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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

Applicants

SUPPLEMENTARY MOTION RECORD OF THE MONITOR
(Motion Returnable November 10, 2010)

November 8, 2010

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

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

Lawyers for the Monitor, FTI Consulting Canada ULC

5744215 v1

TO: THE SERVICE LIST

Index

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

Applicants

SUPPLEMENTARY MOTION RECORD OF THE MONITOR
(Motion Returnable November 10, 2010)

INDEX

TAB	DESCRIPTION	PAGE
1	Factum of the United Steelworkers dated July 2, 2010, Re: Court of Appeal File No. M38582	
2	Miller, Canfield, Paddock and Stone LLP letter to Stikeman Elliott LLP dated October 21, 2010	

TAB 1

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

COURT OF APPEAL FOR ONTARIO

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.

FACTUM OF THE UNITED STEELWORKERS

July 2, 2010

SACK GOLDBLATT MITCHELL LLP
20 Dundas Street West, Suite 1100
Toronto, ON M5G 2G8

Darrell L. Brown LSUC# 29398U
Tel: (416) 979-4050
Fax: (416) 591-7333

Lawyer for the United Steelworkers

SERVICE LIST

TO: **KOSKIE MINSKY LLP**
20 Queen Street West
Suite 900
Toronto, Ontario
M5H 3R3

Andrew J. Hatnay
Tel: (416) 595-2150
Fax: (416) 204-2872

Demetrios Yiokarios
Tel: 416-595-2130
Fax: 416-204-2810

Lawyers for 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

AND TO: **STIKEMAN ELLIOTT LLP**
Barristers and Solicitors
Suite 5300
Commerce Court West
199 Bay Street
Toronto, ON M5L IB9

Ashley Taylor
Tel: (416) 869-5236
E-mail: ataylor@stikeman.com

Lawyers for the Monitor, FTI Consulting Canada ULC

AND TO: **GOODMANS LLP**
Barristers & Solicitors
250 Yonge Street, Suite 2400
Toronto, ON M5B 2M6

Brian Empey
Tel: (416) 979-2211
Fax: (416) 979-1234
E-mail: bempey@goodmans.ca

Fred Myers
Tel: (416) 597-5923
Fax: (416) 979-1234
E-mail: fmyers@goodmans.ca

Lawyers for Sun Indalex Finance, LLC

AND TO: **FINANCIAL SERVICES COMMISSION OF ONTARIO**

Legal Services Branch
5160 Yonge Street, 17th Floor, Box 85
Toronto, ON M2N 6L9

Mark Bailey
Legal Counsel
Tel: (416) 590-7555
Fax: (416) 590-7556
Email: mark.bailey@fsco.gov.on.ca

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

COURT OF APPEAL FOR ONTARIO

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.

FACTUM

PART I - THE APPELLANT AND THE DECISION UNDER APPEAL 3

PART II - OVERVIEW 5

PART III - THE FACTS 6
- A. The Salaried Plan in Deficit 6
- B. The CCAA Proceeding Generates Liquid Assets 9
- C. Pension and Corporate Governance Issues 11
- D. The August 28, 2009 Motions 13

PART IV - THE ISSUES 14

PART V - THE LAW 15
- A. Fiduciary Duty 15
- B. Amounts Subject to Windup Deemed Trust 18
- C. The Failure to Find a Deemed Trust and Order Monitor Payment 25
- D. Failure to Apply PPSA Priority Rules 30
- E. Costs Payable from the Fund 33

PART VI - ORDER REQUESTED 34

PART I - THE APPELLANT AND THE DECISION UNDER APPEAL

1. This is an appeal from the decision of the Honourable Justice Campbell (the "CCAA judge") of the Ontario Superior Court of Justice rendered on February 18, 2010.

2. The Appellants are the United Steelworkers (the "USW") acting on behalf of its members who were employed with the debtor, Indalex Limited ("Indalex"), and are beneficiaries of the Retirement Plan for Salaried Employees of Indalex and Associated Companies (the "Salaried Plan").

3. On August 28, 2009, three motions were argued before the CCAA Judge:

a. A motion by the United Steelworkers for a declaration that the amount representing the wind up liability owing to the Salaried Plan is subject to a deemed trust for the benefit of the beneficiaries of the Salaried Plan to be paid to the fund of the Salaried Plan;

b. A motion by the former executives ("Former Executives") of the the Retirement Plan for Executive Employees of Indalex Canada and Associated Companies (the "Executive Plan") for a declaration that the amount representing the wind up liability owing to the Executive Plan is subject to a deemed trust under section 57(4) of the Ontario *Pension Benefits Act* ("PBA") for the benefit of the beneficiaries of the Executive Plan and is to be paid to the fund of the Executive Plan;

c. A motion by the company for an order lifting the CCAA stay of proceedings to allow the company to file a voluntary assignment in bankruptcy, and take all steps necessary for the filing of an assignment in bankruptcy.

4. The motions were decided by the CCAA Judge in Reasons for Decision released on February 18, 2010. The results of the motions are as follows:

a. The CCAA Judge dismissed the USW's motion on the basis that, although a liability had accrued with respect to the wind up deficiency in the Salaried Plan, a payment was not actually due on July 20, 2009, the date of the sale approval motion and therefore, no amount was subject to a deemed trust as of that date. The CCAA Judge stated:

> [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 there under 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.[1]

b. The CCAA Judge dismissed the Former Executives' motion essentially on the basis that since the wind up of the Executive Plan had not yet occurred, there were "no deficiencies in payments" owing to the Executive Plan and thus that there was no basis for a deemed trust "at this time".[2]

c. The CCAA Judge dismissed the company's motion for leave to assign itself into bankruptcy on the basis that, given his finding on the deemed trust motions, the company's motion for a bankruptcy was moot. He stated:

> [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.
>
> ...
>
> [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.[3]

---

[1] Reasons for Decision, USW Appeal Book and Compendium, Tab 5, paras. 49-50

[2] Reasons for Decision, USW Appeal Book and Compendium, Tab 5, par. 24

[3] Reasons for Decision, USW Appeal Book and Compendium, Tab 5 at paras. 52 and 55.

PART II - OVERVIEW

5. The Salaried Plan was wound up on December 31, 2006. It was underfunded at the time of windup due to Indalex's failure to properly fund the Plan. Indalex is obligated to fund the windup deficiency (the "Deficiency").

6. Although the sale of the assets of Indalex was approved on July 20, 2009, the Monitor held $6.75 million in reserve, an amount approximating the underfunding in aggregate of the Salaried Plan and the Executive Plan.

7. This case pits the claims of beneficiaries of the Salaried and Executive Plans, who seek to advance their rights under the statutory deemed trust provisions of s. 57 of the *Pension Benefits Act,* R.S.O. 1990, c. P-8 (the "PBA"), against the claim of Indalex US, the parent company of the Plans' sponsor, which seeks to have the funds held in reserve remitted to Indalex US pursuant to its guarantee of the DIP loan. Indalex (the "Applicant") chose to argue on behalf of a related third-party creditor for distribution of the funds held in reserve in lieu of honouring the fiduciary and statutory obligations flowing from Indalex's sponsorship of the Salaried and Executive Plans.

