Court File No: 34308

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

B E T W E E N :

FTI CONSULTING CANADA ULC ,
IN ITS CAPACITY AS COURT-APPOINTED MONITOR OF INDALEX LIMITED, ON BEHALF OF INDALEX LIMITED

Applicant
(Respondent)

- and -

KEITH CARRUTHERS, LEON KOZIEROK, RICHARD BENSON, JOHN FAVERI, KEN WALDRON, JOHN (JACK) W. ROONEY, BERTRAM MCBRIDE, MAX DEGAN, EUGENE D'IORIO, RICHARD SMITH, ROBERT LECKIE, NEIL FRASER and FRED GRANVILLE ("RETIREES"),
AND UNITED STEELWORKERS

Respondents
(Appellants)

- and -

MORNEAU SOBECO LIMITED PARTNERSHIP and THE SUPERINTENDENT OF FINANCIAL SERVICES

Interveners
(Interveners)

RESPONSE OF THE UNITED STEELWORKERS TO THE APPLICATION FOR LEAVE TO APPEAL

(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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- and –

MORNEAU SOBECO LIMITED PARTNERSHIP and
THE SUPERINTENDENT OF FINANCIAL SERVICES

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MEMORANDUM OF ARGUMENT OF THE RESPONDENT, UNITED STEELWORKERS

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PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The applicant, FTI Consulting Canada ULC (the "Monitor") seeks leave to appeal the decision of the Court of Appeal for Ontario dated April 7, 2011. The decision involved a Canadian company, Indalex Limited ("Indalex"), that became insolvent and was sold as a going concern while under the protection of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended (*CCAA*). The Court of Appeal unanimously held, *inter alia,* that, in the unique circumstances of this case, the deficiencies in the pension plan covering Indalex's salaried employees 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. 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 pension plans from the sale assets before paying Sun Indalex.

2. Sun Indalex and George L. Miller have also brought applications for leave to appeal the Court's decision.

3. The United Steelworkers ("USW") submit that, for the reasons set out below and in its Memoranda of Argument filed in the other applications, all three applications for leave to appeal should be dismissed. The Court of Appeal correctly applied well known principles of statutory interpretation and correctly applied common law principles to the unusual facts of this case.

4. Contrary to the assertions contained in the Monitor's Memorandum of Argument, the Court's decision does not create "a new discretionary scheme of distribution under the *CCAA* ... that threatens to deprive both debtor companies and pension sponsors nationally of access to credit". Indalex violated basic procedural safeguards, failed to present evidence in the *CCAA* proceeding of a conflict between the provincial pension legislation deemed trust requirements and the remedial objectives underlying the *CCAA,* and fostered conflicts of interest that led to decisions favouring the U.S. parent company over its fiduciary obligations as a pension plan administrator. Moreover, the Monitor was intertwined in its own conflict of interest with Indalex

through its affiliation with the Chief Restructuring Officer ("CRO") in the U.S. bankruptcy proceeding.

5. The Court of Appeal merely enforced existing law. If a debtor company presents evidence in a *CCAA* proceeding that the *CCAA* restructuring effort cannot succeed if the provincially legislated deemed trust provisions are enforced, the doctrine of paramountcy will be invoked and the *CCAA* judge will preserve the super-priority normally accorded debtor-in-possession ("DIP") financing. Third party secured creditors are not threatened by this decision. In the vast majority of cases, the deemed trust obligations will be set aside.

B. The Facts

(i) Background

6. Indalex Limited[1] sponsored and administered two registered pension plans, one for salaried employees (the "Salaried Plan") and one for executive employees (the "Executive Plan"). The Respondent USW represents certain Indalex employees, including seven employees who were members of the Salaried Plan and who have deferred vested entitlements under that Plan.[2]

7. 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".[3]

8. 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

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[1] 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.
[2] Court of Appeal Reasons, paras. 6, 29-30, FTI Record, Vol. 1., Tab 4-E, pp. 38, 42.
[3] Court of Appeal Reasons, para. 34, FTI Record, Vol. 1, Tab 4-E, p. 43.

$1,795,600.[4] Pension benefits have been significantly reduced. Unless the deficiency in the Plan is funded, retirees' pension benefits will be permanently reduced.

(ii) The *CCAA* proceedings: The Initial Order

9. 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*. The Applicant in this application for leave to appeal, FTI Consulting Canada ULC, was appointed as monitor.[5]

10. The key advisor to the entire Indalex group of companies (both U.S. and Canadian) before and during the *CCAA* proceedings was Keith Cooper, the senior managing director of FTI Consulting Inc. The Monitor is a wholly-owned subsidiary of FTI Consulting Inc.[6]

11. On July 31, 2009, all of the directors of Indalex resigned. On August 12, 2009, by a Unanimous Shareholder Declaration, Mr. Cooper was appointed to direct the affairs of Indalex. In effect, this meant that the affairs of Indalex were now directed by the CRO of Indalex US.[7]

12. 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.[8] 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.

