

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

BETWEEN:

UNITED STEELWORKERS

Applicant
(Appellant)

- and -

**FTI CONSULTING CANADA ULC, IN ITS CAPACITY AS COURT-APPOINTED
MONITOR OF INDALEX LIMITED, ON BEHALF OF INDALEX LIMITED, GEORGE
L MILLER, THE CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATE OF THE
US INDALEX DEBTORS and SUN INDALEX FINANCE, LLC**

Respondents
(Respondents)

- and -

**MORNEAU SOBECO LIMITED PARTNERSHIP and
THE SUPERINTENDENT OF FINANCIAL SERVICES**

(Interveners)
(Interveners)

**MEMORANDUM OF ARGUMENT OF THE
UNITED STEELWORKERS IN APPLICATION FOR LEAVE TO APPEAL THE
COSTS ENDORSEMENT**

Pursuant to Rule 25 of the Rules of the Supreme Court of Canada

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PART I - STATEMENT OF FACTS AND ISSUES OF PUBLIC IMPORTANCE**A. Overview**

1. The United Steelworkers (the "USW") seeks leave to appeal the Costs Endorsement (the "Endorsement") of the Court of Appeal of Ontario dated September 7, 2011. The Endorsement was issued following a Court of Appeal of Ontario decision (the "Decision") dated April 7, 2011 that involved a Canadian company, Indalex Limited ("Indalex"), that became insolvent. Substantially all Indalex assets were sold while under the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("CCAA") thereby permitting operations to continue albeit under new ownership. The Court of Appeal unanimously held, *inter alia*, that, in the unique circumstances of this case, the deficiencies in the Retirement Plan for Salaried Employees of Indalex and Associated Companies (the "Salaried Plan") were subject to a deemed trust under the Ontario *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("PBA") and were payable in priority to the claim of Indalex's secured creditor, Sun Indalex Finance, LLC ("Sun Indalex"). The Court also held that Indalex had breached its fiduciary duties as the Salaried Plan administrator. It ordered the Monitor to pay the full cost of deficiencies in Indalex's Salaried Plan from the proceeds of the assets sale before paying Sun Indalex.

2. The Decision also dealt with a claim for payment of the deficiency in the Retirement Plan for Executive Employees of Indalex Limited and Associated Companies (the "Executive Plan"). The Court of Appeal found that Indalex breached its fiduciary duty to the Executive Plan beneficiaries under both the common law and section 22(4) of the *PBA*. The Court imposed a constructive trust over a portion of the proceeds from the sale of Indalex's assets held in reserve by the Monitor in the amount of the wind-up deficit owing to the Executive Plan, also ranking in priority over the secured claim of Sun Indalex.

3. The Court of Appeal received extensive written submissions from the parties on a number of issues related to the awarding of costs. Counsel for 14 of 17 members of the Executive Plan (the "Executives") and the USW, who is the bargaining agent for 7 of 169 of the Salaried Plan beneficiaries, sought to have costs paid from the funds of the respective Plans on a substantial indemnity basis.

4. Morneau Shepell Ltd. (“Morneau”), the administrator of both Plans, and the Ontario Superintendent of Financial Services (the “Superintendent”) supported payment of the Executives’ costs from the fund of the Executive Plan on a substantial indemnity basis. At the same time, Morneau and the Superintendent opposed payment of costs to the USW from the fund of the Salaried Plan.

5. The Court of Appeal approved the payment of the Executives’ substantial indemnity legal fees and disbursements in the amount of \$269,913.78 from the fund of the Executive Plan. The Court of Appeal declined to order costs paid to the USW from the fund of the Salaried Plan. The Endorsement cites three factors rendering the USW in a “materially different position” to that of the Executives.

- a. Counsel for the Executives obtained consents from their clients in May of 2011 shortly before filing costs submissions with the Court of Appeal. After being presented with consents from the represented beneficiaries, Morneau agreed to the payment of costs from the Executive Plan’s fund. The USW had not obtained consents from non-union beneficiaries of the Salaried Plan. The Court of Appeal endorsed the Executives’ agreement highlighting the Executives’ consents as a contributing factor justifying the differential treatment between the two Appellant groups.
- b. The Court noted that the USW, though the legal representative of the unionized members, is not a beneficiary to the Salaried Plan.
- c. The Court also highlighted the deficit position of the Salaried Plan. However, the quantum of the deficit in the Executive Plan was greater than that of the Salaried Plan, which seemingly undermines funding status of the Salaried Plan as a determining factor.

6. Both the Executives’ and the USW’s claim to costs from the respective funds were based on longstanding pension trust principles and the terms of the respective Plans regarding authorized payment of fund expenses. As a general rule, costs are payable from a pension trust on a substantial indemnity basis to the beneficiaries of a pension plan, where the interests being advanced are not adversarial as between plan members and are: (a) for the benefit of all plan members or (b) to promote the due administration of the Plan (the “Costs Payment Test”).¹ The

¹ *Nolan v. Kerry (Canada) Inc.*, [2009] 2 S.C.R. 678 at para. 127 citing *Smith, Lennon v. Ontario (Superintendent of Financial Services)* (2007), 87 O.R. (3d) 736 (S.C.J.), and *Turner v. Andrews*, 2001 BCCA 76, 85 B.C.L.R. (3d) 32; *Kerry (Canada) Inc. v. DCA Employees Pension Committee*, 2007 ONCA 605, at paras. 10 - 13

Costs Payment Test, as applied in several pension trust cases, has resulted in the awarding of costs from the pension trust to pension plan beneficiaries. Proceedings to advance the interests of plan beneficiaries or to enforce the due administration of a trust can be commenced by as few as one beneficiary. The Costs Payment Test focuses on the substantive basis underlying the proceeding, not whether agreement to proceed has been obtained from all beneficiaries.

7. The Court of Appeal's Endorsement establishes a dichotomy whereby non-union beneficiaries can seek to enforce pension trust obligations with the expectation that, provided the objective of the proceeding is to enforce the due administration of the trust or is for the benefit of all beneficiaries, legal costs and disbursements can be recovered from the pension fund, regardless of the outcome of the proceeding. Union members typically must rely on their bargaining agent to defend their interests since, in most instances, they are precluded from initiating legal action to enforce rights covered by the collective bargaining agreement. The Endorsement prevents the bargaining agent from recovering costs for the actions taken on behalf of its unionized members/Plan beneficiaries despite the union's actions having been taken to support both the enforcement of the due administration of the Salaried Plan and to support preservation of retirement benefits for all Salaried Plan beneficiaries, unionized and non-unionized.