8. The August 28, 2009 motions by the USW and counsel for the Former Executives, seeking orders that the amounts owing by Indalex to the Salaried and Executive Plans be paid from the funds held in reserve pursuant to s. 57 of the *PBA,* was supported by counsel for the Financial Services Commission of Ontario ("FSCO").

9. The Salaried Plan's liabilities crystallized at the date of windup, December 31, 2006. All liabilities were accrued as of that date. Pursuant to ss. 57(4) of the PBA, those

liabilities are subject to a deemed trust. The CCAA judge erred in law in concluding that the accrued liability was not subject to the deemed trust because it was an amount that was not due to be paid on the date of the sale of assets. To the contrary, the deemed trust applies irrespective of when a payment is due as long as the amount was accrued as a liability at the date of the windup. The CCAA judge did not have discretion under the CCAA to dispense with the deemed trust.

10. Since the deemed trust ranks in priority to other secured creditors, the USW respectfully requests this Honourable Court to uphold the appeal and order the Monitor to pay the funds held in reserve pursuant to the priorities established at law in an amount equal to the Deficiency, namely to pay the Salaried Plan fund in satisfaction of the amounts owing to the Salaried Plan.

PART III - THE FACTS

A. The Salaried Plan in Deficit

11. Indalex was the sponsor and administrator of the Salaried Plan, registered with "FSCO" and the Canadian Revenue Agency.[4]

12. The USW was certified to represent certain employees of Indalex, seven of whom were members of the Salaried Plan and have deferred vested entitlements under the Salaried Plan.[5]

---

[4] Affidavit of Cathy Braker sworn August 5, 2009 ("Braker Affidavit"), USW Appeal Book and Compendium, Tab 14, par. 2

[5] Braker Affidavit, USW Appeal Book and Compendium, Tab 14, paras. 4 - 5

13. The Salaried Plan contained a defined benefit and defined contribution component. Indalex and members of the Salaried Plan were required to make USW contributions to the Plan.[6],[7]

14. Section 4.02 of the Salaried Plan obligates the employer, Indalex, to make sufficient contributions to the Salaried Plan and creates a legitimate expectation on the part of beneficiaries of the Salaried Plan that the promised pension benefits will be fully funded and paid in accordance with the Salaried Plan:

> (1) Subject to [certain exclusions], the Employer will make such contributions to the Fund as are required, based on the advice of the Actuary, to provide;
>
> (a) the normal cost of the defined benefits currently accruing to its Members under the Plan; and
>
> (b) for the proper amortization of any liability or solvency deficiency, both in accordance with the requirements of the Applicable Pension Legislation, after taking into account the assets of the fund and all other relevant factors.[8]

15. Section 14.03 of the Salaried Plan requires the employer 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".[9]

16. The Salaried Plan was wound up on December 31, 2006.[10], [11]

---

[6] Retirement Plan for Salaried Employees of Indalex Limited and Associated Companies (the "Salaried Plan"), Braker Affidavit, Exhibit "A"; USW Appeal Book and Compendium, Tab 14A, p. 8

[7] Excerpt from Affidavit of Timothy R.J. Stubbs sworn April 3, 2009, Braker Affidavit, Exhibit "C"; USW Appeal Book and Compendium, Tab 14C, par. 61.

[8] Retirement Plan for Salaried Employees of Indalex Limited and Associated Companies (the "Salaried Plan"), Braker Affidavit, Exhibit "A"; USW Appeal Book and Compendium, Tab 14A, pp. 25-26

[9] The Salaried Plan, Braker Affidavit, Exhibit "A"; USW Appeal Book and Compendium, Tab 14A, p. 26

[10] Reasons for Decision; USW Appeal Book and Compendium, Tab 5, par. 26

[11] Braker Affidavit; USW Appeal Book and Compendium, Tab 14, p. 5, par. 3

17. All current service contributions have been made to the plan.[12]

18. At the time of the windup of the Salaried Plan, there was a Deficiency in Indalex's contributions to the Plan. As at December 31, 2007, the Deficiency under the Salaried Plan was $2,252,900. As at December 31, 2008, the Deficiency in the Salaried Plan was $1,795,600.[13], [14]

19. The Mercer Report prepared pursuant to section 32 of Regulation 909 on the funded position of the Salaried Plan as at December 31, 2008, in respect of the windup as at December 31, 2008, indicates that the minimum annual special payments to fund the Deficiency is $626,100 per year with the last payment due December 31, 2011.[15]

20. Indalex asserts that in April, 2009, it made a special payment of $601,000 to the Salaried Plan.[16]

21. In June, 2009, Indalex filed with FSCO an actuarial valuation indicating that an additional catch-up payment of $25,100, plus interest as of January 1, 2009, was required to be made to the defined benefit component of the Salaried Plan.[17]

22. At paragraph 25 of the Reasons for Decision, the CCAA judge incorrectly states that "prior to the sale of the assets approved on July 20, 2009, all pension payments

---

[12] Affidavit of Bob Kavanaugh sworn August 12, 2009 ("Kavanaugh Affidavit"), USW Appeal Book and Compendium, Tab 15, par. 6

[13] Reasons for Decision, par. 22; USW Appeal Book and Compendium, Tab 5

[14] Braker Affidavit; USW Appeal Book and Compendium, Tab 14, p. 6, paras. 6 - 7

[15] Mercer Report June 2009, Braker Affidavit, Exhibit "D"; USW Appeal Book and Compendium, Tab 14D, p. 8

[16] Kavanaugh Affidavit; USW Appeal Book and Compendium, Tab 15, par. 11

[17] Kavanaugh Affidavit; USW Appeal Book and Compendium, Tab 15, par. 12

required under obligation to Indalex employees, both statutory and contractual, were met." Indalex failed to remit the $25,100 catch-up payment referred to in paragraph 19 of this Factum.

B. The CCAA Proceeding Generates Liquid Assets

23. On March 20. 2009, the Applicants' U.S. based affiliates (collectively, "Indalex US") commenced reorganization proceedings under Chapter II of Title 11 of the *United States Code*. 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").[18], [19], [20]

24. On April 8, 2009, the Court authorized Indalex to borrow funds (the 'DIP Borrowings") pursuant to a debtor-in-possession credit agreement (as amended, the "DIP Credit Agreement") among Indalex US, the Applicants and a syndicate of lenders (the "DIP Lenders") for which JPMorgan Chase Bank, N.A. was administrative agent (the DIP Agent"). The Applicants' obligation to repay the DIP Borrowings was guaranteed by Indalex US, subject to a Monitor's reserve.[21], [22], [23], [24]

25. After a Court-approved marketing process, on July 20, 2009, the Honourable Justice Campbell approved the sale of Indalex's Canadian assets to SAPA Canada Inc.

---

[18] Reasons for Decision, paras. 2 – 3; USW Appeal Book and Compendium, Tab 5

[19] Affidavit of Keith Cooper, sworn August 24, 2009 ["Cooper Affidavit"]; USW Appeal Book and Compendium, Tab 17, paras. 4 – 5.

