interentreprises transmet à l'administrateur du régime une copie de l'accord selon lequel l'employeur doit cotiser, ou une déclaration écrite qui indique les cotisations que l'employeur doit verser ainsi que les autres obligations de l'employeur aux termes du régime de retraite. L.R.O. 1990, chap. P.8, art. 61.

Placement de la caisse de retraite

62. Toute personne qui participe au choix d'un placement qui sera fait avec l'actif d'une caisse de retraite veille à ce que le choix du placement soit conforme aux critères énoncés dans la présente loi et prescrits par les règlements. L.R.O. 1990, chap. P.8, art. 62.

Date et avis

(2) Dans un ordre prévu au paragraphe (1), le surintendant précise la date de prise d'effet de la liquidation, les personnes, la ou les catégories de personnes auxquelles l'administrateur doit donner avis de l'ordre et les renseignements qui doivent être inclus dans l'avis. L.R.O. 1990, chap. P.8, par. 69 (2).

Rapport de liquidation

70. (1) L'administrateur d'un régime de retraite, lorsque ce régime doit être totalement ou partiellement liquidé, dépose un rapport de liquidation qui indique ce qui suit :

a) l'actif et le passif du régime de retraite;

b) les prestations qui seront fournies aux participants, aux anciens participants ou aux autres personnes aux termes du régime de retraite;

c) les méthodes d'attribution et de répartition de l'actif du régime de retraite, et la méthode de détermination des priorités pour le paiement des prestations;

d) les autres renseignements prescrits.

Paiements sur la caisse de retraite après la remise de l'avis d'intention de liquider

(2) Aucun paiement n'est effectué sur la caisse de retraite qui a fait l'objet d'un avis d'intention de liquider tant que le surintendant n'a pas approuvé le rapport de liquidation.

Champ d'application du par. (2)

(3) Le paragraphe (2) n'a pas pour effet d'empêcher la continuation du paiement d'une pension ou de toute autre prestation si ce paiement a commencé avant la remise de l'avis d'intention de liquider le régime de retraite, ou d'empêcher tout autre paiement qui est prescrit ou qui est approuvé par le surintendant.

Approbation

(4) Un administrateur ne fait des paiements sur la caisse de retraite qu'en conformité avec le rapport de liquidation approuvé par le surintendant.

Refus d'approbation

(5) Le surintendant peut refuser d'approuver un rapport de liquidation qui ne répond pas aux exigences de la présente loi et des règlements, ou qui ne protège pas les intérêts des participants et des anciens participants au régime de retraite.

Droits et prestations à la liquidation partielle

(6) À la liquidation partielle d'un régime de retraite, les participants, les anciens participants et les autres personnes qui ont droit à des prestations en vertu du régime de retraite ont des droits et prestations qui ne sont pas inférieurs aux droits et prestations qu'ils auraient à la liquidation totale du régime de retraite à la date de prise d'effet de la liquidation partielle. L.R.O. 1990, chap. P.8, art. 70.

Nomination d'un administrateur de la liquidation

71. (1) Si un régime de retraite qui doit être liquidé totalement ou partiellement n'a pas d'administrateur ou que l'administrateur ne prend pas de mesures à cet effet, le surintendant peut nommer un administrateur ou agir lui-même à ce titre.

Coûts d'administration de la liquidation

(2) Les coûts d'administration raisonnables du surintendant ou de l'administrateur nommé par celui-ci peuvent être payés sur la caisse de retraite. L.R.O. 1990, chap. P.8, art. 71.

Révocation

(3) Le surintendant peut révoquer la nomination d'un administrateur qu'il a nommé s'il l'estime raisonnable. 1999, chap. 15, art. 13.

Avis des droits à la liquidation et choix

72. (1) Dans le délai prescrit, l'administrateur d'un régime de retraite qui doit être liquidé en totalité ou en partie donne à chaque personne qui a droit à une pension, à une pension différée ou à une autre prestation, ou encore à un remboursement, à l'égard du régime, une déclaration indiquant ce à quoi elle a

continuait, sont incluses dans le calcul de la prestation de retraite prévue au paragraphe (1) dans le cas d'une personne qui a accumulé au moins dix années d'emploi continu chez l'employeur ou qui est participant au régime de retraite depuis au moins dix ans. L.R.O. 1990, chap. P.8, par. 74 (3).

Prestation de raccordement distribuée proportionnellement

(4) Pour l'application du paragraphe (3), si la prestation de raccordement offerte aux termes du régime de retraite ne se rapporte pas à des périodes d'emploi ou d'affiliation au régime de retraite, la prestation de raccordement est distribuée selon le rapport qui existe entre la période réelle d'emploi du participant à la période d'emploi que le participant aurait faite à la première date à laquelle le membre aurait droit au paiement de prestations de retraite et d'une pleine prestation de raccordement aux termes du régime de retraite si celui-ci n'avait pas été liquidé. L.R.O. 1990, chap. P.8, par. 74 (4).

Avis de licenciement

(5) L'affiliation à un régime de retraite qui est totalement ou partiellement liquidé inclut la période de préavis de licenciement exigé en vertu de la partie XV de la *Loi de 2000 sur les normes d'emploi.* L.R.O. 1990, chap. P.8, par. 74 (5); 2004, chap. 31, annexe 31, art. 3.

Champ d'application du par. (5)

(6) Le paragraphe (5) ne s'applique pas afin de calculer le montant de la prestation de retraite d'un participant qui est tenu de cotiser à la caisse de retraite, à moins que le participant verse les cotisations à l'égard de la période de préavis de licenciement. L.R.O. 1990, chap. P.8, par. 74 (6).

Consentement de l'employeur

(7) Pour l'application du présent article, si le consentement de l'employeur est une condition d'admissibilité au droit de recevoir une prestation accessoire, l'employeur est réputé avoir donné son consentement. L.R.O. 1990, chap. P.8, par. 74 (7).

Consentement de l'administrateur : régimes de retraite conjoints

(7.1) Pour l'application du présent article, si le consentement de l'administrateur d'un régime de retraite conjoint est une condition d'admissibilité au droit de recevoir une prestation accessoire, l'administrateur est réputé avoir donné son consentement. 2005, chap. 31, annexe 18, art. 9.

Champ d'application de l'article

(8) Le présent article et les articles 73 (détermination des droits), 84, 85 et 86 (prestations garanties) s'appliquent à l'égard de la liquidation totale ou partielle d'un régime de retraite si la date de prise d'effet de la liquidation est le 1er avril 1987 ou une date postérieure à celle-ci. L.R.O. 1990, chap. P.8, par. 74 (8).

Remboursement

(9) Une personne qui est touchée par une liquidation et qui choisit de recevoir une prestation prévue au paragraphe (1) n'a pas droit au paiement d'un remboursement de cotisations ou d'intérêts en vertu du paragraphe 63 (3) ou (4) (remboursement). L.R.O. 1990, chap. P.8, par. 74 (9).

Responsabilité de l'employeur à la liquidation

75. (1) Si un régime de retraite est liquidé en totalité ou en partie, l'employeur verse à la caisse de retraite :

a) d'une part, un montant égal au total de tous les paiements qui, en vertu de la présente loi, des règlements et du régime de retraite, sont dus ou accumulés, et qui n'ont pas été versés à la caisse de retraite;

b) d'autre part, un montant égal au montant dont :

(i) la valeur des prestations de retraite aux termes du régime de retraite qui seraient garanties par le Fonds de garantie en vertu de la présente loi et des règlements si le surintendant déclare que le Fonds de garantie s'applique au régime de retraite,

(ii) la valeur des prestations de retraite accumulées à l'égard de l'emploi en Ontario et acquises aux termes du régime de retraite,

(iii) la valeur des prestations accumulées à l'égard de l'emploi en Ontario et qui résultent de l'application du paragraphe 39 (3) (règle des 50 pour cent) et de l'article 74,

dépassent la valeur de l'actif de la caisse de retraite attribué, comme cela est prescrit, pour le paiement de prestations de retraite accumulées à l'égard de l'emploi en Ontario. L.R.O. 1990, chap. P.8, par. 75 (1); 1997, chap. 28, art. 200.

Paiement

(2) L'employeur paie les sommes dues en vertu du paragraphe (1) de la manière prescrite et aux moments prescrits. L.R.O. 1990, chap. P.8, par. 75 (2).

Exception : régimes de retraite conjoints

(3) Le présent article ne s'applique pas à l'égard des régimes de retraite conjoints. 2005, chap. 31, annexe 18, art. 10.

Responsabilité à la liquidation : régimes de retraite conjoints

Employeurs

75.1 (1) Si un régime de retraite conjoint est liquidé en totalité ou en partie, l'employeur ou la personne ou entité tenue de cotiser aux termes du régime pour le compte de l'employeur verse à la caisse de retraite :

a) d'une part, un montant égal au total de tous les paiements qui, en vertu de la présente loi, des règlements et du régime, sont payables par l'employeur ou la personne ou entité pour le compte de l'employeur, qui sont dus ou accumulés et qui n'ont pas été versés à la caisse de retraite;

b) d'autre part, les montants supplémentaires qui, aux termes des documents qui créent le régime et en justifient l'existence, sont payables dans les circonstances par l'employeur ou la personne ou entité pour le compte de l'employeur. 2005, chap. 31, annexe 18, art. 11.

Participants

(2) Si un régime de retraite conjoint est liquidé en totalité ou en partie, les participants versent à la caisse de retraite :

a) d'une part, un montant égal au total de tous les paiements qui, en vertu de la présente loi, des règlements et du régime, sont payables par les participants, qui sont dus ou accumulés et qui n'ont pas été versés à la caisse de retraite;

b) d'autre part, les montants supplémentaires qui, aux termes des documents qui créent le régime et en justifient l'existence, sont payables dans les circonstances par les participants. 2005, chap. 31, annexe 18, art. 11.

Paiements

(3) Les paiements exigés par les paragraphes (1) et (2) sont versés de la manière prescrite et aux moments prescrits. 2005, chap. 31, annexe 18, art. 11.

La caisse de retraite continue d'être assujettie

76. La caisse de retraite d'un régime de retraite qui est liquidé continue d'être assujettie à la présente loi et aux règlements tant que l'actif de la caisse de retraite n'a pas été déboursé. L.R.O. 1990, chap. P.8, art. 76.

Insuffisance de fonds

77. Sous réserve de l'application du Fonds de garantie, si les sommes de la caisse de retraite ne suffisent pas à payer toutes les prestations de retraite et autres prestations à la liquidation totale ou partielle du régime de retraite, les prestations de retraite et autres prestations sont réduites de la manière prescrite. L.R.O. 1990, chap. P.8, art. 77.

EXCÉDENT

Prélèvement sur une caisse de retraite

78. (1) Aucune somme ne peut être prélevée sur une caisse de retraite pour payer un employeur sans le consentement préalable du surintendant. L.R.O. 1990, chap. P.8, par. 78 (1); 1997, chap. 28, art. 200.

TAB D

General, RRO 1990, Reg 909

This Regulation was amended by several enactments which came into force retroactively. This may cause some versions to contain changes which did not occur exactly at the dates shown.
This version is not the latest.

Past version: in force between Apr 1, 2009 and Jun 18, 2009

Link to this version: http://www.canlii.org/en/on/laws/regu/rro-1990-reg-909/56756/

Pension Benefits Act

R.R.O. 1990, REGULATION 909

GENERAL

Consolidation Period: From April 1, 2009 to the e-Laws currency date.

Last amendment: O. Reg. 116/09.

This is the English version of a bilingual regulation.

PART I
INTERPRETATION

1. (1) In this Regulation,

"accountant" means a public accountant licensed under the *Public Accountancy Act*; ("comptable")

"*Canadian Institute of Actuaries Standards of Practice*" means the *Canadian Institute of Actuaries Standards of Practice* (December 2008), developed and adopted by the Actuarial Standards Board and published by the Canadian Institute of Actuaries; ("*Normes de pratique de l'Institut canadien des actuaires*")

"designated plan" means a pension plan that is a designated plan for the purposes of the *Income Tax Act* (Canada); ("régime désigné")

"eligible contribution" means a payment made by an employer to a pension fund or an insurance company, as applicable, in respect of a pension plan, that qualifies as an eligible contribution for the purposes of the *Income Tax Act* (Canada); ("cotisation admissible")

"government" means Her Majesty in right of Ontario, an agent of Her Majesty, a municipality as defined in the *Municipal Affairs Act* and a regional municipality as defined in the *Ontario Unconditional Grants Act*; ("gouvernement")

"life income fund" means an RRIF that meets the requirements of either Schedule 1 or Schedule 1.1; ("fonds de revenu viager")

"life income fund that is governed by this Schedule" means an RRIF that meets the requirements of Schedule 1 or Schedule 1.1, as the case may be; ("fonds de revenu viager régi par la présente annexe")

"locked-in retirement account" means an RRSP that meets the requirements set out in subsection 21 (2); ("compte de retraite avec immobilisation des fonds")

(2) The documents that create and support a jointly sponsored pension plan must set out the methods by which the decisions referred to in paragraphs 3 and 4 of subsection (1) are to be made. O. Reg. 116/06, s. 3.

3.2 Each of the following pension plans is prescribed as a jointly sponsored pension plan for the purposes of the Act:

1. OMERS Primary Pension Plan, registered under the Act as number 345983.
2. OMERS Supplemental Pension Plan for Police, Firefighters and Paramedics, registered under the Act as number 1175892. O. Reg. 413/07, s. 3.

FUNDING OF PENSION PLANS

PAYMENTS — GENERAL

4. (1) Every pension plan shall set out the obligation of the employer or any person or entity required to make contributions on behalf of the employer and, in the case of a jointly sponsored pension plan, the obligation of the members of the pension plan, if applicable, to contribute both in respect of the normal cost and any going concern unfunded liability and solvency deficiency under the plan. O. Reg. 116/06, s. 4 (1).

(2) Subject to subsection (2.1), an employer who is required to make contributions under a pension plan or, if a person or entity is required to make contributions under the pension plan on behalf of the employer, that person or entity and, if applicable, the members of the pension plan or their representative shall make payments to the pension fund or to an insurance company, as applicable, that are not less than the sum of,

(a) all contributions, including contributions in respect of any going concern unfunded liability and solvency deficiency and money withheld by payroll deduction or otherwise from an employee, that are received from employees as the employees' contributions to the pension plan;

(b) all contributions required to pay the normal cost;

(c) all special payments determined in accordance with section 5; and

(d) all special payments determined in accordance with sections 31, 32 and 35 and all payments determined in accordance with section 31.1. O. Reg. 712/92, s. 3 (2); O. Reg. 73/95, s. 2 (1); O. Reg. 116/06, s. 4 (2-4).

(2.1) Despite subsection (2), an employer required to make contributions under a designated plan shall not be required to make a payment to the pension fund or to an insurance company, as applicable, that is not an eligible contribution. O. Reg. 73/95, s. 2 (2).

(2.2) Despite subsections (1) and (2), the amount of contributions required to be made to a pension plan that provides defined benefits may be determined by using an actuarial cost method other than a benefit allocation method if,

(a) the actuarial cost method that is used is consistent with accepted actuarial practice; and

(b) the rules set out in subsection (2.3) are satisfied. O. Reg. 116/06, s. 4 (5).

(2.3) For the purposes of clause (2.2) (b), the rules are as follows:

1. If the valuation date of a report filed under section 3, 13 or 14 is before December 31, 2006 and, at the valuation date, the amount determined under clause (a) of the definition of "going concern assets" in subsection 1 (2) is not less than the going concern liabilities determined using a benefit allocation method, the present value of the required contributions for the three-year period referred to in paragraph 1.1 must not be less than the present value of the contributions for that period that would be made in respect of the normal cost for the plan if the benefit allocation method were used, after the application of any actuarial gains to reduce the normal cost in accordance with subsection 7 (3).

1.1 The three-year period referred to in paragraph 1 must begin,

i. in the case of a pension plan that is not a jointly sponsored pension plan, on the valuation date, or

ii. in the case of a jointly sponsored pension plan, on a date not later than 12 months after the valuation date or, in the case of an inter-valuation report described in section 5.5, not later than January 1, 2007.

1.2. If the valuation date of a report filed under section 3, 13 or 14 is on or after December 31, 2006 and, at the valuation date, the amount determined under clause (a) of the definition of "going concern assets" in subsection 1 (2) is not less than the going concern liabilities determined using a benefit allocation method, the present value of the required contributions for the five-year period referred to in paragraph 1.3 must not be less than the present value of the contributions for that period that would be made in respect of the normal cost for the plan if the benefit allocation method were used, after the application of any actuarial gains to reduce the normal cost in accordance with subsection 7 (3).

1.3 The five-year period referred to in paragraph 1.2 must begin,

i. in the case of a pension plan that is not a jointly sponsored pension plan, on the valuation date, or

ii. in the case of a jointly sponsored pension plan, on a date not later than 12 months after the valuation date.

2. If, at the valuation date of a report filed under section 3, 13 or 14, the amount determined under clause (a) of the definition of "going concern assets" in subsection 1 (2) is less than the going concern liabilities determined using a benefit allocation method, the present value of the required contributions, which are determined under the actuarial cost method used by the plan, must not be less than the sum of the present value of the normal cost and the present value of the special payments determined in accordance with section 5 that would be required to liquidate any going concern unfunded liability determined using the benefit allocation method.

2.1 The present values referred to in paragraphs 1, 1.2 and 2 shall be determined without reference to paragraphs 7 and 10 and without reference to subsections (2.7) and (2.7.1).

3. The rate or rates of interest to be used in calculating present values referred to in paragraphs 1, 1.2 and 2 shall be the rate or rates used in the report for the going concern valuation.

3.1 For the purposes of paragraphs 1, 1.2 and 2, the going concern valuation prepared using the benefit allocation method shall use the same rate or rates of interest as those used in the going concern valuation prepared using the actuarial cost method used by the plan.

4. In the case of a pension plan that is not a jointly sponsored pension plan, the present values referred to in paragraph 2 shall be calculated using whichever of the following periods is longer:

i. The period that begins on the valuation date and continues until the end of the remaining amortization period of the going concern unfunded liability that has the longest remaining amortization period.

ii. The period of five years that begins on the valuation date.

4.1 In the case of a jointly sponsored pension plan, the present values referred to in paragraph 2 shall be calculated using whichever of the following periods is longer:

i. The period that begins on a date not later than 12 months after the valuation date or, in the case of an inter-valuation report described in section 5.5, not later than January 1, 2007, and continues until the end of the remaining amortization period of the going concern unfunded liability that has the longest remaining amortization period.

ii. The period of five years that begins on a date not later than 12 months after the valuation date or, in the case of an inter-valuation report described in section 5.5, not later than January 1, 2007.

5. In the case of a jointly sponsored pension plan,

   i. the present values referred to in paragraph 1 shall be calculated based on the sum of the projected pensionable earnings for each year in the three-year period referred to in that paragraph,

   ii. the present values referred to in paragraph 1.2 shall be calculated based on the sum of the projected pensionable earnings for each year in the five-year period referred to in that paragraph,

   iii. the present values referred to in paragraph 2 shall be calculated based on the period used for the purposes of paragraph 4.1 and the sum of the projected pensionable earnings for each year in that period, and

   iv. the actuarial assumptions used to determine the sums referred to in subparagraphs i, ii and iii of the projected pensionable earnings shall be consistent with those used in the report for the going concern valuation based on the benefit allocation method.

6. Subject to paragraph 7, the required contribution rate for a jointly sponsored pension plan shall be determined as a level percentage of pensionable earnings for each class of members, subject to any variation that is necessary in order to take into account integration with the *Canada Pension Plan* or the *Quebec Pension Plan.*

7. If the required contribution rate set out in a report filed under section 3 or 14 in respect of a jointly sponsored pension plan is higher than the required contribution rate determined in the last report filed under section 3, 13 or 14, the required contribution rate may be increased each year for up to three years, commencing not later than 12 months after the valuation date, by at least one third of the difference between the two contribution rates, but only if,

   i. the contribution rate after that period is a level percentage of pensionable earnings, subject to any variation that is necessary in order to take into account integration with the *Canada Pension Plan* or the *Quebec Pension Plan*, and

   ii. the present value of the required contributions using the increased rates is not less than,

      A. the present value of the contributions that would be made in respect of the normal cost for the plan if the benefit allocation method were used, after the application of any actuarial gains to reduce the normal cost in accordance with subsection 7 (3), if paragraph 1 or 1.2 applies, or

      B. the sum of the present value of the normal cost and the present value of the special payments determined in accordance with section 5 that would be required to liquidate any going concern unfunded liability determined using the benefit allocation method, if paragraph 2 applies.

8. For the purposes of paragraph 7, the determination of whether the required contribution rate set out in the report is higher than the required contribution rate determined in the last filed report shall be made without taking into account the ability to increase required contribution rates each year for up to three years under that paragraph, and without taking into account the ability to carry forward amounts under paragraph 10 to reduce those increases.

9. The present values referred to in subparagraph 7 ii shall be calculated using the same period as was used to calculate the present values referred to in paragraph 1, 1.2 or 2, whichever is applicable.

10. If paragraph 7 permits the required contribution rate to be increased each year for up to three years and the amount of any increase in the first or second year exceeds one third of the difference between the required contribution rate set out in the report and the required contribution rate determined in the last filed report, the excess may be carried forward to the following year or years and used to reduce the increases in the following year or years, as long as the present value of the required contributions using the increased rates, as adjusted, is not

less than the present value referred to in sub-subparagraph 7 ii A or B, whichever is applicable. O. Reg. 116/06, s. 4 (5); O. Reg. 570/06, s. 2 (1-10).

(2.4) If, in accordance with subsection (2.2), the amount of contributions required to be made to a pension plan that provides defined benefits is determined by using an actuarial cost method other than a benefit allocation method, the payments to the pension fund or to an insurance company, as applicable, shall not be less than the sum of,

(a) the required contributions determined using the actuarial cost method; and

(b) all special payments determined in accordance with section 5 with respect to any solvency deficiency. O. Reg. 116/06, s. 4 (5).

(2.5) If the amount of contributions required to be made to a pension plan that provides defined benefits is determined in accordance with subsection (2.2) using an actuarial cost method other than a benefit allocation method, the contributions shall be deemed to be the contributions required to be made under this Regulation and the definitions in section 1 shall apply with necessary modifications. O. Reg. 116/06, s. 4 (5).

(2.6) If a report filed under section 3 or 14 discloses, in respect of a jointly sponsored pension plan for which a benefit allocation method is used to set contribution rates, that an increase in the normal cost is required or that an increase is required in the amount of contributions that were previously reduced under subsection 7 (3), payment of that increase shall commence on a date not later than 12 months after the valuation date. O. Reg. 570/06, s. 2 (11).

(2.7) If a report filed under section 3 or 14 discloses that there is a going concern unfunded liability that is required to be liquidated in respect of a jointly sponsored pension plan for which a benefit allocation method is used to set the contribution rates, the special payments in respect of the going concern unfunded liability, as determined in accordance with subsection 5 (1.2), may be increased each year for up to three years, commencing not later than 12 months after the valuation date or, in the case of an inter-valuation report described in section 5.5, not later than January 1, 2007, by at least one third of the special payments, but only if,

(a) the special payments after that period are a level percentage of pensionable earnings for each class of members, subject to any variation that is necessary in order to take into account integration with the *Canada Pension Plan* or the *Quebec Pension Plan*; and

(b) the present value of the special payments, including the increased special payments, over the amortization period is not less than the amount of the going concern unfunded liability. O. Reg. 570/06, s. 2 (12).