13. Mr. Cooper was the primary negotiator of the DIP credit agreement on behalf of Indalex. He was aware that the Salaried and Executive Plans were underfunded and that pensions would

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[4] Court of Appeal Reasons, paras. 31-34, FTI Record, Vol. 1., Tab 4-E, p. 43.
[5] Court of Appeal Reasons, paras. 7-8, 50, FTI Record, Vol. 1., Tab 4-E, pp. 38, 46.
[6] Court of Appeal Reasons, paras. 44-46, FTI Record, Vol. 1., Tab 4-E, p. 45.
[7] Court of Appeal Reasons, paras. 47-48, FTI Record, Vol. 1., Tab 4-E, p. 46.
[8] Court of Appeal Reasons, paras. 9, 51-53, FTI Record, Vol. 1, Tab 4-E, pp. 38, 46-47.

be reduced if shortfalls were not met, but did not discuss Indalex's pension obligations in respect of the Plans during the negotiation of the DIP credit agreement.[9]

14. The Initial Order was further amended on June 12, 2009 to allow Indalex to borrow more money.[10] Counsel for a group of retired members of the Executive Plan (the "Former Executives") was served with the motion material the evening of June 11th at 8:27 p.m. At the motion they sought to reserve their right to confirm that the motion was solely for the purpose of increasing the DIP loan amount. After discussion with Indalex's and the Monitor's counsel, the Former Executives withdrew their reservation and the motion proceeded.[11]

(iii) The Sale Approval Order

15. 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.[12]

16. Indalex also sought approval to distribute the sale proceeds to the DIP lenders. USW and the Former Executives objected to the planned distribution of the sale proceeds on the basis, *inter alia*, of the statutory deemed trust and priority claims described below.[13]

17. The *CCAA* judge ruled that the objections of USW and the Former Executives should be dealt with promptly as part of the overall approval process. He stated, "following the submissions of counsel, it was agreed that an expedited hearing process on the retirees' and employees' positions would be undertaken promptly, and that the funds on hand with the Monitor would be sufficient if required to satisfy the retirees' alleged trust claims."[14]

18. 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 approximating the Plans' deficiencies pending the determination of the deemed trust claims. The sale closed on July 31, 2009 and the proceeds,

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[9] Court of Appeal Reasons, para. 45, FTI Record, Vol. 1, Tab 4-E, p. 45.
[10] Court of Appeal Reasons, paras. 54-56, FTI Record, Vol. 1, Tab 4-E, p. 47.
[11] Court of Appeal Reasons, paras. 54-56, FTI Record, Vol. 1, Tab 4-E, p. 47.
[12] Court of Appeal Reasons, paras. 57-58, FTI Record, Vol. 1, Tab 4-E, p. 48.
[13] Court of Appeal Reasons, paras. 57-62, FTI Record, Vol. 1, Tab 4-E, p. 48.
[14] Reasons of the *CCAA* judge, para. 16, FTI Record, Vol. 1, Tab 4-A, p. 20.

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.[15]

(iv) The deemed trust provisions of the *Pension Benefits Act*

19. Section 57(4) of Ontario's *PBA* provides that an employer is deemed to hold in trust 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":[16]

> 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.

20. Section 75(1) of the *PBA* requires an employer to make two different types of payment on a plan wind-up. Section 75(1)(a) requires an employer to make all payments that are due immediately or that have accrued and not been paid into the pension fund and would, for example, capture unpaid current service costs and unpaid special payments. Section 75(1)(b) requires the employer to pay additional amounts into the pension fund if there are insufficient assets to cover the value of the pension benefits in three categories.[17]

21. Section 31 of the Regulations under the *PBA* gives an employer up to five years to make all of the required s. 75 contributions.[18]

22. Upon finding a deemed trust, the issue is whether the trust assets are to be given priority over the claims of other secured creditors pursuant to section 30(7) of the *Personal Property Security Act,* R.S.O. 1990, c. P.10 (*PPSA*).

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[15] Court of Appeal Reasons, paras. 10-14, 63-65, FTI Record, Vol. 1., Tab 4-E, pp. 38-39, 49.
[16] *Pension Benefits Act,* R.S.O. 1990 c. P.8, s. 57(4).
[17] *PBA,* ss. 57(4), 75(1).
[18] *Pension Benefits Act,* Regulation 909, R.R.O. 1990, s. 31(1) and 31(2)(a).

(v) The motions before Justice Campbell

23. At the August 28, 2009 motions, the USW and the Former 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*.[19] 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.[20]

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.[21]

25. Neither Indalex nor any other party argued that the motions constituted a collateral attack on the Initial Order, as amended, and the *CCAA* judge did not raise or consider the issue.[22]

26. 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.[23]

27. 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.[24]

C. Decision of the Ontario Court of Appeal

28. The USW and the Former 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

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[19] Court of Appeal Reasons, para. 61, FTI Record, Vol. 1., Tab 4-E, p. 48.
[20] Court of Appeal Reasons, para. 62, FTI Record, Vol. 1., Tab 4-E, p. 48.
[21] Court of Appeal Reasons, para. 66, FTI Record, Vol. 1., Tab 4-E, p. 49.
[22] Reasons of the *CCAA* judge, FTI Record, Vol. 1, Tab 4-A.
[23] Reasons of the *CCAA* judge, paras. 49-50, FTI Record, Vol. 1, Tab 4-A, p. 26.
[24] Reasons of the *CCAA* judge, paras. 55, FTI Record, Vol. 1, Tab 4-A, p. 26.

held that 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 USW and the Former 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.

