COURT FILE NUMBER	1601-01675
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY

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 ARRANGEMENT OF ARGENT ENERGY TRUST, ARGENT ENERGY (CANADA) HOLDINGS INC. and ARGENT ENERGY (US) HOLDINGS INC.

DOCUMENT	**BENCH BRIEF OF THE APPLICANTS**
HEARING	**TUESDAY, MARCH 8, 2016**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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I INTRODUCTION

1. This Bench Brief is submitted on behalf of Argent Energy Trust (the "Trust"), Argent Energy (Canada) Holdings Inc. ("Argent Canada") and Argent Energy (US) Holdings Inc. ("Argent US", and together with the Trust and Argent Canada, the "Applicants" or "Argent") in support of an application extending the stay of proceedings granted in the Initial Order dated February 17, 2016 (the "Initial Order") to May 17, 2016.

2. The Applicants' application will be supported by, among other things, the Affidavit No. 2 of Sean Bovingdon, President and Chief Financial Officer of the Applicants, sworn on February 29, 2016 (the "Bovingdon Affidavit No. 2") and the Affidavit of Harrison Williams, Chief Executive Officer of The Oil & Gas Asset Clearinghouse, LLC ("OGAC"), sworn on February 29, 2016 (the "Williams Affidavit"). Argent also refers to and relies upon the Affidavit of Mr. Bovingdon sworn on February 16, 2016 in support of the application for the Initial Order (the "Bovingdon Affidavit No. 1"). Capitalized terms not defined herein have the meanings given to them in the Bovingdon Affidavit No. 2.

3. To date, Argent has not received any requests for cross-examination of Mr. Bovingdon or Mr. Williams on any of their Affidavits sworn in these proceedings.

4. The purpose of this Bench Brief is to outline for the Court certain legislation and jurisprudence that is relevant to the relief being sought in the Applicants' application on March 8, 2016.

5. In addition, Argent understands that an ad hoc committee of unsecured subordinated debentureholders (the "Ad Hoc Committee") intends to address its opposition to the granting of the Initial Order at the hearing of this Application. Argent has addressed its understanding of the Ad Hoc Committee's concerns, as reflected in communications received from counsel for the Ad Hoc Committee and the Brief of Argument of the Ad Hoc Committee received earlier today, in this Brief.

6. The Applicants' application and supporting materials have been served upon the service list in this proceeding. Argent also refers to and relies upon its Bench Brief filed on February 17, 2016 in support of the Application for the Initial Order.

II EXTENSION OF STAY OF PROCEEDINGS

CCAA Authority for an Extension of the Stay

7. The current stay of proceedings expires on March 18, 2016. The Applicants are seeking an extension of the stay period up to and including May 17, 2016.

8. Section 11.02(2) of the *Companies' Creditors Arrangement Act* (the "CCAA") gives the court discretion to grant or extend a stay of proceedings:

> (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
>
> (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph 1(a);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

- *CCAA*, s. 11.02(2) **[TAB 1]**

9. Pursuant to section 11.02(3) of the CCAA, to exercise its discretion to extend the stay of proceedings, the Court must be satisfied that: (i) circumstances exist that make the order appropriate, and (ii) the applicant has acted, and is acting, in good faith and with due diligence during the CCAA proceedings.

- *CCAA*, s. 11.02(3) **[TAB 1]**

Actions in Good Faith and with Due Diligence since the granting of the Initial Order

10. Since the date of the Initial Order (and earlier), the Applicants have acted, and continue to act, in good faith and with due diligence in all respects, including in their pursuit of the Sale Solicitation Process and in dealing with all of their stakeholders, including creditors, employees and suppliers.

11. Since the date of the Initial Order, the Applicants have, among other things:

(a) cooperated with the Monitor to facilitate its monitoring of the Applicants' business and operations;

(b) communicated, in some cases very extensively, with various stakeholder groups and/or their advisors, including the Syndicate, the Ad Hoc Committee, critical suppliers, trade creditors, employees, contractors and others;

(c) worked with the Monitor and OGAC to pursue the Sale Solicitation Process;

(d) liaised with U.S. counsel and attended in Court in the U.S. regarding the Chapter 15 proceedings under the U.S. Bankruptcy Code that were commenced in respect of Argent Canada and Argent US; and

(e) continued to operate and manage Argent's business in the ordinary course, subject to the terms of the Initial Order.

Bovingdon Affidavit No. 2, paras. 6, 12-13, 15-16.

The Sale Solicitation Process

12. The requested extension will allow the Applicants to continue the Sale Solicitation Process that was approved by this Honourable Court in the Initial Order. The Sale Solicitation Process is a comprehensive and transparent sale process through coordinated insolvency proceedings in Canada and the United States that is intended to yield the best offer(s) available in these difficult circumstances. The Sale Solicitation Process is the best available option for creditors to maximize their recoveries.

Sale Solicitation Process, attached as Schedule "A" to the Initial Order filed February 17, 2016.

13. In response to concerns raised by the Ad Hoc Committee, the Williams Affidavit sets out in detail the significant experience and expertise of OGAC, and of Mr. Williams himself, in relation to OGAC's agreement to assist Argent US in soliciting and evaluating offers for a sale of the shares of Argent US (which are held by Argent Canada) or of some or all of Argent US' oil and gas properties. Mr. Williams has over 25 years' experience in the

oil and gas acquisition and divestiture business, having been directly involved in hundreds of transactions valued at billions of dollars, in every major basin in the U.S. OGAC has handled negotiated sales of oil and gas properties of up to and over U.S. $1 Billion, with clientele ranging from small independent companies to Exxon Mobil, and provides marketing and advisory services supported by a high level of reserve engineering, geoscience and land expertise. The evidence is clear that OGAC and Mr. Williams have a wealth of skills, experience, and expertise in negotiated transaction, marketing and advisory services in relation to oil and gas properties, which will allow Argent to maximize its value through the Sale Solicitation Process.

Williams Affidavit, paras. 2, 4-7 and Exhibits 1-4.

Bovingdon Affidavit No. 1, Exhibit "21".

14. OGAC worked with the Monitor and Argent, in consultation with the Syndicate, and all of their respective advisors to specifically tailor and develop a sale process (including timelines and milestones) for Argent's asset base, and to take advantage of current market conditions, including a present lack of assets on the market of comparable quality to those of Argent. The Sale Solicitation Process is designed to maximize and obtain the highest and best offer for Argent's assets.

Williams Affidavit, paras. 8, 9 and 15.

15. OGAC, Argent and the Monitor took particular care to develop a sale process that best marketed Argent's assets, using a negotiated bid process along the lines of a typical asset sale that would attract more participants and offers, rather than choosing to market the assets using a sale method for oil and gas assets that has typically been used in recent U.S. bankruptcy proceedings, which have led to disappointing results. A number of participants in Argent's Sale Solicitation Process have advised Mr. Williams that they would not be participating, had this been a typical U.S. bankruptcy sale process.

Williams Affidavit, para. 16.

16. Further, the Sale Solicitation Process is well underway and there has been strong interest to date. The marketing process began on February 11, 2016; bids are not due until March 17, 2016.

Williams Affidavit, paras. 16

17. OGAC has made significant progress in marketing Argent US and its assets:

(a) On February 10 and 11, 2016, OGAC presented a booth, featuring a poster of a marketing flyer regarding Argent US, at the North American Prospect Expo ("NAPE"), a premier industry event attended by over 11,000 energy industry professionals. Copies of the marketing flyer were distributed and OGAC personnel discussed argent with potential interested parties;

(b) On February 17, 2016, the marketing flyer regarding Argent US was distributed by email to over 12,000 potentially interested parties in OGAC's database;

(c) Notices of the Sale Solicitation Process have been published in the Daily Oil Bulletin and in the Houston Chronicle on February 23, 2016 and February 29, 2016, respectively;

(d) A robust and well-organized data set to support the marketing of the assets has been reviewed and evaluated by OGAC and made available to participants in the Virtual Data Room (the "VDR") as of February 17, 2016;

(e) As at February 26, 2016:

(i) more than 80 potential bidders had signed confidentiality agreements so as to allow them to participate in the Sale Solicitation Process;

(ii) more than 70 potential bidders had visited the VDR;

(iii) 11 potential bidders had received or requested data room presentations, at which OGAC engineers and geologists take the potential bidder through the data to explain the assets and the potential value; and

(f) The strong response to the Sale Solicitation Process to date is, based on Mr. Williams' experience, within the top ten percent of the deals that he has been involved with in his 25 years in the business, in terms of participant activity at this stage of the process. Bids are not due until March 17, 2016.

Williams Affidavit, paras. 5, 10-15 and Exhibits 5-7.

18. The usual sale process in the U.S. (outside of bankruptcy or insolvency) for bidders to conduct their due diligence and put forth bids is approximately four weeks. As such, based on his extensive experience and expertise in the oil and gas asset and divestiture industry, Mr. Williams remains confident that the Sale Solicitation Process, including the timelines and the bid deadline of March 17, 2016 set out therein, is reasonable and appropriate, and will allow Argent to maximize value through a sale of its shares or assets.

Williams Affidavit para. 17.

19. The Sale Solicitation Process should be maintained on schedule and should not be disrupted. Disruption of the Sale Solicitation Process at this stage would likely have a significant chilling effect on potential buyers.

Williams Affidavit para. 17.

A Stay Extension is Appropriate in the Circumstances

20. The requested extension to the stay of proceedings is required to allow Argent, with the assistance of OGAC and the Monitor, to continue the Sale Solicitation Process.

21. The requested extension is appropriate in the circumstances because May 17, 2016 is the deadline by which a purchase agreement must be approved by both this Honourable Court and the US Court, so Argent will be required to return to this Honourable Court prior to May 17, 2016 in any event.

22. Through the Sale Solicitation Process, the extension of the stay of proceedings will have the effect of maximizing the value of Argent. Further, the extension will provide stability to the Sale Solicitation Process and will instill confidence in the participants in that

process. Alternatively, if the extension of the stay is not granted, an immediate cessation of operations and liquidation of the assets would likely result in substantial diminution in realization value for creditors, and would cause significant difficulties for Argent's partners, employees and suppliers. A reasonable unsecured creditor would surely prefer the prospect of recovery on its debt (enhanced by the extension of the stay of proceeding and the completion of the Sale Solicitation Process), as compared to the immediate liquidation that would result if the stay of proceedings were not extended.

23. The Monitor has assisted the Applicants in preparing cash flow projections which indicate that, subject to the relief requested herein being granted, with the benefit of the Interim Financing provided by the Syndicate, the Applicants will have sufficient liquidity to continue funding their operations and the costs associated with the ongoing proceedings for the duration of the requested extension of the stay of proceedings.

24. The Syndicate, which is Argent's only secured creditor, supports the extension of the stay of proceedings, and no creditor will be prejudiced in any material way by the extension.

25. Further, the Monitor supports this Application to extend the stay of proceedings.

III COMMUNICATIONS WITH THE AD HOC COMMITTEE

26. The Bovingdon Affidavit No. 2 sets out the communications between, and includes copies of all correspondence between, Argent and the Ad Hoc Committee through February 29, 2016 regarding complaints raised by the Ad Hoc Committee. Further, Argent has now received a Brief, filed today on behalf on the Ad Hoc Committee. Argent understands the complaints of the Ad Hoc Committee to be as follows:

(a) the Ad Hoc Committee was not served with advance notice of the application for the Initial Order;

(b) the Ad Hoc Committee does not believe that the Sale Solicitation Process protects and balances the interests of stakeholders and should not have been granted as part of the Initial Order;

(c) the proceedings pursuant to Chapter 15 of the U.S. Bankruptcy Code are not the appropriate forum;

(d) the fees of the Ad Hoc Committee's advisors should be paid;

(e) the KERP and KEIP should not have been approved in the Initial Order;

(f) Argent's objective is to provide a "quick exit for secured lenders at the expense of unsecured creditors"; and

(g) a Chief Restructuring Officer ("CRO") should be appointed.