(2.7.1) If subsection (2.7) permits the special payments in respect of the going concern unfunded liability, as determined in accordance with subsection 5 (1.2), to be increased each year for up to three years, and the amount of any increase in the first or second year exceeds one third of the special payments, the excess may be carried forward to the following year or years and used to reduce the increases in the following year or years, as long as the present value of the special payments, including the increased special payments, as adjusted, over the amortization period is not less than the amount of the going concern unfunded liability. O. Reg. 570/06, s. 2 (13).

(2.8) In the case of a jointly sponsored pension plan, contributions referred to in subsection 39 (3) of the Act include contributions made by a former member in respect of any going concern unfunded liability or solvency deficiency. O. Reg. 116/06, s. 4 (5).

(3) Where there is a prior year credit balance, the employer may apply the prior year credit balance to reduce the payments required under clauses (2) (b), (c) and (d). O. Reg. 712/92, s. 3 (1).

(3.1) Subsection (3) does not apply if the pension plan provides defined benefits and a benefit allocation method is not used to set contribution rates. O. Reg. 116/06, s. 4 (6).

(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 instalments within thirty days after the month for which contributions are payable, the amount of the instalments to be either a total fixed dollar amount, a fixed dollar amount for each employee or member of the plan or a fixed percentage either of the portion of the payroll related to members of the plan or of employee contributions.

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

4. Revoked: 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 instalments in accordance with the times for payment set out in sections 5, 31 and 35.

6. All special payments determined in accordance with subsections 31 (1) and (2), section 32 and subsection 35 (3), by annual instalment in accordance with the times for payment set out in sections 31, 32 and 35. O. Reg. 712/92, s. 3 (1); O. Reg. 386/04, s. 1; O. Reg. 116/06, s. 4 (7).

(5) Subject to subsections (10) and (11), if the period covered by a report filed under section 3, 5.3, 13 or 14 or submitted under this section has ended, and no report covering a subsequent period is filed under section 14 or submitted under this section, the employer or, if a person or entity is required to make contributions on behalf of the employer, that person or entity and, if applicable, the members of the pension plan shall continue to make payments in accordance with the report most recently filed or submitted under section 3, 5.3, 13 or 14 or this section. O. Reg. 116/06, s. 4 (9).

(6) The Superintendent may cause a report on a plan to be prepared where,

(a) a report required under section 3, 13 or 14 on the plan has not been filed within one year after the time required by this Regulation; and

(b) the Superintendent is of the opinion that the preparation of a report in accordance with subsection (7) is necessary to ensure that the plan is sufficiently funded to provide the benefits under the plan. O. Reg. 712/92, s. 3 (2); O. Reg. 307/98, s. 2 (1); O. Reg. 144/00, s. 4 (1).

(7) A report under subsection (6) must contain the information required by section 3, 13 or 14, whichever applies. O. Reg. 144/00, s. 4 (2).

(7.1) A report under subsection (6) must be prepared by an actuary chosen by the Superintendent and must be submitted by the actuary to the Superintendent. O. Reg. 144/00, s. 4 (2).

(8) If, during the preparation of a report on a plan, under this section, the Superintendent forms the opinion that the report is no longer necessary to ensure that the plan is sufficiently funded to provide the benefits under the plan, the Superintendent may cause work on the report to cease and the actuary need not submit the report to the Superintendent. O. Reg. 712/92, s. 3 (2); O. Reg. 307/98, s. 2 (3).

(9) If a report is submitted to the Superintendent under subsection (7.1), the employer or, if another person or entity is required to make contributions on behalf of the employer, that person or entity and, if applicable, the members of the pension plan shall make payments in accordance with the report. O. Reg. 116/06, s. 4 (10).

(10) Except as provided in subsection (11), if a payment requirement set out in a report submitted under subsection (7.1) concerning a plan differs from a payment requirement set out in a report filed by the administrator, the employer or, if another person or entity is required to make contributions on behalf of the employer, that person or entity and, if applicable, the members of the pension plan shall make payments in accordance with the higher requirement. O. Reg. 116/06, s. 4 (10).

(11) If, in the opinion of the Superintendent, a payment in accordance with the higher requirement under subsection (10) is not necessary to ensure that the plan is sufficiently funded to provide benefits under the plan, the payments shall be made in accordance with the lower requirement. O. Reg. 116/06, s. 4 (10).

(12) Revoked: O. Reg. 144/00, s. 4 (3).

(13) This section does not apply to a pension plan described in subsection 6 (1) unless it is a jointly sponsored pension plan. O. Reg. 116/06, s. 4 (11).

SPECIAL PAYMENTS — GENERAL

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

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

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

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

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

(e) with respect to any solvency deficiency arising on or after the Regulation date, the special payments required to liquidate the solvency deficiency, with interest at the rates described in subsection (2), by equal monthly instalments over the period beginning on the valuation date of the report in which the solvency deficiency was determined and ending on the 31st day of December, 2002, or five years, whichever is longer. O. Reg. 712/92, s. 4.

(1.1) Despite clauses (1) (b) and (e), in the case of a jointly sponsored pension plan, the special payments may be determined in accordance with subsection (1.2) as of,

(a) the date the going concern unfunded liability arose, for special payments referred to in clause (1) (b); or

(b) the date the solvency deficiency arose, for special payments referred to in clause (1) (e). O. Reg. 116/06, s. 5 (1).

(1.2) The special payments referred to in subsection (1.1) are determined under the following rules:

1. Each scheduled payment must be a level percentage of the sum of pensionable earnings of the members of the pension plan at the valuation date projected to the date when the scheduled payments commence and, after that date, projected annually until the end of the amortization period without reference to,

   i. changes in the membership of the plan that may occur after the valuation date and that arise from termination of employment or membership, the retirement or death of members or the addition of new members to the plan, or

   ii. any other changes in the membership of the plan that may occur after the valuation date.

1.1 Despite paragraph 1, if there is reason to believe that there will be a material decline in the number of members before the end of the amortization period, the sum in paragraph 1 of the projected pensionable earnings must reflect the expected decline in the sum of projected pensionable earnings.

2. The sum in paragraph 1 of the projected pensionable earnings must be determined based on actuarial assumptions that are consistent with those used to project pensionable earnings in the going concern valuation based on the benefit allocation method.

3. The present value of the scheduled payments at the date described in subsection (1.1) must be equal to the amount of the going concern unfunded liability or solvency deficiency being liquidated.

4. The amortization periods for each series of scheduled payments must be the same as the respective periods under clauses (1) (b) and (e), beginning not later than 12 months after the valuation date.

5. The present value of the scheduled payments must be determined,

   i. with respect to any going concern unfunded liability, using the interest rate or rates used in the report to determine the going concern unfunded liability, and

   ii. with respect to any solvency deficiency, using the interest rates used in the report to determine the solvency deficiency. O. Reg. 116/06, s. 5 (1); O. Reg. 570/06, s. 3.

(2) The rates of interest to be used in calculating the special payments under clauses (1) (d) and (e) with respect to a solvency deficiency are the rates used in the report under section 14 in which the solvency deficiency was determined for the applicable portions of the amortization period for the special payments. O. Reg. 712/92, s. 4.

(3) Except where the employer elects not to redetermine under subsection (8), every solvency deficiency determined in a report with a valuation date before the Regulation date shall be redetermined in accordance with this Regulation and the amount of the redetermined solvency deficiency shall be reported in a report filed in accordance with subsection (5). O. Reg. 712/92, s. 4.

(4) A determination under subsection 13 (1.1) or clause 14 (8) (a) that a solvency deficiency is zero is a determination of a solvency deficiency for the purposes of subsection (3). O. Reg. 712/92, s. 4.

(5) Except where the employer elects not to redetermine under subsection (8), the administrator shall file a report in accordance with subsections (6) and (7). O. Reg. 712/92, s. 4.

(6) The valuation date of the report referred to in subsection (5) shall be not later than the last day of the fiscal year of the plan in which the Regulation date falls and the report shall be filed within nine months of the valuation date. O. Reg. 712/92, s. 4.

(7) The report referred to subsection (5) shall set out,

(a) the information described in subsections 14 (7), (8) and (9);

(b) the amount of each redetermined solvency deficiency;

(c) the special payments, determined in accordance with clause 5 (1) (c), with respect to each redetermined solvency deficiency;

(d) the amount of the initial solvency balance; and

(e) the amount of the prior year credit balance. O. Reg. 712/92, s. 4.

(8) The employer for a plan may elect not to redetermine the solvency deficiencies arising before the Regulation date if the conditions of subsection (9) are met in relation to each of the following reports:

1. Reports in respect of the plan filed under sections 3, 13 and 14 with valuation dates on or after the lst day of January, 1988 but nine months before the Regulation date.

2. Reports required to be filed in respect of the plan under section 3 on or after the 1st day of July, 1988 but before the Regulation date.

3. Reports required to be filed in respect of the plan under section 13 on or after the lst day of March, 1988 but before the Regulation date.

4. Reports required to be filed in respect of the plan under section 14 on or after the lst day of October, 1988 but before the Regulation date. O. Reg. 712/92, s. 4.

(9) The following are the conditions that must be met in relation to the reports described in subsection (8):

1. The reports have all been filed.

2. The reports have all been prepared in accordance with the requirements of the Act and this Regulation in effect on the valuation date of the report.

3. All payments required by the reports to be made before the Regulation date have been made.

4. An actuary has signed a statement that the requirements of paragraph 2 have been met.

5. The administrator has signed a statement that the requirements of paragraphs 1 and 3 have been met. O. Reg. 712/92, s. 4.

(10) An employer who elects not to redetermine under subsection (8) may not rescind the election. O. Reg. 712/92, s. 4.

(11) Where an employer for a plan has elected not to redetermine under subsection (8), the administrator for the plan shall file, within nine months after the last day of the fiscal year of the plan in which the Regulation date falls, a report including,

(a) the statements described in paragraphs 4 and 5 of subsection (9);

(b) with respect to the special payments required under clause 5 (1) (d), the amount of the monthly instalments and the period over which they are to be paid;

(c) the amount of initial solvency balance at the Regulation date; and

(d) the amount of the prior year credit balance at the Regulation date. O. Reg. 712/92, s. 4.

(12) In this section,

"prepayments", in relation to a plan, means that part of the special payments that exceeded the special payments required under this Regulation as it read before the Regulation date and that were paid by the employer before the Regulation date with respect to the going concern unfunded liability but that were not applied by the employer before the Regulation date under subsection 12 (1) of this Regulation as it read before the Regulation date, but no special payments by the employer that were included in the calculation of the initial solvency balance of the plan shall be included in prepayments. O. Reg. 712/92, s. 4.

(13) For a plan established on or after the Regulation date, the prior year credit balance to be used in the report on the plan filed under section 13 shall be zero. O. Reg. 712/92, s. 4.

(14) For a plan in respect of which an administrator files a report under subsection (11), the prior year credit balance to be used in the subsection (11) report shall be an amount equal to the sum of any positive initial solvency balance for the plan and an amount equal to the prepayments for the plan. O. Reg. 712/92, s. 4.

(15) For a plan not referred to in subsection (13) or (14), the prior year credit balance to be used in the first report filed or submitted under any one of sections 3, 4 and 14 after the Regulation date shall be an amount equal to the sum of any positive initial solvency balance for the plan and an amount equal to the prepayments for the plan or, in the case of a plan with no positive initial solvency balance, an amount equal to the prepayments for the plan. O. Reg. 712/92, s. 4.

(16) Subject to subsections (13), (14), (15), (16.1) and 5.1 (5), the prior year credit balance to be used in any report required by this Regulation shall be the amount by which the sum of,

(a) the prior year credit balance stated in the last report filed or submitted in respect of the plan under this Regulation; and

(b) the total employer contributions made to the plan after the valuation date of the last report filed or submitted in respect of the plan under this Regulation but before the current valuation date,

exceeds,

(c) the aggregate employer contributions required to be paid under section 4 after the valuation date of the last report filed or submitted in respect of the plan under this Regulation but before the current valuation date, calculated without reference to any prior year credit balance. O. Reg. 712/92, s. 4; O. Reg. 144/00, s. 5 (1).

(16.1) For a report filed under section 3 or 14 or submitted under section 4 that has a valuation date of December 31, 1998 or later, the prior year credit balance may be reduced to an amount that is,

(a) less than the amount otherwise determined in accordance with subsection (16); and

(b) not less than zero. O. Reg. 144/00, s. 5 (2).

(16.2) Despite subsections (13), (14), (15), (16) and (16.1), if a pension plan provides defined benefits and a benefit allocation method is not used to set the contribution rates, the prior year credit balance to be used in any report filed or submitted in respect of the pension plan shall be zero. O. Reg. 116/06, s. 5 (2).

(17) If, on any valuation date after the initial valuation date the sum of the solvency assets and the solvency asset adjustment exceeds the sum of the solvency liabilities, the solvency liability adjustment and the prior year credit balance (such excess being referred to in this subsection as the "solvency excess"), the special payments under clauses (1) (c), (d) and (e) with respect to solvency deficiencies arising before the valuation date that are scheduled for payment after the valuation date shall be adjusted in accordance with the following rules:

1. Where the solvency excess is greater than or equal to the present value of the special payments under clauses (1) (c), (d) and (e), the special payments shall be reduced to zero.

2. Where the solvency excess is less than the present value of the special payments under clauses (1) (c), (d) and (e), the monthly rate of the special payments shall not be changed but the amortization period or periods for the special payments shall be reduced so as to reduce the solvency excess to zero. O. Reg. 712/92, s. 4; O. Reg. 116/06, s. 5 (3).

(18) If on the Regulation date a plan provides plant closure benefits or permanent layoff benefits, the employer may elect, by filing written notice with the Superintendent within the time set out in subsection (19), to exclude all plant closure benefits and permanent layoff benefits in calculating the solvency liabilities of the plan. O. Reg. 712/92, s. 4.

(19) An election under subsection (18) shall be made within the time set out in this Regulation for the filing of the first report on the plan after the Regulation date under section 3 or 14. O. Reg. 712/92, s. 4.

(20) At any time after an election is made under subsection (18), the employer may rescind the election by filing written notice. O. Reg. 712/92, s. 4.

(21) A rescission under subsection (20) is effective from the date on which the written notice is filed. O. Reg. 712/92, s. 4.

(22) An employer who has rescinded an election under subsection (18) shall not make any further election under subsection (18) in respect of the plan. O. Reg. 712/92, s. 4.

(23) Except where an employer elects not to redetermine under subsection (8) or files an initial special report under subsection 5.3 (1), the special payments required in the period beginning on the Regulation date and ending on the initial valuation date to amortize a going concern unfunded liability or solvency deficiency shall be not less than the special payments required under this Regulation as it read immediately before the Regulation date. O. Reg. 712/92, s. 4.

(24) Where an employer has elected not to redetermine under subsection (8), the special payments required in the period beginning on the Regulation date and ending on the initial valuation date with respect to each solvency deficiency determined in a report with a valuation date before the Regulation date shall be not less than the special payments required under clause 5 (1) (d). O. Reg. 712/92, s. 4.

(25) Nothing in this section relieves any person from making any payments required under this Regulation in respect of a negative initial solvency balance of a plan. O. Reg. 712/92, s. 4.

5.1 (1) Where an employer has a plan that has more than $500,000,000 of assets, calculated at market value, as shown in the financial statements filed under section 76 for the fiscal year immediately preceding the date of election, and the plan is registered under the Act and is not a plan described in subsection 6 (1), the employer may file a written notice electing to have the plan treated as a qualifying plan for the purposes of this section. O. Reg. 712/92, s. 4.

(2) Where an employer has two or more plans that together have more than $500,000,000 of assets, calculated at market value, as shown in the financial statements filed under section 76 for the fiscal year immediately preceding the date of election, each of the plans is registered under the Act and none of the plans is a plan described in subsection 6 (1), the employer may file a written notice electing to have all of the plans treated as qualifying plans for the purposes of this section. O. Reg. 712/92, s. 4.

(2.1) Employers are not entitled to file a written notice under subsection (1) or (2) on or after June 28, 2002. O. Reg. 203/02, s. 1.

(3) A plan in respect of which an election has been made under subsection (1) or (2) becomes a qualifying plan at the time of filing the notice of the election and remains a qualifying plan until the election has been rescinded in accordance with this section. O. Reg. 712/92, s. 4.

(4) Subject to subsections (6), (7) and (8) and despite clause 4 (2) (c), an employer for a qualifying plan need not make special payments under clauses 5 (1) (c), (d) and (e) with respect to any solvency deficiency for the plan. O. Reg. 712/92, s. 4.

(5) The prior year credit balance to be used in any report under this Regulation in respect of a qualifying plan shall be an amount equal to the prepayments, within the meaning of subsection 5 (12), for the plan. O. Reg. 712/92, s. 4.

(6) Subsection (8) applies to a plan in respect of which an election was made under subsection (1) as of the earlier of,

(a) the valuation date of any report filed or submitted under this Regulation in respect of the plan after the filing of the notice of election that shows that the plan has assets equal to or less than $500,000,000, calculated at market value; and

(b) nine months before the first date on which a report required to be filed under section 14 in respect of the plan is not filed. O. Reg. 712/92, s. 4.

(7) Subsection (8) applies to plans in respect of which an election was made under subsection (2) as of the earlier of,

(a) the valuation date of the first report filed or submitted under this Regulation in respect of one of the plans after the filing of the notice of election that shows that the plans together have assets equal to or less than $500,000,000, calculated at market value; and

(b) nine months before the first date on which a report required to be filed under section 14 in respect of any of the plans is not filed. O. Reg. 712/92, s. 4.

Dispositions générales, RRO 1990, Règl 909

Ce règlement a subi plusieurs modifications entrées en vigueur rétroactivement. Ceci peut faire en sorte que certaines versions comportent des changements qui n'ont pas eu lieu précisément aux dates indiquées. Cette version n'est pas la plus récente.

Version antérieure : en vigueur entre le 1 avr. 2009 et le 18 juin 2009

Lien vers cette version : http://www.canlii.org/fr/on/legis/regl/rro-1990-regl-909/56756/

Loi sur les régimes de retraite

R.R.O. 1990, RÈGLEMENT 909

DISPOSITIONS GÉNÉRALES

Période de codification : Du 1er avril 2009 à la date à laquelle Lois-en-ligne est à jour.

Dernière modification : Règl. de l'Ont. 116/09.

Le texte suivant est la version française d'un règlement bilingue.

PARTIE I
DÉFINITIONS ET INTERPRÉTATION

1. (1) Les définitions qui suivent s'appliquent au présent règlement.

«comptable» Comptable public titulaire d'un permis délivré en vertu de la *Loi sur la comptabilité publique*. («accountant»)

«compte de retraite avec immobilisation des fonds» REÉR qui satisfait aux exigences énoncées au paragraphe 21 (2). («locked-in retirement account»)

«cotisation admissible» Paiement que fait un employeur à une caisse de retraite ou à une compagnie d'assurance, selon le cas, à l'égard d'un régime et qui constitue une cotisation admissible pour l'application de la *Loi de l'impôt sur le revenu* (Canada). («eligible contribution»)

«coût normal» Le coût des prestations de retraite et des prestations accessoires, déterminé d'après une évaluation à long terme, qui est imputé à un exercice d'un régime. («normal cost»)

«évaluation du financement maximal» S'entend d'une évaluation du financement maximal pour l'application de la *Loi de l'impôt sur le revenu* (Canada). («maximum funding valuation»)

«FERR» Fonds enregistré de revenu de retraite constitué conformément à la *Loi de l'impôt sur le revenu* (Canada). («RRIF»)

«fonds de revenu de retraite immobilisé» FERR qui satisfait aux exigences énoncées à l'annexe 2. («locked-in retirement income fund»)

«fonds de revenu viager» FERR qui satisfait aux exigences de l'annexe 1 ou de l'annexe 1.1. («life income fund»)

«fonds de revenu viager régi par la présente annexe» FERR qui satisfait aux exigences de l'annexe 1 ou de l'annexe 1.1, selon le cas. («life income fund that is governed by this Schedule»)

3. Les employeurs ou les personnes ou les entités qui cotisent pour leur compte ou qui les représentent et les participants au régime ou leurs représentants sont chargés conjointement de prendre toutes les décisions au sujet de ses modalités et des modifications qui lui sont apportées.

4. Les employeurs ou les personnes ou les entités qui cotisent pour leur compte ou qui les représentent et les participants au régime ou leurs représentants sont chargés conjointement de prendre toutes les décisions concernant :

i. soit la nomination de l'administrateur du régime,

ii. soit la nomination ou la sélection de personnes comme membres d'un organisme ou d'une entité visé à l'alinéa 8 (1) b), c), e), f) ou h) de la Loi qui est l'administrateur du régime.

5. Le niveau des prestations de retraite d'un participant, autres que les prestations accessoires, et le montant de ses cotisations sont directement liés à ses gains ouvrant droit à pension. Règl. de l'Ont. 116/06, art. 3.

(2) Les documents qui créent un régime de retraite conjoint et en justifient l'existence doivent énoncer la façon de prendre les décisions visées aux dispositions 3 et 4 du paragraphe (1). Règl. de l'Ont. 116/06, art. 3.

3.2 Chacun des régimes de retraite suivants est prescrit à titre de régime de retraite conjoint pour l'application de la Loi :

1. Le Régime de retraite principal d'OMERS, enregistré en vertu de la Loi sous le numéro 345983.

2. Le Régime complémentaire d'OMERS pour les policiers, les pompiers et les auxiliaires médicaux, enregistré en vertu de la Loi sous le numéro 1175892. Règl. de l'Ont. 413/07, art. 3.

FINANCEMENT DES RÉGIMES DE RETRAITE

PAIEMENTS — DISPOSITIONS GÉNÉRALES

4. (1) Le régime énonce l'obligation qu'a l'employeur ou toute personne ou entité qui est tenue de cotiser pour son compte et, dans le cas d'un régime de retraite conjoint, celle qu'ont ses participants, s'il y a lieu, de cotiser à la fois à l'égard de son coût normal, ainsi que de son passif à long terme non capitalisé et de son déficit de solvabilité éventuels. Règl. de l'Ont. 116/06, par. 4 (1).

(2) Sous réserve du paragraphe (2.1), l'employeur qui est tenu de cotiser à un régime ou la personne ou l'entité qui est tenue de le faire pour son compte, le cas échéant, et, s'il y a lieu, les participants au régime ou leur représentant font, à la caisse de retraite ou à la compagnie d'assurance, selon le cas, des paiements qui ne sont pas inférieurs à la somme des éléments suivants :

a) les cotisations, y compris celles relatives à tout passif à long terme non capitalisé et à tout déficit de solvabilité ainsi que les sommes déduites par retenues salariales ou autrement, qui sont reçues des employés à titre de cotisations des employés au régime;

b) les cotisations nécessaires pour payer le coût normal;

c) les paiements spéciaux déterminés conformément à l'article 5;

d) les paiements spéciaux déterminés conformément aux articles 31, 32 et 35 et les paiements déterminés conformément à l'article 31.1. Règl. de l'Ont. 142/94, art. 1; Règl. de l'Ont. 73/95, par. 2 (1); Règl. de l'Ont. 116/06, par. 4 (2) à (4).