8. Determination of costs awards are not usually a subject that is worthy of this Court's consideration, since the awards typically run with the event and are non-controversial. However, pension trust litigation has generated special rules designed to enable plan beneficiaries to defend their rights and to oversee the due administration of the trust fund. Moreover, trust law requires the treatment of beneficiaries with an even hand. The entry of union status into the deliberation as to entitlement to cost recovery from the fund effectively creates sub-classes of beneficiaries whose rights differ based on criteria unrelated to the plan and trust documents. Bargaining agents must make choices as to where to apply resources to effectively serve the union members' interests. The inability of the union members' legal representative (bargaining agent) to have access to payment of costs from the fund on the unionized Plan beneficiaries' behalf when the Costs Payment Test is satisfied could serve as a disincentive to pursuing court action to police union members' pension rights.

9. It is not only unionized members who may be affected by this Endorsement. The introduction of a consent requirement to the Costs Payment Test can impact any beneficiary seeking to enforce pension rights. Beneficiaries do not usually have access to Plan member lists. Obtaining consent from Plan members, particularly in a fast moving proceeding such as a *CCAA* proceeding, may well be impossible in advance of taking action to protect one's pension rights. Yet, following the terms of this Endorsement, pension plan beneficiaries who are unable to obtain consent from other plan beneficiaries may be held personally liable for the costs of the proceeding. This financial risk may dampen the willingness of pension plan members to step up as applicants or plaintiffs when the circumstances would otherwise support taking action.

10. The application for leave to appeal raises three questions of national and public importance:

- a. Whether the Court of Appeal erred in holding that the bargaining agent for unionized pension plan members does not have the right to obtain payment of costs from a pension trust fund on behalf of its unionized members/plan beneficiaries?
- b. Whether the Court of Appeal erred in requiring consent from pension plan beneficiaries as a prerequisite to ordering payment of costs from a pension trust fund when the proceeding is non-adversarial between pension plan beneficiaries, has been initiated to enforce the due administration of the trust and is for the benefit of all pension plan beneficiaries?
- c. Whether the Court of Appeal erred in considering the funding status of a pension plan as a prerequisite to ordering the payment of costs from a pension trust fund when the proceeding is non-adversarial between pension plan beneficiaries, has been initiated to enforce the due administration of the trust and is for the benefit of all pension plan beneficiaries?

B. The Facts

(i) Background

11. Indalex Limited² sponsored and administered two registered pension plans, one for salaried employees (the "Salaried Plan") and one for executive employees (the "Executive

² Hereafter "Indalex" refers collectively to Indalex Limited and its associated companies, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc., which were the Applicants in the proceedings before the Ontario Superior Court of Justice

Plan”). The USW represents certain Indalex employees, including seven employees who were members of the Salaried Plan and who have deferred vested entitlements under that Plan.³

12. 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”.⁴

13. Section 6.03 of the Salaried Plan provides that “[a]ll normal and reasonable fees and expenses incurred in the operation and administration of the Plan and the Fund will be paid from the Fund.”⁵

14. The purpose of USW’s involvement in this litigation was to ensure that Indalex met its contribution, funding and plan administration obligations.

15. The Salaried Plan was wound up effective December 31, 2006. Indalex failed to make sufficient contributions to the Plan and it was underfunded. Special wind-up payments were made in 2007, 2008 and 2009. However, as of December 31, 2008, the wind-up deficiency was still \$1,795,600.⁶ Pension benefits have been significantly reduced (a 20% reduction for Plan members in Ontario and a 25% reduction in all other jurisdictions).⁷ Unless the deficiency in the Plan is funded, retirees’ pension benefits will be permanently reduced.

(ii) The CCAA proceedings: The Initial Order

16. In March 2009, Indalex’s U.S. parent company and its affiliates (hereafter “Indalex U.S.”) sought Chapter 11 bankruptcy protection in the United States. On April 3, 2009, Indalex obtained an *ex parte* court order from the Ontario Superior Court (the “Initial Order”) giving it protection from its creditors under the CCAA. FTI Consulting Canada ULC, was appointed as monitor.⁸

³ Court of Appeal Reasons, paras. 6, 29-30, USW Record, Vol. 1, Tab 3-E, pp. 31, 35

⁴ Court of Appeal Reasons, para. 34, USW Record, Vol. I, Tab 3-E, p. 36

⁵ Affidavit of Cathy Braker, sworn August 5, 2009, USW Record, Vol. II, Tab 5-G, p. 116

⁶ Court of Appeal Reasons, paras. 31-34, USW Record, Vol. I, Tab 3-E, p. 36

⁷ Affidavit of Robert Champagne, sworn October 21, 2010, Exhibit “D”, USW Record, Vol. II, Tab 5-H, p. 133

⁸ Court of Appeal Reasons, paras. 7-8, 50, USW Record, Vol. I, Tab 3-E, pp. 31, 50

17. The Initial Order was obtained on April 3, 2009 and a stay of proceedings against Indalex was ordered. On April 8, 2009, the Initial Order was amended to allow 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.⁹ The USW received notice of the motion the evening prior to the motion after its offices had closed and without a motion record. USW did not attend the motion.

