

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO
LIMITED AND BECANCOUR SILICON INC.

Applicants

**FACTUM OF THE RESPONDENTS,
THE COMMUNICATIONS, ENERGY AND PAPERWORKERS
UNION OF CANADA**

January 11, 2012

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PART I - INTRODUCTION

1. The Respondent, the Communications, Energy and Paperworkers Union of Canada, Local 184 (the "**Respondent CEP**"), is the bargaining agent for the unionized employees at the Applicants' plants located in Bécancour, Québec. The Respondent CEP represents active and retired unionized workers who benefit from the Bécancour Union Pension Plan¹ and the Québec Silicon Union Pension Plan to which the Applicants are required to make contributions pursuant to the terms of those Plans, the Collective Agreement between the Respondent CEP and the Applicants, and the *Québec Supplemental Pension Plans Act*, R.S.Q., c. R-15.1 (the "*QSPPA*").

¹ Unless otherwise defined, the terms used herein have the meanings ascribed to them in the Applicants' materials.

2. the Applicants have brought the within motion and are seeking the following relief:
 - (a) An Order granting increased priority to the Administration Charge and to the D&O Charge;
 - (b) An Order suspending the Applicants' obligations to make certain Pension Contributions with respect to their Pension Plans;
 - (c) An Order approving key employee retention plans and granting such employees a Charge over the Applicants' Property; and
 - (d) An Order sealing the Confidential Supplement to the first report of the Monitor.
3. The Respondent CEP respectfully requests that the relief being sought by the Applicants in the within motion be dismissed.

PART II – SUMMARY OF FACTS

4. The Applicants own two manufacturing facilities in Bécancour, Québec. The Respondent CEP and the Applicants, namely Bécancour Silicon Inc. (BSI) and Québec Silicon, are parties to a collective agreement which is set to expire in April 2013.

Affidavit of Jean Simoneau, sworn January 10, 2012 ("Simoneau Affidavit"), para. 5, Respondent CEP's Motion Record.

5. The Collective Agreement provides for Pension Plans for its active and retired employees or their beneficiaries, including the defined benefit plan at the BSI facility (Bécancour Union Pension Plan), the defined benefit plan at the Québec Silicon facility (Québec Silicon Union Pension Plan), defined contribution plan at

the Québec Silicon facility (Québec Silicon Union Pension Plan) (the "Pension Plans").

Simoneau Affidavit, para. 7, Respondent CEP's Motion Record.

6. There are approximately one hundred and fifty (150) active employees who are members of the Pension Plans and ninety-eight (98) inactive employees or their beneficiaries who are members of the Pension Plans.

Simoneau Affidavit, para. 7, Respondent CEP's Motion Record.

7. Of the approximately one hundred and fifty (150) active employees who are members of the Pension Plans, approximately one hundred and seven (107) are covered by the defined benefit Pension Plans and the other forty-three (43) are covered by the defined contribution plan. All ninety-eight (98) inactive employees or their beneficiaries who are members of the Pension Plan are covered by the Bécancour Union Pension Plan.

Simoneau Affidavit, para. 8, Respondent CEP's Motion Record.

8. The Applicants are required to make normal cost contributions as well as solvency payments (or "special payments") to these pension funds pursuant to the terms of the Pension Plans, the Collective Agreement, and the *Québec Supplemental Pension Plans Act*, R.S.Q., c. R-15.1 (the "QSPPA").
9. On January 3, 2012, the Applicants applied to this Honourable Court for relief under the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36, as amended (*CCAA*) without notice to its creditors including the Respondent CEP or

the Respondent CEP's members of the Pension Plan Committee. The requested relief was granted by an Order dated January 3, 2012 (the "Initial Order").

10. The Initial Order granted Administration Charges and D&O Charges on the assets of the Applicants, but those charges ranked only after "other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise, including any deemed trust created under the *Ontario Pension Benefits Act* or the *Quebec Supplemental Pension Plans Act* (collectively, the "Encumbrances"). The Initial Order permits the beneficiaries of the charges to seek priority over those Encumbrances on notice.

Initial Order, dated January 3, 2012, para. 40, Applicant's Comeback Motion Affidavit, Exhibit A, Tab 2.