PART II - QUESTIONS IN ISSUE

29. The Monitor has raised the following issues in its application for leave to appeal:

a. Did the Court of Appeal err in its interpretation or application of the rule against collateral attacks?

b. Did the Court of Appeal err in holding that the deficiencies in the Salaried Plan were subject to a deemed trust under the *PBA*?

c. Did the Court of Appeal err in its interpretation or application of Indalex's fiduciary obligations in the context of the *CCAA* proceedings?

PARTS III & IV - STATEMENT OF ARGUMENT & SUBMISSIONS

A. The Court of Appeal did not err in its interpretation or application of the rule against collateral attacks

30. The Court of Appeal rejected the argument that the motions brought by USW and the Former Executives were an impermissible collateral attack on the orders made by the *CCAA* judge. USW submits that it did not err in this regard.

31. The Court of Appeal correctly held that it was not appropriate to raise the collateral attack argument for the first time on appeal.[25] Its decision is consistent with the decisions of this Honourable Court and other courts of appeal which have rejected the introduction of new issues not fully canvassed by the court below.[26] The *CCAA* judge was in the best position to determine what was meant by the previous orders and whether the motions constituted a collateral attack on those orders. He did not raise the issue of a collateral attack and the failure of any of the Respondents to raise it before him suggests that they did not believe the *CCAA* judge would be receptive to the argument.

32. The Monitor misapplies the doctrine of collateral attack. This appeal related to a motion conducted in the same forum and dealing, *inter alia,* with the same ongoing matter as was dealt with in the Initial Order,[27] the Approval and Vesting Order,[28] and the June 12, 2009 Order.[29] When the collateral attack doctrine is applied, it is applied to a party bound by an order, who has sought to avoid the effect of the order by challenging it in the wrong forum. At no time did the forum change in the *CCAA* proceeding. At no time did the matter or proceeding change.

33. An essential element defining impermissible collateral attacks is the attempt by a party to litigate in more than one forum or *more than one* proceeding.[30] The Ontario Court of Appeal explained the concept in *TeleZone,* quoting from the decision on appeal: [31]

> In other words, when a separate and new action is filed to challenge some aspect of an **earlier and separate case**, it is called a collateral attack on the earlier case. That is not what happened in any of the four cases. None of the plaintiffs in its statement of claim attacked, or challenged the correctness of, the underlying administrative decision. [...] The collateral attack doctrine applies when a litigant is seeking to challenge the legal force of a prior court order, or judicial or quasi-judicial decision of an administrative tribunal, in **subsequent proceedings**. [emphasis added]

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[25] Court of Appeal Reasons, para. 149, FTI Record, Vol. 1., Tab 4-E, p. 76.
[26] *Cusson v. Quan,* [2009] 3 S.C.R. 273, paras. 36-37.
[27] Order of the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) dated April 8, 2009 (Amended and Restated Initial Order), FTI Record, Vol. 2, Tab 6-B, pp. 18–39.
[28] Order of the Honourable Mr. Justice Campbell dated July 20, 2009 (Approval and Vesting Order), FTI Record, Vol. 2, Tab 6-G, pp. 77 – 100.
[29] Order of the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) dated June 12, 2009 (Re Amendment of the DIP Credit Agreement), FTI Record, Vol. 2, Tab 6-E, pp. 67-69.
[30] *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, [2003] 3 S.C.R. 77, para. 33.
[31] *TeleZone Inc. v. Attorney General (Canada)*, 2008 ONCA 892 (CanLII), paras. 97-98; aff'd, [2010] 3 S.C.R. 585.

34. By definition, a "motion" means "a motion in a proceeding or an intended proceeding".[32] The USW motion did not stand on its own as a separate proceeding. At no time was the *CCAA* forum, matter or proceeding changed. An essential element in the doctrine of collateral attack is missing – a separate forum as explained by this Court in *Garland v. Consumers' Gas Co.*:

> The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal. ...Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings...As McMurtry C.J.O. points out...the collateral attack cases all involve a party, bound by an order, seeking to avoid the effect of that order by challenging its validity in the wrong forum.[33]

35. The USW and the Former Executives raised their objections to the distribution of the proceeds of the sale in the context of the *CCAA* proceedings and the *CCAA* judge designed a process by which those claims would be resolved (see paras. 16-18 above).[34] The Approval and Vesting order acknowledged the deemed trust issue. The USW should not now be faulted for following that process, particularly when no other party objected to the process at the time.

36. A further essential element of an impermissible collateral attack is an attempt to overturn a decision or to challenge the legal force of a prior court order. As explained in the *Garland* case, the USW's motion did not seek to overturn or challenge the legal force of a previous order.