18. The Initial Order was further amended on June 12, 2009 to allow Indalex to borrow more money.¹⁰

(iii) The Sale Approval Order

19. On July 20, 2009, Indalex sought approval to sell its assets as a going concern to SAPA Holdings AB ("SAPA"). The Canadian sale proceeds were to be paid to the Monitor. As a term of the sale, SAPA assumed no responsibility or liability whatsoever for the Plans.¹¹

20. Indalex also sought approval to distribute the sale proceeds to the DIP lenders. USW and the Executives objected to the planned distribution of the sale proceeds on the basis, *inter alia*, of statutory deemed trust and priority claims.¹²

21. The *CCAA* judge ruled that the objections of the USW and the Executives should be dealt with promptly as part of the overall approval process.¹³ The *CCAA* judge approved the sale on June 20, 2009, but ordered the Monitor to retain a Reserve Fund of \$6.75 million, an amount which included an approximation of the Plans' deficiencies pending the determination of the deemed trust claims. The sale closed on July 31, 2009 and the proceeds, minus the Reserve Fund and other undistributed proceeds, were paid to the DIP lenders. Indalex U.S. paid the shortfall (approximately US\$10.75 million) fulfilling its guarantee.¹⁴

⁹ Court of Appeal Reasons, paras. 9, 51-53, USW Record, Vol. I, Tab 3-E, pp. 31, 39 - 40

¹⁰ Court of Appeal Reasons, paras. 54-56, USW Record, Vol. I, Tab 3-E, p. 40

¹¹ Court of Appeal Reasons, paras. 57-58, USW Record, Vol. I, Tab 3-E, p. 41

¹² Court of Appeal Reasons, paras. 57-62, USW Record, Vol. I, Tab 3-E, p. 41

¹³ Reasons of the *CCAA* Judge, para. 16, USW Record, Vol. I, Tab 3-A, p. 13

¹⁴ Court of Appeal Reasons, paras. 10-14, 63-65, USW Record, Vol. I, Tab 3-E, pp. 31 - 32, 42

(iv) The motions before Justice Campbell

22. At the August 28, 2009 motions, the USW and the Executives asserted a statutory deemed trust in respect to the unfunded pension liabilities pursuant to sections 57(4) and 75 of the *PBA*, which they maintained must be paid in preference to the claims of the secured creditors pursuant to s. 30(7) of the *PPSA*.¹⁵ They also asserted 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 the Plans' administrator.¹⁶

23. Although there are 169 Salaried Plan beneficiaries, 162 are non-union beneficiaries. Only the USW, acting on behalf of its seven union members/Plan beneficiaries, sought to enforce the statutory, Plan and trust obligations on behalf of the beneficiaries of the Salaried Plan.¹⁷

24. Indalex filed its own motion, seeking to lift the *CCAA* stay to permit the filing of a voluntary assignment into bankruptcy. In orders dated February 18, 2010, the *CCAA* judge dismissed the three motions.¹⁸

25. The *CCAA* judge held that no deemed trust existed because, although the Salaried Plan was wound up and a liability had accrued with respect to its deficiency, no payment was due with respect to the deficiency on July 20, 2009 (the date of the approved sale of Indalex) and, therefore, no amount was subject to a statutory deemed trust as at that date.¹⁹

26. Although the deemed trust claims were dismissed, the *CCAA* judge indicated that, absent a direct conflict with federal legislation, it would be inappropriate to allow a voluntary assignment into bankruptcy in order to defeat a secured claim under valid provincial legislation.²⁰

C. Decision of the Ontario Court of Appeal

27. The USW and the Executives obtained leave to appeal to the Ontario Court of Appeal. On April 7, 2011, a unanimous panel of the Court of Appeal allowed the appeal, and held that

¹⁵ Court of Appeal Reasons, para. 61, USW Record, Vol. I, Tab 3-E, p. 41

¹⁶ Court of Appeal Reasons, para. 62, USW Record, Vol. I, Tab 3-E, p. 41

¹⁷ Affidavit of Robert Champagne, sworn October 21, 2010, para. 7, USW Record, Vol. II, Tab 5-H, p. 129

¹⁸ Court of Appeal Reasons, para. 66, USW Record, Vol. I, Tab 3-E, p. 42

¹⁹ Reasons of the *CCAA* judge, paras. 49-50, USW Record, Vol. I, Tab 3-A, p. 19

²⁰ Reasons of the *CCAA* judge, paras. 55, USW Record, Vol. I, Tab 3-A, p. 19

the Monitor was to pay from the Reserve Fund into the Plans an amount sufficient to satisfy the deficiencies in each Plan. In so holding, the Court concluded that:

- a. the deficiencies in the Salaried Plan were subject to a statutory deemed trust under ss. 57(4) and 75 of the *PBA*;
- b. Indalex had fiduciary obligations to the Plans' beneficiaries and breached those duties;
- c. the motions brought by the USW and the Executives were not collateral attacks on the Interim Order, as amended and that, in any event the rules against collateral attacks should not apply in the circumstances of this case; and
- d. as the issue of paramountcy was never invoked, and no finding of paramountcy was made, the *PBA* continued to operate and the super-priority charge did not override the *PBA* deemed trust. Therefore, the deemed trust was to be satisfied first from the Reserve Fund.

28. The parties were unable to agree on costs. Extensive written submissions were filed with the Court of Appeal in May and June 2011. The USW sought payment from the fund of the Salaried Plan on a substantial indemnity basis to the extent that costs were not ordered against the respondents. In contrast, the Executives sought full indemnity payment from the fund of the Executive Plan with a commitment to pay into the fund any costs subsequently received from the respondents. The Court of Appeal released its Endorsement on September 7, 2011. With respect to the request by USW to obtain payment from the Salaried Plan's fund, the Court of Appeal held:

[3] The USW sought an order to the same effect in respect of the Salaried Plan. We decline to make that order because the USW is in a materially different position than the Retirees [Executives]. The Retirees are beneficiaries of the pension fund. The individual represented Retirees, who comprise 14 of 17 members of the Executive Plan, have consented to the payment of costs from their individual benefit entitlements. Those who have not consented will not be affected by the payment. By contrast, the USW is the bargaining agent (not a beneficiary) for only 7 of the 169 beneficiaries of the Salaried Plan, none of whom have been given notice of, or consented to, the payment of legal costs from the Salaried Plan. It is also significant that we are not dealing with surplus pension funds as the Salaried Plan is underfunded.²¹

²¹ Court of Appeal Costs Endorsement ("Endorsement"), para. 3, USW Record, Vol. I, Tab 3-J, p. 117

29. With respect to the consents authorizing payment of costs from the fund provided by the Executives, it was not until April 29, 2011 that the first consent was obtained from a beneficiary of the Executive Plan, well after the costs were incurred for each proceeding.²² The consents were obtained to counter the Executive Plan Administrator's (Morneau's) opposition to payment of costs from the fund of the Executive Plan. The quantum of the payment from the fund to the Executives represents the total of costs incurred inclusive of the *CCAA* proceedings, the leave to appeal, the intervenor motion and the Court of Appeal proceeding.²³