11. The Applicants now seek an order for, *inter alia*, a super-priority to be given to the Administration Charge and the D&O Charge over the Encumbrances listed in the Initial Order.
12. According to the Applicants, the solvency deficit owed to the Respondent CEP's Bécancour Union Pension Plan was approximately \$7.9 million as of the most recently filed actuarial valuation (September 30, 2010). Normal cost contributions owing to the Plan are approximately \$7,088 per month, and special payments owing to the Plan are approximately \$95,300 per month.

Applicant Initial Application Affidavit, para. 90(c), (Exhibit "B" to Applicant's Comeback Motion Affidavit), Applicant's Motion Record, Tab 2

13. The solvency deficit owed to the Respondent CEP's Québec Silicon Union Pension Plan, according to the Applicants was approximately \$3.7 million as of the actuarial valuation filed September 30, 2010. Starting in January 2012, normal cost contributions owing by the Applicants to the Plan are approximately \$51,227 per month, and special payments owing to the Plan are approximately \$47,743 per month.

Applicant Initial Application Affidavit, para. 93(b), (Exhibit "B" to Applicant's Comeback Motion Affidavit), Applicant's Motion Record, Tab 2

14. In the within motion, the Applicants seek to suspend the special payments to the Bécancour Union and the Québec Silicon Union Pension Plans, being \$95,300 per month to the Bécancour Union Pension Plan and \$47,743 per month to the Québec Silicon Union Pension Plan.
15. In support of the within Application for relief under the *CCAA*, the Applicants rely on the sworn affidavits of Mr. Peter A.M. Kalins who is a senior representative of the Applicants. While the affidavits set out the financial troubles affecting the Applicants, neither the affidavits nor the attachments thereto offer a clear restructuring plan or strategy to resolve the Applicants' ongoing liquidity crisis.

Applicant's Comeback Motion Affidavit, Affidavit of Peter Kalins, sworn January 5, 2012, ("Application Affidavit"), Exhibit B, Applicant's Motion Record, Tab 2.

PART III – ISSUES

16. The issues in this motion are as follows:
- (a) Should this Court grant increased priority to the Administration Charge and the D&O Charge?
 - (b) Should this Court grant an order suspending the Applicants' obligations to make the Pension Contributions with respect to the Pension Plans?
 - (c) Should this Court approve the KERPs and grant the KERP Charge?
 - (d) Should this Court seal the Confidential Supplement?

PART IV – LAW & ARGUMENT

17. In deciding whether to grant the orders requested, it is incumbent on this Honourable Court to bear in mind the objectives of the *CCAA*, and base its decision in the principles of fairness and equity.

United Air Lines, Inc. (Re), [2005] O.J. No. 1044 (Sup. Ct. J.) at para 8, Respondent CEP's BOA, Tab 1.

18. For each of the four orders sought by the Applicants, s. 11.02(3)(a) of the *CCAA* makes it clear that the burden of proof lies with the Applicant to satisfy the Court that the order sought is appropriate. It is the Respondent CEP's position that the Applicants have not offered adequate evidence to support the extraordinary relief requested.

A. A SUPER-PRIORITY CHARGE SHOULD NOT BE GRANTED TO THE APPLICANTS

19. While it is not disputed that this Honourable Court has the jurisdiction and discretion to Order a super-priority charge in the context of a *CCAA* proceeding, the Respondent CEP respectfully submits that this is an extraordinary measure, and that the onus is on the party seeking such an Order to satisfy the Court that such the Order ought to be awarded in the circumstances.
20. The super-priority charge sought by the Applicant would have the effect of subordinating the rights of *inter alia* the Pension Plans, including the statutory trusts that are created pursuant to the *QSPPA*. In the Respondent CEP's respectful submission, significant and reliable evidence must be adduced prior to overriding the rights of the Pension Plans.
21. In order to grant a super-priority charge, the Applicants must show that the application of provincial legislation "would frustrate the company's ability to restructure and avoid bankruptcy."

Indalex (Re), 2011 ONCA 265, [2011] O.J. No. 1621 (C.A.) at paras. 181.
Respondent CEP's BOA, Tab 2.
22. In the Respondent CEP's respectful submission, the evidence presented by the Applicants falls short of showing the necessity of the super-priority charge.
23. Presently, the Applicants have not provided any plan for the purpose of restructuring the Applicants' entities. Absent a restructuring proposal, the affected creditors, including the Pension Plans, have no reason to believe that their interests will be protected through the issuance of the Orders being sought.

On the contrary, the Applicants are requesting extraordinary relief without providing the necessary facts to justify same.