27. Each of these complaints are addressed in the Bovingdon Affidavit No. 2 and/or herein Argent notes that the Ad Hoc Committee has not filed an application, or any evidence, seeking a CRO or inclusion of its fees as a charge against Argent's assets. Nevertheless, Argent addresses these points herein.

Service of the Ad Hoc Committee

28. There is no requirement under the CCAA for a CCAA applicant to serve notice of the application for the initial order upon unsecured creditors. In the present case, as is often the case at the outset of CCAA proceedings, where the Trust is a reporting issuer and was publicly traded as at the date of the application for the Initial Order, Argent had serious disclosure concerns about serving unsecured creditors, including the Ad Hoc Committee members and their counsel (none of whom where subject to a non-disclosure agreement with Argent) with notice of the application.

29. Despite there being no requirement to do so, following the Trust's issuance of a press release announcing the CCAA filing prior to markets opening on February 17, 2016, counsel for Argent did, as a courtesy, contact counsel for the Ad Hoc Committee the morning of the application for the Initial Order, to advise of the same and to bring

Argent's press release to his attention. Argent's counsel addressed this in submissions to this Honourable Court on February 17, 2016.[1]

Bovingdon Affidavit No. 2, para. 11 and Exhibits "2", "4" and "5" (page 15 lines 6-22 of Exhibit "5").

30. Canadian courts have interpreted section 11 of the CCAA as specifically authorizing that initial orders may be made "without notice". While the approach in the 1990s was to provide notice to all interested parties, the courts have recognized, more recently, that an order dispensing with service of notice on parties, other than parties named in the initial order, is within the wide discretion of the court under the CCAA. In *Algoma Steel Inc., Re,* the Ontario Court of Appeal commented:

> Initial orders, made on a without notice basis, are specifically authorized by s. 11(1) of the CCAA. Proceedings under the CCAA are often urgent, complex and dynamic. Farley J. was faced with complex facts and a difficult decision potentially implicating the closure of one of the largest companies in Ontario. Moreover, he had to make his decision in a very timely fashion. In these circumstances, he recognized that his initial order might not be acceptable to all interested parties, including some of Algoma's creditors. That is why he included a comeback clause in his order and specifically invited parties to resort to it in his endorsement.

- *Algoma Steel Inc., Re,* 2001 CarswellOnt 1742, (2001), 25 C.B.R. (4th) 194 (C.A.) at para. 7 **[TAB 2]**

31. The Alberta CCAA initial order template does not include a "comeback clause"; however, Alberta practice allows an applicant to challenge the granting of an initial order at a subsequent application to extend a stay of proceedings. In fact, Argent's counsel has confirmed to the Ad Hoc Committee's counsel that the application for the stay extension may be treated as a "true comeback hearing". To date, Argent has not received notice of any application by the Ad Hoc Committee.

32. In *Indalex Ltd., Re,* the Supreme Court of Canada has recognized that it may be appropriate or even necessary to seek an initial order on an *ex parte* basis:

[1] Counsel for Argent advised the Court that they had contacted counsel for the Ad Hoc Committee by telephone; in fact, the contact was by email correspondence, which counsel for the Ad Hoc Committee had responded to by 7:30 a.m. MST on the morning of the application.

> This may be an appropriate – even necessary – step in order to prevent "creditors from moving to realize on their claims, essentially a 'stampede to the assets' once creditors learn of the debtor's financial distress": J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 55 ("*Rescue!*"); see also *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194 (Ont. C.A.), at para. 7.

- *Indalex Ltd., Re,* 2013 SCC 6 at para. 208 **[TAB 3]**

33. More recently, in *Victorian Order of Nurses for Canada, Re*, the Ontario Supreme Court accepted that prior notice to all creditors, or potential creditors, was "neither feasible nor practical in the circumstances."

- *Victorian Order of Nurses for Canada, Re*, 2015 ONSC 7371 at para. 12 **[TAB 4]**

34. The CCAA requires service of secured, but not unsecured, creditors where an applicant seeks an Order approving an administration charge, an interim financing charge, or a directors' charge. Argent served its secured creditor, the Syndicate, with notice of the application for the Initial Order.

- *CCAA*, s. 11.52, 11.2, 11.51 **[TAB 1]**

35. The Alberta CCAA initial order template contemplates service upon secured, but not unsecured, creditors.

- Alberta CCAA Initial Order Template **[TAB 5]**

36. Finally, since the granting of the Initial Order, Argent has:

(a) confirmed that the stay extension application will be a "true comeback hearing" (which alone should render any complaint about prior service moot);

(b) repeatedly invited discussions with the Ad Hoc Committee;

(c) corresponded (through its counsel) with the Ad Hoc Committee numerous times in an attempt to address the Ad Hoc Committee's concerns;

(d) responded to information and document requests (where relevant and appropriate) of the Ad Hoc Committee; and

(e) delayed the application for recognition of the Initial Order by the U.S. Bankruptcy Court to allow the Ad Hoc Committee time to discuss its concerns.

While Argent has reiterated its commitment to discussing and seeking to address the concerns of the Ad Hoc Committee, the Ad Hoc Committee has not put forward any specific proposals to alter this process that provide any certainty that Argent's urgent liquidity situation will be addressed.

Bovingdon Affidavit No. 2, paras. 12-16 and Exhibits "6" to "20".

The Sale Solicitation Process will maximize value for all interested parties

37. The Sale Solicitation Process is addressed in the Williams Affidavit, and above. Argent, OGAC and Mr. Williams are confident that the Sale Solicitation Process, including the timelines therein, is reasonable and appropriate and will maximize the value of Argent US for the benefit of all stakeholders. As stated in the Bovingdon Affidavits, a sale process within the contemplated insolvency proceedings was a condition of the Syndicate providing Interim Financing, which was urgently needed in order for Argent to continue its business and operations. There were no other options available to Argent that allowed that, and Argent had investigated a significant number of other possible options, beginning in October 2014.

Williams Affidavit.

Bovingdon Affidavit No. 1, paras. 82-90, 94-106.

Bovingdon Affidavit No. 2, paras. 23-25.

38. The Sale Solicitation Process is already approved and well underway. Given the impressive progress of the Sale Solicitation Process to date (as described above and in the Williams Affidavit), there is no longer any need to have a theoretical debate as to whether this particular process will generate interest in Argent US or its assets. We now know that the process is not just working, but that it is working exceedingly well.

39. In addition, any sale that ultimately results from the Sale Solicitation Process will be subject to approval of this Honourable Court pursuant to the Initial Order and section 36 of the CCAA. Accordingly, if the Ad Hoc Committee has an issue with the sale at that time, it will be free then to advance any arguments with respect to the sale process or otherwise. However, at this time, Argent submits it would be destructive to value, and not commercially reasonable, to disrupt what is by all accounts an extremely successful sale process.

40. Canadian courts have approved sale processes as part of initial orders granted in other CCAA proceedings, without notice to unsecured creditors of the applicants (see Sino-Forest Corporation, Re). Further, while the CCAA requires that an application for court authorization of a sale or disposition of assets be on notice to secured creditors, the CCAA does not require that an application for court approval of a sale process be made on notice to any creditors, secured or unsecured. In the present case, Argent served its application for the Initial Order, including approval of the Sale Solicitation Process, upon the Syndicate, being Argent's sole secured creditor, and the Syndicate supported the application.

- *CCAA*, s. 36 **[TAB 1]**
- Endorsement of Mr. Justice Morawetz dated April 2, 2012, *Sino-Forest Corporation (Re)*, 2012 ONSC 2063 **[TAB 6]**

Proceedings Pursuant to Chapter 15 of the U.S. Bankruptcy Code

41. The U.S. Bankruptcy Court for the Southern District of Texas, Corpus Christi Division (the "U.S. Bankruptcy Court") granted an Order for interim recognition of part, but not all, of the Initial Order, on February 22, 2016.

Bovingdon Affidavit No. 2, para. 17, Exhibit "22".

42. With respect to the complaint of the Ad Hoc Committee that the Chapter 15 Proceedings are not the appropriate forum, Argent notes that the Subordinated Debentureholders are not creditors of either Argent US or Argent Canada, the debtor companies that are subject to the Chapter 15 Proceedings. The Subordinated Debentureholders are creditors of the

Trust, only, and the Trust is not a party to the Chapter 15 Proceedings. At best, the Subordinate Debentureholders are a creditor of a creditor of an applicant in the Chapter 15 Proceedings.

43. As such, Argent respectfully submits that to the extent that the Ad Hoc Committee has standing in the Chapter 15 Proceedings (which Argent denies), this issue is properly within the jurisdiction of the U.S. Bankruptcy Court.

44. The Ad Hoc Committee has filed an Objection to the Chapter 15 Proceedings, which will be addressed at the application for final recognition by the U.S. Bankruptcy Court on March 9 and 10, 2016.

Bovingdon Affidavit No. 2, para. 17, Exhibit "21".

45. The U.S. Bankruptcy Court is hearing a motion today, brought by Argent US and Argent Canada, to quash certain discovery requests made by the Ad Hoc Committee. The Ad Hoc Committee has the right to cross-examine Mr. Bovingdon on his Affidavit in Canada; it has not asked to do so.

46. The Ad Hoc Committee has suggested that certain of the relief granted in the Initial Order, including the approval of the Sale Solicitation Process, is somehow premature because it was granted prior to the recognition hearing in the U.S., and because the majority of Argent's assets and employees are in the U.S. However, the Ad Hoc Committee seems to misunderstand the purpose and process of a recognition proceeding. By definition, the relief must first be granted in the primary proceeding (i.e. Canada) before it can be recognized in the recognition proceeding (i.e. the U.S.).

47. In addition to these submissions, Argent refers to and relies upon its Brief filed February 17, 2016 in support of the Application for the Initial Order, along with the Bovingdon Affidavit No. 1, in support of its submissions that each of the Applicants meets the test to qualify for protection under the CCAA. This Honourable Court is not (and should not) be asked to make any determinations as to whether the CCAA proceedings should be

recognized in the U.S. under Chapter 15. That is a question for the U.S. Bankruptcy Court.

Payment of the fees of the Ad Hoc Committee's Advisors

48. The Ad Hoc Committee is requesting payment by Argent of the fees and expenses of the Ad Hoc Committee's legal advisors, and a corresponding charge on Argent's assets.

49. The charge sought can only be ordered if the test set out in s. 11.52(c) of the CCAA is satisfied. Section 11.52 states:

> **11.52** (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) **any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.**
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company. [emphasis added]

- *CCAA*, s. 11.52 **[TAB 1]**

50. The Ad Hoc Committee has tendered literally no evidence capable of satisfying the specific factual requirement of s. 11.52(c). There is no evidence that the requested charge "is necessary for the Ad Hoc Committee's effective participation in these proceedings." In fact, the Ad Hoc Committee is made up of sophisticated and presumably well-funded investors. The Ad Hoc Committee has been actively participating in this proceeding and in the Chapter 15 Proceeding. As a result, its request for a charge must be dismissed.

51. Although Argent acknowledges that charges have been granted for the fees of noteholder committees in other cases, Argent submits that it is not appropriate in this case. As a preliminary matter, this proceeding is distinguishable from the cases cited by the Ad Hoc Committee as in this case there is no evidence that the Subordinated Debentures are the fulcrum creditor (and if fact there is ample evidence to the contrary), and this is not a case where the debtor has reached an agreement with an hoc committee of noteholders to effect a consensual transaction. To date, the Ad Hoc Committee has offered nothing constructive by way of proposals or suggestions that will allow Argent to address its urgent liquidity crisis and continue its business and operations.

52. The Ad Hoc Committee states, in its Brief, that it wants "a fair and reasonable process in which they can participate meaningfully," yet to date, they have made no effort to do so or to contribute any constructive proposal to this proceeding.