[20] Order of the Honourable Justice Morawetz, April 3, 2009 re: Indalex Limited et al. ("Initial Order"); USW Appeal Book and Compendium, Tab 6

[21] Reasons for Decision, paras. 4 - 5; USW Appeal Book and Compendium, Tab 5

[22] Cooper Affidavit; USW Appeal Book and Compendium, Tab 17, paras. 7 – 10.

[23] Order of the Honourable Mr. Justice Morawetz, April 8, 2009 re Indalex Limited et al. ["Amended and Restated Initial Order"]; USW Appeal Book and Compendium, Tab 7, par. 32

[24] Order of the Honourable Justice Campbell, July 20, 2009 re Indalex Limited et al. ["Approved and Vesting Order"]; USW Appeal Book and Compendium, Tab 9, par. 14

("SAPA") and ordered that upon closing the SAPA transaction, the proceeds of the sale (the "Canadian Sale Proceeds") were to be paid to the Monitor. The Applicant in the CCAA proceedings (which includes Indalex), received total consideration for the sale of its assets in the amount of approximately (USD) $151,183,000.00 (subject to certain adjustments).[25], [26], [27], [28]

26. Also, on July 20, 2009, the Applicant in the CCAA proceedings moved for approval to distribute proceeds of the sale to its lenders with the result that there would be no payment being made to fund the deficit in the Salaried Plan.

27. The USW objected to the planned distribution of assets on the basis that Indalex was not making any payment to the Salaried Plan. The USW relied on the statutory deemed trust that applies to amounts owing to a pension plan by an employer that have not been paid pursuant to sections 57 and 75 of the PBA.[29], [30]

28. Although not referred to in the Reasons for Decision, the USW also relied on section 30(7) of the Ontario *Personal Property Security Act,* R.S.O. 1990, c. P.10 (the "*PPSA*"). Section 30(7) of the *PPSA* expressly gives priority to the deemed trust in the *PBA* over secured creditors.

29. The Monitor was directed to make a distribution to the DIP Lenders from the Canadian Sale Proceeds in satisfaction of the Applicants' obligations to the DIP

---

[25] Reasons for Decision, paras. 6 – 7; USW Appeal Book and Compendium, Tab 5
[26] Order of the Honourable Justice Campbell, July 20, 2009 re: Indalex Limited et al. ("Sale Order"); USW Appeal Book and Compendium, Tab 9
[27] Cooper Affidavit; USW Appeal Book and Compendium, Tab 17, paras. 7 – 10.
[28] Affidavit of Fred Fazio, sworn June 29, 2009; USW Appeal Book and Compendium, Tab 16, par. 40.
[29] Reasons for Decision; USW Appeal Book and Compendium, Tab 5, paras. 9, 18
[30] Cooper Affidavit; USW Appeal Book and Compendium, Tab 17, par. 21

Lenders, subject to a reserve that the Monitor considered to be appropriate in the circumstances (the "Undistributed Proceeds"). The Monitor retained $6.75 million on reserve, approximating the amount owed to the Salaried and Executive Plans.[31], [32], [33]

30. On July 31, 2009, the sale of Indalex's assets to SAPA closed. A total payment of (USD) $17,041,391.80 was made from the Canadian Sale Proceeds by the Monitor, on behalf of the Applicants, to the DIP Agent. This resulted in a deficiency of (USD) $10,751,247.22 in respect of the DIP loan. The DIP Agent called on the guarantee granted to the DIP Lenders by Indalex US for the amount of the deficiency. Indalex US paid the guarantee obligation and now seeks distribution from the Undistributed Proceeds held in reserve by the Monitor.[34]

C. Pension and Corporate Governance Issues

31. The primary negotiator of the DIP Credit Agreement on behalf of the Indalex group of companies was Mr. Keith Cooper, the Senior Managing Director of FTI Consulting Inc. Mr. Cooper provided consulting services to Indalex US prior to and through the attempted restructuring. FTI Consulting Inc. and the Monitor are affiliated entities.[35], [36]

---

[31] Reasons for Decision; USW Appeal Book and Compendium, Tab 5, paras. 8 - 10
[32] Order of the Honourable Justice Campbell, July 20, 2009 re: Indalex Limited et al. ("Sale Order"); USW Appeal Book and Compendium, Tab 9
[33] Cooper Affidavit; USW Appeal Book and Compendium, Tab 17, paras. 7, 10
[34] Reasons for Decision; USW Appeal Book and Compendium, Tab 5, par. 11
[35] Cooper Affidavit; USW Appeal Book and Compendium, Tab 17, paras. 1, 6
[36] Cross-Examination Transcript of Keith Cooper, August 26, 2009; USW Appeal Book and Compendium, Tab 18, par. 7

32. The pension obligations owing to the Salaried and Executive Plans were not discussed during the negotiation of the DIP Credit Arrangement.[37]

33. On July 31, 2009, all directors of Indalex resigned. Between July 31, 2009 and August 12, 2009, there was no corporate governance of Indalex. On August 12, 2009, a Unanimous Shareholder Declaration was executed. Pursuant to that Declaration, Mr. Keith Cooper was appointed to direct the affairs of all Indalex entities.[38], [39], [40]

34. During cross-examination on the Affidavit of Keith Cooper, Mr. Cooper indicated that he and his staff acted as the *de facto* administrator of the Salaried and Executive Pension Plans, but also thought that the Monitor was the legal administrator of the pension plans.[41]

35. On October 14, 2009, Judge Walsh of the US Court granted an Order converting the Chapter 11 Proceedings to Chapter 7 Proceedings. Effective as of 4:00 p.m. Eastern Time on October 30, 2009, control of Indalex US passed to the Chapter 7 Trustee. There was no one designated as responsible to carry out the fiduciary duties associated with the administration of the Salaried and Executive Plans since Mr. Cooper, the Chief Restructuring Officer, relinquished control on October 30, 2009.

36. On November 5, 2009, the Ontario Superintendent of Financial Services appointed the actuarial firm of Morneau Sobeco to act as administrator of the Salaried Plan.

---

[37] Cross-Examination Transcript of Keith Cooper, August 26, 2009, USW Appeal Book and Compendium, Tab 18, par. 11
[38] Cooper Affidavit; USW Appeal Book and Compendium, Tab 17, par. 33
[39] Cross-Examination Transcript of Keith Cooper, August 26, 2009; USW Appeal Book and Compendium, Tab 18, paras. 16, 80
[40] Unanimous Shareholder Declaration dated August 12, 2009; USW Appeal Book and Compendium, Tab 19
[41] Cross-examination Transcript of Keith Cooper, August 26, 2009; USW Appeal Book and Compendium, Tab 18, par. 25

D. The August 28, 2009 Motions

37. Three motions were heard on August 28th:

d. A motion by the USW for a declaration that the amount representing the windup liability owing to the Salaried Plan is subject to a deemed trust for the benefit of the beneficiaries of the Salaried Plan to be paid into the fund of the Salaried Plan;

e. A motion by the Former Executives for a declaration that the amount representing the windup liability owing to the Executive Plan is subject to a deemed trust for the benefit of the beneficiaries of the Executive Plan to be paid into the fund of the Executive Plan; and

f. A motion by the Applicants for, among other things, an order lifting the stay of proceedings for the purpose of allowing the Applicants, or any of them, to (i) file a voluntary assignment in bankruptcy pursuant to section 49 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"), and (ii) take all steps necessary and incidental to the filing of a voluntary assignment in bankruptcy.