Applicant's Comeback Motion Affidavit, Application Affidavit, Exhibit B, paras. 139-142, Applicant's Motion Record, Tab 2.

24. In such a context, the Respondent CEP submits that the Applicant's request for the super-priority charge for the Administrators, directors, officers, and key employees of the corporation represents a conflicting interest between the interests of the Applicants' entities on the one hand, and the interests of Pension Plans on the other. As will be discussed below, the *QSPPA* creates a deemed trust for the employer in respect of the payments it must make to a Pension Plans.

25. In the context of the Applicants' *CCAA* proceedings, the Applicants must "wear two hats," and act both in their corporate interest and in the best interest of the Pension Plans. The Applicants cannot simply ignore its obligations to the Pension Plans in favour of the corporation.

Indalex (Re), at para. 129, Respondent CEP's BOA, Tab 2.

26. Where the "two hats" give rise to a conflict of interest and a corporation favours its corporate interest rather than its obligations to its fiduciaries, there will be consequences. In *Indalex*, the Court found that the corporation seeking *CCAA* protection had acted in a manner that revealed a conflict with the duties it owed toward the beneficiaries of pension plans and ordered the corporation to pay the special payments it owed the Plans.

Indalex (Re), at para. 140 & 207, Respondent CEP's BOA, Tab 2.

27. In light of the lack of evidentiary support for the super-priority charge sought by the Applicants, the risk of conflicting interests, and the importance of the Applicants' fiduciary duties to the Pension Plans, the Respondent CEP takes the position that the super-priority charge requested by the Applicants ought not to be granted.
28. Contrary to the Applicants' assertions, the *CCAA* does not necessarily override conflicting requirements of provincial law. Rather, judges have the discretion in the context of the *CCAA* to make orders pursuant to the *CCAA* that override provincial legislation. Such discretion must be exercised through a careful weighing of the facts before the Court, and only where the Applicant proves it is necessary in the context and consistent with the objects of the *CCAA*.

Indalex (Re), at paras. 179 & 189, Respondent CEP's BOA, Tab 2.

29. In the alternative to the Respondent CEP's position that no super-priority charge should be granted, the Respondent CEP takes the position that any super-priority charge ordered by this Court ought to rank *after* the Pension Plans. In this circumstance, the rank in Charges would be as follows:

1. Pension Plans
2. Super-priority Administrative Charges
3. KERP Charges (if granted, which is not supported but opposed, *infra*)
4. D&O Charges
5. All other Encumbrances

30. This result prevents a breach in fiduciary obligation to the beneficiaries of the pension funds while permitting the Applicant to take measures it deems necessary to protect its corporate interests.

B. THE APPLICANTS' OBLIGATIONS TO THE PENSION PLANS SHOULD NOT BE SUSPENDED

31. As the employer sponsor of Pension Plans, the Applicants are in a position of power and trust with respect to the beneficiaries of the Pension Plans. This Honourable Court should be cautious in authorizing the Applicants to suspend payments to its Pension Plans, particularly when the Applicants are in a financially precarious position and no restructuring plan has been proposed to address such concerns.

Indalex (Re), at paras. 119, Respondent CEP's BOA, Tab 2.

32. In respect of the Bécancour Union Pension Plan and the Silicium Québec Pension Plan, the Applicants are bound by contract (through the Collective Agreement and the Pension Plan documents) to make contributions to the Pension Plans. More importantly, the Applicants owe statutory duties to the beneficiaries of the pension funds pursuant to the *QSPPA*.
33. The *QSPPA* sets out in s. 49 that any contributions and accrued interest not paid into the pension fund are deemed to be held in trust by the employer. Section 52 further requires the employer to act with reasonable prudence, diligence, and care in making payments to a pension plan, the lack of which will attract

personal liability upon the directors of the legal person owing contributions to the plan.

34. The *QSPPA* thus creates a "deemed trust" of the amounts owing by the Applicants to the Pension Plans. The Ontario Court of Appeal has confirmed that, in the context of Ontario legislation that is substantially similar to the *QSPPA* (the *Pension Benefits Act*, R.S.O. c. P.8), *all* of the contributions an employer owes a pension fund, including the special payments, are subject to the deemed trust provision.

Indalex (Re), at para. 101, Respondent CEP's BOA, Tab 2.