53. In addition, the Ad Hoc Committee is made up of Subordinated Debentures that are contractually subordinated to, among other things, the Syndicate and all ordinary trade debt of the Trust. In addition, the Subordinated Debentures are structurally subordinated to all debts of Argent US. Accordingly, the Subordinated Debentures cannot receive any recovery until the Syndicate and all other creditors are paid in full. It would therefore be an absurd result if Argent (and by extension its creditors, who are likely not to be paid in full) had to fund two law firms in advancing their clients' subordinated claims. The legal fees spent in advancing these subordinated claims cannot rank higher than the claims themselves.

54. In the *Nelson Education Ltd.* case cited by the Ad Hoc Committee in support of its submissions that its fees should be paid, the decision was clearly fact specific. In that case, the second lien lenders were contractually entitled to receive payments of professional fees. That is not the case for the Ad Hoc Committee.

- *Nelson Education Ltd.*, 2015 ONSC 3580 at para 44.

[TAB 13, Brief of the Ad Hoc Committee filed March 3, 2016]

55. Lastly, Argent previously agreed (subject to a termination right) to pay the fees and expenses of the Ad Hoc Committee's Canadian counsel with respect to a possible

consensual transaction when different market and other circumstances existed. That is consistent with the foregoing and the cases cited by the Ad Hoc Committee – debtors will sometimes agree to pay the fees and expenses of a creditor group where the two parties are negotiating or effecting a consensual deal. The fact that Argent previously agreed to pay fees to the Ad Hoc Committee's counsel does not require it to do so in a completely different circumstance.

Approval of the KERP and KEIP in the Initial Order

56. Canadian Courts have approved key employee retention plans in applications for initial orders pursuant to the CCAA, where notice of the application has not been provided to unsecured creditors.

- *Grant Forest Products Inc., Re,* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) at paras. 1, 8-25.
  [TAB 11, Argent's Brief filed February 17, 2016]

57. Further, the British Columbia Supreme Court recently approved a key employee retention plan in the context of a CCAA proceeding in *Walter Energy Canada Holdings, Inc., Re.* Justice Fitzpatrick stated that the authority to approve a KERP (including without notice) is found in the courts' general statutory jurisdiction under section 11 of the CCAA to grant relief if appropriate. Section 11 states:

> 11. General power of court – Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Fitzpatrick J. also noted that KERPs have been approved in numerous insolvency proceedings, particularly where the retention of certain employees was deemed critical to a successful restructuring.

- *Walter Energy Canada Holdings, Inc., Re*, 2016 CarswellBC 158, 2016 BCSC 107 at paras. 56-58, 61 **[TAB 7]**
- *CCAA*, s. 11 **[TAB 1]**

58. In addition to these submissions, Argent refers to and relies upon its Brief filed February 17, 2016 in support of the Application for the Initial Order, along with the Bovingdon Affidavit No. 1, in support of its submissions that the KERP and KEIP, and the KERP and KEIP Charge, remain appropriate. As noted at the hearing of the application for the Initial Order, the KERP was not new; it had been approved by Argent in June of 2015, long before the commencement of the CCAA proceedings, and employees had remained with Argent since that time on the understanding that the KERP would become payable.

Bovingdon Affidavit No. 1, paras. 131-142.

Brief filed by Argent February 17, 2016, paras. 54-58.

These Proceedings are not a "Quick Exit"

59. The Ad Hoc Committee's suggestion that Argent is attempting to provide a "quick exit for secured lenders at the expense of unsecured creditors" is unsubstantiated and belied by the facts as set out in the Bovingdon Affidavit No. 1 and the Bovingdon Affidavit No. 2. Argent has been working diligently on restructuring efforts since October 2014. Argent is in default on its Credit Agreement with the Syndicate, and has no ability to repay the approximately US $51.9 Million owed to the Syndicate. In order to obtain Interim Financing that would allow Argent to continue to operate and carry on business, Argent sought the Initial Order, including approval of the Sale Solicitation Process as required as a condition of the Interim Financing, and engaged OGAC to run a robust sale process that was designed by Argent and OGAC, in consultation with the Monitor, to maximize Argent's value. If there is value in Argent for junior creditors, the Sale Solicitation Process is the best method in the circumstances to realize that value.

Bovingdon Affidavit No. 2, para. 28.

Bovingdon Affidavit No. 1, paras. 46-103.

There are No Grounds for a CRO

60. The Ad Hoc Committee's Brief requests the appointment of a CRO; however:

(a) no application has been filed seeking that relief;

(b) no evidence has been filed in support of that relief;

(c) no explanation has ever been given by the Ad Hoc Committee, in its Brief, as to why a CRO would be appropriate (and this is the first time that the Ad Hoc Committee has ever mentioned a request for a CRO in these proceedings); and

(d) no authority has been presented that supports the granting of a CRO.

As such, there is no application for, and no grounds to appoint a CRO in there proceedings.

III CONCLUSION AND RELIEF SOUGHT

61. Argent remains committed to discussing, and, where possible, resolving the concerns of its stakeholders. And notwithstanding that the Ad Hoc Committee says it is seeking 'a fair and reasonable process in which they can participate meaningfully', there have been no proposals from the Ad Hoc Committee that address, with any certainty, Argent's urgent liquidity and cash flow crises. Argent respectfully submits that in these circumstances, it is not enough for the Ad Hoc Committee to simply complain about the process without proposing an alternative process with the necessary funding (which for certainty the proposed Amended and Restated Initial Order does not accomplish because it wrongly assumes that the Interim Financing will continue to be available). Argent submits that the Initial Order granted remains just and reasonable.

62. Further, Argent submits that as set out in the Bovingdon Affidavit No. 1, the Bovingdon Affidavit No. 2, and the Williams Affidavit, (1) circumstances exist that make an order to extend the stay of proceedings granted in the Initial Order appropriate; and (2) Argent has acted, and is acting, in good faith and with due diligence during the CCAA proceedings.

63. As such, the Applicants respectfully seek an Order under the CCAA, substantially in the form as attached to the Stay Extension Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of March, 2016

BENNETT JONES LLP

Per: _____

Kelsey Meyer / Sean Zweig
Solicitors for the Applicants

Estimated Time for Argument: 45 minutes

TABLE OF AUTHORITIES

1. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, ss. 11, 11.02(2), 11.02(3), 11.2, 11.51, 11.52, 36.

2. *Algoma Steel Inc., Re,* 2001 CarswellOnt 1742, (2001), 25 C.B.R. (4th) 194 (C.A.).

3. *Indalex Ltd., Re,* 2013 SCC 6.

4. *Victorian Order of Nurses for Canada, Re*, 2015 ONSC 7371.

5. Alberta CCAA Initial Order Template.

6. Endorsement of Mr. Justice Morawetz dated April 2, 2012, *Sino-Forest Corporation (Re)*, 2012 ONSC 2063.

7. *Walter Energy Canada Holdings, Inc., Re*, 2016 CarswellBC 158, 2016 BCSC 107.

TAB 1

CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

R.S.C., 1985, c. C-36

L.R.C. (1985), ch. C-36

Current to February 3, 2016

Last amended on February 26, 2015

À jour au 3 février 2016

Dernière modification le 26 février 2015

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http://lois-laws.justice.gc.ca

General power of court

11 Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

...

Stays, etc. — other than initial application

11.02(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(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.

...

Interim financing

11.2 (1)On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having

regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 36, s. 65.

...

Security or charge relating to director's indemnification

11.51 (1)On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

2005, c. 47, s. 128; 2007, c. 36, s. 66.

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

2005, c. 47, s. 128; 2007, c. 36, s. 66.

...

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to

do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

2005, c. 47, s. 131; 2007, c. 36, s. 78.

TAB 2

2001 CarswellOnt 1742
Ontario Court of Appeal

Algoma Steel Inc., Re

2001 CarswellOnt 1742, [2001] O.J. No. 1943, 105 A.C.W.S. (3d) 585, 147 O.A.C. 291, 25 C.B.R. (4th) 194

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36 AND THE BUSINESS CORPORATIONS ACT, R.S.O. 1990, c. B.16; AND IN THE MATTER OF A PROPOSED PLAN OF ARRANGEMENT WITH RESPECT TO ALGOMA STEEL INC.; ALGOMA STEEL INC. (Applicant/Responding Party)

Osborne A.C.J.O., Doherty, MacPherson JJ.A.

Heard: May 18, 2001
Judgment: May 25, 2001
Docket: CA M27359

Proceedings: Refusing leave to appeal from 2001 CarswellOnt 1999, (April 23, 2001), Doc. 01-CL-4115 (Ont. S.C.J. [Commercial List]); refusing leave to appeal (April 23, 2001), Doc. 01-CL-4115 (Ont. S.C.J. [Commercial List])

Counsel: *John B. Laskin*, *David Outerbridge*, for Moving Party, First Mortgage Noteholders
Michael Barrack, *Geoff Hall*, *Sarit Batner*, for Responding Party, Algoma Steel Inc.
John T. Porter, *Alan Merskey*, *Mario Forte*, for DIP Lenders
Ken Rosenberg, *Lily Harmer*, *Marcus Knapp*, for United Steelworkers of America
James H. Grout, for Monitor
Andrew Hatnay, for Superintendent of Financial Services
Michael Weinczok, for Directors of Algoma Steel Inc.

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.d Effect of arrangement
XIX.3.d.i General principles

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — General

Creditors held $550-million mortgage on corporation — Corporation entered into arrangement with creditors under Companies' Creditors Arrangement Act — Corporation's ex parte motion for authorization to obtain additional financing was allowed — Order gave certain other charges priority over creditors' charges — Creditors brought application for leave to appeal — Application dismissed — Motion judge's order contained comeback clause that creditors were using in alternate proceedings — Proceedings were urgent, complex and dynamic and required immediate resolution — Appeals

under Act should be limited — Appeal would be premature — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Table of Authorities

Cases considered:

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) — followed

Statutes considered:

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

s. 11(1) — considered

s. 11(3) — referred to

s. 13 — pursuant to

APPLICATION for leave to appeal from judgment respecting mortgage arrangement, 2001 CarswellOnt 1999 (Ont. S.C.J. [Commercial List]).

Endorsement. ***Per curiam*:**

1 The First Mortgage Noteholders ("the Noteholders") seek leave to appeal, pursuant to s. 13 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("the *CCAA*"), from the order of Farley J. dated April 23, 2001 [2001 CarswellOnt 1999 (Ont. S.C.J. [Commercial List])]. The Noteholders are a consortium of about a dozen companies and groups which holds first mortgage notes totalling about $550 million issued by the respondent Algoma Steel Inc. ("Algoma").

2 Farley J.'s order was an initial order made pursuant to s. 11(3) of the *CCAA*, on a motion by Algoma. It was made without notice to the Noteholders. The essence of Farley J.'s order was an authorization to Algoma to obtain additional financing ("the DIP Financing") from its existing bank lenders during the 30 day stay period permitted by s. 11(3) of the *CCAA*. The purpose of the order was to respond, on an urgent and interim basis, to a serious negative cash flow crisis at Algoma. Indeed, without short-term financial assistance designed to serve as a base for restructuring Algoma's current indebtedness, Algoma might well have had to cease operations. The order also gave priorities (which the parties call superpriorities) to the DIP Financing charge and to certain Administration and Directors Charges over the Noteholders' existing security.

3 In his endorsement, Farley J. said, *inter alia*:

> Algoma qualifies as a corporation with the threshold debt re seeking relief under the CCAA.
>
> . . . . .
>
> The noteholders who are owed in excess of $1/2 billion were not represented today for the very simple reason that none of them were served. The reason for that as I understand it is that there is no set up at the present time of a Creditor's Committee or any equivalent. *I note that there is a comeback clause and I would particularly emphasize that if it is felt appropriate and needed, this clause should be used on a timely basis.*
>
> Order to issue as per my fiat.