38. The motions described in paragraph 34 were decided by the CCAA judge in the Reasons for Decision dated February 18, 2010.

39. The CCAA judge dismissed the USW's motion on the basis that, although a liability had accrued with respect to the Deficiency, a payment was not due with respect to this Deficiency on July 20, 2009, the date of the approved sale and, therefore, no amount was subject to a statutory deemed trust as at that date. The CCAA judge stated:

> [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.[42]

40. The CCAA judge did not find it necessary to rule on the Applicant's motion to lift the stay, in effect, dismissing the motion. He stated:

> [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.
>
> ...
>
> [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. [Emphasis added.][43]

PART IV - THE ISSUES

41. USW proposes that the Court answer the following questions of law:

a. Did the Company breach its fiduciary duty to the Plan beneficiaries?

b. What amounts that are payable to a pension plan (i.e. going concern payments, special payments and windup payments) are subject to the windup deemed trust?

c. Did the CCAA judge err by holding that no deemed trust existed with respect to the Deficiency of the Salaried Plan as at July 20, 2009 and err further by not ordering the Monitor to pay the amount of the Deficiency to the Salaried Plan?

d. Did the CCAA judge err by not applying the priority rules in the PPSA s. 30 that explicitly gives priority to the PBA deemed trust over secured creditors?

---

[42] Reasons for Decision, paras. 49, 50.

[43] Reasons for Decision, paras. 51, 55

e. Should the Court order that the Appellants' legal costs be paid from the Plan's funds?

PART V - THE LAW

A. Fiduciary Duty

Did the Company breach its fiduciary duty to the Plan beneficiaries?

42. A plan administrator owes a fiduciary duty to pension plan members and pensioners in respect of all activities administering a pension plan both under section 22 of the PBA and the common law.[44]

43. Indalex *qua* Plan administrator is precisely the party that has the fiduciary obligation to protect the interests of the Salaried Plan beneficiaries. Indalex owed a duty to the pension beneficiaries to selflessly protect their interests in respect of the Salaried Plan. The evidence shows that Indalex did the exact opposite.[45], [46], [47]

44. Pension beneficiaries depend on plan sponsors to protect their interests in the pension plan. Plan beneficiaries are vulnerable to the actions and inactions of the Plan sponsor and as such can be characterized as involuntary creditors.[48], [49]

45. The administrator's fiduciary duty continues through the windup of a pension plan and extends to any discretionary decisions made by an administrator during the windup process. The exercise of discretion by an administrator during the windup process must

[44] *Pension Benefits Act*, R.S.O. 1990, c. P.8, s. 22
[45] *Re Usarco Limited* (1991) 42 E.T.R. 235 (Ont. Gen. Div.), at 241
[46] Gillese, E.E., 1996, *The Fiduciary Liability of the Employer as Pension Plan Administrator*, Toronto, Ontario, 18 November 1996, The Canadian Institute 1-25
[47] *Pension Benefits Act, supra*, s. 22
[48] *Re Stelco Inc.* (2005), 75 O.R. (3d) 5 (C.A.), par. 6
[49] *Re Stelco Inc.* [2004] O.J. 4899 (S.C.J.), par. 1

be discharged in a manner that avoids any conflicts of interest in respect of its role as both administrator and employer.

46. In *Usarco,* Justice Farley held that the deemed trust provisions themselves in the PBA imply a fiduciary obligation on the company.[50]

47. Not only did Indalex fail to take any steps to fund the Salaried Plan properly so that it would be able to provide the promised level of benefits to the beneficiaries, the company mounted an aggressive opposition to the USW motion for a declaration that the deemed trust applies, including a motion to bankrupt the company to defeat the deemed trust.

48. On July 31, 2009, all the directors of Indalex resigned. On August 12, 2009, a Unanimous Shareholder Declaration was executed pursuant to which Keith Cooper was appointed to direct the affairs of all Indalex entities.[51], [52]

49. Keith Cooper confirmed under cross-examination that he was the administrator of the Indalex pension plans, that he was the primary negotiator of the DIP Credit Agreement on behalf of the Indalex group of companies and that, during negotiation of the DIP Credit Agreement, the default on pension obligations owed to the Salaried Plan was never discussed.[53], [54], [55]

---

[50] *Usarco, supra*, at par. 16
[51] Cooper Affidavit; USW Appeal Book and Compendium, Tab 17, par. 33
[52] Cross-Examination Transcript of Keith Cooper, August 26, 2009; USW Appeal Book and Compendium, Tab 18, at question 20, p. 10 and questions 77- 80, pp. 26 - 27
[53] Cooper Affidavit; USW Appeal Book and Compendium, Tab 17, paras. 30 – 31
[54] Cross-Examination Transcript of Keith Cooper, August 26, 2009; USW Appeal Book and Compendium, Tab 18, at questions 6 - 9, p. 5.

50. Mr. Cooper admitted that:

- He knew that that he and his staff acted as the administrator of the Plans.[56]
- He knew the Plans were underfunded on a windup basis.[57]
- He knew the beneficiaries would have their pension benefits cut as a result of the underfunding.[58]
- He refused to answer questions about what steps were taken to have the purchasing company take over administration of the pension plans.[59]
- He was the pension plan administrator and directing mind of the company when it applied to the CCAA court at the time of the Former Executives' and USW's deemed trust motions to have the company assigned into bankruptcy to defeat the deemed trust motions.[60]

51. The CCAA judge emphasized that a bankruptcy proceeding should not be used solely to defeat a secured claim under valid provincial legislation such as the deemed trust provisions of the PBA:

> [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. ...[61]

52. Mr. Cooper, as the controlling mind of Indalex, made an active choice to avoid statutory and fiduciary obligations owed to the Plan beneficiaries in Canada and to seek

---

[55] Cross-Examination Transcript of Keith Cooper, August 26, 2009; USW Appeal Book and Compendium, Tab 18; at questions 10 - 11, p. 6

[56] Cross-Examination Transcript of Keith Cooper, August 26, 2009; USW Appeal Book and Compendium, Tab 18, at questions 62, 65 and 66, pp. 22 - 23

[57] Cross-Examination Transcript of Keith Cooper, August 26, 2009; USW Appeal Book and Compendium, Tab 18, at questions 20, 54, 55, p. 20.

[58] Cross-Examination Transcript of Keith Cooper, August, 29, 2009; USW Appeal Book and Compendium, Tab 18, at question 55, p. 20.

[59] Cross-Examination Transcript of Keith Cooper, August 26, 2009; USW Appeal Book and Compendium, Tab 18, at questions 91 - 98, pp. 30 – 32

[60] Cross-Examination Transcript of Keith Cooper, August 26, 2009; USW Appeal Book and Compendium, Tab 18, at questions 63 and 70, pp. 23 and 25

[61] Reasons for Decision, par. 55; USW Appeal Book and Compendium, Tab 5

voluntary assignment in bankruptcy to ensure that the funds on reserve would be paid over to Indalex US. Mr. Cooper's actions constituted, at the least, a conflict of interest, given his role in managing Indalex US contrasted with his management obligations with respect to Indalex Canada, and a breach of statutory and fiduciary duty owed to Salaried Plan beneficiaries.[62], [63], [64], [65]

53. Indalex has a fiduciary duty to act in the best interests of the Salaried Plan beneficiaries. Despite this duty, Indalex has not acknowledged or acted on its statutory lien: section 57(5) of the PBA provides that "[t]he 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)."[66]

54. Based on the above, the evidence is incontrovertible that the company breached its fiduciary duty to the Plan beneficiaries.