35. Likewise, the special payments which the Applicants seek to suspend in the amount of \$95,300 per month to the Bécancour Union Pension Plan and \$47,743 per month to the Silicium Union Pension Plan are payments that are to be held in trust for the beneficiaries of the Pension Plans. The Applicants thus have a fiduciary obligation to the beneficiaries of the pension funds to hold the funds in trust.
36. In addition, certain representatives of the Applicants owe fiduciary duties to the Pension Plans. There are three employer members of the pension committee for both of the Pension Plans for which the Respondent CEP's members are beneficiaries.

Simoneau Affidavit, para. 9, Respondent CEP's Motion Record.

37. The *QSPPA* sets out specific obligations for members of a pension committee. Section 150 of the *QSPPA* makes the members of the pension committee

trustees to the Pension Plan and s. 151 requires those members to act with reasonable prudence, diligence, and care. Sections 153, 158 and 159 explicitly require pension administrators to avoid conflicts of interest, and where one exists, to report such to the pension committee in writing.

38. As Directors and Officers of the Applicants, the membership of the individuals on the pension committee should raise some concern for this Court with respect to the risk that their interests might conflict, particularly where the individuals stand to benefit from the super-priority charges being sought in this motion.
39. Aside from the conflict of interest provisions of the *QSSPA*, the *CCAA* jurisprudence is specifically aware of the conflicting interests that may motivate a corporation not to pay special payments to Pension Plans.

Indalex (Re), at paras. 129 – 132, Respondent CEP's BOA, Tab 2.

40. As argued in the previous section, the Respondent CEP takes the position that the Applicants' request to suspend the special payments to the Bécancour Union Pension Plan and the Québec Silicon Union Pension Plan reveals that its interests are in conflict.
41. There is no evidence that the Applicants have approached or consulted with the Respondent CEP or any of the beneficiaries under the Pension Plans to discuss suspending special payments or alternatives to address the pension deficit. Nor has the Applicant offered any evidence that it is taking measures to act in accordance with its fiduciary obligations to the beneficiaries of the Pension Plans.

Simoneau Affidavit, para. 7, Respondent CEP's Motion Record.

42. Even if the Court does not find a conflict of interest, the Respondent CEP takes the position that the Court ought not exercise its discretion to suspend the Applicants' obligation to make special payments to Pension Plans. The simple statement of the Ontario Court of Appeal summarizes the Respondent CEP's position: "[t]he **CCAA was not designed to allow a company to avoid its pension obligations.**"

Indalex (Re), at para. 199, Respondent CEP's BOA, Tab 2.

43. In *United Air Lines*, the employer brought a motion for an order authorizing it to cease funding pension plans. The Court held that, while parties may find it worthwhile to consent to a deferral of pension funding, such a deferral is not a "given right" of a company. Rather, the company must present evidence to convince the Court that it is unable to make such payments in light of the principles of fairness and equity.

United Air Lines, Inc. (Re), para. 5 & 8, Respondent CEP's BOA, Tab 1.

44. Fairness and equity demands that suspending special payments to pension plans ought only to be ordered where there is clear and cogent evidence that the suspension of the special payments will benefit the beneficiaries under the Pension Plans. In the present matter, given that the Applicants have failed to present a restructuring plan, it would be unfair and inequitable for this Honourable Court to grant an order suspending special payments.
45. In exercising its discretion to authorize the suspension of special payments to a pension plan, the Court will also canvass the possibility of the affected parties

negotiating alternative ways of dealing with the special payments with the pensioners, and whether such a negotiation can occur on an even playing field:

[I]t is desirable to ensure that there is an opportunity for such negotiation in CCAA circumstances, as an important means of achieving the most satisfactory arrangements for all concerned to the extent possible.

Collins & Aikman Automotive Canada Inc. (Re), [2007] O.J. No. 4186 at paras. 110 (Sup. Ct. J.) Respondent CEP's BOA, Tab 4.

United Airlines (Re) at para. 5, Respondent CEP's BOA, Tab 1.