[Emphasis added.]

4 The comeback clause in the underlined passage is reflected in paragraph 48 of Farley J.'s order:

> 48. THIS COURT ORDERS that any interested person may apply to this court to vary or rescind this order or seek other relief upon seven (7) days' notice to the Applicant, the Monitor and to any other party likely to be affected by the order sought or upon such other notice, if any, as this court may order.

5 Once the Noteholders became aware of Farley J.'s order, they decided to challenge it. They did so in two ways: by seeking leave to appeal to this court and by initiating a motion to vary before Farley J. The former proceeded before this court, on a preliminary basis, on May 15 and, on the merits, on May 18. The latter was scheduled to be heard by Farley J. on May 23.

6 The Noteholders seek leave to appeal Farley J.'s order on three bases, which they frame as Proposed Questions for this court:

> (1) Did the motions judge exceed his jurisdiction in making the initial order by altering existing priorities of and between secured creditors through the granting of superpriorities without the consent of the First Mortgage Noteholders?
>
> (2) Did the motions judge exceed his jurisdiction or otherwise err in law by granting these superpriorities without any notice to the First Mortgage Noteholders or to the trustee under the trust indenture?
>
> (3) Did the motions judge err in law by failing: (a) to treat the First Mortgage Noteholders in an equitable and even-handed manner relative to the Bank Lenders; and (b) to give due regard to the prejudice suffered by the First Mortgage Noteholders as a result of the initial order?

7 In our view, the motion for leave to appeal is premature. Initial orders, made on a without notice basis, are specifically authorized by s. 11(1) of the *CCAA*. Proceedings under the *CCAA* are often urgent, complex and dynamic. The Algoma proceedings fit that description. Farley J. was faced with complex facts and a difficult decision potentially implicating the closure of one of the largest companies in Ontario. Moreover, he had to make his decision in a very timely fashion. In these circumstances, he recognized that his initial order might not be acceptable to all interested parties, including some of Algoma's creditors. That is why he included a comeback clause in his order and specifically invited parties to resort to it in his endorsement.

8 The fact that the *CCAA* provides that an appeal of an initial order is only available with leave indicates that appeals in *CCAA* proceedings should be limited. An appeal court should be cautious about intervening in the *CCAA* process, especially at an early stage. On this point, we are attracted to the reasoning of MacFarlane J.A. (in chambers) in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 ((B.C. C.A. [In Chambers])) , at 272:

> [T]here may be an arguable case for the petitioners to present to a panel of this court on discrete questions of law. But I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial court is an ongoing one. . . .
>
> A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course of that trial, than a chambers judge who makes interlocutory orders in proceedings for which he has no further responsibility.
>
> . . . In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellant proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.

9 Like MacFarlane J.A., we do not say that leave to appeal should never be granted in the midst of *CCAA* proceedings. However, it is premature to grant such leave at this juncture in the Algoma proceedings. Farley J.'s order was only an initial

order brought on an urgent basis to deal with seemingly desperate circumstances. Moreover, the order specifically opened the proceedings to all interested parties and invited dissatisfied parties to bring their concerns to the court on a timely basis. The Noteholders availed themselves of this opportunity by initiating a motion to vary which was scheduled to be heard on the very day the initial order expired. In our view, this is precisely how a dynamic *CCAA* proceedings should unfold. Accordingly, it would be unwise to interrupt this normal and desirable process by granting leave to appeal at this juncture. The issues that the Noteholders want to raise can be considered by Farley J., importantly in the context of the entire proceedings with which he is familiar. Moreover, if at a later point in time this court grants leave to appeal, it will then have the benefit of the considered reasons of the motions judge flowing from a complete record and from full argument by all interested parties.

10 For these reasons, the motion for leave to appeal is dismissed, without prejudice to the right of the Noteholders, or any other interested party, to make a similar motion at a later juncture in the proceedings, and to do so on an expedited basis. Only the United Steelworkers of America requested their costs of the motion. They are entitled to their costs which we would fix at $1000.

Application dismissed.

End of Document

TAB 3

2013 SCC 6
Supreme Court of Canada

Indalex Ltd., Re

2013 CarswellOnt 733, 2013 CarswellOnt 734, 2013 SCC 6, [2013] 1 S.C.R. 271, [2013] W.D.F.L. 1591, [2013] W.D.F.L. 1592, [2013] S.C.J. No. 6, 20 P.P.S.A.C. (3d) 1, 223 A.C.W.S. (3d) 1049, 2 C.C.P.B. (2nd) 1, 301 O.A.C. 1, 354 D.L.R. (4th) 581, 439 N.R. 235, 8 B.L.R. (5th) 1, 96 C.B.R. (5th) 171, J.E. 2013-185, D.T.E. 2013T-97

Sun Indalex Finance, LLC (Appellant) and United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville (Respondents)

George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors (Appellant) and United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville (Respondents)

FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited (Appellant) and United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville (Respondents)

United Steelworkers (Appellant) and Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership) and Superintendent of Financial Services (Respondents) and Superintendent of Financial Services, Insolvency Institute of Canada, Canadian Labour Congress, Canadian Federation of Pensioners, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers Association (Interveners)

McLachlin C.J.C., LeBel, Deschamps, Abella, Rothstein, Cromwell, Moldaver JJ.

Heard: June 5, 2012
Judgment: February 1, 2013
Docket: 34308

Proceedings: reversing *Indalex Ltd., Re* (2011), 89 C.C.P.B. 39, 276 O.A.C. 347, 331 D.L.R. (4th) 352, 17 P.P.S.A.C. (3d) 194, 75 C.B.R. (5th) 19, 104 O.R. (3d) 641, 2011 C.E.B. & P.G.R. 8433, 2011 ONCA 265, 2011 CarswellOnt 2458 (Ont. C.A.); reversing *Indalex Ltd., Re* (2010), 79 C.C.P.B. 301, 2010 ONSC 1114, 2010 CarswellOnt 893 (Ont. S.C.J. [Commercial List]); and reversing in part *Indalex Ltd., Re* (2011), 81 C.B.R. (5th) 165, 92 C.C.P.B. 277, 2011 ONCA 578, 2011 CarswellOnt 9077 (Ont. C.A.); additional reasons to *Indalex Ltd., Re* (2011), 89 C.C.P.B. 39, 276 O.A.C. 347, 331 D.L.R. (4th) 352, 17 P.P.S.A.C. (3d) 194, 75 C.B.R. (5th) 19, 104 O.R. (3d) 641, 2011 C.E.B. & P.G.R. 8433, 2011 ONCA 265, 2011 CarswellOnt 2458 (Ont. C.A.)

Counsel: Benjamin Zarnett, Frederick L. Myers, Brian F. Empey, Peter Kolla, for Appellant, Sun Indalex Finance, LLC

Harvey G. Chaiton, George Benchetrit, for Appellant, George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors
David R. Byers, Ashley John Taylor, Nicholas Peter McHaffie, for Appellant, FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited
Darrell L. Brown, for Appellant / Respondent, United Steelworkers
Andrew J. Hatnay, Demetrios Yiokaris, for Respondents, Keith Carruthers, et al.
Hugh O'Reilly, Amanda Darrach, for Respondent, Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership)
Mark Bailey, Leonard Marsello, William MacLarkey, for Respondent / Intervener, Superintendent of Financial Services
Robert I. Thornton, D.J. Miller, for Intervener, Insolvency Institute of Canada
Steven Barrett, Ethan Poskanzer, for Intervener, Canadian Labour Congress
Kenneth T. Rosenberg, Andrew K. Lokan, Massimo Starnino, for Intervener, Canadian Federation of Pensioners
Éric Vallières, Alexandre Forest, Yoine Goldstein, for Intervener, Canadian Association of Insolvency and Restructuring Professionals
Mahmud Jamal, Jeremy Dacks, Tony Devir, for Intervener, Canadian Bankers Association

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

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

I Bankruptcy and insolvency jurisdiction
I.1 Constitutional jurisdiction of Federal government and provinces
I.1.c Paramountcy of Federal legislation

Bankruptcy and insolvency

VIII Property of bankrupt
VIII.3 Pension funds

Bankruptcy and insolvency

VIII Property of bankrupt
VIII.5 Trust property
VIII.5.e Miscellaneous

Bankruptcy and insolvency

X Priorities of claims
X.2 Preferred claims
X.2.d Wages and salaries of employees
X.2.d.ii Creation of statutory trust

Bankruptcy and insolvency

XIV Administration of estate
XIV.6 Sale of assets
XIV.6.h Miscellaneous

Bankruptcy and insolvency

XVII Practice and procedure in courts
XVII.7 Appeals

XVII.7.e Miscellaneous

Bankruptcy and insolvency

XVII Practice and procedure in courts
XVII.8 Costs
XVII.8.h Miscellaneous

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.d "Come-back" clause

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.f Lifting of stay

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I.1.c Administrators, trustees and custodians
I.1.c.ii Fiduciary duties
I.1.c.ii.A Liabilities for breach

Pensions

I Private pension plans
I.1 Administration of pension plans
I.1.c Administrators, trustees and custodians
I.1.c.ii Fiduciary duties
I.1.c.ii.B Miscellaneous

Pensions

I Private pension plans
I.1 Administration of pension plans
I.1.c Administrators, trustees and custodians
I.1.c.v Miscellaneous

Pensions

I Private pension plans
I.1 Administration of pension plans
I.1.g Valuation and funding of plans
I.1.g.iii Deficiency

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I.2.l.ii Registered plans

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I.5 Practice in pension actions
I.5.d Costs

Personal property security

IV Priority of security interest
IV.6 Security interests versus other interests
IV.6.b Under provincial law
IV.6.b.iii Statutory and deemed trusts

Headnote

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

Pensions — I Ltd. was part of group of companies that became insolvent — Bankruptcy protection was sought — I Ltd. was administrator of two registered pension plans — Salaried plan was in process of being wound up when Companies' Creditors Arrangement Act proceedings began — Executive plan was closed but not wound up — Amended initial order was obtained, authorizing I Ltd. to borrow from debtor-in-possession ("DIP") lenders and granting them priority over all other creditors — Pension plan members brought unsuccessful motions for declaration that deemed trust equal to unfunded pension liability was enforceable against proceeds of sale of assets of I Ltd. — In allowing plan members' appeal, Court of Appeal ordered distribution from reserve fund in order to pay amount of each plan's deficiency — I Ltd., monitor, secured creditor, and trustee in bankruptcy appealed order — Appeal allowed — With respect to salaried plan, I Ltd. was deemed to hold in trust amount necessary to satisfy wind-up deficiency — Deemed trust did not apply to wind-up deficiency with respect to executive plan — As result of application of doctrine of federal paramountcy, DIP charge superseded deemed trust.

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

Trusts — I Ltd. was part of group of companies that became insolvent — Bankruptcy protection was sought — I Ltd. was administrator of two registered pension plans — Salaried plan was in process of being wound up when Companies' Creditors Arrangement Act proceedings began — Executive plan was closed but not wound up — Amended initial order was obtained, authorizing I Ltd. to borrow from debtor-in-possession ("DIP") lenders and granting them priority over all other creditors — Pension plan members brought unsuccessful motions for declaration that deemed trust equal to unfunded

pension liability was enforceable against proceeds of sale of assets of I Ltd. — In allowing plan members' appeal, Court of Appeal ordered distribution from reserve fund in order to pay amount of each plan's deficiency — I Ltd., monitor, secured creditor, and trustee in bankruptcy appealed order — Appeal allowed — With respect to salaried plan, I Ltd. was deemed to hold in trust amount necessary to satisfy wind-up deficiency — Deemed trust did not apply to wind-up deficiency with respect to executive plan — As result of application of doctrine of federal paramountcy, DIP charge superseded deemed trust.