(2.1) Malgré le paragraphe (2), l'employeur qui est tenu de cotiser à un régime désigné n'est pas tenu de faire un paiement qui n'est pas une cotisation admissible à la caisse de retraite ou à une compagnie d'assurance, selon le cas. Règl. de l'Ont. 73/95, par. 2 (2).

(2.2) Malgré les paragraphes (1) et (2), le montant des cotisations qui doivent être versées à un régime qui offre des prestations déterminées peut être déterminé selon une méthode d'évaluation actuarielle autre qu'une méthode de répartition des prestations si :

a) d'une part, la méthode d'évaluation actuarielle qui est utilisée est compatible avec les normes actuarielles reconnues;

b) d'autre part, les règles énoncées au paragraphe (2.3) sont respectées. Règl. de l'Ont. 116/06, par. 4 (5).

(2.3) Pour l'application de l'alinéa (2.2) b), les règles sont les suivantes :

1. Si la date d'évaluation du rapport déposé aux termes de l'article 3, 13 ou 14 est antérieure au 31 décembre 2006 et que, à la date d'évaluation, la somme déterminée aux termes de l'alinéa a) de la définition de «actif à long terme» au paragraphe 1 (2) n'est pas inférieure au passif à long terme déterminé selon une méthode de répartition des prestations, la valeur actuelle des cotisations obligatoires pour la période de trois ans visée à la disposition 1.1 ne doit pas être inférieure à la valeur actuelle des cotisations qui seraient versées pour cette période à l'égard du coût normal du régime, déterminé selon la méthode de répartition des prestations, après affectation de tout gain actuariel à sa réduction conformément au paragraphe 7 (3).

1.1 La période de trois ans mentionnée à la disposition 1 commence :

i. dans le cas d'un régime qui n'est pas un régime de retraite conjoint, à la date d'évaluation,

ii. dans le cas d'un régime de retraite conjoint, dans les 12 mois qui suivent la date d'évaluation ou, dans le cas d'un rapport intermédiaire visé à l'article 5.5, au plus tard le 1er janvier 2007.

1.2 Si la date d'évaluation du rapport déposé aux termes de l'article 3, 13 ou 14 tombe le 31 décembre 2006 ou après cette date et que, à la date d'évaluation, la somme déterminée aux termes de l'alinéa a) de la définition de «actif à long terme» au paragraphe 1 (2) n'est pas inférieure au passif à long terme déterminé selon une méthode de répartition des prestations, la valeur actuelle des cotisations obligatoires pour la période de cinq ans visée à la disposition 1.3 ne doit pas être inférieure à la valeur actuelle des cotisations qui seraient versées pour cette période à l'égard du coût normal du régime, déterminé selon la méthode de répartition des prestations, après affectation de tout gain actuariel à sa réduction conformément au paragraphe 7 (3).

1.3 La période de cinq ans mentionnée à la disposition 1.2 commence :

i. dans le cas d'un régime qui n'est pas un régime de retraite conjoint, à la date d'évaluation,

ii. dans le cas d'un régime de retraite conjoint, dans les 12 mois qui suivent la date d'évaluation.

2. Si, à la date d'évaluation du rapport déposé aux termes de l'article 3, 13 ou 14, la somme déterminée aux termes de l'alinéa a) de la définition de «actif à long terme» au paragraphe 1 (2) est inférieure au passif à long terme déterminé selon une méthode de répartition des prestations, la valeur actuelle des cotisations obligatoires, déterminées selon la méthode d'évaluation actuarielle utilisée par le régime, ne doit pas être inférieure à la somme de la valeur actuelle du coût normal et de celle des paiements spéciaux déterminés conformément à l'article 5 qui seraient nécessaires pour acquitter un passif à long terme non capitalisé, déterminé selon la méthode de répartition des prestations.

2.1 Les valeurs actuelles visées aux dispositions 1, 1.2 et 2 sont déterminées sans tenir compte des dispositions 7 et 10 ni des paragraphes (2.7) et (2.7.1).

3. Le ou les taux d'intérêt à utiliser pour le calcul des valeurs actuelles visées aux dispositions 1, 1.2 et 2 correspondent aux taux utilisés dans le rapport à l'égard de l'évaluation à long terme.

3.1 Pour l'application des dispositions 1, 1.2 et 2, l'évaluation à long terme effectuée selon la méthode de répartition des prestations se sert du ou des mêmes taux d'intérêt que ceux qui ont servi dans celle effectuée selon la méthode d'évaluation actuarielle utilisée par le régime.

4. Dans le cas d'un régime qui n'est pas un régime de retraite conjoint, les valeurs actuelles visées à la disposition 2 sont calculées en fonction de celle des périodes suivantes qui est la plus longue :

i. La période qui commence à la date d'évaluation et qui court jusqu'à la fin de la portion à courir de la période d'amortissement du passif à long terme non capitalisé dont cette portion est la plus longue.

ii. La période de cinq ans qui commence à la date d'évaluation.

4.1 Dans le cas d'un régime de retraite conjoint, les valeurs actuelles visées à la disposition 2 sont calculées en fonction de celle des périodes suivantes qui est la plus longue :

i. La période qui commence dans les 12 mois qui suivent la date d'évaluation ou, dans le cas d'un rapport intermédiaire visé à l'article 5.5, au plus tard le 1er janvier 2007 et qui court jusqu'à la fin de la portion à courir de la période d'amortissement du passif à long terme non capitalisé dont cette portion est la plus longue.

ii. La période de cinq ans qui commence dans les 12 mois qui suivent la date d'évaluation ou, dans le cas d'un rapport intermédiaire visé à l'article 5.5, au plus tard le 1er janvier 2007.

5. Dans le cas d'un régime de retraite conjoint :

i. les valeurs actuelles visées à la disposition 1 sont calculées en fonction du total des gains ouvrant droit à pension prévus pour chaque année de la période de trois ans visée à cette disposition,

ii. les valeurs actuelles visées à la disposition 1.2 sont calculées en fonction du total des gains ouvrant droit à pension prévus pour chaque année de la période de cinq ans visée à cette disposition,

iii. les valeurs actuelles visées à la disposition 2 sont calculées en fonction de la période utilisée pour l'application de la disposition 4.1 et du total des gains ouvrant droit à pension prévus pour chaque année de cette période,

iv. les hypothèses actuarielles utilisées pour déterminer les totaux, visés aux sous-dispositions i, ii et iii, des droits ouvrant droit à pension prévus sont compatibles avec celles utilisées dans le rapport à l'égard de l'évaluation à long terme effectuée selon la méthode de répartition des prestations.

6. Sous réserve de la disposition 7, le taux de cotisation obligatoire d'un régime de retraite conjoint est déterminé comme un pourcentage constant des gains ouvrant droit à pension pour chaque catégorie de participants, sous réserve de toute modification requise aux fins de la coordination avec le *Régime de pensions du Canada* ou le *Régime de rentes du Québec*.

7. Si le taux de cotisation obligatoire fixé dans le rapport déposé aux termes de l'article 3 ou 14 à l'égard d'un régime de retraite conjoint est supérieur à celui déterminé dans le dernier rapport déposé aux termes de l'article 3, 13 ou 14, il peut, chaque année pendant un maximum de trois ans, à compter d'au plus tard 12 mois après la date d'évaluation, être augmenté d'au moins du tiers de la différence entre les deux taux de cotisation, mais seulement si les conditions suivantes sont réunies :

i. le taux de cotisation d'après cette période correspond à un pourcentage constant des gains ouvrant droit à pension, sous réserve de toute modification requise aux fins de la coordination avec le *Régime de pensions du Canada* ou le *Régime de rentes du Québec*,

ii. la valeur actuelle des cotisations obligatoires selon les taux majorés n'est pas inférieure :

A. à la valeur actuelle des cotisations qui seraient versées à l'égard du coût normal du régime, déterminé selon la méthode de répartition des prestations, après affectation de tout gain actuariel à sa réduction conformément au paragraphe 7 (3), si la disposition 1 ou 1.2 s'applique,

B. à la somme de la valeur actuelle du coût normal et de celle des paiements spéciaux déterminés conformément à l'article 5 qui seraient nécessaires pour acquitter un passif à long terme non capitalisé, déterminé selon la méthode de répartition des prestations, si la disposition 2 s'applique.

8. Pour l'application de la disposition 7, le calcul visant à déterminer si le taux de cotisation obligatoire fixé dans le rapport est supérieur à celui déterminé dans le dernier rapport déposé s'effectue sans tenir compte de la capacité d'augmenter les taux de cotisation obligatoire chaque année pendant un maximum de trois ans en vertu de cette disposition ni de celle de reporter des sommes en vertu de la disposition 10 pour réduire ces augmentations.

9. Les valeurs actuelles visées à la sous-disposition 7 ii sont calculées en fonction de la même période que celle utilisée aux fins du calcul des valeurs actuelles visées à la disposition 1, 1.2 ou 2, selon celle qui s'applique.

10. Si la disposition 7 permet d'augmenter le taux de cotisation obligatoire chaque année pendant un maximum de trois ans et que le montant de l'augmentation éventuelle de la première ou de la deuxième année dépasse le tiers de la différence entre le taux de cotisation obligatoire fixé dans le rapport et celui déterminé dans le dernier rapport déposé, l'excédent peut être reporté à l'année ou aux années suivantes et servir à réduire les augmentations faites ces années, pourvu que la valeur actuelle des cotisations obligatoires selon les taux majorés rajustés ne soit pas inférieure à celle visée à la sous-sous-disposition 7 ii A ou B, selon celle qui s'applique. Règl. de l'Ont. 116/06, par. 4 (5); Règl. de l'Ont. 570/06, par. 2 (1 à 10).

(2.4) Si, conformément au paragraphe (2.2), le montant des cotisations qui doivent être versées à un régime qui offre des prestations déterminées est déterminé selon une méthode d'évaluation actuarielle autre qu'une méthode de répartition des prestations, les paiements faits à la caisse de retraite ou à la compagnie d'assurance, selon le cas, ne doivent pas être inférieurs à la somme des éléments suivants :

a) les cotisations obligatoires déterminées selon la méthode d'évaluation actuarielle;

b) les paiements spéciaux déterminés conformément à l'article 5 relativement à tout déficit de solvabilité. Règl. de l'Ont. 116/06, par. 4 (5).

(2.5) Si le montant des cotisations qui doivent être versées à un régime qui offre des prestations déterminées est déterminé conformément au paragraphe (2.2) selon une méthode d'évaluation actuarielle autre qu'une méthode de répartition des prestations, ces cotisations sont réputées celles qui doivent être versées aux termes du présent règlement et les définitions à l'article 1 s'appliquent avec les adaptations nécessaires. Règl. de l'Ont. 116/06, par. 4 (5).

(2.6) Si le rapport déposé aux termes de l'article 3 ou 14 révèle, à l'égard d'un régime de retraite conjoint dont les taux de cotisation sont fixés au moyen d'une méthode de répartition des prestations, la nécessité d'une augmentation du coût normal ou d'une augmentation du montant des cotisations antérieurement réduites aux termes du paragraphe 7 (3), le versement de cette augmentation commence dans les 12 mois qui suivent la date d'évaluation. Règl. de l'Ont. 570/06, par. 2 (11).

(2.7) Si le rapport déposé aux termes de l'article 3 ou 14 révèle un passif à long terme non capitalisé qui doit être acquitté à l'égard d'un régime de retraite conjoint dont les taux de cotisation sont fixés au moyen d'une méthode de répartition des prestations, les paiements spéciaux rattachés à ce passif, déterminés conformément au paragraphe 5 (1.2), peuvent être augmentés d'au moins du tiers, chaque année pendant un maximum de trois ans, à compter d'au plus tard 12 mois après la date d'évaluation ou, dans le cas d'un rapport intermédiaire visé à l'article 5.5, à compter d'au plus tard le 1er janvier 2007, mais seulement si les conditions suivantes sont réunies :

a) les paiements spéciaux d'après cette période correspondent à un pourcentage constant des gains ouvrant droit à pension de chaque catégorie de participants, sous réserve de toute modification requise aux fins de la coordination avec le *Régime de pensions du Canada* ou le *Régime de rentes du Québec*;

b) la valeur actuelle des paiements spéciaux, y compris les paiements spéciaux majorés, à effectuer pendant la période d'amortissement n'est pas inférieure au passif à long terme non capitalisé. Règl. de l'Ont. 570/06, par. 2 (12).

(2.7.1) Si le paragraphe (2.7) permet d'augmenter chaque année, pendant un maximum de trois ans, les paiements spéciaux rattachés au passif à long terme non capitalisé, déterminés conformément au

paragraphe 5 (1.2), et que le montant de l'augmentation éventuelle de la première ou de la deuxième année dépasse le tiers de ces paiements, l'excédent peut être reporté à l'année ou aux années suivantes et servir à réduire les augmentations faites ces années, pourvu que la valeur actuelle des paiements spéciaux, y compris les paiements spéciaux majorés rajustés, à effectuer pendant la période d'amortissement ne soit pas inférieure au passif à long terme non capitalisé. Règl. de l'Ont. 570/06, par. 2 (13).

(2.8) Dans le cas d'un régime de retraite conjoint, les cotisations visées au paragraphe 39 (3) de la Loi comprennent les cotisations versées par un ancien participant à l'égard de tout passif à long terme non capitalisé ou de tout déficit de solvabilité. Règl. de l'Ont. 116/06, par. 4 (5).

(3) Lorsqu'il existe un solde créditeur de l'exercice antérieur, l'employeur peut l'affecter à la réduction des paiements visés aux alinéas (2) b), c) et d). Règl. de l'Ont. 142/94, art. 1.

(3.1) Le paragraphe (3) ne s'applique pas si le régime offre des prestations déterminées et ne se sert pas d'une méthode de répartition des prestations pour fixer les taux de cotisation. Règl. de l'Ont. 116/06, par. 4 (6).

(4) Les paiements visés aux paragraphes (2) et (2.4) sont faits par l'employeur ou par la personne ou l'entité qui est tenue de cotiser pour son compte, le cas échéant, et, s'il y lieu, par les participants au régime dans les délais suivants :

1. Les sommes reçues d'un employé par l'employeur, y compris celles qui sont déduites par retenues salariales ou autrement, comme cotisations des employés au régime, dans les 30 jours qui suivent le mois au cours duquel elles ont été reçues ou déduites.

2. Abrogée : Règl. de l'Ont. 116/06, par. 4 (8).

3. Dans le cas d'un régime de retraite qui offre des prestations déterminées, les cotisations de l'employeur relatives au coût normal indiqué dans un rapport préparé aux termes de l'alinéa 13 (1) a) ou 14 (7) a) pour chaque période visée par un rapport commençant le 1er janvier 1988 ou après cette date, payables en versements mensuels, dans les 30 jours qui suivent le mois pour lequel les cotisations sont payables, le montant des versements devant être un montant total fixe en dollars, un montant fixe en dollars pour chaque employé ou participant au régime ou un pourcentage fixe soit de la partie de la masse salariale rattachée aux participants au régime, soit des cotisations des employés.

3.1 Si toutes les prestations de retraite offertes par le régime sont des prestations à cotisation déterminée, les cotisations de l'employeur pour l'exercice du régime, payables en versements mensuels, dans les 30 jours qui suivent le mois pour lequel les cotisations sont payables, le montant des versements devant être un montant total fixe en dollars, un montant fixe en dollars pour chaque employé ou participant au régime ou un pourcentage fixe soit de la partie de la masse salariale rattachée aux participants au régime, soit des cotisations des employés.

4. Abrogée : Règl. de l'Ont. 116/06, par. 4 (8).

5. Les paiements spéciaux déterminés conformément à l'article 5, au paragraphe 31 (5) et au paragraphe 35 (5), autres que les paiements faits aux termes de la disposition 4, payables en versements mensuels égaux, selon les délais de paiement énoncés aux articles 5, 31 et 35.

6. Les paiements spéciaux déterminés conformément aux paragraphes 31 (1) et (2), à l'article 32 et au paragraphe 35 (3), payables en versements annuels, selon les délais de paiement énoncés aux articles 31, 32 et 35. Règl. de l'Ont. 142/94, art. 1; Règl. de l'Ont. 386/04, art. 1; Règl. de l'Ont. 116/06, par. 4 (7).

(5) Sous réserve des paragraphes (10) et (11), si la période visée par un rapport déposé aux termes de l'article 3, 5.3, 13 ou 14 ou présenté aux termes du présent article est terminée et qu'aucun rapport visant une période subséquente n'est déposé aux termes de l'article 14 ni présenté aux termes du présent article, l'employeur ou la personne ou l'entité qui est tenue de cotiser pour son compte, le cas échéant, et, s'il y a lieu, les participants au régime continuent de faire les paiements conformément au rapport déposé ou présenté le plus récemment aux termes de l'article 3, 5.3, 13 ou 14 ou du présent article. Règl. de l'Ont. 116/06, par. 4 (9).

(6) Le surintendant peut faire préparer un rapport sur un régime lorsque :

a) un rapport sur le régime exigé par l'article 3, 13 ou 14 n'a pas été déposé dans l'année qui suit le délai fixé par le présent règlement;

b) le surintendant est d'avis que la préparation d'un rapport conformément au paragraphe (7) est nécessaire pour veiller à ce que le régime ait un financement suffisant pour fournir les prestations qu'il prévoit. Règl. de l'Ont. 142/94, art. 1; Règl. de l'Ont. 307/98, par. 2 (1); Règl. de l'Ont. 144/00, par. 4 (1).

(7) Le rapport prévu au paragraphe (6) renferme les renseignements exigés par l'article 3, 13 ou 14, selon celui de ces articles qui s'applique. Règl. de l'Ont. 144/00, par. 4 (2).

(7.1) Le rapport prévu au paragraphe (6) est préparé et présenté au surintendant par l'actuaire de son choix. Règl. de l'Ont. 144/00, par. 4 (2).

(8) Si, au cours de la préparation d'un rapport sur un régime prévu au présent article, le surintendant est d'avis que le rapport n'est plus nécessaire pour veiller à ce que le régime ait un financement suffisant pour fournir les prestations qu'il prévoit, il peut faire cesser la préparation du rapport et l'actuaire n'a pas besoin de le lui présenter. Règl. de l'Ont. 142/94, art. 1; Règl. de l'Ont. 307/98, par. 2 (3).

(9) Si un rapport est présenté au surintendant aux termes du paragraphe (7.1), l'employeur ou la personne ou l'entité qui est tenue de cotiser pour son compte, le cas échéant, et, s'il y a lieu, les participants au régime font les paiements conformément au rapport. Règl. de l'Ont. 116/06, par. 4 (10).

(10) Sous réserve du paragraphe (11), si le montant d'un paiement exigé dans un rapport présenté aux termes du paragraphe (7.1) en ce qui concerne un régime est différent de celui exigé dans un rapport déposé par l'administrateur, l'employeur ou la personne ou l'entité qui est tenue de cotiser pour son compte, le cas échéant, et, s'il y a lieu, les participants au régime font le paiement exigé le plus élevé. Règl. de l'Ont. 116/06, par. 4 (10).

(11) Si, de l'avis du surintendant, le paiement exigé le plus élevé visé au paragraphe (10) n'est pas nécessaire pour faire en sorte que le régime ait un financement suffisant pour fournir les prestations qu'il prévoit, c'est le paiement exigé le moins élevé qui est fait. Règl. de l'Ont. 116/06, par. 4 (10).

(12) Abrogé : Règl. de l'Ont. 144/00, par. 4 (3).

(13) Le présent article ne s'applique pas aux régimes visés au paragraphe 6 (1), à moins qu'ils ne soient des régimes de retraite conjoints. Règl. de l'Ont. 116/06, par. 4 (11).

PAIEMENTS SPÉCIAUX — DISPOSITIONS GÉNÉRALES

5. (1) Sauf disposition contraire du présent article et des articles 4, 5.1 et 7, les paiements spéciaux qui doivent être faits après la date d'évaluation initiale aux termes de l'alinéa 4 (2) c) ne sont pas inférieurs à la somme des éléments suivants :

a) les paiements spéciaux qui restent à faire relativement à tout passif initial non capitalisé ou déficit actuariel au sens du Règlement 746 des Règlements refondus de l'Ontario de 1980, tel qu'il existait le 31 décembre 1987, après que soit réduite la somme du passif initial non capitalisé et du déficit actuariel du montant des gains actuariels inutilisés qui existaient le 31 décembre 1987;

b) relativement à tout passif à long terme non capitalisé non visé par l'alinéa a), les paiements spéciaux nécessaires pour acquitter le passif, avec intérêts au taux d'intérêt de l'évaluation à long terme, par versements mensuels égaux sur une période de quinze ans commençant à la date d'évaluation du rapport dans lequel le passif à long terme non capitalisé a été déterminé;

c) relativement à chaque déficit de solvabilité redéterminé aux termes du paragraphe (3), les paiements spéciaux nécessaires pour acquitter le déficit de solvabilité redéterminé, avec intérêts aux taux utilisés pour le calcul du passif de solvabilité dans le premier rapport déposé ou présenté aux termes de l'article 3, 4 ou 14 et dont la date d'évaluation est postérieure à la date du Règlement, par versements mensuels égaux sur la période commençant à la date d'évaluation du rapport dans lequel le déficit de solvabilité a été déterminé et se terminant le 31 décembre 2002;

d) relativement à chaque déficit de solvabilité né avant la date du Règlement mais non redéterminé aux termes du paragraphe (3), les paiements spéciaux nécessaires pour acquitter le déficit de solvabilité, avec intérêts aux taux visés au paragraphe (2), par versements mensuels égaux sur la période commençant à la date d'évaluation du rapport dans lequel le déficit de solvabilité a été déterminé et se terminant au plus tard le 31 décembre 2002;

e) relativement à tout déficit de solvabilité né à la date du Règlement ou après celle-ci, les paiements spéciaux nécessaires pour acquitter le déficit de solvabilité, avec intérêts aux taux visés au paragraphe (2), par versements mensuels égaux sur la période commençant à la date d'évaluation du rapport dans lequel le déficit de solvabilité a été déterminé et se terminant le 31 décembre 2002 ou après cinq ans, selon la plus longue de ces périodes. Règl. de l'Ont. 142/94, art. 1.

(1.1) Malgré les alinéas (1) b) et e), dans le cas d'un régime de retraite conjoint, les paiements spéciaux peuvent être déterminés conformément au paragraphe (1.2) à l'une ou l'autre des dates suivantes :

a) la date à laquelle est né le passif à long terme non capitalisé, dans le cas des paiements spéciaux visés à l'alinéa (1) b);

b) la date à laquelle est né le déficit de solvabilité, dans le cas des paiements spéciaux visés à l'alinéa (1) e). Règl. de l'Ont. 116/06, par. 5 (1).

(1.2) Les paiements spéciaux visés au paragraphe (1.1) sont déterminés conformément aux règles suivantes :

1. Chaque paiement prévu correspond à un pourcentage constant du total des gains ouvrant droit à pension des participants au régime à la date d'évaluation estimés à la date du début de ces paiements et, après cette date, annuellement jusqu'au terme de la période d'amortissement sans tenir compte des éléments suivants :

   i. les modifications de l'affiliation au régime susceptibles de se produire après la date d'évaluation par suite de la cessation de l'emploi ou de l'affiliation, de la retraite ou du décès de participants ou de l'ajout de nouveaux participants au régime,

   ii. toutes les autres modifications de l'affiliation au régime susceptibles de se produire après la date d'évaluation.