> ... [T]he doctrine of collateral attack does not apply in this case because here the specific object of the appellant's action is not to invalidate or render inoperative the Board's orders, but rather to recover money that was illegally collected by the respondent as a result of Board orders.[35]

37. Like the appellants in the *Garland* case, the USW is not the object of the order.

> ... [T]he appellant is not the object of the orders and thus there can be no concern that he is seeking to avoid the orders by bringing this action. As a result, a threat to the integrity of the system does not exist because the appellant is not legally bound to follow the orders. Thus, this action does not appear, in fact, to be a collateral attack on the Board's orders.[36]

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[32] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, s. 1.03.
[33] *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, paras. 70-72.
[34] Court of Appeal Reasons, para. 150, FTI Record, Vol. 1, Tab 4-E, p. 77.
[35] *Garland v. Consumers' Gas Co.*, *supra* note 33, para. 71.
[36] *Garland* v. *Consumers' Gas Co.*, *supra* note 33, para. 73.

38. The USW did not dispute that the order was valid and opposable against creditors of Indalex. Rather, the USW's motion sought to recover money in which the USW asserted the Salaried Plan and, as a result, its beneficiaries were entitled to flowing from the enforcement of the deemed trust. By definition, trust assets are not part of the Indalex estate. The USW's motion asserted that the Salaried Plan beneficiaries were not the object of the order as opposed to disputing the validity of the order.

39. The doctrine of collateral attack is closely related to issue estoppel. The requirements of issue estoppel are that the same question has been decided; that the judicial decision which is said to create the estoppel was final; and that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel was raised or their privies.[37] In this case, the Initial Order was granted *ex parte.* Therefore, the parties involved at the Initial Order stage were not the same as those involved in the August 28th motion or the appeal.

40. Moreover, issue estoppel will not apply "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment."[38] In this case, the questions of paramountcy and deemed trust were not raised by Indalex nor considered by Morawetz J. in the Initial Order or in the June 12th Order, nor were they considered by Campbell J. in the Approval and Vesting Order. The deemed trust issue cannot be characterized as having been distinctly or even collaterally put in issue at any of these motions. On the contrary, Indalex had undertaken to comply with all applicable laws including "regulatory deemed trust requirements".[39]

41. Also closely related to the doctrine of collateral attack is the doctrine of *res judicata.* While *res judicata* has been applied to interlocutory proceedings, it is applied less stringently. As explained in *Buschau v. Rogers Communications*:

> I acknowledge that the doctrine of res judicata does apply to interlocutory applications. The court has some discretion, however, with respect to the application of the doctrine, and will generally apply it less stringently to

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[37] *Angle v. M.N.R.*, [1975] 2 S.C.R. 248, p. 254.
[38] *Angle, ibid.*, p. 255.
[39] Court of Appeal Reasons, para. 178, FTI Record, Vol. 1, Tab 4-E, p. 86.

> interlocutory orders than to final orders. In particular, the rule in *Henderson* v *Henderson* (1843), 3 Hare 100,67 E.R. 313 (Ch.) that a party must bring forward "its full case" at one time is of limited application to interlocutory applications. Judicial efficiency, one of the foundations of the doctrine of *res judicata*, will often be well served by allowing interlocutory applications to deal with only small parts of a larger picture.[40]

42. The deemed trust issue and the consequences flowing therefrom cannot be said to have been canvassed and duly considered in the *CCAA* orders cited above. Consequently, the doctrine of collateral attack cannot be applied.

43. In the further alternative, even if the collateral attack rule does apply, this is not, as the Court of Appeal held, a case for its strict application. The purpose of the rule against collateral attacks is to preserve the repute of the administration of justice and to maintain the rule of law. As the Court of Appeal held, consistent with this Court's jurisprudence,[41] in the circumstances there was no other effective means by which the USW and the Former Executives could assert their claims to a deemed trust and the motions did not damage the repute of the administration of justice:[42]

> ...[I]t was only when Indalex brought a motion for approval of the sale of its assets to SAPA and for a distribution of the sale proceeds to the DIP lenders that it became clear that Indalex intended to abandon the Plans in their underfunded states. The appellants immediately took steps to assert their claims in the very forum in which all of the Court Orders had been made, namely, the *CCAA* court. By permitting their motions to be heard, the *CCAA* judge did not damage the repute of the administration of justice. On the contrary, he strengthened it. He enabled the sale to proceed while ensuring that the competing claims to the Reserve Fund would be decided on the merits and expeditiously.

Nor did the motions jeopardize the rule of law:[43]

> Given the nature of a *CCAA* proceeding, the court must often make orders on an urgent and expedited basis, with little or no notice to creditors and other interested parties. Its processes are sufficiently flexible that it can accommodate situations

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[40] *Buschau v. Rogers Communications Inc.*, 2003 BCSC 1718 (CanLII), para. 36.
[41] *R. v. Litchfield,* [1993] 4 S.C.R. 333, pp. 336-337. See also *R. v. Domm* (1996), 31 O.R. (3d) 540 (C.A.), pp. 17-20.
[42] Court of Appeal Reasons, paras. 162-166, FTI Record, Vol. 1, Tab 4-E, pp. 80-82.
[43] Court of Appeal Reasons, para. 167, FTI Record, Vol. 1, Tab 4-E, pp. 82-83.

> such as the one that arose here. A strict application of the rule would preclude the appellants from having the opportunity to meaningfully challenge the super-priority charge in the Initial Order, as amended ... that result would be a fundamental flaw in the *CCAA* process, one in which procedure triumphed over substance.

44. The Court properly exercised its residual discretion to refuse to apply the doctrine when to do so would be contrary to the requirements of justice.