46. The Applicants have not pointed to a particular reason, other than generalized liquidity problems, as to why it is unable to make special payments to its Pension Plans. There is no reasonable financing plan in place according to which the Court can find that the withholding of such payments is a measure necessary to preserve the business of the company.
47. The cases cited by the Applicants in support of its position can be distinguished on their facts. In *Fraser Papers*, Pepall J. exercised her discretion to grant the requested order only after carefully balancing the evidence before the Court. In that case, the applicants had requested that special payments to the pension funds be suspended due to the demands of the DIP financing, the attainment of which was essential to restructure the company and allow the company to avoid bankruptcy. Moreover, at the time of the request, the company had presented a restructuring plan to its creditors. Justice Pepall reasoned as follows:

I must then consider whether having concluded that I have jurisdiction, I should exercise it as requested by the

Applicants. Frankly, I do not consider either of the alternatives to be particularly appealing. **On the one hand, one does not wish to in any way jeopardize pensions.** On the other hand, the Applicants have no ability to pay the special payments at this time. Their ability to operate is wholly dependent on the provision of DIP financing. Furthermore, payment of the special payments constitutes a DIP loan event of default. A bankruptcy would not produce a better result for the employees with respect to the special payments in that they do not receive priority in bankruptcy. [...] Failure to stay the obligation to pay the special payments would jeopardize the business of the Applicants and their ability to restructure. The opportunity to restructure is for the benefit of all stakeholders including the employees. That opportunity should be maintained. (emphasis added)

Fraser Papers Inc. (Re), [2009] O.J. No. 3188 (Sup. Ct. J) at para. 21, Respondent CEP's BOA, Tab 3.

48. Similar facts with respect to DIP financing were present in *Collins & Aikman*.

Collins & Aikman at para. 91-93, Respondent CEP's BOA, Tab 4.

49. In *AbitibiBowater* and *White Birch Paper*, the Court relied on direct and specific actuarial testimony that the continuation of the special payments would put the survival of the business in jeopardy. No such evidence is present in this matter.

AbitibiBowater Inc. (Re), (2009) 57 C.B.R. (5th) 285 (Q.S.C.) at paras. 40-50, Respondent CEP's Motion Record, Tab 5.

White Birch Paper Holding Co. (Re), 2010 CarswellQue 1780 (S.C.) at paras. 91-2, Respondent CEP's Motion Record, Tab 6.

50. The Court must not merely rely on the idea that special payments are pre-filing obligations, and must probe into the facts regarding the request for a suspension.

White Birch Paper at para. 97, Respondent CEP's Motion Record, Tab 6.

51. Absent compelling reasons to suspend payments that are not only statutorily and contractually required but also the subject of a fiduciary duty to the beneficiaries of the Pension Plans, it is the Respondent CEP's position that the Court should not authorize the Applicants to suspend the special payments. Nor should the Applicants be relieved of liability under the *QSPPA* for a failure to make such payments.

C. THE KERP SHOULD NOT BE APPROVED

52. With respect to the Applicants' request for a KERP to be approved, the Respondent CEP submits that, although this Honourable Court has the power to approve a KERP, the Court must only do so where it is convinced that it is necessary in the circumstances to make such an order.
53. The Respondent CEP respectfully submits that Applicants have not offered the evidence required to justify such an extraordinary order.
54. When considering whether to order a KERP, the Court considers evidence on the necessity of the KERP as it applies to the retention of specific employees, whether and which persons/parties have approved of the selected KERP participants and the amounts of their bonuses. The Court will then determine the reasonableness of the KERP.

Arclin Canada Ltd. (Re), [2009] O.J. No. 4260 at paras. 2-5 (Sup. Ct. J.)
Respondent CEP's BOA, Tab. 7.

55. In *Arclin*, there was evidence before the Court that the two named participants of the KERP had both been approached with new job opportunities, that the

individuals would be hard to replace, and that they had taken on significant responsibility in the *CCAA* proceedings.

Arclin at para. 7, Respondent CEP's BOA, Tab 7.

56. The Applicant has not presented any meaningful evidence on the propriety of the proposed KERP arrangement. The Applicants have not named the KERP recipients, provided any specific information regarding their involvement with the *CCAA* proceeding, addressed their replaceability, or set out the individual bonuses. Moreover, there is no evidence that the individuals subject to the KERP have been approached by prospective employers or are considering new job opportunities. In the circumstances, it would be unfair and inequitable for the Court to approve the KERP requested by the applicant.

D. THE CONFIDENTIAL SUPPLEMENT SHOULD NOT BE SEALED

57. The Respondent CEP submits that, in the event that the KERP is approved, the KERP should not be sealed. The Court's careful analysis in the approval of the KERP and its reluctance to keep the KERP confidential in the absence of convincing evidence in *Arclin* should inform this Honourable Court's analysis in this proceeding. Indeed, the Court in *Arclin* stated:

Key employee retention programs are controversial. The *CCAA* process should be open and transparent to the greatest extent possible.

Arclin at para. 17, Respondent CEP's BOA, Tab 7.