B. Amounts Subject to Windup Deemed Trust

What amounts that are payable to a pension plan (i.e. going concern payments, special payments and windup payments) are subject to the windup deemed trust?

55. The overall purpose of the PBA is to protect employees' pension benefits. This has been stated in numerous cases and is well summarized in the unanimous decision in *Huus* v. *Ontario Superintendent of Pensions*:

> [25] I start with this observation: pension plans are for the benefit of the employees, not the companies which create them. They are a particularly

[62] Cooper Affidavit; USW Appeal Book and Compendium, Tab 17, paras. 30 – 31.
[63] Cross-Examination Transcript of Keith Cooper, August 26, 2009; USW Appeal Book and Compendium, Tab 18, par. 20
[64] *Froese v. Montreal Trust Co. of Canada*, [1996] B.C.J. No. 1091 (C.A.), at paras. 59 -60
[65] *Pension Benefits Act, supra*, s. 22
[66] *Pension Benefits Act, supra*, s. 22 and ss. 57(5)

important component of the compensation employees receive in return for their labour. They are not a gift from the employer; they are earned by the employees. Indeed, in addition to their labour, employees usually agree to other trade-offs in order to obtain a pension. As explained by Cory . in *Schmidt* v. *Air Products Canada Ltd.*, [1994] 2 S.C.R. 611 at 646:

> In the case of pension plans, employees not only contribute to the fund, in addition they almost invariably agree to accept lower wages and fewer employment benefits in exchange for the employer's agreeing to set up the pension trust in their favour.

[261 Similar statements have been expressed by this court in several cases. In Gencorp Canada Inc. v. Ontario (Superintendent of Pensions) (1998), 39 O.R. (3d) 38 at 43 (C.A.), Robins J.A. said:

> [T]he Pension Benefit Act is clearly public policy legislation establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Ontario. It is intended to benefit and protect the interests of members and former members of pension plans....

[27] In Firestone Canada Inc. v. Ontario (Pension Commission) (1990), 1 O.R. (3d) 122 at 127 (C.A.) ("Firestone"), Blair J.A. stated that the PBA "is clearly intended to benefit employees" and "[i]n. particular. . . evinces a special solicitude for employees affected by plant closures".[67]

56. The Supreme Court of Canada has recognized that the underlying and paramount purpose of the PBA is to establish a regulatory regime to protect the legislated rights of members.

> 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 (see GenCorp, supra; Firestone Canada Inc. v. Ontario (Pension Commission) (1990), 1 O.R. (3d) 122 (C.A.), at p. 127). This is especially important when, as recognized by this Court in *Schmidt* v. *Air Products Canada Ltd.*, [1994) 2 S.C.R. 611, at p.

[67] *Huus v. Ontario (Superintendent of Pensions)* (2002), 58 O.R. (3rd) 380 of paras. 25 - 27

> 646, it is remembered that pensions are now generally given for consideration rather than being merely gratuitous rewards.[68]

57. An employer who sponsors a pension plan is subject to making different categories of payments depending on the funded level of the plan to ensure that the plan is adequately funded and is capable of paying the benefits that are promised to the employees on retirement. The type of payments were recently summarized in *Fraser Papers* as follows:

> Employer pension contributions are described by M. Starnino, J-C Killey and C. P. Prophet in their article entitled "The Intersection of Labour and Restructuring Law in Ontario: A Survey of Current Law".
>
>> "In the case of a defined benefit plan, (i.e., a plan that promises to pay the beneficiaries of the plan a specific amount in retirement) the amount of the current service contribution is determined using actuarial estimations having regard to, among other things, the amount of the benefit to be provided, the demographics of the workforce and the anticipated returns generated by the investments in which the pension plan is invested.
>>
>> Second, if the pension plan is a defined benefit plan then an employer may be required to make additional contributions to the pension plan called "special payments". The obligation to make special payments arises where the original plan experience or investment performance differed from that assumed by the actuaries in order to provide the benefit promised to employees and the plan develops either a going concern unfunded liability or a solvency deficiency.
>>
>> A going concern unfunded liability arises when it appears, based on a periodic actuarial assessment of the plan, that the plan is insufficiently funded to pay the benefits that are or will become due, assuming that the pension plan continues indefinitely. Once a going concern unfunded liability is identified, the employer is required to make monthly special payments to fund the deficiency within fifteen years.
>>
>> A solvency deficiency [ie a wind up deficiency] arises when it appears, based upon a periodic actuarial assessment of the plan, that the plan's current assets are insufficient to meet the obligations that would be due if the employer immediately discontinued its business and the plan were wound up. In the case of a solvency deficiency, the employer is required to make special payments to

[68] *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services),* [2004] 3 S.C.R. 152, paras. 37, 38

fix the deficiency within a five year time frame. Pending amendments will extend this period to 10 years."[69]

58. The CCAA judge suggested in his Reasons for Decision that even where the deemed trust applies, it would not include windup liability payments, but only unpaid going concern and special payments. Respectfully, such an interpretation is inconsistent with the language of the PBA and is contrary to the purpose of section 57(4) and the broader purpose of the PBA to protect members of pension plans.

59. The PBA sets out a detailed scheme by which a pension plan is wound up. Section 75 of the PBA imposes a liability on an employer to pay into the pension fund on its windup all amounts that are required to be paid into the fund to provide the pension benefits promised to its members. Section 75 breaks out the different categories of payment in various subsections, all of which are to be paid into a pension plan being wound up. Section 75(1)(a) refers to the amounts equal to the total of all payments that are due immediately or that have accrued and have not been paid into the pension fund. This would, for example, capture unpaid current service costs and unpaid special payments.

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 ...[70]

***Pension Benefits Act, supra*, s. 75**

[69] *Fraser Papers Inc. (Re)*, [2009] O.J. No. 3188, 55 C.B.R. (5th) 217, at par. 13.
[70] *Pension Benefits Act, supra*, s. 75

60. Section 75(1)(b) goes further and requires an *additional* calculation to be made to determine a further amount to be paid into the pension plan by an employer comprised of three categories as set out below:

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

61. The two groups of payments under section 75(1)(a) and (b) are different categories of payments that an employer must pay into a pension plan that is being wound up.

62. The deemed trust in section 57(4) of the *PBA* is expressly aimed at creating a deemed trust for the beneficiaries of the pension plan in an amount of money equal to employer contributions "***accrued** to the date of wind-up **but not yet due** under the plan or regulations*." Section 57(4) captures in a deemed trust all amounts that an employer is required to pay into the pension plan on its windup under section 75 under both categories in 75 (1)(a) and (b). There is no language in section 57(4) or elsewhere in the *PBA* that would suggest that the windup deemed trust in section 57(4) is confined to amounts owing only under section 75(1)(a).