Pensions --- Administration of pension plans — Administrators, trustees and custodians — Fiduciary duties — Miscellaneous

I Ltd. was part of group of companies that became insolvent — Bankruptcy protection was sought — I Ltd. was administrator of two registered pension plans — Salaried plan was in process of being wound up when Companies' Creditors Arrangement Act proceedings began — Executive plan was closed but not wound up — Amended initial order was obtained, authorizing I Ltd. to borrow from debtor-in-possession ("DIP") lenders and granting them priority over all other creditors — Pension plan members brought unsuccessful motions for declaration that deemed trust equal to unfunded pension liability was enforceable against proceeds of sale of assets of I Ltd. — In allowing plan members' appeal, Court of Appeal ordered distribution from reserve fund in order to pay amount of each plan's deficiency — I Ltd., monitor, secured creditor, and trustee in bankruptcy appealed order — Appeal allowed — I Ltd.'s fiduciary obligations as plan administrator conflicted with management decisions that needed to be taken in best interests of corporation — I Ltd. should have taken steps to ensure that interests of plan members were protected, but did not do so — With respect to salaried plan, I Ltd. was deemed to hold in trust amount necessary to satisfy wind-up deficiency, but DIP charge superseded deemed trust by application of doctrine of federal paramountcy.

Pensions --- Administration of pension plans — Administrators, trustees and custodians — Fiduciary duties — Liabilities for breach

I Ltd. was part of group of companies that became insolvent — Bankruptcy protection was sought — I Ltd. was administrator of two registered pension plans — Salaried plan was in process of being wound up when Companies' Creditors Arrangement Act proceedings began — Executive plan was closed but not wound up — Amended initial order was obtained, authorizing I Ltd. to borrow from debtor-in-possession ("DIP") lenders and granting them priority over all other creditors — Pension plan members brought unsuccessful motions for declaration that deemed trust equal to unfunded pension liability was enforceable against proceeds of sale of assets of I Ltd. — In allowing plan members' appeal, Court of Appeal ordered distribution from reserve fund in order to pay amount of each plan's deficiency — I Ltd., monitor, secured creditor, and trustee in bankruptcy appealed order — Appeal allowed — I Ltd.'s fiduciary obligations as plan administrator conflicted with management decisions that needed to be taken in best interests of corporation — I Ltd. should have taken steps to ensure that interests of plan members were protected, but did not do so — Constructive trust remedy was not available, as required condition was not met — With respect to salaried plan, I Ltd. was deemed to hold in trust amount necessary to satisfy wind-up deficiency, but DIP charge superseded deemed trust by application of doctrine of federal paramountcy.

Pensions --- Administration of pension plans — Administrators, trustees and custodians — Miscellaneous

I Ltd. was part of group of companies that became insolvent — Bankruptcy protection was sought — I Ltd. was administrator of two registered pension plans — Salaried plan was in process of being wound up when Companies' Creditors Arrangement Act proceedings began — Executive plan was closed but not wound up — Amended initial order was obtained, authorizing I Ltd. to borrow from debtor-in-possession ("DIP") lenders and granting them priority over all other creditors — Pension plan members brought unsuccessful motions for declaration that deemed trust equal to unfunded pension liability was enforceable against proceeds of sale of assets of I Ltd. — In allowing plan members' appeal, Court of Appeal ordered distribution from reserve fund in order to pay amount of each plan's deficiency — I Ltd., monitor, secured creditor, and trustee in bankruptcy appealed order — Appeal allowed — I Ltd.'s fiduciary obligations as plan administrator conflicted with management decisions that needed to be taken in best interests of corporation — I Ltd. should have taken steps to ensure that interests of plan members were protected, but did not do so — With respect to salaried plan, I Ltd.

was deemed to hold in trust amount necessary to satisfy wind-up deficiency, but DIP charge superseded deemed trust by application of doctrine of federal paramountcy.

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — Miscellaneous

Collateral attack doctrine — I Ltd. was part of group of companies that became insolvent — Bankruptcy protection was sought — I Ltd. was administrator of two registered pension plans — Salaried plan was in process of being wound up when Companies' Creditors Arrangement Act proceedings began — Executive plan was closed but not wound up — Amended initial order was obtained, authorizing I Ltd. to borrow from debtor-in-possession ("DIP") lenders and granting them priority over all other creditors — Pension plan members brought unsuccessful motions for declaration that deemed trust equal to unfunded pension liability was enforceable against proceeds of sale of assets of I Ltd. — In allowing plan members' appeal, Court of Appeal ordered distribution from reserve fund in order to pay amount of each plan's deficiency — I Ltd., monitor, secured creditor, and trustee in bankruptcy appealed order — Appeal allowed — It could not be argued that plan members were barred from defending their interests by collateral attack doctrine — Argument that plan members should have appealed amended initial order authorizing DIP charge, and were precluded from subsequently arguing that their claim ranked in priority to that of DIP lenders, was not convincing — With respect to salaried plan, I Ltd. was deemed to hold in trust amount necessary to satisfy wind-up deficiency, but DIP charge superseded deemed trust by application of doctrine of federal paramountcy.

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous

Distribution of proceeds — I Ltd. was part of group of companies that became insolvent — Bankruptcy protection was sought — I Ltd. was administrator of two registered pension plans — Salaried plan was in process of being wound up when Companies' Creditors Arrangement Act proceedings began — Executive plan was closed but not wound up — Amended initial order was obtained, authorizing I Ltd. to borrow from debtor-in-possession ("DIP") lenders and granting them priority over all other creditors — Pension plan members brought unsuccessful motions for declaration that deemed trust equal to unfunded pension liability was enforceable against proceeds of sale of assets of I Ltd. — In allowing plan members' appeal, Court of Appeal ordered distribution from reserve fund in order to pay amount of each plan's deficiency — I Ltd., monitor, secured creditor, and trustee in bankruptcy appealed order — Appeal allowed — With respect to salaried plan, I Ltd. was deemed to hold in trust amount necessary to satisfy wind-up deficiency — Deemed trust did not apply to wind-up deficiency with respect to executive plan — As result of application of doctrine of federal paramountcy, DIP charge superseded deemed trust.

Personal property security --- Priority of security interest — Security interests versus other interests — Under provincial law — Statutory and deemed trusts

Companies' Creditors Arrangement Act — I Ltd. was part of group of companies that became insolvent — Bankruptcy protection was sought — I Ltd. was administrator of two registered pension plans — Salaried plan was in process of being wound up when Companies' Creditors Arrangement Act proceedings began — Executive plan was closed but not wound up — Amended initial order was obtained, authorizing I Ltd. to borrow from debtor-in-possession ("DIP") lenders and granting them priority over all other creditors — Pension plan members brought unsuccessful motions for declaration that deemed trust equal to unfunded pension liability was enforceable against proceeds of sale of assets of I Ltd. — In allowing plan members' appeal, Court of Appeal ordered distribution from reserve fund in order to pay amount of each plan's deficiency — I Ltd., monitor, secured creditor, and trustee in bankruptcy appealed order — Appeal allowed — With respect to salaried plan, I Ltd. was deemed to hold in trust amount necessary to satisfy wind-up deficiency — Deemed trust did not apply to wind-up deficiency with respect to executive plan — As result of application of doctrine of federal paramountcy, DIP charge superseded deemed trust.

Bankruptcy and insolvency --- Priorities of claims — Preferred claims — Wages and salaries of employees — Creation of statutory trust

Pension plans — I Ltd. was part of group of companies that became insolvent — Bankruptcy protection was sought — I Ltd. was administrator of two registered pension plans — Salaried plan was in process of being wound up when Companies'

Creditors Arrangement Act proceedings began — Executive plan was closed but not wound up — Amended initial order was obtained, authorizing I Ltd. to borrow from debtor-in-possession ("DIP") lenders and granting them priority over all other creditors — Pension plan members brought unsuccessful motions for declaration that deemed trust equal to unfunded pension liability was enforceable against proceeds of sale of assets of I Ltd. — In allowing plan members' appeal, Court of Appeal ordered distribution from reserve fund in order to pay amount of each plan's deficiency — I Ltd., monitor, secured creditor, and trustee in bankruptcy appealed order — Appeal allowed — With respect to salaried plan, I Ltd. was deemed to hold in trust amount necessary to satisfy wind-up deficiency — Deemed trust did not apply to wind-up deficiency with respect to executive plan — As result of application of doctrine of federal paramountcy, DIP charge superseded deemed trust.

Bankruptcy and insolvency --- Bankruptcy and insolvency jurisdiction — Constitutional jurisdiction of Federal government and provinces — Paramountcy of Federal legislation

I Ltd. was part of group of companies that became insolvent — Bankruptcy protection was sought — I Ltd. was administrator of two registered pension plans — Salaried plan was in process of being wound up when Companies' Creditors Arrangement Act ("CCAA") proceedings began — Executive plan was closed but not wound up — Amended initial order was obtained, authorizing I Ltd. to borrow from debtor-in-possession ("DIP") lenders and granting them priority over all other creditors — Pension plan members brought unsuccessful motions for declaration that deemed trust equal to unfunded pension liability was enforceable against proceeds of sale of assets of I Ltd. — In allowing plan members' appeal, Court of Appeal ordered distribution from reserve fund in order to pay amount of each plan's deficiency — I Ltd., monitor, secured creditor, and trustee in bankruptcy appealed order — Appeal allowed — With respect to salaried plan, I Ltd. was deemed to hold in trust amount necessary to satisfy wind-up deficiency, but DIP charge superseded deemed trust by application of doctrine of federal paramountcy — Federal and provincial laws were inconsistent, as they gave rise to different, and conflicting, orders of priority — Section 30(7) of Personal Property Security Act required part of proceeds from asset sale to be paid to plan's administrator before other secured creditors were paid — However, amended initial order provided that DIP charge ranked in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise — This court-ordered priority based on CCAA had same effect as statutory priority.

Estates and trusts --- Trusts — Constructive trust — Gains by fiduciaries

Breach of fiduciary duty — I Ltd. was part of group of companies that became insolvent — Bankruptcy protection was sought — I Ltd. was administrator of two registered pension plans — Salaried plan was in process of being wound up when Companies' Creditors Arrangement Act proceedings began — Executive plan was closed but not wound up — Amended initial order was obtained, authorizing I Ltd. to borrow from debtor-in-possession ("DIP") lenders and granting them priority over all other creditors — Pension plan members brought unsuccessful motions for declaration that deemed trust equal to unfunded pension liability was enforceable against proceeds of sale of assets of I Ltd. — In allowing plan members' appeal, Court of Appeal ordered distribution from reserve fund in order to pay amount of each plan's deficiency — I Ltd., monitor, secured creditor, and trustee in bankruptcy appealed order — Appeal allowed — I Ltd.'s fiduciary obligations as plan administrator conflicted with management decisions that needed to be taken in best interests of corporation — I Ltd. should have taken steps to ensure that interests of plan members were protected, but did not do so — Constructive trust remedy was not available, as required condition was not met — With respect to salaried plan, I Ltd. was deemed to hold in trust amount necessary to satisfy wind-up deficiency, but DIP charge superseded deemed trust by application of doctrine of federal paramountcy.