58. In *Arclin*, the KERP was sealed for only a seven-day period due to the fact that the Court was not convinced that prejudice would occur if the KERP was not sealed.

Arclin at para. 18, Respondent CEP's BOA, Tab 7.

59. Where a party wishes a document be kept confidential in a *CCAA* proceeding, the onus is on that party to give reasons for such a request.

White Birch Paper at paras. 80 & 84, Respondent CEP's BOA, Tab 6.

60. Accordingly, the Respondent CEP submits that, in the event that the KERP is approved by this Honourable Court, the KERP should not be sealed and rather should be treated in the same manner as other *CCAA* documents through the Monitor. In the alternative, the Respondent CEP submits that a copy of the KERP should be provided to the Respondent CEP.

PART V – ORDER REQUESTED

61. The Respondent CEP requests an Order dismissing the relief sought by the Applicants.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of January, 2012.



Denis W. Ellickson

Lawyers for the Respondent,
Communications, Energy and Paperworkers
Union of Canada

SCHEDULE "A"
LIST OF AUTHORITIES

1. *United Air Lines, Inc. (Re)*, [2005] O.J. No. 1044 (Sup. Ct. J.)
2. *Indalex Limited (Re)*, 2011 ONCA 265, [2011] O.J. No. 1621
3. *Fraser Papers Inc. (Re)*, [2009] O.J. No. 3188 (Sup. Ct. J.)
4. *Collins & Aikman Automotive Canada Inc. (Re)*, [2007] O.J. No. 4186 (Sup. Ct. J.)
5. *AbitibiBowater Inc. (Re)*, [2009] S 7 C.B.R. (5th) 285 (Q.S.C.)
6. *White Birch Paper Holding Co. (Re)*, 2010 CarswellQue 1780 (S.C.)
7. *Arclin Canada Ltd. (Re)*, [2009] O.J. No. 4260

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. *Québec Supplemental Pension Plans Act, R.S.Q., c. R-15.1*

49 Until contributions and accrued interest are paid into the pension fund or to the insurer, they are deemed to be held in trust by the employer, whether or not the latter has kept them separate from his property.

52 Unless they have exercised the prudence, diligence and care that a reasonable person would have exercised in comparable circumstances or unless, in the same circumstances they were unaware of the default, the directors of a legal person which, as an employer, is a party to a pension plan, shall be solidarily liable for contributions which become due and remain unpaid during their term in office, with interest, up to a contributory period of six months.

In the case of a multi-employer pension plan that is not considered as such pursuant to section 11, the directors of a subsidiary are liable for the contributions only if the parent company fails to pay the contributions referred to in the first paragraph. Where the directors of the subsidiary also fail to pay the contributions for which they are liable under this paragraph, the directors of the parent company become liable for the contributions.

The six-month limit set out in the first paragraph does not apply where the pension fund is managed by the employer.

150 Except in the case of an insured plan, the pension committee shall act in the capacity of a trustee.

150.1 The pension committee may, at any time, submit its recommendations to the person or body who may amend the pension plan as to any eventual amendments to the pension plan.

153 The person or body exercising delegated powers shall assume the same obligations and incur the same liability as those the pension committee or one of its members would have had to assume or have incurred if the powers had been exercised by the pension committee. The same applies to service providers and representatives who exercise a discretionary power belonging to the committee.

158 No member of a pension committee may exercise his powers in his own interest or in the interest of a third person nor may he place himself in a situation of conflict between his personal interest and the duties of his office.

If the committee member is himself a member or a beneficiary of the plan, he shall exercise his powers in the common interest, considering his own interest to be the same as that of the other members or beneficiaries of the plan.

159 Every member of a pension committee shall, without delay, notify the committee in writing of any interest he has in an enterprise that is susceptible of causing his personal interest to conflict with the duties of his office, and of any rights, other than those arising from the plan, he may have in or may invoke against the pension fund, specifying, where such is the case, the nature and value of the rights.

The pension committee shall keep at its office a register in which every interest or right notified to it pursuant to the first paragraph shall be recorded. Any interested person may examine the register without charge during usual working hours, and the limit set out in section 115 does not apply to such an examination.

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

11.02 (3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

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Court File No. CV-12-9539-00CL

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PROCEEDING COMMENCED AT
TORONTO

**FACTUM OF THE COMMUNICATIONS, ENERGY
AND PAPERWORKERS UNION OF CANADA**

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