1.1 Malgré la disposition 1, s'il existe des raisons de croire qu'il se produira une baisse importante du nombre de participants avant la fin de la période d'amortissement, le total, visé à la disposition 1, des gains ouvrant droit à pension prévus tient compte de la baisse prévue de ce total.

2. Le total, visé à la disposition 1, des gains ouvrant droit à pension prévus est déterminé selon des hypothèses actuarielles compatibles avec celles utilisées pour estimer les gains ouvrant droit à pension dans l'évaluation à long terme effectuée selon la méthode de répartition des prestations.

3. La valeur actuelle des paiements prévus, à la date visée au paragraphe (1.1), est égale au passif à long terme non capitalisé ou au déficit de solvabilité à acquitter.

4. Les périodes d'amortissement applicables aux séries de paiements prévus sont les mêmes que les périodes correspondantes visées aux alinéas (1) b) et e) et commencent au plus tard 12 mois après la date d'évaluation.

5. La valeur actuelle des paiements prévus est déterminée :

   i. d'une part, relativement au passif à long terme non capitalisé, en utilisant le ou les taux d'intérêt utilisés dans le rapport pour le calcul du passif à long terme non capitalisé,

   ii. d'autre part, relativement au déficit de solvabilité, en utilisant les taux d'intérêt utilisés dans le rapport pour le calcul du déficit de solvabilité. Règl. de l'Ont. 116/06, par. 5 (1); Règl. de l'Ont. 570/06, art. 3.

(2) Les taux d'intérêt à utiliser pour le calcul des paiements spéciaux visés aux alinéas (1) d) et e) relativement à un déficit de solvabilité correspondent aux taux utilisés dans le rapport prévu à l'article 14 dans lequel le déficit de solvabilité a été déterminé pour les parties applicables de la période d'amortissement des paiements spéciaux. Règl. de l'Ont. 142/94, art. 1.

(3) Sauf lorsque l'employeur choisit en vertu du paragraphe (8) de ne pas le redéterminer, le déficit de solvabilité déterminé dans un rapport dont la date d'évaluation est antérieure à la date du Règlement est redéterminé conformément au présent règlement et le montant du déficit de solvabilité redéterminé est inscrit dans le rapport déposé conformément au paragraphe (5). Règl. de l'Ont. 142/94, art. 1.

(4) S'il est déterminé conformément au paragraphe 13 (1.1) ou à l'alinéa 14 (8) a) que le déficit de solvabilité est de zéro, cette détermination est une détermination du déficit de solvabilité pour l'application du paragraphe (3). Règl. de l'Ont. 142/94, art. 1.

(5) Sauf lorsque l'employeur choisit en vertu du paragraphe (8) de ne pas faire de redétermination, l'administrateur dépose un rapport conformément aux paragraphes (6) et (7). Règl. de l'Ont. 142/94, art. 1.

(6) La date d'évaluation du rapport visé au paragraphe (5) n'est pas postérieure au dernier jour de l'exercice du régime au cours duquel tombe la date du Règlement. Le rapport est déposé dans les neuf mois de la date d'évaluation. Règl. de l'Ont. 142/94, art. 1.

(7) Le rapport visé au paragraphe (5) indique ce qui suit :

a) les renseignements visés aux paragraphes 14 (7), (8) et (9);

b) le montant de chaque déficit de solvabilité redéterminé;

c) les paiements spéciaux, déterminés conformément à l'alinéa 5 (1) c), relativement à chaque déficit de solvabilité redéterminé;

d) le montant du solde de solvabilité initial;

e) le montant du solde créditeur de l'exercice antérieur. Règl. de l'Ont. 142/94, art. 1.

(8) L'employeur partie à un régime peut choisir de ne pas redéterminer les déficits de solvabilité nés avant la date du Règlement s'il est satisfait aux conditions prévues au paragraphe (9) à l'égard de chacun des rapports suivants :

1. Les rapports sur le régime déposés aux termes des articles 3, 13 et 14 et dont les dates d'évaluation ne sont pas antérieures au 1er janvier 1988, mais sont antérieures de neuf mois à la date du Règlement.

2. Les rapports qui doivent être déposés sur le régime aux termes de l'article 3 le 1er juillet 1988 ou après cette date, mais avant la date du Règlement.

3. Les rapports qui doivent être déposés sur le régime aux termes de l'article 13 le 1er mars 1988 ou après cette date, mais avant la date du Règlement.

4. Les rapports qui doivent être déposés sur le régime aux termes de l'article 14 le 1er octobre 1988 ou après cette date, mais avant la date du Règlement. Règl. de l'Ont. 142/94, art. 1.

(9) Il doit être satisfait aux conditions qui suivent à l'égard des rapports visés au paragraphe (8) :

1. Les rapports ont tous été déposés.

2. Les rapports ont tous été préparés conformément aux exigences de la Loi et du présent règlement qui sont applicables à la date d'évaluation des rapports.

3. Les paiements qui, selon les rapports, doivent être faits avant la date du Règlement l'ont été.

4. Un actuaire a signé une déclaration selon laquelle il a été satisfait aux exigences de la disposition 2.

5. L'administrateur a signé une déclaration selon laquelle il a été satisfait aux exigences des dispositions 1 et 3. Règl. de l'Ont. 142/94, art. 1.

(10) L'employeur qui choisit en vertu du paragraphe (8) de ne pas faire de redétermination ne peut annuler son choix. Règl. de l'Ont. 142/94, art. 1.

(11) Lorsqu'un employeur partie à un régime a choisi en vertu du paragraphe (8) de ne pas faire de redétermination, l'administrateur du régime dépose, dans les neuf mois qui suivent le dernier jour de l'exercice du régime au cours duquel tombe la date du Règlement, un rapport comprenant ce qui suit :

a) les déclarations visées aux dispositions 4 et 5 du paragraphe (9);

b) relativement aux paiements spéciaux exigés par l'alinéa 5 (1) d), l'indication du montant des versements mensuels et de la période sur laquelle ils doivent être faits;

c) l'indication du montant du solde de solvabilité initial à la date du Règlement;

d) l'indication du montant du solde créditeur de l'exercice antérieur à la date du Règlement. Règl. de l'Ont. 142/94, art. 1.

(12) La définition qui suit s'applique au présent article.

«paiement anticipé» À l'égard d'un régime, s'entend de la partie des paiements spéciaux qui a dépassé les paiements spéciaux exigés par le présent règlement, tel qu'il existait avant la date du Règlement, et que l'employeur a versée avant cette date relativement au passif à long terme non capitalisé, mais qu'il n'a pas imputée avant la même date aux termes du paragraphe 12 (1) du présent règlement, tel qu'il existait avant celle-ci. Toutefois, aucun paiement spécial fait par l'employeur et inclus dans le calcul du solde de solvabilité initial du régime ne doit être inclus dans un paiement anticipé. Règl. de l'Ont. 142/94, art. 1.

(13) Pour un régime établi à la date du Règlement ou après celle-ci, le solde créditeur de l'exercice antérieur à utiliser dans le rapport sur le régime qui est déposé aux termes de l'article 13 est de zéro. Règl. de l'Ont. 142/94, art. 1.

(14) Pour un régime à l'égard duquel l'administrateur dépose un rapport aux termes du paragraphe (11), le solde créditeur de l'exercice antérieur à utiliser dans ce rapport est un montant égal à la somme du solde de solvabilité initial positif du régime et du montant des paiements anticipés relatifs au régime. Règl. de l'Ont. 142/94, art. 1.

(15) Pour un régime non visé au paragraphe (13) ou (14), le solde créditeur de l'exercice antérieur à utiliser dans le premier rapport déposé ou présenté aux termes des articles 3, 4 et 14 après la date du Règlement est un montant égal à la somme du solde de solvabilité initial positif du régime et du montant des paiements anticipés relatifs au régime ou, si le régime ne présente pas de solde de solvabilité initial positif, égal aux paiements anticipés relatifs au régime. Règl. de l'Ont. 142/94, art. 1.

(16) Sous réserve des paragraphes (13), (14), (15), (16.1) et 5.1 (5), le solde créditeur de l'exercice antérieur à utiliser dans un rapport exigé par le présent règlement est le montant de l'excédent de la somme des montants suivants :

a) le solde créditeur de l'exercice antérieur, déclaré dans le dernier rapport sur le régime déposé ou présenté aux termes du présent règlement;

b) les cotisations totales de l'employeur versées au régime après la date d'évaluation du dernier rapport sur le régime déposé ou présenté aux termes du présent règlement, mais avant la date d'évaluation courante;

sur :

c) l'ensemble des cotisations de l'employeur qui doivent être versées aux termes de l'article 4 après la date d'évaluation du dernier rapport sur le régime déposé ou présenté aux termes du présent règlement, mais avant la date d'évaluation courante, calculées sans tenir compte du solde créditeur de l'exercice antérieur. Règl. de l'Ont. 142/94, art. 1; Règl. de l'Ont. 144/00, par. 5 (1).

(16.1) Dans le cas d'un rapport qui est déposé aux termes de l'article 3 ou 14 ou présenté aux termes de l'article 4 et dont la date d'évaluation tombe le 31 décembre 1998 ou après cette date, le solde créditeur de l'exercice antérieur peut être ramené à un montant qui :

a) d'une part, est inférieur au montant calculé par ailleurs conformément au paragraphe (16);

b) d'autre part, n'est pas inférieur à zéro. Règl. de l'Ont. 144/00, par. 5 (2).

(16.2) Malgré les paragraphes (13), (14), (15), (16) et (16.1), si un régime offre des prestations déterminées et qu'une méthode de répartition des prestations n'est pas utilisée pour fixer les taux de cotisation, le solde créditeur de l'exercice antérieur à utiliser dans un rapport déposé ou présenté à son égard est de zéro. Règl. de l'Ont. 116/06, par. 5 (2).

(17) Si, à une date d'évaluation postérieure à la date d'évaluation initiale, la somme de l'actif de solvabilité et du rajustement de l'actif de solvabilité dépasse la somme du passif de solvabilité, du rajustement du passif de solvabilité et du solde créditeur de l'exercice antérieur (cet excédent étant appelé dans le présent paragraphe «excédent de solvabilité»), les paiements spéciaux visés aux alinéas (1) c), d) et e) à l'égard d'un déficit de solvabilité né avant la date d'évaluation et qui sont prévus après celle-ci sont rajustés conformément aux règles qui suivent :

1. Lorsque l'excédent de solvabilité est supérieur ou égal à la valeur actuelle des paiements spéciaux visés aux alinéas (1) c), d) et e), les paiements spéciaux sont ramenés à zéro.

2. Lorsque l'excédent de solvabilité est inférieur à la valeur actuelle des paiements spéciaux visés aux alinéas (1) c), d) et e), le taux mensuel des paiements spéciaux n'est pas modifié, mais leur période d'amortissement est réduite de façon à ramener l'excédent de solvabilité à zéro. Règl. de l'Ont. 142/94, art. 1; Règl. de l'Ont. 116/06, par. 5 (3).

(18) Si, à la date du Règlement, un régime fournit des prestations de fermeture d'entreprise ou des prestations de mise à pied permanente, l'employeur peut choisir, en déposant un avis écrit auprès du surintendant dans le délai visé au paragraphe (19), d'exclure toutes ces prestations du calcul du passif de solvabilité du régime. Règl. de l'Ont. 142/94, art. 1.

(19) Le choix visé au paragraphe (18) est fait dans le délai prévu par le présent règlement pour le dépôt du premier rapport sur le régime, préparé aux termes de l'article 3 ou 14, après la date du Règlement. Règl. de l'Ont. 142/94, art. 1.

(20) L'employeur peut en tout temps annuler un choix fait en vertu du paragraphe (18) en déposant un avis écrit à cet effet. Règl. de l'Ont. 142/94, art. 1.

(21) L'annulation prévue au paragraphe (20) prend effet à la date de dépôt de l'avis écrit. Règl. de l'Ont. 142/94, art. 1.

(22) L'employeur qui a annulé un choix fait en vertu du paragraphe (18) ne peut faire un autre choix en vertu du même paragraphe relativement au régime. Règl. de l'Ont. 142/94, art. 1.

(23) Sauf si l'employeur choisit en vertu du paragraphe (8) de ne pas faire de redétermination ou dépose un rapport spécial initial en vertu du paragraphe 5.3 (1), les paiements spéciaux exigés pour la période commençant à la date du Règlement et se terminant à la date d'évaluation initiale, en vue de l'amortissement du passif à long terme non capitalisé ou du déficit de solvabilité, ne doivent pas être inférieurs aux paiements spéciaux exigés par le présent règlement tel qu'il existait immédiatement avant la date du Règlement. Règl. de l'Ont. 142/94, art. 1.

(24) Lorsque l'employeur a choisi en vertu du paragraphe (8) de ne pas faire de redétermination, les paiements spéciaux exigés pour la période commençant à la date du Règlement et se terminant à la date d'évaluation initiale, relativement à chaque déficit de solvabilité déterminé dans un rapport dont la date d'évaluation est antérieure à la date du Règlement, ne doivent pas être inférieurs aux paiements spéciaux exigés par l'alinéa 5 (1) d). Règl. de l'Ont. 142/94, art. 1.

(25) Le présent article n'a pas pour effet de soustraire une personne à l'obligation qu'elle a de faire un paiement exigé par le présent règlement relativement au solde de solvabilité initial négatif d'un régime. Règl. de l'Ont. 142/94, art. 1.

TAB E

Pension Benefits Standards Act, 1985, RSC 1985, c 32 (2nd Supp)

Current version: in force since Apr 1, 2011

Link to the latest version : http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-32-2nd-supp/latest/
Stable link to this version : http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-32-2nd-supp/88077/
Currency: Last updated from the Justice Laws Web Site on 2011-05-26

Pension Benefits Standards Act, 1985

R.S., 1985, c. 32 (2nd Supp.)

P-7.01

[1986, c. 40, assented to 27th June, 1986]

An Act respecting pension plans organized and administered for the benefit of persons employed in connection with certain federal works, undertakings and businesses

SHORT TITLE

Short title

1. This Act may be cited as the *Pension Benefits Standards Act, 1985*.

INTERPRETATION

Definitions

2. (1) In this Act,

"actuary"
« actuaire »

"actuary" means a Fellow of the Canadian Institute of Actuaries;

"additional voluntary contribution"
« cotisation facultative »

"additional voluntary contribution" under a pension plan means an optional contribution by a member that does not give rise to an obligation on the employer to make additional contributions;

"administrator"
« administrateur »

"administrator", in relation to a pension plan, means the administrator referred to in section 7, and includes the replacement administrator appointed under subsection 7.6(1);

"cessation of membership"
« fin de participation »

"cessation of membership" in a pension plan has the meaning assigned by subsection (2);

"collective agreement"
« convention collective »

"collective agreement" means an agreement in writing entered into between an employer and a bargaining agent containing provisions respecting terms and conditions of employment and related matters;

8. (1) An employer shall ensure, with respect to its pension plan, that the following amounts are kept separate and apart from the employer's own moneys, and the employer is deemed to hold the amounts referred to in paragraphs (*a*) to (*c*) in trust for members of the pension plan, former members, and any other persons entitled to pension benefits under the plan:

(*a*) the moneys in the pension fund,

(*b*) an amount equal to the aggregate of the following payments that have accrued to date:

(i) the prescribed payments, and

(ii) the payments that are required to be made under a workout agreement; and

(*c*) all of the following amounts that have not been remitted to the pension fund:

(i) amounts deducted by the employer from members' remuneration, and

(ii) other amounts due to the pension fund from the employer, including any amounts that are required to be paid under subsection 9.14(2) or 29(6).

Where bankruptcy, etc., of employer

(2) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (1) is deemed to be held in trust shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate.

Administration of pension plan and fund

(3) The administrator shall administer the pension plan and pension fund as a trustee for the employer, the members of the pension plan, former members, and any other persons entitled to pension benefits or refunds under the plan.

Standard of care

(4) In the administration of the pension plan and pension fund, the administrator shall exercise the degree of care that a person of ordinary prudence would exercise in dealing with the property of another person.

Manner of investing assets

(4.1) The administrator shall invest the assets of a pension fund in accordance with the regulations and in a manner that a reasonable and prudent person would apply in respect of a portfolio of investments of a pension fund.

Special knowledge or skill

(5) Without limiting the generality of subsection (4), an administrator who in fact possesses, or by reason of profession or business ought to possess, a particular level of knowledge or skill relevant to the administration of a pension plan or pension fund shall employ that particular level of knowledge or skill in the administration of the pension plan or pension fund.

Administrator not liable

(5.1) An administrator is not liable for contravening subsection (4), (4.1) or (5) if the contravention occurred because the administrator relied in good faith on

(*a*) financial statements of the pension plan prepared by an accountant, or a written report of the auditor or auditors of the plan, that have been represented to the administrator as fairly reflecting the financial condition of the plan; or

(*b*) a report of an accountant, an actuary, a lawyer, a notary or another professional person whose profession lends credibility to the report.

Conflict of interest

(6) A person shall not accept an appointment to a body referred to in paragraph 7(1)(*a*) or (*b*) or subparagraph 7(1)(*c*)(ii) if there would be a material conflict of interest between that person's role as a member of that body and that person's role in any other capacity.

Not a conflict of interest

(6.1) For the purposes of subsection (6), merely being entitled to a pension benefit or having an interest in a pension benefit credit does not constitute a conflict of interest.

Eliminating conflict of interest

(7) A person described in subsection (6) shall, within ninety days after becoming aware that a material conflict of interest exists,

(*a*) eliminate that conflict of interest; or

(*b*) resign as a member of that body.

Validity of documents

(8) A document issued by a board of trustees or other similar body or a pension committee is valid notwithstanding a material conflict of interest of a member thereof.

Removal of member

(9) If a person contravenes subsection (6) or (7), the Superintendent or any other interested person may apply to a court of competent jurisdiction for an order that that person be replaced, and the court may make an order on such terms as it considers appropriate.

Other conflicts of interest

(10) If there is a material conflict of interest between the role of an employer who is an administrator, or the role of the administrator of a simplified pension plan, and their role in any other capacity, the administrator

(*a*) shall, within thirty days after becoming aware that a material conflict of interest exists, declare that conflict of interest to the pension council or to the members of the pension plan; and

(*b*) shall act in the best interests of the members of the pension plan.

Court order

(11) If an administrator contravenes subsection (10), a court of competent jurisdiction may, on application by the Superintendent or any other interested person, make any order on such terms as the court considers appropriate.

R.S., 1985, c. 32 (2nd Supp.), s. 8; 1998, c. 12, s. 6; 2010, c. 12, s. 1791.

FUNDING AND SURPLUS

REQUIRED FUNDING

Funding of pension plan

9. (1) A pension plan shall be funded in accordance with the prescribed tests and standards for solvency.

Payments by employer

(1.1) In respect of a pension plan that is not a multi-employer pension plan, the employer shall pay into the pension fund all amounts required to meet the prescribed tests and standards for solvency.

Multi-employer pension plan

(1.2) In respect of a multi-employer pension plan, each participating employer shall pay into the pension fund all contributions that they are required to pay under an agreement between participating employers or a collective agreement, statute or regulation.

Actuarial reports

(2) In the case of an actuarial report required under subsection 12(2), if the Superintendent is of the opinion that the report has not been prepared

(*a*) on the basis of actuarial assumptions or methods that are adequate and appropriate, and

(*b*) in accordance with the standards of practice adopted by the Canadian Institute of Actuaries, except as otherwise specified by the Superintendent,

the Superintendent shall notify the administrator in writing of this opinion and shall direct the administrator to cause the appropriate changes to be made to the report, and the administrator shall forthwith comply with such a direction.

Amended report

(3) A pension plan shall be funded in accordance with the report referred to in subsection (2) as amended pursuant to any direction of the Superintendent under that subsection.

(4) to (6) [Repealed, 1998, c. 12, s. 8]

R.S., 1985, c. 32 (2nd Supp.), s. 9; 1998, c. 12, s. 8; 2010, c. 12, s. 1793.

Designation of actuary

9.01 (1) If the Superintendent is of the opinion that it is in the best interests of the members or former members, or any other persons entitled to pension benefits under a pension plan, the Superintendent may designate an actuary to prepare, in accordance with subsection 12(3.1), an actuarial report or a termination report required under subsection 12 (2) or 29(9), respectively, and to provide the administrator with the report within the period specified by the Superintendent.

Notification

(2) The Superintendent must notify the administrator in writing of the designation. If the administrator is not the employer, the administrator must notify the employer in writing.

Obligation to provide information

Loi de 1985 sur les normes de prestation de pension, LRC 1985, c 32 (2e suppl)

Version courante : en vigueur depuis le 1 avr. 2011

Normes de prestation de pension, Loi de 1985 sur les

L.R., 1985, ch. 32 (2e suppl.)

P-7.01

[1986, ch. 40, sanctionné le 27 juin 1986]

Loi concernant les régimes de pension institués et gérés en faveur de personnes dont l'emploi est lié à des ouvrages, entreprises ou activités de compétence fédérale

TITRE ABRÉGÉ

Titre abrégé

1. *Loi de 1985 sur les normes de prestation de pension.*

DÉFINITIONS

Définitions

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

« accord de sauvetage »
" *workout agreement* "

« accord de sauvetage » Accord établissant un calendrier de capitalisation approuvé par le ministre au titre de l'article 29.3.

« accord multilatéral »
" *multilateral agreement* "

« accord multilatéral » Accord conclu en vertu du paragraphe 6.1(1).

« actuaire »
" *actuary* "

« actuaire » Fellow de l'Institut canadien des actuaires.

« administrateur »
" *administrator* "

« administrateur » L'administrateur, au sens de l'article 7, d'un régime de pension ou son remplaçant nommé en vertu du paragraphe 7.6(1).

« âge admissible »
" *pensionable age* "

« âge admissible » Âge minimal, compte tenu des périodes d'emploi du participant auprès de l'employeur ou de sa période de participation au régime, le cas échéant, auquel le service d'une prestation de pension — autre qu'une prestation

1998, ch. 12, art. 5; 2010, ch. 25, art. 182.

Demande d'assemblée

7.5 (1) L'administrateur est tenu, sur demande écrite du surintendant, de convoquer, dans le délai fixé par celui-ci, une assemblée chargée d'examiner les points inscrits à l'ordre du jour joint à la demande.

Participation

(2) Le surintendant peut participer à l'assemblée et ordonner à toute autre personne intéressée d'y participer; il peut également ordonner à l'administrateur d'y inviter les participants, les anciens participants et les autres personnes qui ont droit à une prestation de pension au titre du régime de pension.

1998, ch. 12, art. 5; 2010, ch. 12, art. 1789.

Nomination d'un nouvel administrateur

7.6 (1) Si l'administrateur est insolvable ou est dans l'impossibilité d'agir, ou si le surintendant l'estime nécessaire dans l'intérêt des participants, des anciens participants ou de toute autre personne qui a droit à une prestation de pension au titre du régime de pension, ce dernier peut remplacer l'administrateur par toute personne qu'il nomme à cette fin. Le remplaçant peut recouvrer sur le fonds de pension ses honoraires et dépenses, dans la mesure où ils sont raisonnables.