45. The USW did not seek to vary or amend the Initial Order. The motion sought to enforce pre-existing statutory rights. Indalex had taken no steps to present evidence to Morawetz J. as to why such rights should be negated as part of the Initial Order motion. To the contrary, Indalex presented evidence that it would honour its deemed trust obligations (see paragraph 41). The initial order established priorities for DIP lenders, it did not establish property rights.

46. The Monitor argues at paragraphs 31 and 32 that the Retirees' rights were determined at the June 12, 2009 motion. There was no substantive analysis of Retirees' rights at that motion. The Court of Appeal expressly rejected this argument as put forth by the US Trustee:

> To the extent that the U.S. Trustee suggests that the Former Executives raised the deemed trust issue at the motion heard on June 12, 2010, I reject this submission. As explained in the background portion of these reasons, the Former Executives' reservation of rights on June 12, 2010, was to obtain time to confirm that the motion related solely to an increase in the DIP loan amount. [44]

47. When the Retirees raised the issue of underfunding of the Executive Plan at the July 2, 2009 motion to approve bidding procedures, Morawetz J. endorsed the record indicating that: "The issues can be raised by the retirees on any application **to approve a transaction** – but that is for another day."[45] (emphasis added) The USW and the Retirees followed this direction precisely. The motion to approve the sales transaction was on July 20, 2009. The USW and Retirees asserted their claims to a deemed trust concurrent with the July 20, 2009 motion "to approve a transaction".

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[44] Court of Appeal Reasons, Footnote 15, FTI Record, Vol. 1, Tab 4-E, p. 80.
[45] Court of Appeal Reasons, para. 159, FTI Record, Vol. 1, Tab 4-E, p. 80.

48. In paragraphs 35 to 40 of its Memorandum of Argument, the Monitor also claims that the Court of Appeal's decision "creates asymmetry between the *Bankruptcy and Insolvency Act* and the *CCAA*. USW's response to these issues is set out in its Memoranda of Argument in the applications for leave to appeal brought by Sun Indalex and George L. Miller. The USW adopts and relies upon those submissions in this application.

B. Court of Appeal did not err in holding that the deficiencies in the Salaried Plan were subject to a deemed trust under the *PBA*

49. As set out in paragraph 19 above, s. 57(4) of the *PBA* provides that, upon a wind up, "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." The question raised by USW's motion was: what amounts payable to a pension plan (i.e. going concern payments, special payments and windup payments) are subject to the windup deemed trust? What amounts had **accrued** on the date of the wind up, **but were not yet due under the plan or regulations**, and were therefore subject to the deemed trust?

50. This Court has repeatedly held that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".[46]

51. The *CCAA* judge recognized that s. 57(4) "contemplates the calculation to be made as of the date of wind-up of the amounts required to make up the deficiency" and "were it not for the provisions in s. 31 of the Regulations [which give an employer up to five years to pay the deficiency in a plan], Indalex would have had under s. 75 of the *PBA* to pay in as of the date of wind-up any Plan deficiency." He recognized that the amounts owing under s. 75(1) had accrued at the date of wind-up. However, in his view, since that amount could be paid annually in instalments over five years, there was nothing to be made subject to the deemed trust under s. 57(4) at the time of the sale because the payments were not due until they were required to be

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[46] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, para. 21.

paid.[47] The Court of Appeal correctly held that this interpretation was not consistent with the plain language of s. 57(4), the provisions of the *PBA* as a whole or the objects of the *PBA*.

52. With respect to its plain language, and as the *CCAA* judge himself recognized, s. 57(4) creates a deemed trust in respect to amounts that have "accrued to the date of the wind up", but are "not yet due" to be paid. The fact that s. 75(1) required Indalex to pay the deficiencies in the Salaried Plan but did not require the payment to be made on the date of the wind-up did not mean that they had not accrued, and was no basis to exclude those liabilities from the deemed trust. As the Court of Appeal correctly held, "the fact that an employer is given time in which to pay the requisite contributions into the pension fund does not change the fact that the liabilities accrued by the wind up date":[48]

> This point is reinforced when one distinguishes amounts that are "accrued" from amounts that are "not yet due". In *Hydro-Electric Power Commission (Ontario) v. Albright* ... the Supreme Court of Canada explains that money is "due" when there is a legal obligation to pay it, whereas payments are "accrued" when the rights or obligations are constituted and the liability to pay exists, even if the payment does not need to be made until a later date (*i.e.* is not "due" until a later date).

53. Indeed, the Superior Court of Ontario previously recognized not only the distinction between "due" and "accrued" in s. 75(1), but also the distinction between the application of a deemed trust in the context of an ongoing plan under s. 57(3) of the *PBA* and the application of a deemed trust in the context of a plan wind up under s. 57(4):[49]

> Quite clearly, in a wind-up situation, the wording of [s. 57(4)] is to oblige the employer (Usarco) with a trust arrangement concerning those contributions which are accrued, even though such may not be due under the plan. This is distinct from an ongoing situation envisaged by [s. 57(3)], where such obligation is with respect to contributions which are then due but not yet paid over to the pension fund. [Section 57(5)] gives the Administrator a lien and a charge over the deemed trust amounts. By [s. 57(6)], the deemed trust applies whether or not the employer kept these monies separate and apart. It is clear from [s. 75(1)(a)] that "due" and "accrued" are not identical, as they are referred to separately therein.