30. The Court of Appeal declined to order costs against the parties in the *CCAA* motions stating that "the conventional approach in *CCAA* proceedings is to rarely make costs orders, with the result that each party bears its own costs".²⁴

31. Costs of the appeal were ordered against Sun Indalex and the US Trustee, payable jointly and severally, in the amount of \$40,000 to each of the Executives and USW inclusive of applicable taxes and disbursements.²⁵

PART II - QUESTIONS IN ISSUE

32. The application for leave to appeal raises three questions of national and public importance:

- a. Whether the Court of Appeal erred in holding that the bargaining agent for unionized pension plan members does not have the right to obtain payment of costs from a pension trust fund on behalf of its unionized members/plan beneficiaries?
- b. Whether the Court of Appeal erred in requiring consent from pension plan beneficiaries as a prerequisite to ordering payment of costs from a pension trust fund when the proceeding is non-adversarial between pension plan beneficiaries, has been initiated to enforce the due administration of the trust and is for the benefit of all pension plan beneficiaries?
- c. Whether the Court of Appeal erred in considering the funding status of a pension plan as a prerequisite to ordering the payment of costs from a pension trust fund when the proceeding is non-adversarial between pension plan beneficiaries, has

²² Affidavit of Jenny Correia, dated May 5, 2011, Exhibit "B", USW Record, Vol. II, Tab 5-I, pp. 137 - 138

²³ Tab 5 of the Executives' Costs Submission to the Court of Appeal, dated May 25, 2011, USW Record, Vol. II, Tab 5-J, pp. 145 - 160

²⁴ Court of Appeal Endorsement, para. 4, USW Record, Vol. I, Tab 3-J, p. 117

²⁵ Court of Appeal Endorsement, para. 7, USW Record, Vol. I, Tab 3-J, p. 118

been initiated to enforce the due administration of the trust and is for the benefit of all pension plan beneficiaries?

PART III - STATEMENT OF ARGUMENT

A. The denial of a bargaining agent's right to recover costs from a pension plan fund on behalf of unionized Plan members is a matter of national public importance

33. In the *CCAA* proceeding, the USW was accepted as having standing to pursue the deemed trust motion on behalf of the unionized members of the Salaried Plan.²⁶

34. Union members generally are represented by their bargaining agent. It is common ground that when a union is the exclusive bargaining agent for a group of employees, those employees, individually or collectively, are precluded from initiating legal action in respect of differences related to the administration of the collective agreement.²⁷ In the *Bisaillon* case, this Court described the role of the union as follows:

The union's power to control the process includes the power to settle cases or bring cases to a conclusion in the course of the arbitration process, or to work out a solution with the employer, subject to the compliance with the parameters of the legal duty of representation ... The system of collective representation thus takes certain individual rights away from employees. In particular, employees are denied the possibility of negotiating their conditions of employment directly with their employer and also lose control over the application of those conditions. ... The union's monopoly with respect to collective bargaining is based not only on the existence of a collective agreement, but also on certification of the union.²⁸
[emphasis added]

35. In its submissions before the Court of Appeal, Morneau argued that the USW should have sought an order from the *CCAA* Court to be appointed as representative counsel for the beneficiaries of the Salaried Plan as a prerequisite to claiming costs from the fund. This assumes incorrectly that the legal representative seeking to enforce the due administration of the fund or to promote the interests of all beneficiaries, must represent all beneficiaries to be entitled to cost recovery from the fund.

²⁶ Reasons of the *CCAA* Judge, para. 16, USW Record, Vol. I, Tab 3-A, p. 13

²⁷ *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, para. 58

²⁸ *Bisaillon v. Concordia University*, 2006 SCC 19 (CanLII), paras. 24, 26, 28

36. The Costs Payment Test evolved from general trust principles, in particular the seminal case of *Re Buckton*.²⁹ In that decision, Kekewich J. described the recovery principle as follows:

... There is a second class of case differing in form, but not in substance, from the first. In these cases it is admitted on all hands, or it is apparent from the proceedings, that although the application is made, not by trustees (who are respondents), but by some of the beneficiaries, yet it is made by reason of some difficulty of construction, or administration, which would have justified an application by the trustees, and it is not made by them only because, for some good reason or other, a different course has been deemed more convenient. To cases of this class I extend the operation of the same rule as is observed in cases of the first class. The application is necessary for the administration of the trust, and the costs of all parties are necessarily incurred for the benefit of the estate regarded as a whole.³⁰ [emphasis added]

37. The Costs Payment Test examines the purpose of the proceeding. A single beneficiary can bring an action and if, based on the facts, it is demonstrated necessary for the due administration of the trust or is for the benefit of all beneficiaries, that single beneficiary can recover his or her costs from the trust fund on a substantial indemnity basis provided the action is not adversarial between plan beneficiaries. While a representation order would demonstrate that the USW was formally appointed to act for all Salaried Plan beneficiaries, if the actions of the USW in defending the rights of its members/Plan beneficiaries ensure due administration of the trust or promote the interests of all Plan beneficiaries, the test requirements have been met.

38. There can be no argument that the USW's actions advanced the case on behalf of all Salaried Plan beneficiaries despite the fact that only seven Salaried Plan members have ever paid USW union dues. The USW did so because neither the Monitor nor the Plan Administrator (Indalex) had taken any steps whatsoever to protect or clarify the interests of those beneficiaries.³¹

39. The Court of Appeal Decision supports re-constituting full benefits for all Salaried Plan members. Salaried Plan members were facing 20 to 25 percent reductions in their pension benefit entitlements for life.³² Had the Endorsement ordered payment from the fund to the USW, such

²⁹ *Re Buckton* (1907), 2 Ch. 406

³⁰ *Re Buckton* (1907), 2 Ch. 406, pp. 414 - 415

³¹ Court of Appeal Reasons, paras. 45, 116, USW Record, Vol. I, Tab 3-E, pp. 38, 58

³² Affidavit of Robert Champagne, sworn October 21, 2010, Exhibit "D", USW Record, Vol. II, Tab 5-H, pp. 133 - 134

payment would equal approximately \$1045 per Salaried Plan beneficiary, a seemingly minor trade-off in return for reinstatement of full lifetime pension benefits, particularly when, had the USW not acted, these reductions would now be permanent.