63. Critical to discerning the scope of section 57(4) is distinguishing between "accrued" amounts and amounts that are "not yet due". The terms "accrued" and "due" were judicially considered in *Ontario Hydro-Electric Power Commission* v. *Albright* by the Supreme Court of Canada.

> 23 The word "due" in relation to moneys in respect of which there is a legal obligation to pay them may mean either that the facts making the obligation operative have come into existence with the exception that the day of payment has not yet arrived, or it may mean that the obligation has not only been completely constituted but is also presently exigible. That it is used in the latter sense in the present instance is perfectly clear — otherwise the contrast expressed between payments "accrued" and payments "due" would, especially in the case of interest, be patent nonsense. The most natural meaning of such a phrase as "accrued payments" would be, and standing alone it would *prima facie* receive that reading, moneys presently payable; but the word "accrued" according to well recognized usage has, as applied to rights or liabilities the meaning simply of completely constituted — and it may have this meaning although it appears from the context that the right completely constituted or the liability completely constituted is one which is only exercisable or enforceable *in futuro* — a debt for example which is *debitum in praesenti solvendum in futuro*. It is in this sense that it has been widely applied to express the fact that such a liability has been created in relation to a sum of money, part of a whole (made up of an accumulation of such parts) which is not to be payable until a later date, and it is in this sense that it seems to be used in the clause before us.[71]

64. The *Albright* decision confirms that "accrued" means "completely constituted" even if such liability is enforceable in the future. Farley J. distinguished a situation where a plan has been wound up prior to CCAA proceedings even though such payments may not be due under the plan with the application of the deemed trust to an ongoing plan under section 57(3) (s. 58(3) as it then was) in paragraph 23 of the *Usarco* decision.

> 23 Quite clearly, in a wind-up situation, the wording of s. 58(4) [*PBA*] is to oblige the employer (Usarco) with a trust arrangement concerning those contributions which are accrued, <u>even though such may not be due under the plan. This is distinct from an ongoing situation envisaged by s. 58(3) [*PBA*]</u>, where such obligation is with respect to contributions which are then due but not yet paid over to the pension fund. Section 58(5)

[71] *Ontario Hydro-Electric Power Commission* v. *Albright,* 1922 CarswellOnt 134, at par. 23

> [*PBA*] gives the administrator a lien and a charge over the deemed trust amounts. By s. 58(6) [*PBA*], the deemed trust applies whether or not the employer kept these moneys separate and apart. It is clear from s. 76(1)(*a*) [*PBA*] that "due" and "accrued" are not identical, as they are referred to separately therein.[72] [Emphasis added.]

65. The "employer contributions accrued to the date of windup" is an amount subject to the deemed trust irrespective of when the amount is payable. Section 57(4) contemplates that payments may be amortized so that there may be contributions "not yet due" at the time of windup. The regulatory regime provides an employer with an extended time to pay under Section 31 of Regulation 909 under the *PBA*[73] but the extension of the payment period in no way reduces the accrued liability that has crystallized at the time of windup. The CCAA judge correctly describes the nature of the liability in paragraph 34 of the Reasons for Decision as follows:

> [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."[74]

66. The Superintendent's submission to the Superior Court clearly states that it is the position of FSCO that the Deficiency is accrued as of the windup date.

> 29. There is no additional liability that accrues "following" a wind up. The wind up liability of a plan is determined as of the effective date of the wind up. All events crystallize on the wind up date: all pension benefit accruals by members cease and all amounts that an employer is required to pay into an underfunded plan are calculated as of the wind up date. There is no additional or separate wind up liability that develops over time "following" the wind up as the Applicants say. As such, the wind up deficit represents "amounts accrued to the date of wind up."

---

[72] *Re Usarco Limited*, supra, at par. 23

[73] *Pension Benefits Act* Regulation 909, R.R.O. 1990, Amended to O. Reg. 570/06

[74] Reasons for Decision; USW Appeal Book and Compendium, Tab 5, par. 34

67. The Superintendent's conclusions are reflected in longstanding published policies of FSCO. The liability of Indalex at the time of the Salaried Plan's windup on December 31, 2006 is determined by valuing the accrued benefits under the Plan at the time of windup as modified pursuant to sections 73 and 74 of the PBA. At windup, this liability crystallizes. FSCO's policies have consistently described the scope of the liability:

> The wind up liability must reflect all benefits provided under the plan and the applicable legislation on wind up and should be separately summarized for each major category of membership.
>
> ...
>
> If the wind up report reveals that the plan does not have sufficient assets to pay the liabilities on wind up, the employer must pay into the pension fund amounts required under section 75 of the PBA.[75], [76]

68. The Ontario Legislature has not excluded the obligation created by section 75(1)(b) from the deemed trust in section 57(4). On the contrary, the language in section 57(4) expressly contemplates making all amounts that are owing to a pension plan on the date of windup subject to the deemed trust even though they are not yet due under the plan or regulations. This would capture all windup liability payments in all of section 75.

C. The Failure to Find a Deemed Trust and Order Monitor Payment

Did the CCAA judge err by holding that no deemed trust existed with respect to the Deficiency of the Salaried Plan as at July 20, 2009 and err further by not ordering the Monitor to pay the amount of the Deficiency to the Salaried Plan?

---

[75] *Pension Benefits Act, supra*, ss. 73 – 75

[76] Financial Services Commission of Ontario, Filing Requirements and Procedure on Full and Partial Wind Up of a Pension Plan, Index No. W100-101 (December 9, 2004) ["FSCO Policy"] at pp. 10-11

69. It has been repeatedly noted by the Supreme Court of Canada that statutory interpretation should be approached in a manner which takes into consideration not only the words of the Act, but also the "scheme of the Act, the object of the Act, and the intention of Parliament".[77], [78]

70. As described in paragraphs 55 and 56 of this Factum, the paramount purpose of the PBA is to protect employees' pension benefits. The Supreme Court of Canada recently re-affirmed this purpose.

> [28] The purpose of the PBA was explained at para. 13 of *Monsanto*, citing *GenCorp Canada Inc.* v. *Ontario (Superintendent, Pensions)* (1998), 158 D.L.R. (4th) 497 (Ont. C.A.), at para. 16:
>
> > [T]he Pension Benefits Act is clearly public policy legislation establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Ontario. It is intended to benefit and protect the interests of members and former members of pension plans, and **"evinces a special solicitude for employees affected by plant closures"**. [Emphasis added][79]

71. At paragraphs 49 and 50 of the Reasons for Decision, the CCAA judge concluded that, since there was no amount payable to the Salaried Plan on July 20th, the date of the approval of the sale of assets, there was no deemed trust.

> [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.

---

[77] *Bell ExpressVu Ltd. v. Partnership v. Rex*, [2002] 2 S.C.R. 559 at paras. 26 - 27

[78] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at par. 21

[79] *Kerry (Canada) Inc.* v. *Ontario (Superintendent of Financial Services)*, 2009 SCC 39, at para. 28

> [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.