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[47] Reasons of the *CCAA* judge, paras. 32-34, 44-49, FTI Record, Vol. 1, Tab 4-A, pp. 23-26.
[48] Court of Appeal Reasons, paras. 97-100, FTI Record, Vol. 1, Tab 4-E, pp. 58-59. *Ontario Hydro-Electric Power Commission v. Albright* (1992), 64 S.C.R. 306, pp. 312-313.
[49] *Toronto-Dominion Bank v. Usarco Ltd.* (1991), 42 E.T.R 235 (Gen. Div.), para. 23. Section 57(3) of the PBA provides: "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."

54. The effect of the *CCAA* judge's decision was to limit the deemed trust under s. 57(4) to only those payments required to be made by s. 75(1)(a) (i.e. unpaid going concern and special payments) and exclude from its ambit the wind up liability payments required under s. 75(1)(b). This was rejected on appeal since there is no language in s. 57(4) or elsewhere in the *PBA* that would suggest that the windup deemed trust in s. 57(4) is confined to amounts owing only under s. 75(1)(a).[50]

55. The Court of Appeal also correctly concluded that its interpretation of s. 57(4) was consistent with a contextual analysis of s. 57(4). While the employer has an interest in having a reasonable period of time within which to make the s. 75 contributions, giving the employer a five-year period in which to do so places the rights of plan beneficiaries at risk. Section 57(4) and 57(5) (which gives the administrator of the plan a lien and charge on the assets of the employer in an amount equal to the amounts deemed to be held in trust) provide some protection to plan beneficiaries "over the amount of unpaid employer contributions, contributions that had *accrued* to the date of wind up *but [were] not yet due under the regulations.*"[51] [emphasis original]

56. The Court of Appeal also correctly held that its interpretation was consistent with the overall purpose of the *PBA*.[52] The *PBA* is remedial public welfare legislation that is intended to benefit pension plan members by prescribing minimum standards for all pension plans in Ontario.[53] As benefits-conferring legislation, the provisions of the *PBA* must be interpreted in a broad and generous manner. Any doubt arising from difficulties of language in benefits-conferring legislation should be resolved in favour of the affected plan members.[54]

57. There was no "retroactive creation of deemed trusts" as suggested by the Monitor at paragraphs 41 and 49 of its argument. The deemed trust existed from the date of the Salaried Plan wind-up (December 31, 2006) and continues to apply in the absence of a finding of conflict between the *CCAA* and the *PBA* sufficient to invoke paramountcy.

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[50] Court of Appeal Reasons, paras. 101, FTI Record, Vol. 1, Tab 4-E, pp. 59-60.
[51] Court of Appeal Reasons, paras. 102-103, FTI Record, Vol. 1, Tab 4-E, p. 60.
[52] Court of Appeal Reasons, para. 104, FTI Record, Vol. 1, Tab 4-E, pp. 60-61.
[53] *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, paras. 37-38. See also *Huus v. Ontario (Superintendent of Pensions)* (2002), 58 O.R. (3d) 380, 2002 CanLII 23593 (C.A.), paras. 25-28.
[54] *Rizzo & Rizzo Shoes Ltd., supra* note 46, para. 36.

58. Contrary to the Monitor's assertion, the liability created at the date of a pension plan wind-up is not an uncertain and variable amount. The Court of Appeal correctly distinguished between a solvency valuation and a wind-up deficit. In the former, an estimate is prepared, typically at three year intervals, of the liability that an ongoing pension plan would face if it was terminated. A solvency valuation will vary with future events due to, for example, fluctuations in pension plan participation and in fund investment returns. With a wind-up, there is no conjecture. The liability is crystallized as of the date of the wind-up.[55] There will be no additional benefits accrued and no new plan members admitted after the wind-up date. The liability is comparable to the liability on a variable interest loan. The principal amount owing is established as of the wind-up date. The actual amount paid over time, if interval payments are permitted, may fluctuate depending on investment earnings, but the principal amount has been ascertained and is open to assessment by any lender at any time. It is no more or less certain than other financing vehicles.[56]

59. Indalex is no longer a going concern. Substantially all of its assets were transferred to the purchaser, SAPA.[57] Section 31 of the *PBA Regulations* assumes that an employer remains a going concern after the wind-up of its sponsored pension plan. When an employer no longer exists, the five year amortization period is irrelevant. The amount owing is known, due and payable. As noted in paragraph 8 above, the amount of the deficiency in the Salaried Plan as of December 31, 2008 was $1,795,600.[58] Indalex had full knowledge of its funding obligations as was acknowledged in the Affidavit of Bob Kavanaugh who was able to attest with precision to the outstanding deficit applicable to the Salaried Plan.[59] This is hardly an unascertainable amount.