40. In *Nolan v. Kerry (Canada) Inc.*, the Supreme Court of Canada 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 problematic area of the law, was the only means of clarifying the parties’ rights, and whether the litigation was aimed at maladministration.³³

41. The Indalex litigation has clarified problematic areas of pension law: the scope of the deemed trust³⁴ and the application of common law and statutory Plan administrator fiduciary duties during a CCAA proceeding.³⁵ The Decision clarified the Salaried Plan beneficiaries’ rights and the Plan Administrator’s obligations during a CCAA proceeding. Further, the decision highlighted omissions on the part of the Plan administrator that can be characterized as having given rise to maladministration of the Salaried Plan.³⁶

42. The British Columbia Court of Appeal decision in *Patrick v. Telus Communications Inc.* is one example where a small subset of the total number of plan beneficiaries initiated an application seeking the Court’s interpretation of the amending clause of the Telus Pension Plan within a larger pension plan litigation. The plaintiffs in the main action comprised some, but not all of the beneficiaries. The application ruled on by the Court of Appeal was initiated by some, but not all of the plaintiffs, constituting an even smaller subset of the plan beneficiaries.³⁷ There was no representation order with respect to the application. However, both the Court at first instance and the Court of Appeal awarded costs to the plaintiffs from the fund by applying the Costs Payments Test.

43. Barrow J., the judge at first instance, his decision affirmed on appeal, held:

[24] Further, I am satisfied that the application I heard was not adversarial in the sense used in *Buckton*, that is, “as between beneficiaries.” There is no evidence to

³³ *Nolan v. Kerry (Canada) Inc.*, [2009] 2 S.C.R. 678, para. 126

³⁴ Court of Appeal Reasons, paras. 97, 101, 109, USW Record, Vol. I, Tab 3-E, pp. 51, 52 – 53, 55 - 56

³⁵ Court of Appeal Reasons, paras. 116, 139 – 143, 145, 197, USW Record, Vol. I, Tab 3-E, pp. 58, 66 - 68

³⁶ Court of Appeal Reasons, paras. 144, 145, 197, USW Record, Vol. I, Tab 3-E, pp. 68, 88

³⁷ *Patrick v. Telus Communications Inc.*, 2005 BCCA 592 (CanLII), para. 1

suggest that the result of the proceeding will reduce the benefits to which other members of the plan would otherwise be entitled. To the contrary, as noted above, those that are eligible to apply for consent pensions will as a result of the ruling be able to do so. Whether they receive such pensions or not is, of course, a matter to be determined as between the parties and, ultimately, in relation to the specific plaintiffs in this action, by the court on the trial of that issue.

...

[28] Accordingly, I find that the applicants are entitled to their reasonable costs relating to the summary trial application from the fund.³⁸

44. In *Bentall Corp.*, the intervenors were seven members of a pension plan, who objected to a variation of trust proposal that had been consented to by the other 272 members. Sigurdson J. awarded costs from the fund to the dissenting members for the following reasons:

56 In my opinion this is an appropriate case for the trustee and the dissident members to obtain their costs from the fund. This litigation concerned issues of the construction of the trust, interpretation of the guiding statute and a difficult question of whether a variation should be accepted. Even though I acceded to the petitioner's application to vary the trust, I do not consider this dispute to be adverse litigation between parties claiming rights to a fund where one party alleged improper conduct on the part of the other. The issues in this petition were more closely connected with the administration of the trust. The case was ably argued by Mr. Gomery; **to not allow the dissidents' legal fees to be paid from the trust fund would, in future similar cases, practically prohibit dissidents from securing legal counsel.** I think in these circumstances it is appropriate that the respondent, Canada Trust, and the dissident members, obtain their reasonable fees from the trust fund.³⁹ [emphasis added]

45. A union, when certified as the bargaining agent for a group of employees, is the legal representative for those employees.⁴⁰ Morneau cited two cases before the Court of Appeal, *Canwest*⁴¹ and *Fraser Papers*⁴² as indications that the general approach in a CCAA proceeding is for a union to be granted representation status through the issuance of a representation order. In the *Canwest* case, the debtor group of companies consented to a representation order so that both retirees and active members would be represented by a single representative counsel and the

³⁸ *Patrick v. Telus Communications Inc.*, 2005 BCCA 592 (CanLII), paras. 24, 28

³⁹ *Bentall Corp. v. Canada Trust Co.*, 1996 CanLII 8640 (BC SC), para. 56

⁴⁰ *McPhee v. Canadian Union of Public Employees*, 2007 NSSC 94 (CanLII), para. 98, applying three Supreme Court decisions addressing the duty of fair representation: *Canadian Merchant Service Guild v. Gagnon* [1984] 1 S.C.R. 509, at paragraph 38; *Centre hospitalier Régina Ltée v. Québec (Labour Court)* [1990] 1 S.C.R. 1330; *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39

⁴¹ *Canwest Publishing Inc.*, 2010 ONSC 1328 (CanLII), para. 2

⁴² *Fraser Papers Inc., (Re)*, 2009 ONSC 55115 (CanLII), paras. 1, 8, 9

appointed representatives would represent the interests of both retirees and active members (whether former employees were union or non-union).⁴³ In the *Fraser Papers* case, both the Monitor and the Applicant sought to have the union ordered the representative of the pension plan beneficiaries, in part, because the USW in that case already had legal representation status for the U.S. retirees.⁴⁴ In *Fraser Papers*, the USW did not seek funding to support its role as representative. The *Fraser Papers* case did not consider payment of costs from the pension fund and, therefore, has no application to a case where costs are sought from the Plan's fund.⁴⁵ Further, the appointments as representatives in both cases were to facilitate input on a potentially broad range of issues. In contrast to *Canwest* and *Fraser Papers*, the USW faced a dramatically different scenario in the Indalex matter where Indalex vigorously opposed the USW deemed trust claim and sought to nullify its motion through a voluntary assignment in bankruptcy supported by a related party secured creditor.