Notification

(2) Le surintendant notifie sa décision à l'administrateur remplacé dans les plus brefs délais.

Effet du remplacement

(3) La décision emporte transfert de la saisine du fonds de pension au profit du nouvel administrateur à la date de la notification.

Avis

(4) Si le régime de pension fait l'objet d'une cessation totale, le nouvel administrateur avise, dès l'approbation du rapport de cessation au titre du paragraphe 29(10), les participants, les anciens participants ainsi que toute autre personne qui a droit à une prestation de pension au titre du régime de son intention de répartir l'actif du régime en conformité avec le rapport.

Publication

(5) Il fait publier l'avis d'intention dans la *Gazette du Canada* et, sauf directives contraires du surintendant, une fois par semaine pendant deux semaines consécutives, dans un ou plusieurs journaux à grand tirage publiés dans chaque province.

Subrogation

(6) Les participants, les anciens participants ainsi que toute autre personne qui a droit à une prestation de pension au titre du régime de pension avant la nomination du nouvel administrateur sont subrogés dans les droits et réclamations que celui-ci a choisi, par écrit, de ne pas faire valoir. Ils peuvent, pour faire valoir ces droits et réclamations, ester en justice sous leur propre nom.

Libération

(7) Le surintendant peut libérer le nouvel administrateur qui a réparti l'actif du régime de pension conformément à la présente loi et aux règlements.

2010, ch. 12, art. 1790.

Montants détenus en fiducie

8. (1) L'employeur veille à ce que les montants suivants soient gardés séparément de ceux qui lui appartiennent et est réputé les détenir en fiducie pour les participants actuels ou anciens ainsi que pour toutes autres personnes qui ont droit à des prestations de pension ou à des remboursements au titre du régime :

a) les sommes versées au fonds;

b) le montant correspondant à la somme des paiements, accumulés à la date en cause, prévus par règlement ou par un accord de sauvetage;

c) les montants suivants qui n'ont pas été versés au fonds de pension :

(i) les montants déduits par l'employeur sur la rémunération des participants,

(ii) les autres sommes que l'employeur doit au fonds de pension, notamment celles visées aux paragraphes 9.14(2) ou 29(6).

Faillite de l'employeur

(2) En cas de liquidation, de cession des biens ou de faillite de l'employeur, un montant correspondant à celui censé détenu en fiducie, au titre du paragraphe (1), est réputé ne pas faire partie de la masse des biens assujettis à la

procédure en cause, que l'employeur ait ou non gardé ce montant séparément de ceux qui lui appartiennent ou des actifs de la masse.

Gestion du régime et du fonds

(3) L'administrateur d'un régime de pension gère le régime et le fonds de pension en qualité de fiduciaire de l'employeur, des participants actuels ou anciens et de toutes autres personnes qui ont droit à des prestations de pension ou à des remboursements au titre du régime.

Qualité de gestion

(4) L'administrateur doit agir, dans sa gestion, avec autant de prudence que le ferait une personne normale relativement aux biens d'autrui.

Gestion en matière de placement de l'actif

(4.1) L'administrateur doit se conformer, en matière de placement de l'actif d'un fonds de pension, au règlement et adopter la pratique qu'une personne prudente suivrait dans la gestion d'un portefeuille de placements de fonds de pension.

Compétences

(5) L'administrateur qui a ou devrait avoir, compte tenu de sa profession ou de son entreprise, des connaissances ou aptitudes utiles en l'occurrence est tenu de les mettre en oeuvre dans la gestion du régime ou du fonds de pension.

Immunité

(5.1) N'est pas engagée, aux termes des paragraphes (4), (4.1) ou (5), la responsabilité de l'administrateur qui s'appuie de bonne foi sur :

a) des états financiers préparés par un comptable ou un rapport écrit préparé par un vérificateur censés refléter fidèlement la situation du régime de pension;

b) le rapport d'une personne dont la profession permet d'ajouter foi à sa déclaration, notamment l'actuaire, l'avocat, le notaire ou le comptable.

Conflit d'intérêts

(6) Ne peut accepter de faire partie de l'organe de gestion ou du comité des pensions visés au paragraphe 7(1) la personne dont la présence à ce poste créerait un conflit d'intérêts sérieux.

Absence de conflit d'intérêts

(6.1) Pour l'application du paragraphe (6), le seul fait d'avoir droit à une prestation de pension ou d'être titulaire d'un droit à pension ne constitue pas un conflit d'intérêts sérieux.

Suppression du conflit d'intérêts

(7) Le membre, visé au paragraphe (6), qui constate l'existence d'un conflit d'intérêts sérieux doit, dans les quatre-vingt-dix jours suivant le moment où il en constate l'existence :

a) soit y mettre fin;

b) soit se démettre de ses fonctions.

Validité des documents

(8) Les documents émis par l'organe de gestion ou le comité des pensions sont valides malgré l'existence d'un conflit d'intérêts sérieux mettant en cause un de ses membres.

Révocation du membre

(9) Le tribunal compétent peut, à la demande du surintendant ou de tout autre intéressé, ordonner, selon les modalités qu'il estime indiquées, le remplacement de la personne qu'il juge en conflit d'intérêts sérieux.

Autre conflit d'intérêts

(10) L'employeur qui est l'administrateur et qui se trouve dans un conflit d'intérêts sérieux entre les fonctions qu'il exerce à ce double titre de même que l'administrateur d'un régime de pension simplifié qui, en raison des fonctions qu'il occupe par ailleurs, se trouve dans un tel conflit doivent :

a) faire part du conflit au conseil des pensions ou aux participants du régime de pension dans les trente jours suivant le moment où ils en constatent l'existence;

b) agir de façon à servir les intérêts des participants.

Ordonnance du tribunal

(11) En cas de contravention au paragraphe (10), le tribunal compétent peut, à la demande du surintendant ou de tout autre intéressé, rendre l'ordonnance qu'il estime indiquée en l'espèce.

L.R. (1985), ch. 32 (2^{e} suppl.), art. 8; 1998, ch. 12, art. 6; 2010, ch. 12, art. 1791.

TAB F

Employment Pension Plans Act, RSA 2000, c E-8

This statute was amended by several enactments which came into force retroactively. This may cause some versions to contain changes which did not occur exactly at the dates shown.

Current version: in force since Nov 1, 2010

EMPLOYMENT PENSION PLANS ACT

Chapter E-8

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Interpretation

1(1) In this Act,

(a) "additional voluntary contributions" means contributions made by a member to a pension plan that are additional to member required contributions, except optional ancillary contributions and contributions whose payment, under the terms of the plan, imposes on the employer an obligation to make concurrent additional contributions, and includes compounded interest on those additional voluntary contributions and, where any such money has been transferred from the plan, compounded interest on any such money;

(b) "administrator" means

(i) subject to subclause (ii), in relation to

(A) a specified multi-employer plan, the body referred to in section 10(1),

(B) a multi-unit plan, the body referred to in section 11(1), or

(C) any other plan, the board of trustees referred to in section 12 or, if there is no such board, the employer,

or

(ii) where a person has been appointed administrator of a plan by the Superintendent under section 12.1(1) or 78(1) or (2), that person;

(c) "ancillary benefit" means a benefit of a kind provided pursuant to any clause of section 42(1);

(d) "assets", in relation to a pension plan, includes its surplus assets or excess assets, as the case may be;

(e) "benefit" means a pension or any other benefit under a pension plan, and includes a return of contributions to or in respect of a member or former member, any payment in a series of payments that constitutes a benefit and future entitlements to any such benefit, but does not include a refund of surplus assets;

(a) if the fund holder is a trust to which section 49(1)(b)(ii) applies, the custodian, and

(b) if the fund holder is not such a trust, the fund holder.

(1) An employer shall, within the prescribed period, remit employer and member contributions due to the plan,

(a) in the case of a specified multi-employer plan or a multi-unit plan, to the administrator, and

(b) in the case of any other plan, to the ultimate recipient.

(2) The administrator of a specified multi-employer plan or a multi-unit plan shall, within the prescribed period after receiving the contributions from the employer, remit them to the ultimate recipient.

(3) If the ultimate recipient does not receive the contributions it should receive within the period prescribed with reference to subsection (1)(b) or (2), as the case may be, it shall, within the prescribed period, report that fact in writing to the Superintendent.

(3.1) The ultimate recipient shall monitor the remittances that have been and that should have been received by it so as to be able to give the report required by subsection (3) accurately and in time.

(3.2) The employer or administrator, as the case may be, shall provide to the ultimate recipient, at the prescribed time and in the form required by the Superintendent, a summary of the contributions that it is required by this section to remit and that it expects to remit that will enable the ultimate recipient to comply with this section.

(3.3) If any information provided under subsection (3.2) becomes inaccurate, the employer or administrator shall forthwith provide to the ultimate recipient a revised statement giving the correct information.

(4) Money that an employer is required to pay into a pension fund shall be treated as accruing on a daily basis.

RSA 2000 cE-8 s50;2005 c26 s33

Trust arrangement for contributions

51(1) Where an employer receives or withholds money from an employee under an arrangement whereby the employer will pay the money into a pension fund as the employee's contributions under the pension plan, the employer holds the money in trust for the employee until the employer pays the money into the pension fund.

(2) An employer who is required to pay contributions to a pension fund holds in trust for the beneficiaries of the pension plan an amount equal to the employer contributions due and not paid into the pension fund.

(2.1) An administrator who is required to remit contributions under section 50 holds in trust for the beneficiaries of the pension plan an amount equal to those contributions that remain to be so remitted.

(3) Where a pension plan is terminated or wound up in whole or in part, an employer who is required to pay contributions to the pension fund holds in trust for the members, former members and beneficiaries of the pension plan an amount equal to employer contributions accrued to the date of the termination or winding-up but not yet due.

(4) Subsections (1), (2) and (3) apply whether or not the money has been kept separate and apart from other property of the employer.

(5) Subsections (1) to (4) apply in respect of money to be paid to an insurance business that guarantees benefits under a pension plan.

RSA 2000 cE-8 s51;2005 c26 s34

Deemed trust for unremitted contributions

52(1) In this section, "security interest" has the meaning given to it in the *Personal Property Security Act*.

(2) Subject to subsection (3) and section 53, money held by an employer in respect of a member, former member or beneficiary of a plan subject to a trust under section 51 is secured by a security interest on the property and assets of the employer to a maximum of $5000 whether or not that property or those assets are subject to other security interests and is payable, without registration or other perfection of that security interest, in equal priority to claims or rights under section 109 of the *Employment Standards Code* as applied with respect to the money so held.

(3) This section and sections 51 and 53 apply notwithstanding any other Act but with the same force as sections 109 and 111 of the *Employment Standards Code*.

(4) The security interest under this section may be enforced by the administrator, who may commence and conduct a proceeding to enforce it.

1992 c13 s34;1996 cE-10.3 s142

TAB G

Pension Benefits Act, RSNS 1989, c 340

Current version: in force since Dec 21, 2007

Pension Benefits Act

CHAPTER 340

OF THE

REVISED STATUTES, 1989

amended 1992, c. 27; 1993, c. 35; 2000, c. 29, ss. 26-30; 2001, c. 6, s. 120; 2002, c. 21; 2006, c. 42; 2007, c. 49

An Act Respecting Pension Benefits

Short title

1 This Act may be cited as the Pension Benefits Act. *R.S., c. 340, s. 1.*

Interpretation

2 In this Act,

(a) "additional voluntary contribution" means a contribution to a pension fund by a member of a pension plan beyond any amount that the member is required to contribute, but does not include optional ancillary contributions or a contribution in relation to which the employer is required to make a concurrent additional contribution to the pension fund;

(b) "administrator" means a person who administers a pension plan;

(c) "affiliate" means either of two corporations where one is a subsidiary of the other, or either of two corporations that are subsidiaries of the same body corporate or are controlled by the same person;

(d) "assets", in relation to an employer, means assets that in the ordinary course of business would be entered in books of account, whether or not a particular asset is entered in the books of account of the employer;

(e) "bridging benefit" means a periodic payment provided under a pension plan to a former member of the pension plan for a temporary period of time after retirement for the purpose of supplementing the former member's pension benefit until the former member is eligible to receive benefits under the Old Age Security Act (Canada) or is either eligible for or commences to receive retirement benefits under the Canada Pension Plan or the Quebec Pension Plan;

(f) "certified copy" means a copy certified to be a true copy;

(g) "collective agreement" has the same meaning as in the Trade Union Act;

(ga) "common-law partner" of an individual means another individual who has cohabited with the individual in a conjugal relationship for a period of at least two years, neither of them being a spouse;

(4) For the purpose of determining entitlements to a deferred pension, a member of a multi-employer pension plan who terminates employment with a participating employer or an employer on whose behalf contributions are made under the pension plan is deemed not to have terminated employment until the member terminates membership in the pension plan.

(5) Where a member of a multi-employer pension plan is represented by a trade union that, in accordance with the Trade Union Act ceases to represent the member, and the member joins a different pension plan, a member is entitled to terminate membership in the first plan.

(6) Subsection (5) does not apply where there is a reciprocal agreement respecting the two pension plans. *R.S., c. 340, s. 44; 2002, c. 21, s. 20.*

Notice of overdue contribution

45 (1) The administrator of a pension plan or, if there is an agent of the administrator responsible for receiving contributions under the pension plan, the administrator and the agent shall give written notice to the Superintendent of a contribution that is not paid when due.

(2) The administrator and the agent shall give the notice to the Superintendent within sixty days after the date on which the administrator or the agent first became aware of the failure to pay the contribution. *R.S., c. 340, s. 45.*

Employee and employer contributions to be held in trust

46 (1) Where an employer receives money from an employee pursuant to 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 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 is 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 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 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 has a lien and charge on the assets of the employer in an amount equal to the amounts required to be held in trust pursuant to subsections (1), (3) and (4).

(5A) The lien referred to in subsection (5) is not a charge against a parcel registered pursuant to the Land Registration Act until a certificate evidencing the lien has been recorded in the judgment roll.

(5B) The Administrator may record a notice of the lien referred to in subsection (5) in the parcel register of any property owned by a person for whom or on account of whom the amounts are required to be held in trust pursuant to subsections (1), (3) and (4) to which the lien applies and shall thereupon serve that person with a copy of the lien and recording particulars.

(5C) Upon satisfaction of the lien including payment of the fees for recording the lien and the release, the Administrator shall record a release of the lien in the parcel registers in which notice of the lien was recorded.

(6) Money required by subsection (1), (3) or (4) to be held in trust shall be kept separate and apart from other money or property of the employer.

(7) Subsections (1) to (6) apply mutatis mutandis in respect of money to be paid to an insurance company that guarantees pension benefits under a pension plan. *R.S., c. 340, s. 46; 1992, c. 27, s. 2; 2001, c. 6, s. 120; 2002, c. 21, s. 21.*

BENEFITS

Minimum commuted value

47 (1) Where the commuted value of a former member's deferred pension accrued prior to the first day of January, 1988, is less than the value of the contributions the former member was required to make under the pension plan prior to the date plus interest credited to the contributions, the former member is entitled to have the commuted value of the deferred pension increased so that the commuted value is equal to the value of the contributions and the interest.

(2) An increase in the value of the pension or deferred pension in respect of employment before the first day of January, 1988, resulting from an amendment to the pension plan made on or after the first day of January, 1988, may be included in calculating the commuted value of the deferred pension for the purposes of subsection (1).

(3) A former member's contributions made on or after the first day of January, 1988, under a pension plan and the interest on the contributions shall not be used to provide more than fifty per cent of the commuted value of the pension or

TAB H

Pension Benefits Act, SNB 1987, c P-5.1

This Act was amended by several enactments which came into force retroactively. This may cause some versions to contain changes which did not occur exactly at the dates shown.

Current version: in force since Sep 1, 2010

Link to the latest version : http://www.canlii.org/en/nb/laws/stat/snb-1987-c-p-5.1/latest/
Stable link to this version : http://www.canlii.org/en/nb/laws/stat/snb-1987-c-p-5.1/83883/
Currency: Last updated from the New Brunswick Acts and Regulations Web site on 2011-05-20

CHAPTER P-5.1

Pension Benefits Act

Assented to June 27, 1987

Her Majesty, by and with the advice and consent of the Legislative Assembly of New Brunswick, enacts as follows:

1(1) In this Act

"additional voluntary contribution" means a contribution to a pension fund by a member of the pension plan beyond any amount that the member is required to contribute, but does not include

(a) a contribution in relation to which the employer is required to make a concurrent additional contribution to the pension fund,

(b) an optional ancillary contribution, or

(c) a contribution for the purchase of past service;

"administrator" means the person or persons who administer a pension plan;

"assets" , when used in relation to an employer, means assets that in the ordinary course of business would be entered in books of account, whether or not a particular asset is entered in the books of account of the employer;

"Board" means the Labour and Employment Board established under the *Labour and Employment Board Act*;

"bridging benefit" means a periodic payment provided under a pension plan to a member of the pension plan for a temporary period of time after retirement for the purpose of supplementing the member's pension benefit until the member is eligible to receive benefits under the *Old Age Security Act* (Canada) or commences to receive retirement benefits under the *Canada Pension Plan* or the *Quebec Pension Plan*;

"Canada Pension Plan" means the *Canada Pension Plan*, chapter C-5 of the Revised Statutes of Canada, 1970;

"certified copy" means a copy certified to be a true copy;

"commuted value" means the value, calculated in the prescribed manner and as of a fixed date, of a pension, a pension benefit or an ancillary benefit;

49(2) An employer required to make contributions under a pension plan, or a person required to make contributions under a pension plan on behalf of an employer, shall make the contributions in the prescribed manner and in accordance with the prescribed requirements for funding

(a) to the pension fund, or

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

49(3) If the administrator is not the employer, the administrator shall take all necessary action so that contributions required to be paid under the pension plan and under the Act and the regulations are paid to the pension fund.

49(4) 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 the amounts required by the administrator or in the prescribed amounts.

49(5) 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.

49(6) Every person engaged in the investment of money of a pension fund shall ensure that the money is invested in accordance with this Act and the regulations.

49(7) The administrator of a pension plan or, if there is an agent of the administrator responsible for receiving contributions under the plan, the administrator and the agent shall give written notice to the Superintendent of unpaid contributions to the fund.

49(8) If the written notice under subsection (7) is not given to the Superintendent within sixty days after the date on which the contributions become due, the administrator of the pension plan and the employer are jointly liable to pay the contributions plus interest.

2002, c.12, s.23.

50(1) Subject to section 59, a pension fund is trust property for the benefit of the beneficiaries of the fund.

50(2) The beneficiaries of the pension fund are members, former members, and any other persons entitled to pensions, pension benefits, ancillary benefits or refunds under the plan.

2002, c.12, s.24.

51(1) If 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.

51(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.

51(3) An employer who is required by a pension plan 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 employer contributions due and not paid into the pension fund.

51(4) If 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 equal to employer contributions accrued to the date of the wind-up but not yet due under the plan or regulations.

51(5) The administrator of the pension plan has a lien and charge upon the assets of the employer in an amount equal to the amount that is deemed to be held in trust under subsections (1), (3) and (4).

51(6) Subsections (1), (3) and (4) apply whether or not the money mentioned in those subsections is kept separate and apart from other money or property of the employer.

52 If the administrator of the pension plan is the employer and the employer is bankrupt or insolvent, the Superintendent may act as administrator or appoint an administrator of the plan.

53 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.

INTEREST

54 After the commencement of this section, interest on contributions shall be calculated and credited at rates not less than the prescribed rates and in accordance with the prescribed requirements.

MAXIMUM EMPLOYEE COST

55(1) If a member of a pension plan has become entitled to the immediate payment of a contributory pension benefit or has become entitled to a deferred pension in respect of a contributory pension benefit, the member's accumulated contributions with interest are to be applied to offset not more than the percentage of the commuted value of the pension benefit fixed by the plan.

55(1.1) For the purposes of subsection (1), a pension plan may fix a different percentage of the commuted value of a contributory pension benefit that a member's contributions with interest are to offset for the portion of the pension benefit that is attributable, in accordance with the benefit formula of the pension plan, to a purchase of past service made after the commencement of this subsection.

55(2) Upon termination of employment or wind-up of a pension plan, a member of a plan is entitled to a refund of the amount, if any, equal to the aggregate of the contributions made by the member with interest less the amount required to offset the percentage of the commuted value of the pension benefit referred to in subsection (1), and that amount, at the option of the member, shall be dealt with in one or more of the following ways:

(a) returned to the member;

(b) transferred to a registered retirement savings plan as defined in the *Income Tax Act* (Canada) if

(i) the transfer is permitted under that Act or its regulations, and

(ii) the registered retirement savings plan is not a retirement savings arrangement prescribed for the purposes of subparagraph 36(1)(a)(ii); or

(c) transferred to a registered retirement income fund as defined in the *Income Tax Act* (Canada) if

(i) the transfer is permitted under that Act or its regulations, and

(ii) the registered retirement income fund is not a retirement savings arrangement prescribed for the purposes of subparagraph 36(1)(a)(ii).

Loi sur les prestations de pension, LN-B 1987, c P-5.1

Cette loi a subi plusieurs modifications entrées en vigueur rétroactivement. Ceci peut faire en sorte que certaines versions comportent des changements qui n'ont pas eu lieu aux dates indiquées.

Version courante : en vigueur depuis le 1 sept. 2010

CHAPITRE P-5.1

Loi sur les prestations de pension

Sanctionnée le 27 juin 1987

Sa Majesté, sur l'avis et du consentement de l'Assemblée législative du Nouveau-Brunswick, décrète :

1(1) Dans la présente loi

« administrateur » désigne la ou les personnes qui administrent un régime de pension;

« ancien participant » désigne une personne dont l'emploi ou la participation à un régime de pension a cessé et

a) qui reçoit une pension payable sur le fonds de pension, ou

b) qui a droit à une pension différée payable sur le fonds de pension;

« autorité législative désignée » désigne une province ou un territoire du Canada qui est désigné par les règlements comme une province ou un territoire où la législation en vigueur est essentiellement semblable à la présente loi, ainsi que l'ensemble du Canada concernant tout emploi qui relève du Parlement du Canada;

« Commission » désigne la Commission du travail et de l'emploi établie en vertu de la *Loi sur la Commission du travail et de l'emploi*;

« compagnie d'assurance » désigne une corporation autorisée à faire des opérations d'assurance-vie au Canada;

« conjoint » désigne respectivement un homme ou une femme

a) mariés l'un à l'autre,

b) unis par un mariage annulable qui n'a pas été déclaré nul,

c) qui, de bonne foi, ont conclu l'un avec l'autre un mariage nul et ont cohabité au cours de l'année précédente, ou

49(4) L'administrateur d'un régime de pension interemployeur peut exiger que la personne qui reçoit les cotisations du fonds de pension, ou qui l'administre ou qui fait des placements avec l'argent du fonds de pension fournisse un cautionnement aux montants prescrits ou aux montants qu'il exige.

49(5) Un employeur tenu de cotiser à un régime de pension interemployeur doit transmettre à l'administrateur du régime une copie de l'entente selon laquelle l'employeur doit cotiser ou une déclaration écrite qui indique les cotisations que l'employeur est tenu de faire ainsi que toutes autres obligations de l'employeur en vertu du régime de pension.

49(6) Toute personne qui a fait des placements avec l'argent du fonds de pension doit s'assurer que cet argent est placé conformément à la présente loi et aux règlements.