Constitutional law --- Distribution of legislative powers — Relation between federal and provincial powers — Paramountcy of federal legislation — Miscellaneous

I Ltd. was part of group of companies that became insolvent — Bankruptcy protection was sought — I Ltd. was administrator of two registered pension plans — Salaried plan was in process of being wound up when Companies' Creditors Arrangement Act ("CCAA") proceedings began — Executive plan was closed but not wound up — Amended initial order was obtained, authorizing I Ltd. to borrow from debtor-in-possession ("DIP") lenders and granting them priority over all other creditors — Pension plan members brought unsuccessful motions for declaration that deemed trust

equal to unfunded pension liability was enforceable against proceeds of sale of assets of I Ltd. — In allowing plan members' appeal, Court of Appeal ordered distribution from reserve fund in order to pay amount of each plan's deficiency — I Ltd., monitor, secured creditor, and trustee in bankruptcy appealed order — Appeal allowed — With respect to salaried plan, I Ltd. was deemed to hold in trust amount necessary to satisfy wind-up deficiency, but DIP charge superseded deemed trust by application of doctrine of federal paramountcy — Federal and provincial laws were inconsistent, as they gave rise to different, and conflicting, orders of priority — Section 30(7) of Personal Property Security Act required part of proceeds from asset sale to be paid to plan's administrator before other secured creditors were paid — However, amended initial order provided that DIP charge ranked in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise — This court-ordered priority based on CCAA had same effect as statutory priority.

Bankruptcy and insolvency --- Practice and procedure in courts — Costs — Miscellaneous

I Ltd. was part of group of companies that became insolvent — Bankruptcy protection was sought — I Ltd. was administrator of two registered pension plans — Salaried plan was in process of being wound up when Companies' Creditors Arrangement Act proceedings began — Executive plan was closed but not wound up — Amended initial order was obtained, authorizing I Ltd. to borrow from debtor-in-possession lenders and granting them priority over all other creditors — Pension plan members brought unsuccessful motions for declaration that deemed trust equal to unfunded pension liability was enforceable against proceeds of sale of assets of I Ltd. — In allowing plan members' appeal, Court of Appeal ordered distribution from reserve fund in order to pay amount of each plan's deficiency — Court also issued costs endorsement that approved payment of costs of executive plan's members from that plan's fund, but declined to order payment of costs to union from fund of salaried plan — I Ltd., monitor, secured creditor, and trustee in bankruptcy appealed order, and union appealed costs endorsement — Appeal from order allowed; appeal from costs endorsement dismissed; Court of Appeal's orders with respect to costs of that appeal set aside, and all parties to bear their own costs in Court of Appeal and present appeal — There was no error in principle in Court of Appeal's refusal to order union costs to be paid out of pension fund, particularly in light of disposition of present appeal — Union's submissions as to costs were largely based on inaccurate reading of Court of Appeal's costs endorsement.

Pensions --- Practice in pension actions — Costs

I Ltd. was part of group of companies that became insolvent — Bankruptcy protection was sought — I Ltd. was administrator of two registered pension plans — Salaried plan was in process of being wound up when Companies' Creditors Arrangement Act proceedings began — Executive plan was closed but not wound up — Amended initial order was obtained, authorizing I Ltd. to borrow from debtor-in-possession lenders and granting them priority over all other creditors — Pension plan members brought unsuccessful motions for declaration that deemed trust equal to unfunded pension liability was enforceable against proceeds of sale of assets of I Ltd. — In allowing plan members' appeal, Court of Appeal ordered distribution from reserve fund in order to pay amount of each plan's deficiency — Court also issued costs endorsement that approved payment of costs of executive plan's members from that plan's fund, but declined to order payment of costs to union from fund of salaried plan — I Ltd., monitor, secured creditor, and trustee in bankruptcy appealed order, and union appealed costs endorsement — Appeal from order allowed; appeal from costs endorsement dismissed; Court of Appeal's orders with respect to costs of that appeal set aside, and all parties to bear their own costs in Court of Appeal and present appeal — There was no error in principle in Court of Appeal's refusal to order union costs to be paid out of pension fund, particularly in light of disposition of present appeal — Union's submissions as to costs were largely based on inaccurate reading of Court of Appeal's costs endorsement.

Pensions --- Payment of pension — Bankruptcy or insolvency of employer — Registered plans

Deficiency in plans' funding.

Pensions --- Administration of pension plans — Valuation and funding of plans — Deficiency

Insolvency of employer.

Civil practice and procedure --- Costs — Costs of appeals — Miscellaneous

Faillite et insolvabilité --- Biens du failli — Biens détenus en fiducie — Divers

Régimes de retraite — I Ltd. faisait partie d'un groupe de sociétés qui est devenu insolvable — Mesures de protection offertes en matière de faillite ont été déclenchées — I Ltd. administrait deux régimes de retraite enregistrés — Régime des salariés était en cours de liquidation lorsque les procédures sous le régime de la Loi sur les arrangements avec les créanciers des compagnies ont été engagées — Régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé — Ordonnance initiale modifiée a été rendue autorisant I Ltd. à emprunter aux prêteurs au débiteur-exploitant (« DE ») et accordant à ces derniers une priorité sur tous les autres créanciers — Participants des régimes ont déposé des requêtes en vue d'obtenir un jugement déclaratoire portant que le produit de la vente des actifs de I Ltd. était grevé d'une fiducie présumée d'un montant équivalent au passif non capitalisé au titre des pensions — En accueillant l'appel interjeté par les participants, la Cour d'appel a ordonné de combler le déficit de chacun des régimes par prélèvement sur le fonds de réserve — I Ltd., le contrôleur, un créancier garanti et le syndic de faillite ont formé un pourvoi à l'encontre de l'ordonnance — Pourvoi accueilli — En ce qui concernait le régime des salariés, I Ltd. était présumée détenir en fiducie le montant nécessaire pour combler le déficit de liquidation — Fiducie présumée ne s'appliquait pas à un déficit de liquidation relativement au régime des cadres — Application de la doctrine de la prépondérance fédérale faisait en sorte que la sûreté accordée aux prêteurs DE avait priorité sur la fiducie présumée.

Faillite et insolvabilité --- Biens du failli — Fonds de pension

Fiducies — I Ltd. faisait partie d'un groupe de sociétés qui est devenu insolvable — Mesures de protection offertes en matière de faillite ont été déclenchées — I Ltd. administrait deux régimes de retraite enregistrés — Régime des salariés était en cours de liquidation lorsque les procédures sous le régime de la Loi sur les arrangements avec les créanciers des compagnies ont été engagées — Régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé — Ordonnance initiale modifiée a été rendue autorisant I Ltd. à emprunter aux prêteurs au débiteur-exploitant (« DE ») et accordant à ces derniers une priorité sur tous les autres créanciers — Participants des régimes ont déposé des requêtes en vue d'obtenir un jugement déclaratoire portant que le produit de la vente des actifs de I Ltd. était grevé d'une fiducie présumée d'un montant équivalent au passif non capitalisé au titre des pensions — En accueillant l'appel interjeté par les participants, la Cour d'appel a ordonné de combler le déficit de chacun des régimes par prélèvement sur le fonds de réserve — I Ltd., le contrôleur, un créancier garanti et le syndic de faillite ont formé un pourvoi à l'encontre de l'ordonnance — Pourvoi accueilli — En ce qui concernait le régime des salariés, I Ltd. était présumée détenir en fiducie le montant nécessaire pour combler le déficit de liquidation — Fiducie présumée ne s'appliquait pas à un déficit de liquidation relativement au régime des cadres — Application de la doctrine de la prépondérance fédérale faisait en sorte que la sûreté accordée aux prêteurs DE avait priorité sur la fiducie présumée.

Régimes de retraite --- Administration des régimes de retraite — Administrateurs, fiduciaires et dépositaires — Obligations fiduciaires — Divers

I Ltd. faisait partie d'un groupe de sociétés qui est devenu insolvable — Mesures de protection offertes en matière de faillite ont été déclenchées — I Ltd. administrait deux régimes de retraite enregistrés — Régime des salariés était en cours de liquidation lorsque les procédures sous le régime de la Loi sur les arrangements avec les créanciers des compagnies ont été engagées — Régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé — Ordonnance initiale modifiée a été rendue autorisant I Ltd. à emprunter aux prêteurs au débiteur-exploitant (« DE ») et accordant à ces derniers une priorité sur tous les autres créanciers — Participants des régimes ont déposé des requêtes en vue d'obtenir un jugement déclaratoire portant que le produit de la vente des actifs de I Ltd. était grevé d'une fiducie présumée d'un montant équivalent au passif non capitalisé au titre des pensions — En accueillant l'appel interjeté par les participants, la Cour d'appel a ordonné de combler le déficit de chacun des régimes par prélèvement sur le fonds de réserve — I Ltd., le contrôleur, un créancier garanti et le syndic de faillite ont formé un pourvoi à l'encontre de l'ordonnance — Pourvoi accueilli — Il y avait un conflit entre les obligations fiduciaires qui incombaient à I Ltd. en sa qualité d'administrateur des régimes et les décisions de gestion qu'elle devait prendre dans le meilleur intérêt de la société — I Ltd. aurait dû prendre des mesures pour assurer la protection des intérêts des participants au régime, mais ne l'a pas fait — En ce qui concernait le régime des salariés, I Ltd.

était présumée détenir en fiducie le montant nécessaire pour combler le déficit de liquidation, mais en raison de la doctrine de la prépondérance fédérale, la sûreté accordée aux prêteurs DE avait priorité sur la fiducie présumée.

Régimes de retraite --- Administration des régimes de retraite — Administrateurs, fiduciaires et dépositaires — Obligations fiduciaires — Responsabilité découlant de la violation

I Ltd. faisait partie d'un groupe de sociétés qui est devenu insolvable — Mesures de protection offertes en matière de faillite ont été déclenchées — I Ltd. administrait deux régimes de retraite enregistrés — Régime des salariés était en cours de liquidation lorsque les procédures sous le régime de la Loi sur les arrangements avec les créanciers des compagnies ont été engagées — Régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé — Ordonnance initiale modifiée a été rendue autorisant I Ltd. à emprunter aux prêteurs au débiteur-exploitant (« DE ») et accordant à ces derniers une priorité sur tous les autres créanciers — Participants des régimes ont déposé des requêtes en vue d'obtenir un jugement déclaratoire portant que le produit de la vente des actifs de I Ltd. était grevé d'une fiducie présumée d'un montant équivalent au passif non capitalisé au titre des pensions — En accueillant l'appel interjeté par les participants, la Cour d'appel a ordonné de combler le déficit de chacun des régimes par prélèvement sur le fonds de réserve — I Ltd., le contrôleur, un créancier garanti et le syndic de faillite ont formé un pourvoi à l'encontre de l'ordonnance — Pourvoi accueilli — Il y avait un conflit entre les obligations fiduciaires qui incombaient à I Ltd. en sa qualité d'administrateur des régimes et les décisions de gestion qu'elle devait prendre dans le meilleur intérêt de la société — I Ltd. aurait dû prendre des mesures pour assurer la protection des intérêts des participants au régime, mais ne l'a pas fait — Exigences permettant de reconnaître l'application d'une fiducie par interprétation à titre de mesure réparatrice n'étaient pas satisfaites — En ce qui concernait le régime des salariés, I Ltd. était présumée détenir en fiducie le montant nécessaire pour combler le déficit de liquidation, mais en raison de la doctrine de la prépondérance fédérale, la sûreté accordée aux prêteurs DE avait priorité sur la fiducie présumée.

Régimes de retraite --- Administration des régimes de retraite — Administrateurs, fiduciaires et dépositaires — Divers

I Ltd. faisait partie d'un groupe de sociétés qui est devenu insolvable — Mesures de protection offertes en matière de faillite ont été déclenchées — I Ltd. administrait deux régimes de retraite enregistrés — Régime des salariés était en cours de liquidation lorsque les procédures sous le régime de la Loi sur les arrangements avec les créanciers des compagnies ont été engagées — Régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé — Ordonnance initiale modifiée a été rendue autorisant I Ltd. à emprunter aux prêteurs au débiteur-exploitant (« DE ») et accordant à ces derniers une priorité sur tous les autres créanciers — Participants des régimes ont déposé des requêtes en vue d'obtenir un jugement déclaratoire portant que le produit de la vente des actifs de I Ltd. était grevé d'une fiducie présumée d'un montant équivalent au passif non capitalisé au titre des pensions — En accueillant l'appel interjeté par les participants, la Cour d'appel a ordonné de combler le déficit de chacun des régimes par prélèvement sur le fonds de réserve — I Ltd., le contrôleur, un créancier garanti et le syndic de faillite ont formé un pourvoi à l'encontre de l'ordonnance — Pourvoi accueilli — Il y avait un conflit entre les obligations fiduciaires qui incombaient à I Ltd. en sa qualité d'administrateur des régimes et les décisions de gestion qu'elle devait prendre dans le meilleur intérêt de la société — I Ltd. aurait dû prendre des mesures pour assurer la protection des intérêts des participants au régime, mais ne l'a pas fait — En ce qui concernait le régime des salariés, I Ltd. était présumée détenir en fiducie le montant nécessaire pour combler le déficit de liquidation, mais en raison de la doctrine de la prépondérance fédérale, la sûreté accordée aux prêteurs DE avait priorité sur la fiducie présumée.