46. Sections 4.02 and 14.03 of the Salaried Plan obligate the employer to make contributions to the fund to satisfy going concern, solvency deficiency and wind-up liabilities both as specified in the Salaried Plan and as required by the applicable legislation. Section 6.03 of the Salaried Plan provides that “[a]ll normal and reasonable fees and expenses incurred in the operation and administration of the Plan and the Fund will be paid from the Fund”.⁴⁶

47. In addition to the Costs Payment Test principles established at common law for payment of expenses from the trust, the Salaried Plan explicitly authorizes the payment of costs if such costs can be related to the “operation and administration of the Plan”. Indalex, as Plan Administrator, took no steps to enforce the obligations specified in sections 4.02 and 14.03 of the Salaried Plan. The USW, acting on behalf of the seven unionized Plan beneficiaries, sought to enforce the Salaried Plan contribution and administration obligations. The costs it has incurred in doing so are a legitimate expense of the fund pursuant to section 6.03 and, consequently, should have been payable to the USW.

⁴³ Affidavit of John E. Maguire, sworn October 22, 2009, paras. 2, 18 – 23; USW Record, Vol. II, Tab 5-A, pp. 1 - 2, 7 - 8; Order of Pepall, J. (Appointment of Representative Counsel), October 27, 2009, paras. 2 – 4; USW Record, Vol. II, Tab 5-B, pp. 13 - 14

⁴⁴ *Fraser Papers Inc., (Re)*, 2009 ONSC 55115 (CanLII), para. 9

⁴⁵ *Fraser Papers Inc., (Re)*, 2009 ONSC 55115 (CanLII), para. 1

⁴⁶ Affidavit of Cathy Braker, sworn August 5, 2009, Ex. “A”, p. 21, USW Record, Vol. II, Tab 5-G, p. 116

48. The Endorsement, if allowed to stand, effectively creates a two-tier system where unionized pension plan beneficiaries are forced to rely on union financing of any pension plan challenge, even when the payment of expenses of such a challenge is authorized by the pension plan, while non-union pension plan beneficiaries can avail themselves of fund assets to finance legal challenges.

49. Unions are faced with declining revenue and enrolment due largely to the decline of the domestic manufacturing sector. Union representatives make choices every day as to what grievances and legal proceedings to support or decline. Failure to recognize the right of the union to stand in the shoes of union member beneficiaries to defend their pension plan rights and, in doing so, to obtain financing from the pension fund, violates the Costs Payment Test, violates the principle that beneficiaries of a trust must be treated with an even hand, and may negatively influence a union's decision to proceed with litigation.

50. The Endorsement appears to conflict with a long line of pension cases where costs have been awarded to parties from the pension fund.⁴⁷ This result, in and of itself, raises an issue of national public importance since there is now uncertainty as to a union's ability to obtain costs from a pension fund to defend its members' interests. Moreover, from a public policy standpoint, the result effectively treats non-union pension plan beneficiaries more favourably than unionized pension plan beneficiaries based on status that is determined wholly independent from and seemingly unrelated to the terms of the pension plan.

51. The Executives obtained an order for payment of \$269,913.78 from the fund of the Executive Plan on a substantial indemnity basis. In supporting the order for payment, it is implied that the Court of Appeal concluded this was a reasonable amount in accordance with the considerations noted by that Court in its *Burke* decision.⁴⁸ By contrast, the USW sought payment of \$216,662.62 on a substantial indemnity basis minus any amounts ordered paid from the other parties. In effect, this means that the amount sought from the Salaried Plan's fund was

⁴⁷ *Huang v. Telus Corp. Pension Plan (Trustees of)*, 2005 ABQB 40 (CanLII), paras. 147 - 153; *Patrick v. Telus Communications Inc.*, 2005 BCCA 592 (CanLII), paras. 16 - 20; *Burke v. Hudson's Bay Co.*, 2010 SCC 34 (CanLII), para.97; *Burke v. Hudson's Bay Co.*, 2008 ONCA 690 (CanLII), paras. 11 - 15, 25 - 26; *Ontario Teachers' Pension Plan Board v. Ontario (Superintendent of Financial Services)*, 2003 CanLII 32334 (ON SCDC), para. 14; *MacKinnon v. Ontario Municipal Employees Retirement Board*, 2007 ONCA 874 (CanLII), para. 97; *C.A.S.A.W., Local 1 v. Alcan Smelters and Chemicals Ltd.*, 2001 BCCA 303 (CanLII), para. 59 - 60; and *Bentall Corp. v. Canada Trust Co.*, 1996 CanLII 8640 (BC SC), paras. 55 - 56

⁴⁸ *Burke v. Hudson's Bay Co.*, 2008 ONCA 690 (CanLII), para. 18

\$176,662.62, presumably also a reasonable amount given the amount authorized for payment to the Executives.⁴⁹

52. Barring the USW from access to pension funds to pay legitimate Salaried Plan expenses effectively disentitles the seven unionized Plan beneficiaries from the rights that are accorded non-unionized beneficiaries in the same Salaried Plan. A single non-unionized Salaried Plan beneficiary could have initiated the original motion, the ensuing appeal, sought payment of expenses from the fund and, on the basis of the *Burke*⁵⁰ and *Kerry*⁵¹ cases among others, been awarded reimbursement of costs from the fund.. The USW, as the unionized members' legal representative, stands in their shoes, in effect as a beneficiary on their behalf and should be accorded comparable rights to enforce Plan obligations on the members' behalf.