49(7) L'administrateur d'un régime de pension ou, s'il y a un représentant de l'administrateur responsable de recevoir des cotisations en vertu du régime de pension, l'administrateur et le représentant doivent donner un avis écrit au surintendant sur les cotisations impayées au fonds.

49(8) Si l'avis écrit mentionné au paragraphe (7) n'est pas donné au surintendant dans les soixante jours de la date à laquelle les cotisations deviennent dues, l'administrateur du régime de pension et l'employeur sont conjointement responsables du paiement des cotisations plus intérêts.

2002, c.12, art.23.

50(1) Sous réserve de l'article 59, le fonds de pension est un bien en fiducie au profit des bénéficiaires du fonds.

50(2) Les bénéficiaires d'un fonds de pension sont les participants, anciens participants et toutes autres personnes qui ont droit aux pensions, aux prestations de pension, aux prestations accessoires ou aux remboursements en vertu du régime de pension.

2002, c.12, art.24.

51(1) L'employeur qui reçoit de l'argent d'un salarié en vertu d'un arrangement précisant que l'employeur versera cet argent dans un fonds de pension en tant que cotisation du salarié en vertu du régime de pension, est réputé détenir cet argent en fiducie pour le salarié jusqu'à ce que l'employeur verse cet argent au fonds de pension.

51(2) Aux fins du paragraphe (1), l'argent retenu des sommes payables au salarié par l'employeur, que ce soit par déduction dans la feuille de paie ou autrement, est réputé être l'argent que l'employeur a reçu du salarié.

51(3) L'employeur tenu de payer des cotisations à un fonds de pension en vertu d'un régime de pension, est réputé détenir en fiducie pour le compte des bénéficiaires du régime de pension une somme d'argent égale aux cotisations dues par l'employeur et impayées au fonds de pension.

51(4) Si un régime de pension est liquidé totalement ou partiellement, un employeur qui est tenu de payer des cotisations à un fonds de pension est réputé détenir en fiducie pour le compte des bénéficiaires du régime de pension un montant égal aux cotisations de l'employeur accumulées à la date de la liquidation mais pas encore dues en vertu du régime ou des règlements.

51(5) L'administrateur d'un régime de pension a sur les éléments d'actif de l'employeur un privilège et une charge d'un montant égal au montant réputé être détenu en fiducie en vertu des paragraphes (1), (3) et (4).

51(6) Les paragraphes (1), (3) et (4) s'appliquent, peu importe que l'argent y mentionné soit ou ne soit pas gardé séparément et à l'écart d'autres sommes ou biens de l'employeur.

52 Si l'employeur qui est l'administrateur du régime de pension est en faillite ou insolvable, le surintendant peut agir à titre d'administrateur ou nommer un administrateur du régime.

TAB I

Pension Benefits Act, 1997, SNL 1996, c P-4.01

Current version: in force since Jun 4, 2008

Link to the latest version : http://www.canlii.org/en/nl/laws/stat/snl-1996-c-p-4.01/latest/
Stable link to this version : http://www.canlii.org/en/nl/laws/stat/snl-1996-c-p-4.01/59131/
Currency: Last updated from Statutes and Regulations Web site of the House of Assembly on 2011-05-20

This is not the official version.

SNL1996 CHAPTER P-4.01

PENSION BENEFITS ACT, 1997

Amended:

2001 c22 ss19-29; 2001 c42 s31; 2004 c36 s29; 2004 c40; 2004 c47 s29; 2007 c6; 2007 cT-9.1 s5; 2008 c16

CHAPTER P-4.01

AN ACT RESPECTING PENSION BENEFITS

(Assented to December 19, 1996)

Analysis

Be it enacted by the Lieutenant-Governor and House of Assembly in Legislative Session convened, as follows:

PART I
SHORT TITLE AND DEFINITIONS

Short title

1. This Act may be cited as the *Pension Benefits Act, 1997*.

1996 cP-4.01 s1

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(b) is entitled to a deferred pension benefit under this Act; and

(c) has attained age 55 or an earlier age permitted by the plan.

(3) An election under subsection (2) shall be made in writing by the former member and delivered to the administrator of the plan.

(4) A pension benefit on early retirement may be reduced provided the commuted value of the reduced pension benefit is not less than the commuted value of the pension benefit that would have been payable at normal retirement of the member or former member.

1996 cP-4.01 s29

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Remittance

30. (1) An employer shall, within the period prescribed by the regulations, remit employer and member contributions due under a pension plan, and other payments required under this Act,

(a) in the case of a multi-employer pension plan, to the administrator of the plan; and

(b) in the case of another pension plan, to the fundholder.

(2) Where the administrator of a multi-employer pension plan is not the trustee, the administrator shall, immediately on receipt of contributions, remit them to the trustee, and where the trustee is not the fundholder, the trustee shall immediately remit them to the fundholder.

(3) Where an employer fails to remit contributions in accordance with subsection (1), subsequent payment of contributions shall include interest on the contributions as prescribed by the regulations.

1996 cP-4.01 s30

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Failure to remit

31. Where an employer or trustee fails to remit contributions required under section 30 within 30 days after the end of the period prescribed by the regulations, the administrator of the plan or, where the employer or trustee is the administrator of the plan, the fundholder, who should have received them shall immediately notify the superintendent in writing of the failure.

1996 cP-4.01 s31

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Amounts to be held in trust

32. (1) An employer or a participating employer in a multi-employer plan shall ensure, with respect to a pension plan, that

(a) the money in the pension fund;

(b) an amount equal to the aggregate of

(i) the normal actuarial cost, and

(ii) any special payments prescribed by the regulations, that have accrued to date; and

(c) all

(i) amounts deducted by the employer from the member's remuneration, and

(ii) other amounts due under the plan from the employer that have not been remitted to the pension fund

are kept separate and apart from the employer's own money, and shall be considered to hold the amounts referred to in paragraphs (a) to (c) in trust for members, former members, and other persons with an entitlement under the plan.

(2) In the event of a liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that under subsection (1) is considered to be held in trust shall be considered to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own money or from the assets of the estate.

(3) Where a pension plan is terminated in whole or in part, an employer who is required to pay contributions to the pension fund shall hold in trust for the member or former member or other person with an entitlement under the plan an amount of money equal to employer contributions due under the plan to the date of termination.

(4) An administrator of a pension plan has a lien and charge on the assets of the employer in an amount equal to the amount required to be held in trust under subsections (1) and (3).

1996 cP-4.01 s32

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Money not assignable

33. Money payable under a pension plan shall not be assigned, charged, attached, anticipated or given as security and is exempt from execution, seizure or attachment, and a transaction purporting to assign, charge, attach, anticipate or give as security such money is void, except where this section is overridden by another Act, or in circumstances prescribed by the regulations.

1996 cP-4.01 s33

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Refund of contributions

34. On cessation of membership in a pension plan, a member is entitled to withdraw from the plan an amount equal to the aggregate of the member's own contributions, together with interest as prescribed by the regulations, in respect of a period of membership for which the member is not entitled to a pension benefit under section 28, 29, or 43.

1996 cP-4.01 s34

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Funding

35. (1) A pension plan shall provide for funding, in accordance with the requirements for solvency as prescribed by the regulations, which is adequate to provide for payment of all pension benefits required to be paid under the plan.

(2) In the case of an actuarial report required under section 16, where the superintendent is of the opinion that the report has not been prepared

(a) on the basis of actuarial assumptions or methods that are adequate and appropriate; and

(b) in accordance with accepted actuarial practice,

the superintendent shall notify the administrator of the plan in writing of this opinion and shall direct the administrator to have the appropriate changes made to the report, and the administrator shall immediately comply with that direction.

(3) A pension plan shall be funded in accordance with the report referred to in subsection (2) as amended in accordance with the direction of the superintendent.

1996 cP-4.01 s35

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Interest on contributions

36. (1) In the case of a defined contribution plan, the members' accounts shall be credited with interest, gains and losses that can reasonably be attributed to the operation of the pension fund.

(2) In the case of a defined benefit plan,

(a) interest shall be credited on members' contributions at a rate equal to or greater than the rate required by the superintendent; or

TAB J

Pension Benefits Standards Act, RSBC 1996, c 352

Current version: in force since Sep 3, 2009

Link to the latest version : http://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-352/latest/
Stable link to this version : http://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-352/74756/
Currency: Last updated from the BC Laws site on 2011-05-20

PENSION BENEFITS STANDARDS ACT

[RSBC 1996] CHAPTER 352

Part 1 — Administration

Definitions and interpretation

1 (1) In this Act:

"additional voluntary contributions" means contributions made by a member to a pension plan in addition to those contributions required to attain a pension and includes compound interest on those additional voluntary contributions but does not include optional defined benefit contributions or contributions whose payment, under the terms of the plan, imposes on the employer an obligation to make concurrent additional contributions;

"administrator" means

(a) subject to paragraphs (b) and (c), in relation to

(i) a multi-employer plan, the board of trustees referred to in section 7 (1), or

(ii) any plan other than a multi-employer plan,

(A) a board of trustees constituted to administer the plan, or

(B) the employer,

(b) a person appointed administrator of a plan by the superintendent under section 56 (1) or by the minister under section 70, or

(c) the superintendent under section 56 (2);

"advisory council" means the Pension Benefits Standards Advisory Council established under section 3;

"benefit" means a pension or any other benefit under a pension plan, and includes a return of contributions and any payment in a series of payments that constitutes a benefit;

"certified copy" means, in relation to a document, a copy of the document certified to be a true copy by a person authorized to certify the document;

"collective agreement" has the same meaning as in section 1 (1) of the *Labour Relations Code*;

"commuted value" means, in relation to benefits that a person has a present or future entitlement to receive, the actuarial present value of those benefits determined, as of the time in question,

(a) on the basis of actuarial assumptions and methods that are appropriate and in accordance with accepted actuarial practice,

(b) in accordance with any prescribed conditions, and

(c) in a manner acceptable to the superintendent;

superintendent, in writing and within 30 days, respecting the failure of the employer to remit, whether or not the contributions were subsequently remitted.

(6) Subsection (5) does not apply to a pension plan administered by a board of trustees.

Deemed trust

43.1 (1) An employer must, with respect to a pension plan to which the employer is required to make contributions, keep separate and apart from the employer's own assets

(a) all contributions that are due or owing to the pension plan by the employer,

(b) all amounts that have been deducted by the employer from a member's remuneration and not yet remitted to the fund holder, and

(c) all contributions that have been received by the employer with respect to a member and not yet remitted to the fund holder.

(2) The amounts referred to in subsection (1) are deemed to be held in trust for members of the pension plan, former members, and any other persons entitled to pension benefits, refunds or other payments under the plan in accordance with their interests under the plan.

(3) If there is, in respect of an employer, a proceeding

(a) under the *Companies Creditors Arrangement Act* (Canada),

(b) under the *Winding-up and Restructuring Act* (Canada) or similar provincial legislation,

(c) in relation to liquidation, receivership or secured creditor enforcement, or

(d) in relation to insolvency other than under the *Bankruptcy and Insolvency Act* (Canada),

an amount equal to the amounts deemed to be held in trust under subsection (2) is deemed to be separate and apart and form no part of the estate of the employer, whether or not that amount has in fact been kept separate and apart from the employer's own assets or from the assets of the estate.

Investment requirements

44 (1) Pension plan investments, loans and other pension plan financial decisions must be made in accordance with this Act and the regulations and in the best financial interests of plan members, former members and other plan beneficiaries.

(2) Pension plan assets must be invested in a manner that a reasonable and prudent person would apply in respect of a portfolio of investments made on behalf of another person to whom there is owed a fiduciary duty to make investments without undue risk of loss and with a reasonable expectation of a return on the investments commensurate with the risk.

(3) Pension plan assets must be held and invested in the name of the plan, or in the name of a custodian or trustee in accordance with a custodial agreement, trust agreement or statute that clearly indicates that the investments are held for the benefit of the plan.

(4) A plan may provide that investment decisions may be made by a member respecting

(a) contributions made by the employer or the member to a defined contribution plan,

(b) the member's optional ancillary contributions, and

(c) the member's additional voluntary contributions.

(5) A pension plan that allows for optional ancillary contributions must specify how those contributions will be invested.

Benefits and assets on winding up

45 (1) Subject to section 41, a pension plan containing a defined benefit provision must, on the prescribed basis or on another basis that the superintendent considers reasonable and equitable in the circumstances and consents to, in writing, provide for

(a) the reduction of benefits, and

(b) the methods of allocation and distribution of the assets of the plan and the priorities for determining the benefits of persons entitled to the assets,

when the assets of the plan are not sufficient to pay all benefits on the winding up of the plan.

(2) A pension plan must provide for the allocation of any surplus assets on the winding up of the plan

(a) to the members and former members and their spouses, designated beneficiaries and estates,

(b) to the employer, or

(c) to any combination of the persons referred to in paragraph (a) or paragraphs (a) and (b).

TAB K

Supplemental Pension Plans Act, RSQ, c R-15.1

An amendment made by 2009, c. 1, s. 2 and enacted on 2009-01-15 came into force retroactively on 2008-12-31. This may affect one or more past versions of this Act.
This statute replaces RSQ, c R-17.

Current version: in force since Dec 10, 2010

Link to the latest version : http://www.canlii.org/en/qc/laws/stat/rsq-c-r-15.1/latest/
Stable link to this version : http://www.canlii.org/en/qc/laws/stat/rsq-c-r-15.1/86092/
Currency: Last updated from the Publications du Québec site on 2011-05-26

R.S.Q., chapter R-15.1

SUPPLEMENTAL PENSION PLANS ACT

CHAPTER I
APPLICATION AND INTERPRETATION

1. This Act applies to pension plans provided

(1) for employees who report for work at an establishment of their employer located in Québec or, if not, who receive their remuneration from such an establishment, provided, in the latter case, they do not report for work at any other establishment of their employer;

(2) for employees not referred to in paragraph 1 who, while residing in Québec and being employed by an employer whose main establishment is located in Québec, work outside Québec, provided the plans are not governed by an Act of a legislative body other than the Parliament of Québec which provides for a deferred pension.

1989, c. 38, s. 1.

2. This Act does not apply to

(1) a pension plan to which the employer is not required to make contributions. However, it applies to a pension plan where membership therein is a condition precedent to membership in another plan to which an employer is required to make contributions or, conversely, where membership therein is conditioned by membership in that other plan; where that is the case, such pension plans are deemed, for the purposes of this Act, to constitute a single pension plan;

(2) a pension plan established for employees who are also members of a plan governed by this Act, if their employer makes contributions to both plans in their respect and if, under the terms of the other plan, they are entitled to benefits at least equal to the maximum benefits which may be paid under the terms of a registered pension plan defined in section 1 of the Taxation Act (chapter I-3);

(3) a profit sharing plan or a deferred profit sharing plan referred to in Titles I and II of Book VII of Part I of the Taxation Act;

(4) a pension plan established by an Act, unless such Act renders the plan subject to this Act;

(5) a pension plan not established by an Act and administered by the Commission administrative des régimes de retraite et d'assurances, or a pension plan under which the Commission is responsible for the payment of the benefits, except if the Government subjects such pension plan to this Act.

The Government may, by regulation and on the conditions it determines, exempt any pension plan or category of pension plan it designates from the application of all or part of this Act, particularly by reason of the special characteristics of the

48. Unless a pension plan or, in the case of an insured plan, an insurance contract sets a higher rate of interest, any contribution which has not been paid into the pension fund or to the insurer shall bear interest, from the last day of the month following the month for which it should have been paid or, as the case may be, the last day of the month following the month in which it was collected, at the rate prescribed by section 44 or 45 or, in the case of the employer contribution under a defined benefit plan, at the rate of return of the pension fund.

1989, c. 38, s. 48; 2000, c. 41, s. 26.

49. Until contributions and accrued interest are paid into the pension fund or to the insurer, they are deemed to be held in trust by the employer, whether or not the latter has kept them separate from his property.

1989, c. 38, s. 49.

50. The employer shall, on remitting the contributions, inform the pension committee or, in the case of an insured pension plan, the insurer, of the reason for any significant variation in the contributions payable into the pension fund or to the insurer.

1989, c. 38, s. 50.

51. The pension committee or, in the case of an insured pension plan, the insurer shall notify the Régie of any unpaid contribution within 60 days after it becomes due.

1989, c. 38, s. 51; 2000, c. 41, s. 27.

52. Unless they have exercised the prudence, diligence and care that a reasonable person would have exercised in comparable circumstances or unless, in the same circumstances they were unaware of the default, the directors of a legal person which, as an employer, is a party to a pension plan, shall be solidarily liable for contributions which become due and remain unpaid during their term in office, with interest, up to a contributory period of six months.

In the case of a multi-employer pension plan that is not considered as such pursuant to section 11, the directors of a subsidiary are liable for the contributions only if the parent company fails to pay the contributions referred to in the first paragraph. Where the directors of the subsidiary also fail to pay the contributions for which they are liable under this paragraph, the directors of the parent company become liable for the contributions.

The six-month limit set out in the first paragraph does not apply where the pension fund is managed by the employer.

1989, c. 38, s. 52.

53. A director shall be liable under section 52 only in either of the following cases:

(1) where the legal person has been prosecuted within two years after the date the unpaid contribution became due and full satisfaction of the amount awarded by judgment was not obtained upon execution;

(2) where the legal person was, within two years of the date the unpaid contribution became due, the subject of a winding-up order or became bankrupt within the meaning of the Bankruptcy and Insolvency Act (Revised Statutes of Canada, 1985, chapter B-3) and the claim filed has not been discharged.

1989, c. 38, s. 53.

CHAPTER VI
REFUNDS AND PENSION BENEFITS

DIVISION I
GENERAL PROVISIONS

54. The period of continuous employment of an employee is the period during which the employee is employed by an employer, regardless of periods of temporary interruption and periods of disability during which the member continues to accumulate benefits. A period of layoff with a right of recall shall not, for the purposes of this paragraph and notwithstanding the second paragraph of section 5, be considered to be a period of temporary interruption beyond 24 consecutive months, unless the plan so permits and the employee consents thereto.

A change of employer does not, for the purposes of a pension plan, interrupt the period of continuous employment of an employee, provided the Régie authorized the transfer of obligations in the cases referred to in section 22 or in Chapter XII.

In the case of a multi-employer pension plan, even where it is not considered as such pursuant to section 11, a change of employer does not interrupt the period of continuous employment of an employee if the former employer and the successor employer are parties to the plan.

1989, c. 38, s. 54; 1994, c. 24, s. 2.

Loi sur les Régimes complémentaires de retraite, LRQ, c R-15.1

Une modification apportée par 2009, c. 1, a. 2 et édictée le 2009-01-15 est entrée en vigueur rétroactivement le 2008-12-31. Ceci peut affecter une ou plusieurs versions de cette loi.
Cette loi remplace LRQ, c R-17.

Version courante : en vigueur depuis le 10 déc. 2010

Lien vers la dernière version : http://www.canlii.org/fr/qc/legis/lois/lrq-c-r-15.1/derniere/
Lien stable vers cette version : http://www.canlii.org/fr/qc/legis/lois/lrq-c-r-15.1/86092/
Mise-à-jour : Dernière mise à jour effectuée depuis le site des Publications du Québec le 2011-05-26

L.R.Q., chapitre R-15.1

LOI SUR LES RÉGIMES COMPLÉMENTAIRES DE RETRAITE

CHAPITRE I
DOMAINE D'APPLICATION ET DÉFINITIONS

1. La présente loi s'applique aux régimes de retraite relatifs:

1° à des travailleurs qui, pour leur travail, se présentent à un établissement de leur employeur situé au Québec ou, à défaut, reçoivent leur rémunération de cet établissement pourvu que, dans ce dernier cas, ils ne se présentent à aucun autre établissement de leur employeur;

2° à des travailleurs non visés au paragraphe 1° qui, domiciliés au Québec et travaillant pour un employeur dont l'établissement principal y est situé, exécutent un travail hors du Québec, pourvu que ces régimes ne soient pas régis par une loi émanant d'une autorité législative autre que le Parlement du Québec et accordant droit à une rente différée.

1989, c. 38, a. 1.

2. La présente loi ne s'applique pas:

1° à un régime de retraite auquel l'employeur n'est pas tenu de cotiser. Toutefois, elle s'y applique si l'adhésion à ce régime conditionne l'adhésion à un autre régime de retraite auquel l'employeur est tenu de cotiser ou, au contraire, est conditionnée par l'adhésion à cet autre régime; dans ce cas, ces régimes sont réputés, pour l'application de la présente loi, ne former qu'un seul régime de retraite;

2° à un régime de retraite établi pour des travailleurs qui adhèrent également à un régime régi par la présente loi, si leur employeur cotise pour leur compte aux deux régimes et s'ils ont droit, au titre de l'autre régime, à des prestations au moins égales aux prestations maximales qui peuvent être payées au titre d'un régime de pension agréé défini à l'article 1 de la Loi sur les impôts (chapitre I-3);

3° à un régime d'intéressement ou un régime de participation différée aux bénéfices visé aux titres I et II du livre VII de la partie I de la Loi sur les impôts;

4° à un régime de retraite établi par une loi, sauf si celle-ci l'assujettit à la présente loi;

5° à un régime de retraite qui n'est pas établi par une loi et que la Commission administrative des régimes de retraite et d'assurances administre ou dont elle est responsable du paiement des prestations, sauf si le gouvernement assujettit ce régime à la présente loi.

l'article 98 ou d'un remboursement, ou jusqu'à ce qu'une rente additionnelle prévue à l'article 83 soit constituée avec ces cotisations.

1989, c. 38, a. 47; 1992, c. 60, a. 8; 2000, c. 41, a. 25.

48. À moins que le régime de retraite ou, dans le cas d'un régime garanti, le contrat d'assurance ne fixe un taux d'intérêt supérieur, les cotisations qui ne sont pas versées à la caisse de retraite ou à l'assureur portent intérêt, à compter du dernier jour du mois qui suit celui pour lequel elle devait être versée ou, selon le cas, du dernier jour du mois qui suit celui au cours duquel elle a été perçue, au taux visé à l'article 44 ou 45 ou, dans le cas de la cotisation patronale versée au titre d'un régime à prestations déterminées, au taux de rendement de la caisse de retraite.

1989, c. 38, a. 48; 2000, c. 41, a. 26.

49. Jusqu'à leur versement à la caisse de retraite ou à l'assureur, les cotisations et les intérêts accumulés sont réputés détenus en fiducie par l'employeur, que ce dernier les ait ou non gardés séparément de ses biens.

1989, c. 38, a. 49.

50. L'employeur doit, lors de leur versement, informer le comité de retraite ou, dans le cas d'un régime de retraite garanti, l'assureur du motif de toute variation importante des cotisations à verser à la caisse de retraite ou à l'assureur.

1989, c. 38, a. 50.

51. Le comité de retraite ou, dans le cas d'un régime de retraite garanti, l'assureur doit, dans les 60 jours qui suivent son échéance, aviser la Régie de toute cotisation non versée.

1989, c. 38, a. 51; 2000, c. 41, a. 27.

52. Sauf s'ils ont agi avec prudence, diligence et compétence, comme l'auraient fait en pareilles circonstances des personnes raisonnables ou s'ils n'ont pu, dans ces mêmes circonstances, avoir connaissance du défaut, les administrateurs d'une personne morale partie à un régime de retraite à titre d'employeur sont solidairement responsables des cotisations échues et non versées au cours de leur mandat, avec les intérêts, jusqu'à concurrence de six mois de cotisation.