72. Pivotal to the decision of the CCAA judge that there was no deemed trust was his interpretation of the terms "due" and "accruing due". At paragraph 32 of the Reasons for Decision, the CCAA judge stated that the "submission on behalf of the Superintendent distinguished between the words 'due' and 'accruing due'". The term "accruing due" was not used in the Superintendent's submissions, nor in any submissions of the Former Executives or the USW. This is because the operative terms in section 57(4) of the PBA are: "accrued" and "but not yet due under the plan or regulations".[80]

73. The CCAA Judge further cited *Re Ganong Estate; Ganong v. Belyea* to discern the meaning of "all dividends accruing due", a term that does not appear in the *PBA* nor in the Salaried Plan.[81]

74. As described in paragraphs 63 and 64 of this Factum, the term "accrued" means "completely constituted even if such liability is enforceable in the future". The Deficiency under the Salaried Plan had accrued as of the windup date even though the contributions were "not yet due" at the time of the windup.

75. In paragraphs 37 through 39 of the Reasons for Decision, the CCAA judge relies on the *Usarco* and *Ivaco* decisions in support of a conclusion that the Deficiency is not subject to the section 57(4) deemed trust.[82], [83]

76. At paragraph 37 of the Reasons for Decision, the CCAA judge quotes from the Justice Farley's *Usarco* decision to support a conclusion that only going concern

---

[80] *Pension Benefits Act, supra*, ss. 57(4)
[81] Reasons for Decision; USW Appeal Book and Compendium, Tab 5, paras. 35, 37
[82] *Ivaco* (2006) 83 O.R. (3d) 108 (C.A.) affirming *Ivaco Inc.*, 2005 CanLII 27605 (Ont. S.C.)
[83] *Re Usarco Limited,* supra

contributions are covered under section 57(4) of the PBA. Justice Farley later recanted on the view that ss. 57(4) deemed trusts would be limited to going concern payments to be paid up to the windup date.[84]

77. The CCAA judge erred in relying upon Justice Laskin's *obiter* in *Ivaco* both because that decision dealt with section 57(3), not section 57(4) of the *PBA* and because the comments were clearly not the result of an exhaustive analysis of the application of section 57(4) as was indicated in Justice Laskin's comments.

> 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.**[85] [Emphasis added.]

78. In paragraphs 40 to 42 of the Reasons for Decision, the CCAA judge quotes Ari Kaplan and Gregory J. Winfield as further authority in support of a narrow interpretation section 57(4), which excludes a Deficiency on windup from the deemed trust. Both quotes cited rely exclusively on Justice Farley's comments in *Usarco.* No weight should be accorded to this extrinsic evidence. Justice Farley later reversed the *Usarco* opinion by stating in *Ivaco* that the windup liability is included in the amount protected by the section 57 deemed trust.

79. Both the clear meaning of section 57(4) and the underlying purpose of the *PBA* support the enforcement of a deemed trust in respect of the totality of amounts owed at windup – the Deficiency. The USW asserts that the CCAA Judge erred in not finding that a deemed trust existed on July 20, 2009 in an amount equal to the Deficiency in the Salaried Plan.

---

84 *Ivaco Inc.*, 2005 CanLII 27605 (Ont. S.C.), at par. 11

85 *Ivaco* (2006) 83 O.R. (3d) 108 (C.A.) affirming *Ivaco Inc.*, 2005 CanLII 27605 (Ont. S.C.), par. 44

80. If this Honourable Court finds that a deemed trust existed on July 20, 2009, the next question is whether the Monitor should be ordered to pay the amount of the Deficiency to the Salaried Plan's fund. The objective of a CCAA proceeding is to provide protection to a company or group of companies by staying proceedings against the company so that it can restructure. Indalex did not restructure. The stay permitted a sale of assets on July 20, 2009. All that remains of Indalex are the Undistributed Proceeds. When restructuring attempts have come to an end, there is no longer a valid purpose in suspending the enforcement of existing obligations. The ruling of Tysoe J. in the *Ted Leroy* case is consistent with this view:

> I do not quarrel with the proposition that an order under s. 11 of the CCAA can stay the enforcement rights of the Crown. However, **when the restructuring efforts have come to an unsuccessful end,** the Crown is then in a position to exercise its rights under the deemed trust. In addition, **the s. 11 stay powers do not permit the court to authorize a breach of the deemed trust for the benefit of another creditor**.[86] [Emphasis added.]

81. The deemed trust is equal in amount to the Deficiency of the Salaried Plan. Indalex *qua* administrator has a lien and charge on the assets of Indalex *qua* employer equal to the amount of the deemed trust. Indalex *qua* administrator did not take any steps during the CCAA proceedings to enforce the lien and charge. Rather, the directing mind of Indalex was also the directing mind of Indalex US. Indalex US has sought to enforce its right as a non-arm's length secured creditor while Indalex *qua* administrator, under the same directing mind, failed to take the steps necessary to enforce the lien and charge. The Court's intervention is necessary to give effect to the lien and charge thereby preserving the deemed trust.

[86] *Ted Leroy Trucking Ltd., Re* 2009 BCCA 205, at par. 30

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).[87]

82. The sole purpose to enter into bankruptcy proceedings at this stage would be to overturn the section 57(4) deemed trust. This would be incompatible with the underlying purpose of the CCAA. Since enforcing a provincial deemed trust is not incompatible with the CCAA proceeding at this stage (i.e. when restructuring efforts have been exhausted), an order should be issued requiring the Monitor to pay an amount equal to the Deficiency to the Salaried Plan's fund.

D. Failure to Apply PPSA Priority Rules

Did the CCAA judge err by not applying the priority rules in the PPSA, s. 30 that explicitly gives priority to the PBA deemed trust over secured creditors?

83. The CCAA Judge found that there was no conflict between the deemed trust provisions of the PBA and the CCAA.[88]

84. The CCAA judge stated at paragraph 55 of the Reasons for Judgment:

> [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.

85. Section 30(7) of the PPSA expressly gives priority to the deemed trust in the PBA over secured creditors. The section states:

---

[87] *Pension Benefits Act*, *supra*, s. 57(5)
[88] Reasons for Judgment; USW Appeal Book and Compendium, Tab 5, par. 49

Priorities

30. 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*.**[89]

86. In *Usarco*, Farley, J. first gave effect to the deemed trust in section 57 of the PBA and then applied the priority rule in section 30(1) of the PPSA and ordered the receiver to pay an amount of money equal to the regular and special payments required to have been made but not yet paid into the pension plan:

> 13 Therefore, since the bankruptcy petition has not been dealt with, we are presently dealing with a claim by the administrator for certain trust funds held by the receiver. ***The security interest of the bank is subordinate to the interest of the beneficiaries of the deemed trust*** (represented by the administrator) (see: s. 30(7), *PPSA*).[90]

87. Provincial laws in federally regulated bankruptcy and insolvency proceedings continue to apply so long as the doctrine of paramountcy is not triggered.[91], [92]

88. The onus is on the party seeking to invoke the paramountcy doctrine to demonstrate a conflict between federal and provincial legislation as clearly stated by this Court in the *Nortel* decision.