B. The insertion of a consent requirement as a precondition to payment of costs from the fund is inconsistent with the Costs Payment Test and raises a matter of national public importance

53. The Costs Payment Test examines the purpose of actions taken by one or more beneficiaries. The action taken must be non-adversarial between beneficiaries and either taken to promote the due administration of the trust or to obtain a result for the benefit of all beneficiaries. The Endorsement introduces consent of pension plan beneficiaries as an apparent condition precedent to the granting of costs from a pension fund.⁵²

54. Prior case law does not support the consent requirement embraced by the Court of Appeal in this Endorsement nor the requirement for a representation order. In *Huang v. Telus Corp. Pension Plan (Trustees of)*, a small group of plaintiffs filed an action against the trustees of the pension plan alleging that certain incentive bonuses should have been included in the definition of earnings for purposes of the plan. The plaintiffs sought recovery of their costs from the fund applying the Costs Payment Test. Consent of other plan beneficiaries was not sought or required even though the Court recognized that the corpus of the pension fund would be reduced as a result of the costs order. Moreau J. held, "Although the corpus of the pension fund will be

⁴⁹ USW Costs Submissions, Bill of Costs, USW Record, Vol. II, Tab 5-K, pp. 164 -186

⁵⁰ *Burke v. Hudson's Bay Co.*, 2010 SCC 34 (CanLII), para. 97; *Burke v. Hudson's Bay Co.*, 2008 ONCA 690 (CanLII), paras. 11 – 15

⁵¹ *Nolan v. Kerry (Canada) Inc.*, [2009] 2 S.C.R. 678, paras. 118 - 132; *Kerry (Canada) Inc. v. DCA Employees Pension Committee*, 2007 ONCA 605, paras. 6 – 20

⁵² Court of Appeal Endorsement, para. 3, USW Record, Vol. I, Tab 3-J, p. 117

reduced by the amount of the costs, concerns as to whether costs claimed are reasonable can be addressed through taxation.”⁵³

55. In *C.A.S.A.W., Local 1 v. Alcan Smelters and Chemicals Ltd.*, there were two groups of appellants who asserted that the deletion of overtime earnings from the definition of pensionable earnings under the plan in 1990 was unlawful and contrary to the terms of the Plan and the fiduciary obligations owed by the respondents to the appellants. The case is of interest in that the pension plan covered both union and non-union members and both the union and a group of non-union claimants sought to enforce the due administration of the plan. The union was not the subject of a representation order. Though their appeals were dismissed, both the union and non-union appellants were granted costs from the fund. No consent from plan beneficiaries was required to permit payment to the union. Levine J. held:

[59] While this result may appear to be anomalous, the order that the costs of an unsuccessful litigant be paid out of a fund rather than borne by the litigant is recognized as an exception to the normal rule that costs follow the event, because the matter involves the administration of the Plan. The requirement that the respondents reimburse the Plan for its expenses is also a matter of the administration of the Plan, and is therefore consistent with an order that the appellants' costs be paid by the Plan.

[60] I would therefore order that the reasonable costs and disbursements of the appellants in the appeal be paid out of the Plan.⁵⁴

56. The *Bentall Corp.* case referred to above at paragraph 44 awarded costs to seven members of a pension plan who objected to amendments that had been consented to by the other 272 plan members. Not only was consent from the other members not required, the contrary stance adopted by the seven members was not viewed as adversarial to the position adopted by the other beneficiaries because the subject under consideration related to the due administration of the trust.⁵⁵

57. Likewise, the *Patrick* decision described at paragraphs 42 and 43 of this Memorandum awarded costs to a small subset of the plan beneficiary population without a representation order and without obtaining consent from the other plan beneficiaries.

⁵³ *Huang v. Telus Corp. Pension Plan (Trustees of)*, 2005 ABQB 40 (CanLII), para. 151

⁵⁴ *C.A.S.A.W., Local 1 v. Alcan Smelters and Chemicals Ltd.*, 2001 BCCA 303 (CanLII), paras. 59 – 60

⁵⁵ *Bentall Corp. v. Canada Trust Co.*, 1996 CanLII 8640 (BC SC), (1996), para. 56

58. This Court dealt at length with the issue of costs in the *Kerry* decision. It affirmed Gillese J.'s support for a pension trust analysis which hinges on there being a non-adversarial proceeding that either seeks to clarify administration issues or is for the benefit of all of the beneficiaries of the fund. There was an extensive discussion of cost principles applicable to a pension trust at paragraphs 115 through 132. There is no mention of the need to obtain consent from plan beneficiaries prior to the awarding of costs from the fund when the Costs Payment Test, referred to in the decision as pension trust principles, is satisfied.

59. The Endorsement therefore represents a significant departure from previous case law. Further, it may act not only as a disincentive to unions initiating challenges arising from the maladministration of a pension trust, but also raises the issue whether consent is now required any time a sub-group of plan beneficiaries seeks to correct wrongdoing or defend the rights of all beneficiaries with the intent of seeking costs payment from the fund. Plan beneficiaries do not have access to contact information of all beneficiaries. In a *CCAA* proceeding, time is of the essence. The consent requirement could lead to significant delay. Beneficiaries wishing to actively challenge plan administrator action or inaction will likely seek to obtain consent from other beneficiaries to ensure they are not exposed to financial liability. In some instances, the logistical roadblocks in obtaining consents, together with the risk of personal liability for costs, may be sufficient to prevent beneficiaries from moving forward with legitimate challenges to plan administrator action or inaction. It is in the national public interest to clarify the essential elements required to satisfy the Costs Payments Test including when consents will or will not be required. Both union and non-union beneficiaries may balk at initiating proceedings if a consent requirement is imposed as a condition precedent to costs recovery from the fund.

C. The funding status of a pension plan should not preclude beneficiaries' recovery of costs from the fund if the Costs Payment Test is met

60. The Endorsement cites the funded status of the Salaried Plan as a contributing factor in denying the payment of costs from the fund for the USW. Citing this reason as a contributing factor is a source of confusion, since the Executive Plan was also in deficit and costs were awarded to the Executives, albeit with evidence of consent from those represented at the appeal.

61. In its costs submission to the Court of Appeal, the Salaried Plan Administrator, Morneau, suggested that a trust fund that is underfunded should not be subjected to the same principles as a

fund in surplus with respect to recovery of litigation costs. To adopt this line of reasoning would be troublesome. A trust beneficiary steps into a trustee's shoes to enforce trust obligations when the beneficiary perceives that there has been a failure to act on the part of the trustee to ensure the due administration of the trust. A beneficiary's discovery of inaction on the part of a trustee usually is accompanied by a loss of or failure to collect trust assets. To restrict recovery of beneficiary costs to instances when there is a surplus in the pension trust fund would effectively preclude beneficiary enforcement action when it may be most needed.