Dans le cas d'un régime de retraite interentreprises non considéré comme tel par application de l'article 11, cette responsabilité n'incombe aux administrateurs d'une filiale que si la société mère fait défaut de verser les cotisations visées. Si ceux-ci font également défaut de verser des cotisations dont ils sont responsables aux termes du présent alinéa, les administrateurs de la société mère en deviennent à leur tour responsables.

Le plafond de six mois prévu au premier alinéa ne s'applique pas lorsque l'employeur gère la caisse de retraite.

1989, c. 38, a. 52.

53. La responsabilité prévue à l'article 52 n'est engagée que dans l'un ou l'autre des cas suivants:

1° la personne morale a été poursuivie dans les deux ans qui ont suivi l'échéance de la cotisation non versée et l'exécution n'a pu satisfaire au montant accordé par jugement;

2° la personne morale, dans les deux ans qui ont suivi l'échéance de la cotisation non versée, a fait l'objet d'une ordonnance de mise en liquidation ou est devenue faillie au sens de la Loi sur la faillite et l'insolvabilité (Lois révisées du Canada (1985), chapitre B-3) et la réclamation déposée n'a pu être satisfaite.

1989, c. 38, a. 53.

CHAPITRE VI
REMBOURSEMENT ET PRESTATIONS

SECTION I
DISPOSITIONS GÉNÉRALES

54. La période de travail continu d'un travailleur est celle durant laquelle il exécute un travail pour son employeur, sans égard aux périodes d'interruption temporaire ni aux périodes d'invalidité pendant lesquelles le participant continue d'accumuler des droits. La mise à pied avec droit de rappel d'un travailleur ne peut, aux fins du présent alinéa et malgré le deuxième alinéa de l'article 5, être considérée comme une période d'interruption temporaire au delà de 24 mois consécutifs, à moins que le régime ne le permette et que le travailleur n'y consente.

Le changement d'employeurs, pourvu que la Régie ait autorisé le transfert d'engagements dans les cas visés à l'article 22 ou au chapitre XII, n'a pas pour effet d'interrompre la période de travail continu pour l'application du régime de retraite.

TAB L

The Pension Benefits Act, CCSM c P32

Current version: in force since Jun 17, 2010

This is an **unofficial version**.
This version is current as of August 27, 2010 and has been in effect since June 17, 2010.

C.C.S.M. c. P32

The Pension Benefits Act

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Definitions

1(1) In this Act

"active member" of a pension plan means a member of the plan who is accruing a pension under the plan, or would be accruing a pension if it were not for a temporary interruption in employment; (« participant actif »)

"administrator" means

(a) in relation to a pension plan, the person or body of persons referred to in subsection 28.1 (1) or (1.1) that is responsible for administering the plan, and

(b) in relation to a prescribed plan or to a registered retirement income fund as defined in subsection 21.4(1), the financial institution responsible for administering the plan or fund; (« administrateur »)

"commission" means The Pension Commission of Manitoba; (« Commission »)

"common-law partner" of a member or former member means

(a) a person who, with the member or former member, registered a common-law relationship under section 13.1 of *The Vital Statistics Act*, or

(b) a person who, not being married to the member or former member, cohabited with him or her in a conjugal relationship

(i) for a period of at least three years, if either of them is married, or

(ii) for a period of at least one year, if neither of them is married; (« conjoint de fait »)

"common-law relationship" means the relationship between two persons who are common-law partners of each other; (« union de fait »)

"defined benefit pension plan" means a pension plan under which a member's pension

(a) is determined with reference to the member's remuneration for each year of employment, or for a selected number of years of employment, or

(b) is expressed as a fixed amount for each year of employment, or as a fixed periodic amount; (« régime de retraite à prestations déterminées »)

"designated province" means another province or territory of Canada in which there is in force legislation substantially similar to this Act and that has been designated in the regulations as a designated province; (« province désignée »)

27 In any pension plan filed for registration in accordance with section 18,

(a) the conditions for membership shall not, in the opinion of the commission, prevent the gradual accrual of benefits or the spreading of the employer's contributions over an employee's years of employment in the class covered by the plan; and

(b) provisions for computation of the employer's contributions and of the pension and, in the case of a deferred profit-sharing pension plan, the formula governing allocation of contributions and surplus amongst the members of the plan shall not be variable at the discretion of the employer;

unless in the opinion of the commission the circumstances of the plan warrant otherwise.

S.M. 2005, c. 2, s. 19.

Trust for contributions

28(1) Any sum received by an employer from an employee pursuant to an arrangement for the payment of such sum by the employer into a pension plan as the employee's contribution thereto shall be deemed to be held by the employer in trust for payment of the sum after his receipt thereof into the pension plan as the employee's contribution thereto, whether or not the amount thereof has been kept separate and apart by the employer and the employer shall not appropriate or convert any part thereof to his own use or to any use not authorized by the trust.

Payroll deductions

28(2) For the purposes of subsection (1), any sum withheld by an employer for pension purposes, whether by payroll deduction or otherwise, from moneys payable to an employee shall be deemed to be a sum received by the employer from the employee.

Employer's contributions in trust

28(3) Any sum required to be paid into a pension plan by an employer as the employer's contribution to the pension plan shall, when due under the pension plan, be deemed to be held by the employer in trust for payment of the same into the pension plan in accordance with the pension plan and this Act and the regulations as the employer's contribution, whether or not the amount thereof has been kept separate and apart by the employer and the employer shall not appropriate or convert any part of the amount required to be paid to the pension plan to his own use or to any use not authorized by the terms of the pension plan.

Enforcement of trust

28(4) Notwithstanding that the government is not a beneficiary of the trusts deemed to be created under this section, the minister, for and on behalf of the government, may enforce those trusts and for that purpose the government has a lien and charge in the amount of the sums deemed to be held in trust on the assets of the employer that in the ordinary course of business would be entered in the accounts of the business of the employer whether so entered or not.

Payment of trust moneys

28(5) Where under this section the government recovers any moneys deemed to be held in trust under this section, the moneys shall be paid, after deductions of any costs and disbursements incurred by the government in recovering the moneys, to the administrator or, if the employer is the administrator, to the commission as the agency to hold the moneys and disburse the pension benefits under the pension plan.

Notice to be given of any late payment by employer

28(6) Where an employer who is required under a pension plan to remit a sum fails to do so within 60 days after the date required under the plan, the administrator or fund holder to whom the sum was to be remitted shall immediately notify the superintendent in writing.

28(7) Repealed, S.M. 2005, c. 2, s. 20.

S.M. 1997, c. 15, s. 5; S.M. 2005, c. 2, s. 20.

Who may be administrator

28.1(1) A pension plan must be administered by the following person or body:

(a) in the case of a multi-unit pension plan, by a board of trustees in accordance with subsection 26.1(4);

(b) in the case of a jointly trusteed plan, by a board of trustees with at least as many trustees representing members of the plan as there are trustees representing the employer;

(c) in the case of a simplified money purchase pension plan, by an administrator as defined in the regulations;

(d) in the case of a plan with fewer than the prescribed number of members, by the employer;

Loi sur les prestations de pension, CPLM c P32

Version courante : en vigueur depuis le 17 juin 2010

Lien vers la dernière version :	http://www.canlii.org/fr/mb/legis/lois/cplm-c-p32/derniere/
Lien stable vers cette version :	http://www.canlii.org/fr/mb/legis/lois/cplm-c-p32/83232/
Mise-à-jour :	Dernière mise à jour effectuée depuis la version en ligne des lois du Manitoba le 2011-05-20

Ceci n'est pas une version officielle.
Date de codification : 6 août 2010

C.P.L.M. c. P32

Loi sur les prestations de pension

SA MAJESTÉ, sur l'avis et du consentement de l'Assemblée législative du Manitoba, édicte :

Définitions

1(1) Les définitions qui suivent s'appliquent à la présente loi.

« administrateur »

a) Personne ou groupe de personnes visé au paragraphe 28.1(1) ou (1.1) et qui est chargé de l'administration d'un régime de retraite;

b) établissement financier chargé de l'administration d'un régime réglementaire ou d'un fonds enregistré de revenu de retraite au sens du paragraphe 21.4(1). ("administrator")

« âge de la retraite anticipée » Âge minimal auquel un participant peut exiger le versement de sa pension en vertu des dispositions d'un régime de retraite. ("early retirement age")

« autre bénéficiaire » Personne, à l'exclusion d'un participant, qui a droit à une prestation de pension ou autre en vertu d'un régime de retraite. ("other beneficiary")

« Commission » La Commission manitobaine des pensions. ("commission")

« conjoint de fait » Personne qui, selon le cas :

a) a fait enregistrer avec un participant ou un ex-participant une union de fait en vertu de l'article 13.1 de la *Loi sur les statistiques de l'état civil*;

b) a vécu dans une relation maritale avec un participant ou un ex-participant sans être mariée avec lui :

(i) soit pendant une période d'au moins trois ans, si l'un d'eux est marié,

(ii) soit pendant une période d'au moins un an, si aucun d'eux n'est marié. ("common-law partner")

« cotisation volontaire » Cotisation que choisit de verser un participant en vertu d'un régime de retraite en sus des cotisations qu'il est tenu de payer pour obtenir une pension. La présente définition exclut :

a) les cotisations dont le versement, en vertu du régime, a pour effet d'imposer à l'employeur le paiement simultané d'une cotisation supplémentaire;

b) les cotisations accessoires facultatives. ("voluntary additional contribution")

« cotisations accessoires facultatives » Cotisations que choisit de verser un participant à un régime de retraite à prestations déterminées — en sus des cotisations qu'il est tenu de payer pour

cotisations patronales sur les années d'emploi d'un employé dans la catégorie couverte par le régime;

b) les dispositions en vue du calcul des cotisations patronales et de la pension et dans le cas d'un régime de retraite à participation différée aux bénéfices, la formule régissant la répartition des cotisations et des surplus parmi les participants au régime ne peuvent être modifiées à la discrétion de l'employeur.

Les mesures indiquées ci-dessus s'appliquent, sauf si la Commission est d'avis que le contexte du régime de retraite ne justifie pas ces mesures.

L.M. 2005, c. 2, art. 19.

Fiducie pour les cotisants

28(1) Les sommes qu'un employeur reçoit d'un employé conformément à une entente en vue du versement de ces sommes par l'employeur à un régime de retraite, à titre de cotisations salariales relatives à ce régime, sont réputées être détenues en fiducie par l'employeur en vue du versement de ces sommes, après qu'il les ait reçues, au régime de retraite, à titre de cotisations salariales au régime, que l'employeur ait ou non confondu ces cotisations avec d'autres sommes. L'employeur ne peut s'approprier ou convertir une partie de ces cotisations pour son usage personnel ou pour tout autre usage non autorisé par la fiducie.

Retenues salariales

28(2) Pour les besoins du paragraphe (1), les sommes qu'un employeur retient des montants payables à un employé, à des fins de pension, notamment par retenue salariale, sont réputées être des sommes que l'employeur reçoit de l'employé.

Cotisations patronales en fiducie

28(3) Les sommes qu'un employeur doit verser à un régime de retraite à titre de cotisations patronales relatives à ce régime sont réputées, lorsqu'elles sont exigibles aux termes du régime de retraite, être détenues en fiducie par l'employeur en vue de leur versement au régime de retraite, à titre de cotisations patronales, conformément au régime, à la présente loi et aux règlements, que l'employeur ait ou non confondu ces cotisations avec d'autres sommes. L'employeur ne peut s'approprier ou convertir une partie du montant devant être versé au régime pour son usage personnel ou pour tout autre usage non autorisé aux termes du régime.

Exécution d'une fiducie

28(4) Même si le gouvernement n'est pas un bénéficiaire des fiducies réputées être constituées en vertu du présent article, le ministre, au nom du gouvernement, peut exécuter ces fiducies. À cette fin, le gouvernement possède un privilège et une charge correspondant au montant réputé être détenu en fiducie à l'égard de l'actif de l'employeur, et qui dans le cadre ordinaire des affaires serait porté au compte des états financiers de l'employeur, qu'il y soit porté ou non.

Sommes en fiducie

28(5) Si le gouvernement, en vertu du présent article, recouvre les sommes réputées être détenues en fiducie en vertu de cet article, celles-ci sont versées à l'administrateur, après déduction des frais et débours que le gouvernement a engagés pour le recouvrement de ces sommes. Toutefois, si l'employeur est l'administrateur, elles sont versées à la Commission en tant qu'organisme détenant les sommes et versant les prestations de pension aux termes du régime de retraite.

Avis de paiement en retard

28(6) Si un employeur est tenu, en vertu d'un régime de retraite, de remettre une somme et qu'il ne la remet pas dans les 60 jours qui suivent l'échéance que prévoit le régime, l'administrateur ou le dépositaire des fonds à qui la somme était destinée en informe immédiatement le surintendant par écrit.

28(7) Abrogé, L.M. 2005, c. 2, art. 20.

L.M. 1997, c. 15, art. 5; L.M. 2005, c. 2, art. 20.

Fonctions d'administrateur

28.1(1) Un régime de retraite est administré :

a) dans le cas d'un régime multipartite, par un conseil d'administration visé au paragraphe 26.1 (4);

b) dans le cas d'un régime de retraite à fiduciaire conjoint, par un conseil d'administration dont le nombre d'administrateurs représentant les participants correspond au moins à celui des administrateurs représentant l'employeur;

TAB M

Pension Benefits Act, 1992, SS 1992, c P-6.001

Current version: in force since Jun 1, 2005

Print: PDF
Link to the latest version : http://www.canlii.org/en/sk/laws/stat/ss-1992-c-p-6.001/latest/
Stable link to this version : http://www.canlii.org/en/sk/laws/stat/ss-1992-c-p-6.001/11559/
Currency: Last updated from the Freelaw site on 2011-05-20

The
Pension Benefits
Act, 1992

being

Chapter P-6.001 of the Statutes of Saskatchewan, 1992 (effective January 1, 1993) as amended by the Statutes of Saskatchewan, 1996, c.15; 1997, c.T-22.2; 2001, c.50 and 51; 2002, c.S-17.2; and 2004, c.42.

NOTE:
This consolidation is not official. Amendments have been incorporated for convenience of reference and the original statutes and regulations should be consulted for all purposes of interpretation and application of the law. In order to preserve the integrity of the original statutes and regulations, errors that may have appeared are reproduced in this consolidation.

(3) Where an employer has failed to remit any contributions required by subsection (1) before the expiration of 30 days after the end of the prescribed period mentioned in that subsection, the administrator or the fund holder who should have received them shall immediately notify the superintendent in writing of the failure.

1992, c.P-6.001, s.42.

Sums held in trust

43(1) Notwithstanding any other Act, any sum received by an employer from an employee pursuant to an arrangement for the payment of the sum by the employer into a plan as the employee's contribution to the plan is deemed to be held by the employer in trust to be paid into the plan as the employee's contribution, and the employer shall not appropriate or convert any part of it to the employer's own use or to any use not authorized by the terms of the plan.

(2) For the purposes of subsection (1), any sum withheld by an employer, whether by payroll deduction or otherwise, from moneys payable to an employee is deemed to be received by the employer.

(3) Notwithstanding any other Act, any sum required to be paid into a plan by an employer as the employer's contribution to the plan is, when due pursuant to the plan, deemed to be held by the employer in trust to be paid into the plan in accordance with the plan, this Act and the regulations as the employer's contribution, and the employer shall not appropriate or convert any part of it to the employer's own use or to any use not authorized by the terms of the plan.

1992, c.P-6.001, s.43.

Investments

44 Assets of a plan must be invested, and the investments must be made in accordance with the regulations.

1992, c.P-6.001, s.44.

Discrimination on the basis of sex

45 The sex of a person shall not be taken into account in determining:

(a) the amount or rate of contributions required to be made by a member of a plan;

(b) the amount of a pension or the commuted value of a pension to which a person is or may become entitled; or

(c) the entitlement of a person to become a member of a plan.

1992, c.P-6.001, s.45.

TAB N

Supreme Court Act, RSC 1985, c S-26

Current version: in force since Jul 2, 2003

Link to the latest version : http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-s-26/latest/
Stable link to this version : http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-s-26/32070/
Currency: Last updated from the Justice Laws Web Site on 2011-05-26

Supreme Court Act

S-26

An Act respecting the Supreme Court of Canada

SHORT TITLE

Short title

1. This Act may be cited as the *Supreme Court Act*.

R.S., c. S-19, s. 1.

INTERPRETATION

Definitions

2. (1) In this Act, "appeal"
«appel»

"appeal" includes any proceeding to set aside or vary any judgment of the court appealed from;

"Court"
«Cour suprême» ou
«Cour»

"Court" means the Supreme Court of Canada continued by section 3;

"court appealed from"
«juridiction inférieure»

"court appealed from" means the court from which the appeal is brought directly to the Supreme Court, whether that court is one of original jurisdiction or a court of appeal;

"final judgment"
«jugement définitif»

"final judgment" means any judgment, rule, order or decision that determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding;

"judge"
«juge»

"judge" means a judge of the Court and includes the Chief Justice;

"judgment"
«jugement»

"judgment", when used with reference to the court appealed from, includes any judgment, rule, order, decision, decree, decretal order or sentence thereof, and when used with reference to the Supreme Court, includes any judgment or order of that Court;

"judicial proceeding"
«procédure judiciaire»

"judicial proceeding" includes any action, suit, cause, matter or other proceeding in disposing of which the court appealed from has not exercised merely a regulative, administrative or executive jurisdiction;

"Registrar"
«registraire»

"Registrar" means the Registrar of the Court;

"Supreme Court"
«Cour suprême» ou
«Cour»

"Supreme Court" has the meaning given in this section to "Court";

"witness"
«témoin»

"witness" means any person, whether a party or not, to be examined under this Act.

Application to the territories

(2) For the purposes of this Act, the expression "highest court of final resort in a province" includes, in Yukon, the Northwest Territories or Nunavut, the Court of Appeal of that territory.

R.S., 1985, c. S-26, s. 2; 1993, c. 28, s. 78; 2002, c. 7, s. 237(E).

37. Subject to sections 39 and 42, an appeal to the Supreme Court lies with leave of the highest court of final resort in a province from a final judgment of that court where, in the opinion of that court, the question involved in the appeal is one that ought to be submitted to the Supreme Court for decision.

R.S., c. S-19, s. 38.

Appeal with leave of Federal Court of Appeal

37.1 Subject to sections 39 and 42, an appeal to the Court lies with leave of the Federal Court of Appeal from a final judgment of the Federal Court of Appeal where, in its opinion, the question involved in the appeal is one that ought to be submitted to the Court for decision.

1990, c. 8, s. 34.

Appeals *per saltum*

38. Subject to sections 39 and 42, an appeal to the Supreme Court lies on a question of law alone with leave of that Court, from a final judgment of the Federal Court or of a court of a province other than the highest court of final resort therein, the judges of which are appointed by the Governor General, pronounced in a judicial proceeding where an appeal lies to the Federal Court of Appeal or to that highest court of final resort, if the consent in writing of the parties or their solicitors, verified by affidavit, is filed with the Registrar of the Supreme Court and with the registrar, clerk or prothonotary of the court from which the appeal is to be taken.

R.S., 1985, c. S-26, s. 38; 1990, c. 8, s. 35; 2002, c. 8, s. 183.

Exceptions

39. No appeal to the Court lies under section 37, 37.1 or 38 from a judgment in a criminal cause, in proceedings for or on

(*a*) a writ of *habeas corpus*, *certiorari* or prohibition arising out of a criminal charge; or

(*b*) a writ of *habeas corpus* arising out of a claim for extradition made under a treaty.

R.S., 1985, c. S-26, s. 39; 1990, c. 8, s. 36.

Appeals with leave of Supreme Court

40. (1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.

Application for leave

(2) An application for leave to appeal under this section shall be brought in accordance with paragraph 58(1)(a).

Appeals in respect of offences

(3) No appeal to the Court lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence.

Extending time for allowing appeal

(4) Whenever the Court has granted leave to appeal, the Court or a judge may, notwithstanding anything in this Act, extend the time within which the appeal may be allowed.

R.S., 1985, c. S-26, s. 40; R.S., 1985, c. 34 (3rd Supp.), s. 3; 1990, c. 8, s. 37.

Appeals under other Acts

41. Notwithstanding anything in this Act, the Court has jurisdiction as provided in any other Act conferring jurisdiction.

R.S., c. S-19, s. 42.

No appeal from discretionary orders

42. (1) No appeal lies to the Court from a judgment or order made in the exercise of judicial discretion except in proceedings in the nature of a suit or proceeding in equity originating elsewhere than in the Province of Quebec and except in *mandamus* proceedings.

Exception

(2) This section does not apply to an appeal under section 40.

R.S., 1985, c. S-26, s. 42; 1993, c. 34, s. 117(F).

Applications for leave to appeal

43. (1) Notwithstanding any other Act of Parliament but subject to subsection (1.2), an application to the Supreme Court for leave to appeal shall be made to the Court in writing and the Court shall

(*a*) grant the application if it is clear from the written material that it does not warrant an oral hearing and that any question involved is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in the question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it;

(*b*) dismiss the application if it is clear from the written material that it does not warrant an oral hearing and that there is no question involved as described in paragraph (*a*); and

(*c*) order an oral hearing to determine the application, in any other case.

Remand of case

(1.1) Notwithstanding subsection (1), the Court may, in its discretion, remand the whole or any part of the case to the court appealed from or the court of original jurisdiction and order any further proceedings that would be just in the circumstances.

Mandatory oral hearing

(1.2) On the request of the applicant, an oral hearing shall be ordered to determine an application for leave to appeal to the Court from a judgment of a court of appeal setting aside an acquittal of an indictable offence and ordering a new trial if there is no right of appeal on a question of law on which a judge of the court of appeal dissents.

Time for oral hearing

(2) Where the court makes an order for an oral hearing, the oral hearing shall be held within thirty days after the date of the order or such further time as the Court determines.

Quorum

(3) Any three judges of the Court constitute a quorum for the consideration and determination of an application for leave to appeal, whether or not an oral hearing is ordered.

Exception

(4) Notwithstanding subsection (3), five judges of the Court constitute a quorum in the case of an application for leave to appeal from a judgment of a court

(*a*) quashing a conviction of an offence punishable by death; or

(*b*) dismissing an appeal against an acquittal of an offence punishable by death, including an acquittal in respect of a principal offence where the accused has been convicted of an offence included in the principal offence.

R.S., 1985, c. S-26, s. 43; R.S., 1985, c. 34 (3rd Supp.), s. 4; 1990, c. 8, s. 38; 1994, c. 44, s. 98; 1997, c. 18, s. 138.

Loi sur la Cour suprême, LRC 1985, c S-26

Version courante : en vigueur depuis le 2 juil. 2003

Loi sur la Cour suprême

S-26

Loi concernant la Cour suprême du Canada

TITRE ABRÉGÉ

Titre abrégé

1. *Loi sur la Cour suprême.*

S.R., ch. S-19, art. 1.

DÉFINITIONS

Définitions

2. (1) Les définitions qui suivent s'appliquent à la présente loi. «appel »
"appeal"

«appel » Toute procédure visant à l'infirmation ou la rectification d'un jugement d'une juridiction inférieure.