60. At paragraphs 49 to 55 of its argument, the Monitor states that the Indalex decision is inconsistent with prior decisions and expert commentary. Section 57(4) of the *PBA* was not the subject of detailed analysis in these prior decisions. The Court of Appeal distinguished these cases both on their facts and the legal basis upon which they were decided.[60]

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[55] Court of Appeal Reasons, para. 97, FTI Record, Vol. 1, Tab 4-E, p. 58.
[56] Court of Appeal Reasons, paras. 83-92, FTI Record, Vol. 1, Tab 4-E, pp. 53-57.
[57] Court of Appeal Reasons, paras. 58, 63, FTI Record, Vol. 1, Tab 4-E, pp. 48-49.
[58] Court of Appeal Reasons, para. 32, FTI Record, Vol. 1, Tab 4-E, p. 43.
[59] Affidavit of Bob Kavanaugh, paras. 5-14, FTI Record, Vol. 2, Tab 6-L, pp. 121-123.
[60] Court of Appeal Reasons, paras. 105-107, FTI Record, Vol. 1, Tab 4-E, pp. 61-62.

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

> 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.**[61] [emphasis added.]

62. In paragraphs 40 to 42 of his decision, the *CCAA* judge quotes Ari Kaplan and Gregory J. Winfield as further authority supporting his section 57(4) interpretation, which excludes a deficiency on windup from the deemed trust. Both quotes cited rely exclusively on Justice Farley's comments in *Usarco.* Justice Farley later reversed the *Usarco* opinion by stating that the windup liability is included in the amount protected by the section 57 deemed trust.[62]

63. In sum, Indalex does not change existing law, it clarifies a statutory provision that was not the subject of detailed analysis in prior decisions.

C. Court of Appeal did not err in concluding that Indalex owed fiduciary obligations to the Plans' beneficiaries and breached those obligations

64. As administrator of the Plans, Indalex was subject to fiduciary obligations in respect of the Plans' beneficiaries stemming both from the common law[63] and from the *PBA*. The *PBA* not only imposes a fiduciary duty on the plan administrator, but also expressly prohibits an administrator from knowingly permitting its interest to conflict with its duties in respect of a pension fund.[64] The Court of Appeal correctly concluded that the commencement of *CCAA* proceedings did not extinguish Indalex's fiduciary obligation, holding that "In the unique circumstances of this case, Indalex wore both its corporate and its administrator's hats."[65]

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[61] *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, 2006 CanLII 34551 (C.A.) affirming *Re Ivaco Inc.*, 2005 CanLII 27605 (Ont. S.C.), para. 44.
[62] *Ivaco Inc. (Re),* 2005, *ibid.*, para. 11.
[63] *Burke v. Hudson's Bay Co.*, [2010] 2 S.C.R. 273, paras. 39-41.
[64] *PBA,* s. 22.
[65] Court of Appeal Reasons, paras. 113-135, FTI Record, Vol. 1, Tab 4-E, pp. 64-72.

> ...Indalex knew that the Plans were underfunded and that unless more funds were put into the Plans, pensions would have to be reduced. The decisions that Indalex was unilaterally making had the potential to affect the Plans beneficiaries' rights, at a time when they were particularly vulnerable. The peculiar vulnerability of pension plan beneficiaries was even greater than in the ordinary course because they were given no notice of the *CCAA* proceedings, had no real knowledge of what was transpiring and had no power to ensure that their interests were even considered – much less protected – during DIP negotiations.

65. Indalex ignored its obligations as Plan administrator during the *CCAA* proceeding. Further, it "took active steps which undermined the possibility of additional funding to the Plans", including attempting to thwart the motions brought by USW and the Former Executives by seeking to voluntarily assign itself into bankruptcy (the *CCAA* judge also found this improper – see paragraph 27 above):[66]

> It obtained a *CCAA* order that gave priority to the DIP lenders over "statutory trusts" without notice to the Plans' beneficiaries. It sold its assets without making any provision for the Plans. It knew the purchaser was not taking over the Plans. It moved to obtain orders approving the sale and distributing the sale proceeds to the DIP lenders, knowing that no payment would be made to the underfunded Plans. And, Indalex U.S. directed Indalex to bring its bankruptcy motion with the intention of defeating the deemed trust claims and ensuring that the Reserve Fund was transferred to it. In short, Indalex did nothing to protect the best interests of the Plans' beneficiaries and, accordingly, was in breach of its fiduciary obligations as administrator.

66. At paragraph 59 of the Monitor's Memorandum, the Monitor argues that, if this appeal is upheld, a company entering *CCAA* protection would be required to "favour the interests of pension beneficiaries to the detriment of its employees and all other stakeholders including secured lenders". The Court of Appeal decision does not require a *CCAA* applicant to favour pension beneficiaries over other stakeholders. The Court below takes pains to state that a *CCAA* applicant may displace provincial pension benefit standards by invoking paramountcy:

> It is important to recognize that the conclusion I have reached does not mean that a finding of paramountcy will never be made. That determination must be made on a case by case basis. There may well be situations in which paramountcy is invoked and the record satisfies the *CCAA* judge that application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy. ...[67]

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[66] Court of Appeal Reasons, paras. 134-139, FTI Record, Vol. 1, Tab 4-E, pp. 71-74.
[67] Court of Appeal Reasons, para. 181, FTI Record, Vol. 1, Tab 4-E, pp. 87-88.