62. The Costs Payment Test makes no reference to any trust fund solvency test nor do the pension cases that have applied these core principles, at least not until *Indalex*. In *MacKinnon v. OMERS*, the Ontario Court of Appeal ordered costs paid to the plan member certified as the representative of the Plan members on a full indemnity basis paid from the pension fund. The case did not involve a surplus claim. Rather it related to claims for redress for alleged acts of serious maladministration, including breaches of trust and fiduciary duty. There was no discussion as to the funded status of OMERS in the Court of Appeal decision. The Court examined the two arms of the Costs Payment Test and concluded at paragraph 87 of the decision that both categories were satisfied.⁵⁶

63. It is difficult to reconcile the reference to the funded status of the Salaried Plan contained in the Endorsement with previous pension costs award decisions in Ontario, in other provinces, and, as most recently confirmed by this Court, in the *Burke* decision. The Court of Appeal has raised a novel criterion that appears to be applied in respect of union members and not applied in respect of the Executives. The broader issue, particularly at a time when many defined pension plans are in deficit, is whether funding status now constitutes a prerequisite to the payment of costs from the fund. If so, it may well be that the litigation of pension matters will be left to executives in plans that have relatively few members. The executives can afford to pre-fund litigation, then can readily band together to obtain consent to reimbursement of costs from the pension fund. The task is far more complex in a defined benefit plan that has broader and more disparate beneficiary participation, where consent, particularly in fast moving procedures such as under the *CCAA*, may not be readily obtained in the time required to effectively take action and,

⁵⁶ *MacKinnon v. Ontario Municipal Employees Retirement Board*, 2007 ONCA 874 (CanLII), paras. 3, 85 - 89

if a solvency deficit precludes the payment of costs from the fund, may prevent beneficiaries from enforcing their rights.

64. A significant number of defined benefit pension plans are in deficit. In Ontario, 84 percent of provincially registered defined benefit pension plans are less than fully funded on a solvency basis.⁵⁷ To preclude financing of beneficiary action when a fund is in deficit will deter beneficiaries from taking action against non-compliant plan administrators. The pension trust principles embodied by this Court prior to the Indalex Court of Appeal Decision should be reaffirmed, namely that when an action is non-adversarial and either promotes due administration of the fund or seeks to benefit all plan beneficiaries, costs, provided they are reasonable, are payable from the pension trust. These principles should apply regardless of the funded status of the plan.

65. It is in the national and public interest to continue to provide tools for beneficiaries to defend their rights flowing from the administration of pension trusts.

PART IV - SUBMISSION ON COSTS

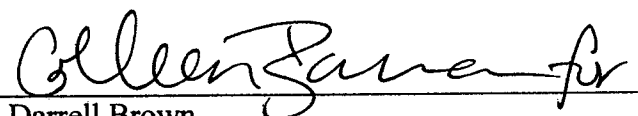
66. USW requests that the Court order the payment of USW's costs of this application from the fund of the Salaried Plan.

PART IV - ORDER SOUGHT

67. The applicant respectfully seeks an order granting the USW leave to appeal, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

November 7, 2011



Darrell Brown

SACK GOLDBLATT MITCHELL LLP

Solicitors for the Respondent,
United Steelworkers

⁵⁷ *Funding of Defined Benefit Pension Plans in Ontario, Seventh Annual Report*, Financial Services Commission of Ontario, March 2011, p. 5, USW Book of Authorities, Tab 17, p. 116

PART VI - TABLE OF AUTHORITIES

CASE LAW	PARAGRAPH
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PART VII - STATUTES AND REGULATIONS

Pension Benefits Act, R.S.O. 1990 c. P.8, ss. 22; 57(3), (4) and (5); 75(1).

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.

(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.

(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.

(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.

(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.

22. (1) L'administrateur d'un régime de retraite apporte à l'administration et au placement des fonds de la caisse de retraite le soin, la diligence et la compétence qu'une personne d'une prudence normale exercerait relativement à la gestion des biens d'autrui.

(2) L'administrateur d'un régime de retraite apporte à l'administration du régime de retraite et à l'administration et au placement des fonds de la caisse de retraite toutes les connaissances et compétences pertinentes que l'administrateur possède ou devrait posséder en raison de sa profession, de ses affaires ou de sa vocation.

(3) Le paragraphe (2) s'applique avec les adaptations nécessaires à un membre d'un comité de retraite ou d'un conseil de fiduciaires qui est l'administrateur d'un régime de retraite et à un membre d'un conseil, d'une commission ou d'un organisme auquel une loi de la Législature confie l'administration d'un régime de retraite.

(4) L'administrateur, ou si l'administrateur est un comité de retraite ou un conseil de fiduciaires, un membre du comité ou du conseil qui est l'administrateur du régime de retraite ne permet pas sciemment que son intérêt entre en conflit avec ses attributions à l'égard du régime de retraite.

(5) Si cela est raisonnable et prudent dans les circonstances, l'administrateur d'un régime de retraite peut employer un ou plusieurs mandataires pour accomplir les actes nécessaires à l'administration du régime de retraite, et à l'administration et au placement des fonds de la caisse de retraite.

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

(6) Seule une personne prescrite peut être fiduciaire d'une caisse de retraite.

(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.

(7) L'administrateur d'un régime de retraite qui emploie un mandataire le choisit personnellement et doit être convaincu de l'aptitude du mandataire à accomplir l'acte pour lequel il est employé. L'administrateur exerce sur son mandataire une surveillance prudente et raisonnable.

(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).

(8) Les normes qui s'appliquent à l'administrateur en vertu des paragraphes (1), (2) et (4) s'appliquent également à un employé ou à un mandataire de l'administrateur.

(9) The administrator of a pension plan is not entitled to any benefit from the pension plan other than pension benefits, ancillary benefits and a refund of contributions.

(9) L'administrateur d'un régime de retraite n'a pas droit à des prestations du régime de retraite autres que des prestations de retraite, des prestations accessoires et un remboursement de cotisations.

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

(10) Le paragraphe (9) s'applique, avec les adaptations nécessaires, au membre d'un comité de retraite ou d'un conseil de fiduciaires qui est l'administrateur d'un régime de retraite et au membre d'un conseil, d'une commission ou d'un organisme auquel une loi confie l'administration d'un régime de retraite.

57(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

(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.

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.

(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

57(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).

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.

ou des règlements.

(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).

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.

Personal Property Security Act, R.S.O. 1990, c. P.10, s. 30(7):

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.

(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.