«Cour suprême » ou «Cour »
"Supreme Court"
"Court"

«Cour suprême » ou «Cour » La Cour suprême du Canada maintenue aux termes de l'article 3.

«juge »
"judge"

«juge » Tout juge de la Cour, y compris le juge en chef.

«jugement »
"judgment"

«jugement » Selon le cas, toute décision d'une juridiction inférieure, ou tout arrêt ou ordonnance de la Cour.

«jugement définitif »
"final judgment"

«jugement définitif » Jugement ou toute autre décision qui statue au fond, en tout ou en partie, sur un droit d'une ou plusieurs des parties à une instance.

«juridiction inférieure »
"court appealed from"

«juridiction inférieure » Juridiction de première instance ou d'appel ayant rendu la décision dont appel est directement interjeté devant la Cour.

«procédure judiciaire »
"judicial proceeding"

«procédure judiciaire » Action, poursuite, affaire ou autre procédure dans laquelle la juridiction inférieure n'a pas simplement exercé des pouvoirs réglementaires, administratifs ou exécutifs.

«registraire »
"Registrar"

«registraire » Le registraire de la Cour suprême.

«témoin »
"witness"

«témoin » Quiconque, partie ou non à l'instance, doit être interrogé sous le régime de la présente loi.

Application aux territoires

(2) Pour l'application de la présente loi, l'expression « le plus haut tribunal de dernier ressort dans une province » vise aussi la Cour d'appel du Yukon, celle des Territoires du Nord-Ouest et celle du Nunavut.

L.R. (1985), ch. S-26, art. 2; 1993, ch. 28, art. 78; 2002, ch. 7, art. 237(A).

LA COUR

Maintien

37.1 Sous réserve des articles 39 et 42, il peut être interjeté appel devant la Cour, avec l'autorisation de la Cour d'appel fédérale, d'un jugement définitif rendu par cette dernière lorsqu'elle estime que la question en jeu devrait être soumise à la Cour.

1990, ch. 8, art. 34.

Saisine directe

38. Sous réserve des articles 39 et 42, il peut être interjeté appel devant la Cour, avec son autorisation et sur une question de droit seulement, d'un jugement définitif prononcé par un tribunal provincial — dont les juges sont nommés par le gouverneur général — ou la Cour fédérale dans une procédure judiciaire et susceptible d'appel devant la Cour d'appel fédérale ou le plus haut tribunal provincial de dernier ressort si le consentement écrit des parties ou de leurs procureurs, certifié par affidavit, est déposé au bureau du registraire et au bureau du greffier ou du protonotaire du tribunal d'où émane l'appel.

L.R. (1985), ch. S-26, art. 38; 1990, ch. 8, art. 35; 2002, ch. 8, art. 183.

Exceptions

39. Il ne peut être interjeté appel devant la Cour, au titre des articles 37, 37.1 ou 38, d'un jugement rendu dans une affaire pénale relativement à des procédures touchant à :

a) un bref d'*habeas corpus*, de *certiorari* ou de prohibition découlant d'une accusation au pénal

b) un bref d'*habeas corpus* résultant d'une demande d'extradition fondée sur un traité.

L.R. (1985), ch. S-26, art. 39; 1990, ch. 8, art. 36.

Appel avec l'autorisation de la Cour

40. (1) Sous réserve du paragraphe (3), il peut être interjeté appel devant la Cour de tout jugement, définitif ou autre, rendu par la Cour d'appel fédérale ou par le plus haut tribunal de dernier ressort habilité, dans une province, à juger l'affaire en question, ou par l'un des juges de ces juridictions inférieures, que l'autorisation d'en appeler à la Cour ait ou non été refusée par une autre juridiction, lorsque la Cour estime, compte tenu de l'importance de l'affaire pour le public, ou de l'importance des questions de droit ou des questions mixtes de droit et de fait qu'elle comporte, ou de sa nature ou importance à tout égard, qu'elle devrait en être saisie et lorsqu'elle accorde en conséquence l'autorisation d'en appeler.

Demandes d'autorisation d'appel

(2) Les demandes d'autorisation d'appel présentées au titre du présent article sont régies par l'alinéa 58(1)*a*).

Appels à l'égard d'infractions

(3) Le présent article ne permet pas d'en appeler devant la Cour d'un jugement prononçant un acquittement ou une déclaration de culpabilité ou annulant ou confirmant l'une ou l'autre de ces décisions dans le cas d'un acte criminel ou, sauf s'il s'agit d'une question de droit ou de compétence, d'une infraction autre qu'un acte criminel.

Prorogation du délai d'appel

(4) Dans tous les cas où elle accorde une autorisation d'appel, la Cour ou l'un de ses juges peut, malgré les autres dispositions de la présente loi, proroger le délai d'appel.

L.R. (1985), ch. S-26, art. 40; L.R. (1985), ch. 34 (3e suppl.), art. 3; 1990, ch. 8, art. 37.

Appels fondés sur d'autres lois

41. Malgré les autres dispositions de la présente loi, la Cour a la compétence prévue par toute autre loi attributive de compétence.

S.R., ch. S-19, art. 42.

Exclusion des ordonnances discrétionnaires

42. (1) Ne sont pas susceptibles d'appel devant la Cour les jugements ou ordonnances rendus dans l'exercice d'un pouvoir judiciaire discrétionnaire, sauf dans les procédures de la nature d'une poursuite ou procédure en equity nées hors du Québec et sauf dans les procédures de *mandamus*.

Exception

(2) Le présent article ne s'applique pas aux appels interjetés aux termes de l'article 40.

L.R. (1985), ch. S-26, art. 42; 1993, ch. 34, art. 117(F).

Demande d'autorisation d'appel

43. (1) Malgré toute autre loi fédérale et sous réserve du paragraphe (1.2), la demande d'autorisation d'appel est présentée par écrit à la Cour, qui, selon le cas :

a) l'accueille, s'il ressort des conclusions écrites qu'elle ne justifie pas la tenue d'une audience et, compte tenu de l'importance de l'affaire pour le public, ou de l'importance des questions de droit ou des questions mixtes de droit et de fait qu'elle comporte, ou de sa nature ou de son importance à tout autre égard, qu'elle devrait en être saisie;

b) la rejette, s'il ressort des conclusions écrites qu'elle ne justifie pas la tenue d'une audience et que les questions soulevées ne sont pas visées à l'alinéa *a*);

c) ordonne, dans les autres cas, la tenue d'une audience pour en décider.

Renvoi d'une affaire

(1.1) Malgré le paragraphe (1), la Cour peut renvoyer une affaire en tout ou en partie à la juridiction inférieure ou à celle de première instance et ordonner les mesures qui lui semblent appropriées.

Audience

(1.2) Sur demande du requérant, la Cour ordonne la tenue d'une audience pour décider d'une demande d'autorisation d'appel dans le cas où la Cour d'appel a annulé un acquittement à l'égard d'un acte criminel et ordonné un nouveau procès, s'il n'y a pas de droit d'appel sur une question de droit au sujet de laquelle un juge de Cour d'appel est dissident.

Délai

(2) Dans le cas où la Cour ordonne la tenue d'une audience, celle-ci doit être tenue dans les trente jours suivant la date de l'ordonnance ou dans le délai supplémentaire fixé par la Cour.

Quorum

(3) Trois juges constituent le quorum pour l'application du paragraphe (1) même si la Cour tient audience.

Exception au quorum

(4) Le quorum est porté à cinq juges lorsque la demande d'autorisation d'appel concerne des jugements :

a) annulant la déclaration de culpabilité, dans le cas d'une infraction punissable de mort;

b) rejetant l'appel d'un acquittement rendu dans le cas d'une infraction punissable de mort, y compris d'un acquittement à l'égard d'une infraction principale dans le cadre de laquelle l'accusé a été déclaré coupable d'une infraction incluse dans l'infraction principale.

L.R. (1985), ch. S-26, art. 43; L.R. (1985), ch. 34 (3e suppl.), art. 4; 1990, ch. 8, art. 38; 1994, ch. 44, art. 98; 1997, ch. 18, art. 138.

JUGEMENTS

Cassation des procédures en certains cas

44. La Cour peut casser les procédures dans les causes portées devant elle qui ne peuvent faire l'objet d'appel ou quand les procédures sont entachées de mauvaise foi.

S.R., ch. S-19, art. 46.

TAB O

000190

Personal Property Security Act, RSO 1990, c P-10

This Act was amended by several enactments which came into force retroactively. This may cause some versions to contain changes which did not occur exactly at the dates shown.

Current version: in force since Oct 25, 2010

Link to the latest version : http://www.canlii.org/en/on/laws/stat/rso-1990-c-p-10/latest/
Stable link to this version : http://www.canlii.org/en/on/laws/stat/rso-1990-c-p-10/84515/
Currency: Last updated from the e-Laws site on 2011-05-20

Personal Property Security Act

R.S.O. 1990, CHAPTER P.10

Consolidation Period: From October 25, 2010 to the e-Laws currency date.

Last amendment: 2010, c. 16, Sched. 5, s. 4.

Definitions and interpretation

1. (1) In this Act,

"accessions" means goods that are installed in or affixed to other goods; ("accessoires")

"account" means a monetary obligation not evidenced by chattel paper or an instrument, whether or not it has been earned by performance, but does not include investment property; ("compte")

"broker" means a broker as defined in the *Securities Transfer Act, 2006*; ("courtier")

"certificated security" means a certificated security as defined in the *Securities Transfer Act, 2006*; ("valeur mobilière avec certificat")

"chattel paper" means one or more than one writing that evidences both a monetary obligation and a security interest in or a lease of specific goods; ("acte mobilier")

"clearing house" means an organization through which trades in options or standardized futures are cleared and settled; ("chambre de compensation")

"clearing house option" means an option, other than an option on futures, issued by a clearing house to its participants; ("option de chambre de compensation")

"collateral" means personal property that is subject to a security interest; ("bien grevé")

"consumer goods" means goods that are used or acquired for use primarily for personal, family or household purposes; ("biens de consommation")

"debtor" means,

(a) a person who,

(i) owes payment or other performance of the obligation secured, and

(ii) owns or has rights in the collateral, including a transferee of or successor to a debtor's interest in collateral,

acquires the security free from the security interest. 2006, c. 8, s. 136.

Same

(7) A purchaser referred to in subsection (6) is not required to determine whether a security interest has been granted in the security or whether the transaction constitutes a breach of a security agreement. 2006, c. 8, s. 136.

No action against purchaser for value without notice of breach

(8) An action based on a security agreement creating a security interest in a financial asset, however framed, may not be brought against a person who acquires a security entitlement under section 95 of the *Securities Transfer Act, 2006* for value and did not know that there has been a breach of the security agreement. 2006, c. 8, s. 136.

Same

(9) A person who acquires a security entitlement under section 95 of the *Securities Transfer Act, 2006* is not required to determine whether a security interest has been granted in a financial asset or whether there has been a breach of the security agreement. 2006, c. 8, s. 136.

Same

(10) If an action based on a security agreement creating a security interest in a financial asset could not be brought against an entitlement holder under subsection (8), it may not be brought against a person who purchases a security entitlement, or an interest in it, from the entitlement holder. 2006, c. 8, s. 136.

Rights of protected purchaser

28.1 (1) This Act does not limit the rights that a protected purchaser of a security has under the *Securities Transfer Act, 2006*. 2006, c. 8, s. 137.

Same

(2) The interest of a protected purchaser of a security under the *Securities Transfer Act, 2006* takes priority over an earlier security interest, even if perfected, to the extent provided in that Act. 2006, c. 8, s. 137.

Same

(3) This Act does not limit the rights of or impose liability on a person to the extent that the person is protected against the assertion of a claim under the *Securities Transfer Act, 2006*. 2006, c. 8, s. 137.

Negotiable instruments, etc.

29. The rights of a person who is,

(a) a holder in due course of a bill, note or cheque within the meaning of the *Bills of Exchange Act* (Canada); or

(b) a transferee from the debtor of money,

are to be determined without regard to this Act. R.S.O. 1990, c. P.10, s. 29.

Priorities

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

1. Where priority is to be determined between security interests perfected by registration, priority shall be determined by the order of registration regardless of the order of perfection.
2. Where priority is to be determined between a security interest perfected by registration and a security interest perfected otherwise than by registration,
   i. the security interest perfected by registration has priority over the other security interest if the registration occurred before the perfection of the other security interest, and
   ii. the security interest perfected otherwise than by registration has priority over the other security interest, if the security interest perfected otherwise than by registration was perfected before the registration of a financing statement related to the other security interest.

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

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

Idem

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

Future advances

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

Exception

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

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

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

Proceeds

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

Reperfected security interests

(6) Where a security interest that is perfected by registration becomes unperfected and is again perfected by registration, the security interest shall be deemed to have been continuously perfected from the time of first perfection except that if a person acquired rights in all or part of the collateral during the period when the security interest was unperfected, the registration shall not be effective as against the person who acquired the rights during such period. R.S.O. 1990, c. P.10, s. 30 (1-6).

Same, extended time

(6.1) Despite subsection (6), where a security interest that is perfected by registration becomes unperfected between February 26, 1996 and April 3, 1996, the security interest shall be deemed to have been continuously perfected from the time of first perfection if the security interest is again perfected by registration by April 12, 1996. 1996, c. 5, s. 2.

Deemed trusts

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

Exception

(8) Subsection (7) does not apply to a perfected purchase-money security interest in inventory or its proceeds. R.S.O. 1990, c. P.10, s. 30 (7, 8).

Priority rules for security interests in investment property

30.1 (1) The rules in this section govern priority among conflicting security interests in the same investment property. 2006, c. 8, s. 138.

Loi sur les Sûretés mobilières, LRO 1990, c P-10

Cette loi a subi plusieurs modifications entrées en vigueur rétroactivement. Ceci peut faire en sorte que certaines versions comportent des changements qui n'ont pas eu lieu précisément aux dates indiquées.

Version courante : en vigueur depuis le 25 oct. 2010

Lien vers la dernière version : http://www.canlii.org/fr/on/legis/lois/lro-1990-c-p-10/derniere/
Lien stable vers cette version : http://www.canlii.org/fr/on/legis/lois/lro-1990-c-p-10/84515/
Mise-à-jour : Dernière mise à jour effectuée depuis le site Lois-en-ligne le 2011-05-20

Loi sur les sûretés mobilières

L.R.O. 1990, CHAPITRE P.10

Période de codification : Du 25 octobre 2010 à la date à laquelle Lois-en-ligne est à jour.

Dernière modification : 2010, chap. 16, annexe 5, art. 4.

Définitions et interprétation

1. (1) Les définitions qui suivent s'appliquent à la présente loi.

«accessoires» Objets incorporés ou fixés à d'autres objets. («accessions»)

«acquéreur» Personne qui prend possession par voie d'acquisition. («purchaser»)

«acquisition» S'entend notamment de la constitution d'un intérêt sur un bien meuble, notamment par voie d'achat, de location à bail, de négociation, d'hypothèque, de mise en gage, de privilège, de don ou de toute autre opération consensuelle. («purchase»)

«acte de fiducie» Contrat de sûreté aux termes duquel une personne morale, avec ou sans capital-actions et quels qu'en soient le lieu et le mode de constitution en personne morale :

a) émet ou garantit des titres de créance ou prévoit l'émission ou la garantie de titres de créance;

b) nomme un fiduciaire pour le compte des détenteurs de ces titres de créance. («trust indenture»)

«acte mobilier» Un ou plusieurs écrits qui attestent à la fois une créance pécuniaire et une sûreté sur des objets déterminés ou une location à bail de tels objets. («chattel paper»)

«actif financier» S'entend au sens de la *Loi de 2006 sur le transfert des valeurs mobilières*. («financial asset»)

«argent» Moyen d'échange autorisé ou adopté par le Parlement du Canada à titre de devise canadienne ou par un gouvernement étranger à titre de devise de ce dernier. («money»)

«avance future» Avance, sous forme d'argent, de crédit ou d'une autre contrepartie, garantie par un contrat de sûreté, que l'avance soit ou non consentie aux termes d'un engagement. («future advance»)

«bail de plus d'un an» S'entend en outre des baux suivants :

a) le bail à durée indéterminée, même si la durée peut être fixée par l'une des parties, ou par convention conclue par deux ou plusieurs parties, dans l'année qui suit sa date de passation;

b) du cessionnaire d'argent qui vient du débiteur. L.R.O. 1990, chap. P.10, art. 29.

Règles de priorité

30. (1) Si aucune autre disposition de la présente loi ne s'y applique, les règles de priorité suivantes s'appliquent aux sûretés portant sur les mêmes biens grevés :

1. Entre les sûretés rendues opposables par enregistrement, la priorité est déterminée selon l'ordre d'enregistrement et sans égard au moment où elles ont été rendues opposables.
2. Entre une sûreté rendue opposable par enregistrement et une sûreté rendue opposable par un autre mode :
   i. la sûreté rendue opposable par enregistrement prime l'autre sûreté si l'enregistrement est effectué avant que l'autre sûreté ait été rendue opposable,
   ii. la sûreté rendue opposable par un autre mode prime la sûreté rendue opposable par enregistrement si elle a été rendue opposable avant l'enregistrement d'un état de financement concernant la sûreté rendue opposable par enregistrement.
3. Entre les sûretés rendues opposables autrement que par enregistrement, la priorité est déterminée selon le moment où elles ont été rendues opposables.
4. Entre les sûretés inopposables, la priorité est déterminée selon le moment où le bien a été grevé.

Idem

(2) Pour l'application du paragraphe (1), la sûreté opposable sans interruption est en tout temps traitée comme si elle avait été rendue opposable par enregistrement, si elle l'a été de cette façon à l'origine. Elle est en tout temps traitée comme si elle avait été rendue opposable autrement que par enregistrement si, à l'origine, elle a été rendue opposable autrement que par enregistrement.

Avances futures

(3) Sous réserve du paragraphe (4), lorsque des avances futures sont consenties pendant qu'une sûreté est opposable, celle-ci a le même rang relativement à chaque avance future que celui qu'elle a relativement à la première avance.

Exception

(4) L'avance future consentie aux termes d'une sûreté opposable est subordonnée aux droits des personnes visées aux sous-alinéas 20 (1) a) (ii) et (iii) si elle est consentie après que le créancier garanti a reçu avis écrit de l'intérêt d'une telle personne, sauf si :

a) le créancier garanti consent l'avance en vue du paiement des frais raisonnables, y compris l'assurance, les taxes et les autres frais engagés pour entrer en possession des biens grevés, pour en maintenir la possession et pour les conserver;

b) le créancier garanti est tenu de consentir l'avance, qu'un cas de défaut ultérieur ou un événement ultérieur et indépendant de sa volonté l'aient ou non relevé ou puissent ou non le relever de l'obligation.

Produit

(5) Pour l'application du paragraphe (1), la date d'enregistrement ou d'opposabilité relative aux biens grevés correspond à la date d'enregistrement ou d'opposabilité relative au produit.

Sûreté rendue de nouveau opposable

(6) La sûreté rendue opposable par enregistrement puis devenue inopposable et par la suite rendue de nouveau opposable par enregistrement est réputée avoir été opposable sans interruption depuis le moment où elle a initialement été rendue opposable. Toutefois, l'enregistrement est sans effet à l'encontre de la personne qui a acquis des droits sur la totalité ou une partie des biens grevés pendant que la sûreté était inopposable. L.R.O. 1990, chap. P.10, par. 30 (1) à (6).

Idem : prorogation

(6.1) Malgré le paragraphe (6), la sûreté rendue opposable par enregistrement puis devenue inopposable entre le 26 février 1996 et le 3 avril 1996 est réputée avoir été opposable sans interruption

depuis le moment où elle a initialement été rendue opposable si elle est rendue de nouveau opposable par enregistrement au plus tard le 12 avril 1996. 1996, chap. 5, art. 2.

Bénéficiaire d'une fiducie

(7) La sûreté sur un compte ou un stock et le produit de ceux-ci est subordonnée à l'intérêt du bénéficiaire d'une fiducie réputée telle aux termes de la *Loi sur les normes d'emploi* ou de la *Loi sur les régimes de retraite*.

Exception

(8) Le paragraphe (7) ne s'applique pas à une sûreté en garantie du prix d'acquisition qui est opposable et qui porte sur un stock ou sur son produit. L.R.O. 1990, chap. P.10, par. 30 (7) et (8).

Règles de priorité : sûretés sur des biens de placement

30.1 (1) Les règles de priorité énoncées au présent article s'appliquent aux sûretés concurrentes portant sur le même bien de placement. 2006, chap. 8, art. 138.

Créancier garanti qui a la maîtrise

(2) La sûreté du créancier garanti qui a la maîtrise du bien de placement selon le paragraphe 1 (2) prime celle du créancier garanti qui n'en a pas la maîtrise. 2006, chap. 8, art. 138.

Valeur mobilière avec certificat rendue opposable par livraison

(3) La sûreté sur une valeur mobilière avec certificat nominative qui est rendue opposable par prise de livraison en vertu du paragraphe 22 (2) et non par obtention de la maîtrise en vertu de l'article 22.1 prime la sûreté concurrente rendue opposable par un autre mode. 2006, chap. 8, art. 138.

Priorité déterminée par l'ordre de survenance

(4) Sauf disposition contraire des paragraphes (5) et (6), entre les sûretés concurrentes détenues par des créanciers garantis dont chacun a la maîtrise selon le paragraphe 1 (2), la priorité est déterminée :

a) si le bien grevé est une valeur mobilière, selon le moment où la maîtrise a été obtenue;

b) si le bien grevé est un droit intermédié qui est porté sur un compte de titres :

(i) selon le moment où le créancier garanti devient la personne pour qui le compte est tenu, s'il a obtenu la maîtrise en vertu de l'alinéa 25 (1) a) de la *Loi de 2006 sur le transfert des valeurs mobilières*,

(ii) selon le moment où l'intermédiaire en valeurs mobilières convient de se conformer aux ordres relatifs aux droits donnés par le créancier garanti à l'égard des droits intermédiés qui sont portés ou à porter sur le compte, si le créancier garanti a obtenu la maîtrise en vertu de l'alinéa 25 (1) b) de la *Loi de 2006 sur le transfert des valeurs mobilières*,

(iii) selon le moment où une autre personne a elle-même obtenu la maîtrise, si le créancier garanti a obtenu celle-ci par son entremise en vertu de l'alinéa 25 (1) c) de la *Loi de 2006 sur le transfert des valeurs mobilières*;

c) si le bien grevé est un contrat à terme porté auprès d'un intermédiaire en contrats à terme, il est satisfait à l'exigence relative à l'obtention de la maîtrise précisée au sous-alinéa 1 (2) d) (ii) en ce qui concerne les contrats à terme portés ou à porter auprès de l'intermédiaire. 2006, chap. 8, art. 138.

Intermédiaire en valeurs mobilières

(5) La sûreté que détient un intermédiaire en valeurs mobilières sur un droit intermédié ou sur un compte de titres tenu chez lui prime la sûreté concurrente détenue par un autre créancier garanti. 2006, chap. 8, art. 138.

Intermédiaire en contrats à terme

(6) La sûreté que détient un intermédiaire en contrats à terme sur un contrat à terme ou un compte de contrats à terme tenu chez lui prime la sûreté concurrente détenue par un autre créancier garanti. 2006, chap. 8, art. 138.