Faillite et insolvabilité --- Procédure devant les tribunaux — Appels — Divers

Règle interdisant les contestations indirectes — I Ltd. faisait partie d'un groupe de sociétés qui est devenu insolvable — Mesures de protection offertes en matière de faillite ont été déclenchées — I Ltd. administrait deux régimes de retraite enregistrés — Régime des salariés était en cours de liquidation lorsque les procédures sous le régime de la Loi sur les arrangements avec les créanciers des compagnies ont été engagées — Régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé — Ordonnance initiale modifiée a été rendue autorisant I Ltd. à emprunter aux prêteurs au débiteur-exploitant (« DE ») et accordant à ces derniers une priorité sur tous les autres créanciers — Participants des régimes ont déposé des requêtes en vue d'obtenir un jugement déclaratoire portant que le produit de la vente des actifs de I Ltd. était grevé d'une fiducie présumée d'un montant équivalent au passif non capitalisé au titre des pensions — En

accueillant l'appel interjeté par les participants, la Cour d'appel a ordonné de combler le déficit de chacun des régimes par prélèvement sur le fonds de réserve — I Ltd., le contrôleur, un créancier garanti et le syndic de faillite ont formé un pourvoi à l'encontre de l'ordonnance — Pourvoi accueilli — On ne pouvait pas affirmer que les participants au régime ne pouvaient pas défendre leurs intérêts en raison de la règle interdisant les contestations indirectes — Prétention selon laquelle les participants auraient dû interjeter appel de l'ordonnance initiale modifiée autorisant la charge DE et qu'ils ne devaient pas être admis à prétendre plus tard que leur créance avait priorité sur celle des prêteurs DE n'était pas convaincante — En ce qui concernait le régime des salariés, I Ltd. était présumée détenir en fiducie le montant nécessaire pour combler le déficit de liquidation, mais en raison de la doctrine de la prépondérance fédérale, la sûreté accordée aux prêteurs DE avait priorité sur la fiducie présumée.

Faillite et insolvabilité --- Administration de l'actif — Vente des actifs — Divers

Partage du produit de la vente — I Ltd. faisait partie d'un groupe de sociétés qui est devenu insolvable — Mesures de protection offertes en matière de faillite ont été déclenchées — I Ltd. administrait deux régimes de retraite enregistrés — Régime des salariés était en cours de liquidation lorsque les procédures sous le régime de la Loi sur les arrangements avec les créanciers des compagnies ont été engagées — Régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé — Ordonnance initiale modifiée a été rendue autorisant I Ltd. à emprunter aux prêteurs au débiteur-exploitant (« DE ») et accordant à ces derniers une priorité sur tous les autres créanciers — Participants des régimes ont déposé des requêtes en vue d'obtenir un jugement déclaratoire portant que le produit de la vente des actifs de I Ltd. était grevé d'une fiducie présumée d'un montant équivalent au passif non capitalisé au titre des pensions — En accueillant l'appel interjeté par les participants, la Cour d'appel a ordonné de combler le déficit de chacun des régimes par prélèvement sur le fonds de réserve — I Ltd., le contrôleur, un créancier garanti et le syndic de faillite ont formé un pourvoi à l'encontre de l'ordonnance — Pourvoi accueilli — En ce qui concernait le régime des salariés, I Ltd. était présumée détenir en fiducie le montant nécessaire pour combler le déficit de liquidation — Fiducie présumée ne s'appliquait pas à un déficit de liquidation relativement au régime des cadres — Application de la doctrine de la prépondérance fédérale faisait en sorte que la sûreté accordée aux prêteurs DE avait priorité sur la fiducie présumée.

Sûretés mobilières --- Ordre de priorité de la sûreté — Sûreté par rapport à d'autres intérêts — En vertu de la législation provinciale — Fiducies d'origine législative et présumées

Loi sur les arrangements avec les créanciers des compagnies — I Ltd. faisait partie d'un groupe de sociétés qui est devenu insolvable — Mesures de protection offertes en matière de faillite ont été déclenchées — I Ltd. administrait deux régimes de retraite enregistrés — Régime des salariés était en cours de liquidation lorsque les procédures sous le régime de la Loi sur les arrangements avec les créanciers des compagnies ont été engagées — Régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé — Ordonnance initiale modifiée a été rendue autorisant I Ltd. à emprunter aux prêteurs au débiteur-exploitant (« DE ») et accordant à ces derniers une priorité sur tous les autres créanciers — Participants des régimes ont déposé des requêtes en vue d'obtenir un jugement déclaratoire portant que le produit de la vente des actifs de I Ltd. était grevé d'une fiducie présumée d'un montant équivalent au passif non capitalisé au titre des pensions — En accueillant l'appel interjeté par les participants, la Cour d'appel a ordonné de combler le déficit de chacun des régimes par prélèvement sur le fonds de réserve — I Ltd., le contrôleur, un créancier garanti et le syndic de faillite ont formé un pourvoi à l'encontre de l'ordonnance — Pourvoi accueilli — En ce qui concernait le régime des salariés, I Ltd. était présumée détenir en fiducie le montant nécessaire pour combler le déficit de liquidation — Fiducie présumée ne s'appliquait pas à un déficit de liquidation relativement au régime des cadres — Application de la doctrine de la prépondérance fédérale faisait en sorte que la sûreté accordée aux prêteurs DE avait priorité sur la fiducie présumée.

Faillite et insolvabilité --- Priorité des créances — Réclamations privilégiées — Traitements et salaires des employés — Création d'une fiducie par la loi

Régimes de retraite — I Ltd. faisait partie d'un groupe de sociétés qui est devenu insolvable — Mesures de protection offertes en matière de faillite ont été déclenchées — I Ltd. administrait deux régimes de retraite enregistrés — Régime des salariés était en cours de liquidation lorsque les procédures sous le régime de la Loi sur les arrangements avec les créanciers des compagnies ont été engagées — Régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé

— Ordonnance initiale modifiée a été rendue autorisant I Ltd. à emprunter aux prêteurs au débiteur-exploitant (« DE ») et accordant à ces derniers une priorité sur tous les autres créanciers — Participants des régimes ont déposé des requêtes en vue d'obtenir un jugement déclaratoire portant que le produit de la vente des actifs de I Ltd. était grevé d'une fiducie présumée d'un montant équivalent au passif non capitalisé au titre des pensions — En accueillant l'appel interjeté par les participants, la Cour d'appel a ordonné de combler le déficit de chacun des régimes par prélèvement sur le fonds de réserve — I Ltd., le contrôleur, un créancier garanti et le syndic de faillite ont formé un pourvoi à l'encontre de l'ordonnance — Pourvoi accueilli — En ce qui concernait le régime des salariés, I Ltd. était présumée détenir en fiducie le montant nécessaire pour combler le déficit de liquidation — Fiducie présumée ne s'appliquait pas à un déficit de liquidation relativement au régime des cadres — Application de la doctrine de la prépondérance fédérale faisait en sorte que la sûreté accordée aux prêteurs DE avait priorité sur la fiducie présumée.

Faillite et insolvabilité --- Compétence en matière de faillite et d'insolvabilité — Compétence constitutionnelle du gouvernement fédéral et des provinces — Prépondérance de la compétence fédérale

I Ltd. faisait partie d'un groupe de sociétés qui est devenu insolvable — Mesures de protection offertes en matière de faillite ont été déclenchées — I Ltd. administrait deux régimes de retraite enregistrés — Régime des salariés était en cours de liquidation lorsque les procédures sous le régime de la Loi sur les arrangements avec les créanciers de compagnies (« LACC ») ont été engagées — Régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé — Ordonnance initiale modifiée a été rendue autorisant I Ltd. à emprunter aux prêteurs au débiteur-exploitant (« DE ») et accordant à ces derniers une priorité sur tous les autres créanciers — Participants des régimes ont déposé des requêtes en vue d'obtenir un jugement déclaratoire portant que le produit de la vente des actifs de I Ltd. était grevé d'une fiducie présumée d'un montant équivalent au passif non capitalisé au titre des pensions — En accueillant l'appel interjeté par les participants, la Cour d'appel a ordonné de combler le déficit de chacun des régimes par prélèvement sur le fonds de réserve — I Ltd., le contrôleur, un créancier garanti et le syndic de faillite ont formé un pourvoi à l'encontre de l'ordonnance — Pourvoi accueilli — En ce qui concernait le régime des salariés, I Ltd. était présumée détenir en fiducie le montant nécessaire pour combler le déficit de liquidation, mais en raison de la doctrine de la prépondérance fédérale, la sûreté accordée aux prêteurs DE avait priorité sur la fiducie présumée — Dispositions fédérales et provinciales étaient inconciliables, car elles produisaient des ordres de priorité différents et conflictuels — Article 30(7) de la Loi sur les sûretés mobilières exigeait qu'une partie du produit de la vente soit versée à l'administrateur du régime de retraite par priorité sur les paiements aux autres créanciers garantis — Or, l'ordonnance initiale amendée prévoyait que la sûreté accordée aux prêteurs DE prenait rang devant toutes les autres sûretés, y compris les fiducies, privilèges, charges et grèvements, d'origine législative ou autre — Cette priorité d'origine judiciaire fondée sur la LACC avait le même effet qu'une priorité d'origine législative.

Successions et fiducies --- Fiducies — Fiducie par interprétation — Profits des fiduciaires

Manquement à l'obligation fiduciaire — I Ltd. faisait partie d'un groupe de sociétés qui est devenu insolvable — Mesures de protection offertes en matière de faillite ont été déclenchées — I Ltd. administrait deux régimes de retraite enregistrés — Régime des salariés était en cours de liquidation lorsque les procédures sous le régime de la Loi sur les arrangements avec les créanciers de compagnies ont été engagées — Régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé — Ordonnance initiale modifiée a été rendue autorisant I Ltd. à emprunter aux prêteurs au débiteur-exploitant (« DE ») et accordant à ces derniers une priorité sur tous les autres créanciers — Participants des régimes ont déposé des requêtes en vue d'obtenir un jugement déclaratoire portant que le produit de la vente des actifs de I Ltd. était grevé d'une fiducie présumée d'un montant équivalent au passif non capitalisé au titre des pensions — En accueillant l'appel interjeté par les participants, la Cour d'appel a ordonné de combler le déficit de chacun des régimes par prélèvement sur le fonds de réserve — I Ltd., le contrôleur, un créancier garanti et le syndic de faillite ont formé un pourvoi à l'encontre de l'ordonnance — Pourvoi accueilli — Il y avait un conflit entre les obligations fiduciaires qui incombaient à I Ltd. en sa qualité d'administrateur des régimes et les décisions de gestion qu'elle devait prendre dans le meilleur intérêt de la société — I Ltd. aurait dû prendre des mesures pour assurer la protection des intérêts des participants au régime, mais ne l'a pas fait — Exigences permettant de reconnaître l'application d'une fiducie par interprétation à titre de mesure réparatrice n'étaient pas satisfaites — En ce qui concernait le régime des salariés, I Ltd. était présumée détenir en fiducie le montant nécessaire

pour combler le déficit de liquidation, mais en raison de la doctrine de la prépondérance fédérale, la sûreté accordée aux prêteurs DE avait priorité sur la fiducie présumée.