67. Plan administration obligations do not disappear merely because a company enters into *CCAA* protection. Benefits still must be paid, benefit inquiries must be answered, new retirement benefit applications must be processed, etc. Yet, Indalex totally disregarded all Salaried Plan administration obligations. The Court of Appeal emphasized Indalex's confusion surrounding its administration responsibilities noting that Mr. Cooper was unsure whether the plan administrator was "Indalex, a combination of him and the Monitor, [or] a combination of him and his staff" and that, ultimately, when choices were to be made as between Indalex US and the Plan beneficiaries, Mr. Cooper, as the directing mind of Indalex chose to take steps to benefit Indalex US.[68]

68. The Court of Appeal is not suggesting that a sale cannot occur without satisfying pensioner claims. Nor is the Court of Appeal stating that Indalex was compelled to seek the appointment of an independent plan administrator, as the Monitor suggests. Proper notice to affected Salaried Plan beneficiaries should have been provided so that these Plan beneficiaries could have taken steps to defend their interest. If Indalex had decided that it was not going to fulfill its Plan administrator functions, it was incumbent upon Indalex to appoint or have appointed an administrator that could fulfill these functions. Instead, Indalex chose to totally ignore administration obligations.[69]

69. At paragraph 63, the Monitor suggests that, even if Indalex could have withdrawn as the administrator, it would have not made a difference. The *PBA* provides an administrator with the tools to protect pension plan assets, including a lien and charge on the Plan sponsor's assets for the amount of the deemed trust (s. 57(5)). Indalex did not pursue the lien and charge. Presumably, a third party administrator, if appointed, would have pursued the lien and charge.

70. Even if Indalex assumed cessation of contributions was permissible during *CCAA* proceedings and thereafter, Indalex was obligated to treat Salaried Plan beneficiaries with an even hand. Indalex continued to pay retirees under the Salaried Plan (28 pensioners as of December 31, 2006) 100 percent of their benefit while knowing that the vast majority of Salaried Plan beneficiaries (141 as of December 31, 2006) had yet to receive their pension benefits. Eventually, a third party administrator would have to reduce benefits. At the very least, Indalex

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[68] Court of Appeal Reasons, paras. 134, 139, FTI Record, Vol. 1, Tab 4-E, pp. 71-74.
[69] Court of Appeal Reasons, para. 139, FTI Record, Vol. 1, Tab 4-E, pp. 73-74.

should have taken positive steps to reduce pension payments so that all Salaried Plan beneficiaries would receive comparable benefits.[70]

D. Does this case raise issues of national importance?

71. The Monitor claims that leave to appeal ought to be granted because the decision of the Court of Appeal will harm commercial lending in Canada. USW submits that these claims are significantly exaggerated for all of the reasons set out herein and in its Memoranda of Argument in the applications for leave to appeal brought by Sun Indalex and the US Trustee. USW adopts and relies on those submissions in this response to the application for leave to appeal.

PART V - SUBMISSION ON COSTS AND ORDER REQUESTED

72. USW requests that the Court dismiss this application for leave to appeal and order the Monitor to pay USW's costs of this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

August 8, 2011

Darrell Brown
SACK GOLDBLATT MITCHELL LLP

Solicitors for the Respondent,
United Steelworkers

[70] Exhibit "A" of the Affidavit of Bob Kavanaugh, Mercer Report on the Plan Wind-Up as of December 31, 2006, p. 21, FTI Record, Vol. 2, Tab 6-L, p. 21.

PART VI - TABLE OF AUTHORITIES

CASE LAW	PARAGRAPH
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Toronto-Dominion Bank v. Usarco Ltd. (1991), 42 E.T.R. 235 (Gen. Div.)	53

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.

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) 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.

(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) 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.

(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) 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.

(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) 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.

(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

(6) Seule une personne prescrite peut être

shall be a trustee of a pension fund.

(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.

(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).

(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.

(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.

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.

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.

fiduciaire d'une caisse de retraite.

(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) 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) 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) 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.

(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.

(4) Si un régime de retraite est liquidé en totalité ou en partie, l'employeur qui est tenu de cotiser à la caisse de retraite est réputé détenir en fiducie pour le compte des bénéficiaires du régime de retraite un montant égal aux cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements.

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).

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

75. (1) Si un régime de retraite est liquidé en totalité ou en partie, l'employeur verse à la caisse de retraite :

(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

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) an amount equal to the amount by which,

b) d'autre part, un montant égal au montant dont :

(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,

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

(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) 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,

(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,

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.

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.

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

31(1) The liability to be funded under section

31. (1) Le passif qui doit être financé aux

75 of the Act shall be funded by annual special payments commencing at the effective date of the wind up and made by the employer to the pension fund.

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

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

termes de l'article 75 de la Loi l'est au moyen de paiements spéciaux annuels qui commencent à la date de prise d'effet de la liquidation et qui sont faits par l'employeur à la caisse de retraite.

(2) Les paiements spéciaux prévus au paragraphe (1) sont, pour chaque exercice, au moins égaux au plus élevé des montants suivants :

a) le montant exigé pendant l'exercice pour financer le passif de l'employeur aux termes de l'article 75 de la Loi, en paiements égaux payables annuellement par anticipation, sur une période maximale de cinq ans...

***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.