> 38 ... [T]he doctrine of paramountcy will apply either where a provincial and a federal statutory provision are in conflict and cannot both be complied with, or where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament. Binnie and Lebel JJ. concluded by summarizing the operation of the doctrine in the following way:

---

[89] *Personal Property Security Act,* R.S.O. 1990, c. P.10 , s. 30

[90] *Re Usarco Limited*, supra, at par. 13

[91] *Crystalline Investments Ltd.* v. *Domgroup Ltd.*, 2004 SCC 3 at par. 43

[92] *GMAC Commercial Credit Corp. Canada* v. *TCT Logistics Inc.*, 2006 SCC 35 at paras. 50 - 52

To sum up, **the onus is on the party relying on the doctrine of federal paramountcy to demonstrate that the federal and provincial laws are in fact 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. (para. 75)[93]

89. The issue of paramountcy of federal legislation was not raised by the Applicants in response to the USW motion to enforce the deemed trust. Rather, the Applicants argued that the deemed trust provision under the PBA did not include the windup deficiency. The Applicants did not address the application of the PPSA super-priority.

90. The deemed trust was stayed, not extinguished under the CCAA proceeding. No paramountcy argument was tendered by the Applicant alleging a conflict between the PBA, PPSA and the CCAA. The CCAA Judge did not find a conflict between the applicable provincial legislation and the CCAA. Further, he expressly stated that it would not be appropriate to invoke the BIA solely to defeat a provincially-invoked deemed trust right.

91. In *Re Collins & Aikman Automotive Canada Inc.*, Spence J. opens the opportunity for interested parties to re-assert their claims upon cessation of a stay. Here, the critical issue is whether, upon lifting the stay, the court will declare and enforce the deemed trust and apply the PPSA super-priority.[94]

92. The July 20th Approval and Vesting Order renders any subrogated right arising from the Indalex US guarantee subject to the Monitor's reserve. In the event that this Honourable Court sees fit to declare the deemed trust, the funds held in reserve related

---

[93] *Re Nortel Networks Corp.*, 2009 CarswellOnt 7383
[94] *Re Collins & Aikman Automotive Canada Inc.*, [2007] O.J. No. 4186 (S.C.J.), at par. 110

to the Salaried Plan's Deficiency will be subject to the PPSA super-priority in favour of the subsection 57(4) deemed trust.[95], [96], [97]

93. For the foregoing reasons, USW asks this Court to declare that the super-priority under the PPSA applies and order the Monitor to pay an amount equal to the Deficiency to the Salaried Plan's fund.

E. Costs Payable from the Fund

Should the Court order that the Appellants' legal costs be paid from the Salaried Plan's fund?

94. The USW undertook to file a motion in the CCAA proceedings to enforce the deemed trust protections embodied in the PBA. The motion was for the benefit of all beneficiaries of the Salaried Plan and to promote the due administration of the Plan. Upon release of the Reasons for Decision, the USW filed for leave to appeal, filed the Notice of Appeal and now files this Factum in support of the appeal. In instances where legal action is initiated that is not adversarial and is for the benefit of all beneficiaries, costs are properly payable from the Pension fund to the extent that costs are not recoverable elsewhere.[98]

95. In *Nolan* v. *Kerry (Canada) Inc.,* the Supreme Court clarified the non-adversarial precondition for cost recovery and, in particular, identified factors in support of the "due administration of the trust". These factors include whether the litigation clarified a

---

[95] Approval and Vesting Order; USW Appeal Book and Compendium, Tab 9, par. 14
[96] *Personal Property Security Act, supra,* s. 30
[97] *Pension Benefits Act, supra,* ss. 57(4)
[98] *Royal Trust Corp. of Canada v. Arthur Andersen Inc.* , [1994] B.C.J. No. 1822 (S.C.) at par. 49 (QL)

problematic area of the law, was the only means of clarifying the parties' rights, and whether the litigation was aimed at maladministration.[99]

96. In the present case, Indalex abdicated its Plan administration responsibilities. There was no discussion of Plan obligations during the negotiation of the DIP Credit Agreement and no attempt to invoke the protections available to it under the PBA so as to maximize the protections available to Plan beneficiaries during the course of the CCAA proceedings. To the contrary, there was an active attempt on the part of the Plan sponsor to prevent the application of the PBA deemed trust provisions. The USW stepped in to fill a void on behalf of all Plan beneficiaries in the Plan. As such, its actions meet the tests of being for the benefit of all Plan beneficiaries, non-adversarial, and directed at compelling action to promote the due administration of the trust.

97. In light of the foregoing, it is consistent with past precedent that the costs incurred by the USW to engage in this proceeding be ordered paid from the Salaried Plan fund to the extent not recovered elsewhere.

PART VI - ORDER REQUESTED

98. The Appellants request:

a. an order allowing the appeal;

b. a declaration that the amounts held on reserve equal to the Deficiency in the Salaried Plan is subject to a deemed trust in respect of the beneficiaries of the Plan;

c. a declaration that the amounts subject to the deemed trust take priority over all secured creditor claims;

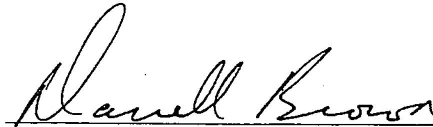
[99] *Nolan v. Kerry (Canada) Inc.*, supra, at par. 126.

d. an order that the Monitor remit payment in an amount equal to the Deficiency in Salaried Plan to the Salaried Plan's fund;

e. an order for costs from the Indalex estate and, to the extent that funds are not available from the estate, from the Salaried Plan.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

July 2, 2010



Darrell Brown

SACK GOLDBLATT MITCHELL LLP
20 Dundas Street West, Suite 1100
Toronto, ON M5G 2G8

Darrell L. Brown LSUC# 29398U
Tel: (416) 979-4050
Fax: (416) 591-7333

Lawyer for the United Steelworkers

TAB 2

Founded in 1852
by Sidney Davy Miller

JOHN D. LESLIE
TEL (519) 561-7422
FAX (519) 977-1565
E-MAIL leslie@millercanfield.com

MILLER CANFIELD

Miller, Canfield, Paddock and Stone, LLP
443 Ouellette Avenue, Suite 300, P.O. Box 1390
Windsor, Ontario, Canada N9A 6R4
TEL (519) 977-1555/(313) 962-1990
www.millercanfield.com

MICHIGAN: Ann Arbor
Detroit • Grand Rapids
Kalamazoo • Lansing
Saginaw • Troy
FLORIDA: Naples
ILLINOIS: Chicago
MASSACHUSETTS: Cambridge
NEW YORK: New York
CANADA: Toronto • Windsor
CHINA: Shanghai
POLAND: Gdynia
Warsaw • Wrocław

October 21, 2010

VIA E-MAIL

Stikeman Elliott LLP
Barristers and Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Ontario
M5L 1B9

Attention: Mr. Ashley John Taylor

Dear Sir:

RE: Indalex Limited
Our File No.: 132117-00002

We would ask that you please remove the firm of McGuireWoods LLP (Michael Roeschenthaler) and this writer's firm from the service list as the Unsecured Creditors' Committee no longer exists and therefore we have no further retainer in this matter.

Yours truly,

JOHN D. LESLIE
/dm

18,492,198.1\132117-00002

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 File No: CV-09-8122-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

SUPPLEMENTARY MOTION RECORD OF THE MONITOR
(Motion Returnable November 10, 2010)

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

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

Lawyers for the Monitor, FTI Consulting Canada ULC