Droit constitutionnel --- Partage des compétences législatives — Rapport entre les compétences fédérales et compétences provinciales — Prépondérance des lois fédérales — Divers

I Ltd. faisait partie d'un groupe de sociétés qui est devenu insolvable — Mesures de protection offertes en matière de faillite ont été déclenchées — I Ltd. administrait deux régimes de retraite enregistrés — Régime des salariés était en cours de liquidation lorsque les procédures sous le régime de la Loi sur les arrangements avec les créanciers de compagnies (« LACC ») ont été engagées — Régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé — Ordonnance initiale modifiée a été rendue autorisant I Ltd. à emprunter aux prêteurs au débiteur-exploitant (« DE ») et accordant à ces derniers une priorité sur tous les autres créanciers — Participants des régimes ont déposé des requêtes en vue d'obtenir un jugement déclaratoire portant que le produit de la vente des actifs de I Ltd. était grevé d'une fiducie présumée d'un montant équivalent au passif non capitalisé au titre des pensions — En accueillant l'appel interjeté par les participants, la Cour d'appel a ordonné de combler le déficit de chacun des régimes par prélèvement sur le fonds de réserve — I Ltd., le contrôleur, un créancier garanti et le syndic de faillite ont formé un pourvoi à l'encontre de l'ordonnance — Pourvoi accueilli — En ce qui concernait le régime des salariés, I Ltd. était présumée détenir en fiducie le montant nécessaire pour combler le déficit de liquidation, mais en raison de la doctrine de la prépondérance fédérale, la sûreté accordée aux prêteurs DE avait priorité sur la fiducie présumée — Dispositions fédérales et provinciales étaient inconciliables, car elles produisaient des ordres de priorité différents et conflictuels — Article 30(7) de la Loi sur les sûretés mobilières exigeait qu'une partie du produit de la vente soit versée à l'administrateur du régime de retraite par priorité sur les paiements aux autres créanciers garantis — Or, l'ordonnance initiale amendée prévoyait que la sûreté accordée aux prêteurs DE prenait rang devant toutes les autres sûretés, y compris les fiducies, privilèges, charges et grèvements, d'origine législative ou autre — Cette priorité d'origine judiciaire fondée sur la LACC avait le même effet qu'une priorité d'origine législative.

Faillite et insolvabilité --- Procédure devant les tribunaux — Frais — Divers

I Ltd. faisait partie d'un groupe de sociétés qui est devenu insolvable — Mesures de protection offertes en matière de faillite ont été déclenchées — I Ltd. administrait deux régimes de retraite enregistrés — Régime des salariés était en cours de liquidation lorsque les procédures sous le régime de la Loi sur les arrangements avec les créanciers de compagnies ont été engagées — Régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé — Ordonnance initiale modifiée a été rendue autorisant I Ltd. à emprunter aux prêteurs au débiteur-exploitant et accordant à ces derniers une priorité sur tous les autres créanciers — Participants des régimes ont déposé des requêtes en vue d'obtenir un jugement déclaratoire portant que le produit de la vente des actifs de I Ltd. était grevé d'une fiducie présumée d'un montant équivalent au passif non capitalisé au titre des pensions — En accueillant l'appel interjeté par les participants, la Cour d'appel a ordonné de combler le déficit de chacun des régimes par prélèvement sur le fonds de réserve — Cour a également rendu une décision concernant les frais qui approuvait le paiement des dépens des participants au régime des cadres sur leur caisse de retraite, mais a refusé d'ordonner que les dépens du syndicat soient acquittés sur la caisse de retraite du régime des salariés — I Ltd., le contrôleur, un créancier garanti et le syndic de faillite ont formé un pourvoi à l'encontre de l'ordonnance, et le syndicat a interjeté appel à l'encontre de la décision concernant les frais — Pourvoi à l'encontre de l'ordonnance accueilli; pourvoi à l'encontre de l'adjudication des dépens rejeté; ordonnances de la Cour d'appel relatives aux dépens afférents aux appels interjetés devant elle annulées, et il a été ordonné que chacune des parties paie ses propres dépens devant la Cour d'appel et devant la Cour suprême du Canada — Décision de la Cour d'appel de refuser d'ordonner que les frais du syndicat soient acquittés sur la caisse de retraite n'était entachée d'aucune erreur de principe, surtout considérant l'issue du présent pourvoi — Prétentions du syndicat relativement aux frais reposaient en grande partie sur une interprétation erronée de la décision de la Cour d'appel concernant les frais.

Régimes de retraite --- Procédure dans le cadre d'actions concernant des régimes de retraite — Frais

I Ltd. faisait partie d'un groupe de sociétés qui est devenu insolvable — Mesures de protection offertes en matière de faillite ont été déclenchées — I Ltd. administrait deux régimes de retraite enregistrés — Régime des salariés était en cours de liquidation lorsque les procédures sous le régime de la Loi sur les arrangements avec les créanciers de compagnies («

LACC ») ont été engagées — Régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé — Ordonnance initiale modifiée a été rendue autorisant I Ltd. à emprunter aux prêteurs au débiteur-exploitant et accordant à ces derniers une priorité sur tous les autres créanciers — Participants des régimes ont déposé des requêtes en vue d'obtenir un jugement déclaratoire portant que le produit de la vente des actifs de I Ltd. était grevé d'une fiducie présumée d'un montant équivalent au passif non capitalisé au titre des pensions — En accueillant l'appel interjeté par les participants, la Cour d'appel a ordonné de combler le déficit de chacun des régimes par prélèvement sur le fonds de réserve — Cour a également rendu une décision concernant les frais qui approuvait le paiement des dépens des participants au régime des cadres sur leur caisse de retraite mais a refusé d'ordonner que les dépens du syndicat soient acquittés sur la caisse de retraite du régime des salariés — I Ltd., le contrôleur, un créancier garanti et le syndic de faillite ont formé un pourvoi à l'encontre de l'ordonnance, et le syndicat a interjeté appel à l'encontre de la décision concernant les frais — Pourvoi à l'encontre de l'ordonnance accueilli; pourvoi à l'encontre de l'adjudication des dépens rejeté; ordonnances de la Cour d'appel relatives aux dépens afférents aux appels interjetés devant elle annulées, et il a été ordonné que chacune des parties paie ses propres dépens devant la Cour d'appel et devant la Cour suprême du Canada — Décision de la Cour d'appel de refuser d'ordonner que les frais du syndicat soient acquittés sur la caisse de retraite n'était entachée d'aucune erreur de principe, surtout considérant l'issue du présent pourvoi — Prétentions du syndicat relativement aux frais reposaient en grande partie sur une interprétation erronée de la décision de la Cour d'appel concernant les frais.

Régimes de retraite --- Paiement de la rente — Faillite ou insolvabilité de l'employeur — Régimes enregistrés

Déficit dans le financement des régimes.

Régimes de retraite --- Administration des régimes de retraite — Évaluation et financement des régimes — Déficit

Insolvabilité de l'employeur.

Procédure civile --- Frais — Frais d'appel — Divers

I Ltd. was a Canadian subsidiary of I Corp. U.S. The I Ltd. group became insolvent. I Corp. U.S. sought bankruptcy protection. I Ltd. obtained a stay under the Companies' Creditors Arrangement Act ("CCAA"). I Ltd. was the administrator of two registered pension plans. The salaried plan was in the process of being wound up when the CCAA proceedings began. The executive plan was closed but not wound up. Protection under the CCAA was obtained, and both plans faced funding deficiencies. An amended initial order was obtained, authorizing I Ltd. to borrow from debtor-in-possession ("DIP") lenders and granting them priority over all other creditors. I Ltd. sold its assets. Plan members brought motions for a declaration that a deemed trust equal in amount to the unfunded pension liability was enforceable against the proceeds of sale.

In dismissing the motions, the court found that the deemed trust did not apply to the wind-up deficiencies, because the associated payments were not "due" or "accruing due" as of the date of the wind-up. The court found that the executive plan did not have a wind-up deficiency, since it had not yet been wound up. The plan members appealed successfully. The Court of Appeal found that the deemed trust created by s. 57(4) of the Pension Benefits Act ("PBA") applied to all amounts due with respect to plan wind-up deficiencies. The Court of Appeal found that executive plan members had a claim arising from I Ltd.'s breach of fiduciary obligations in failing to adequately protect plan members' interests. The Court of Appeal found that imposing a constructive trust over the reserved fund in favour of plan members was an appropriate remedy. The Court of Appeal found that the deemed trust had priority over the DIP charge because the issue of federal paramountcy had not been raised when the amended initial order was issued, and that I Ltd. had stated that it intended to comply with any deemed trust requirements. The Court of appeal ordered the court-appointed monitor to make a distribution from the reserve fund in order to pay the amount of each plan's deficiency. It also issued a costs endorsement that approved payment of the costs of the executive plan's members from that plan's fund, but declined to order the payment of costs to the union from the fund of the salaried plan. I Ltd., the monitor, a secured creditor, and I Corp. U.S.'s trustee in bankruptcy appealed the main order, and the union appealed the costs endorsement.

Held: The appeal of the main order was allowed, and the union's appeal of the costs endorsement was dismissed. The Court of Appeal's orders with respect to the costs of appeal before that court were set aside, and it was ordered that all parties bear their own costs in the Court of Appeal and in the Supreme Court of Canada.

Per Deschamps J. (Moldaver J. concurring): The Court of Appeal correctly held with respect to the salaried plan, which had been wound up, that I Ltd. was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency. The relevant provisions, legislative history and purpose were all consistent with inclusion of the wind-up deficiency in the protection afforded to members with respect to employer contributions upon the wind up of their pension plan. The deemed trust did not apply to the employer's wind-up deficiency with respect to the executive plan. Unlike s. 57(3) of the PBA, which provides that the deemed trust protecting employer contributions exists while a plan is ongoing, s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up.

As a result of the application of the doctrine of federal paramountcy, the DIP charge superseded the deemed trust. Subject to the application of the rules on the admissibility of new evidence, the doctrine of paramountcy could be raised even if it was not invoked in an initial proceeding. The federal and provincial laws in this case were inconsistent, as they gave rise to different, and conflicting, orders of priority. Section 30(7) of the (provincial) Personal Property Security Act required a part of the proceeds from the sale to be paid to the plan's administrator before other secured creditors were paid. However, the amended initial order provided that the DIP charge ranked in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise. This court-ordered priority based on the (federal) CCAA had the same effect as a statutory priority.

I Ltd.'s fiduciary obligations as plan administrator conflicted with management decisions that needed to be taken in the best interests of the corporation. The fact that I Ltd., as plan administrator, might have to claim accrued contributions from itself meant that it would have to simultaneously adopt conflicting positions on whether contributions had accrued as of the date of liquidation and whether a deemed trust had arisen in respect of wind-up deficiencies. This was indicative of a clear conflict between I Ltd.'s interests and those of the plan members. I Ltd. should have taken steps to ensure that the interests of the plan members were protected, but did not do so. On the contrary, it contested the position that the plan members advanced.

It could not be argued that the plan members were barred from defending their interests by the collateral attack doctrine. The argument that the plan members should have appealed the amended initial order authorizing the DIP charge, and were precluded from subsequently arguing that their claim ranked in priority to that of the DIP lenders, was not convincing. Among other things, the plan members did not receive notice of the motion to approve the DIP financing.

Even though I Ltd. breached its fiduciary duty to notify the plan members of the motion that resulted in the amended initial order, their claim remained subordinate to that of I Corp. U.S. (subrogated, as I Corp. U.S. was, to the DIP lenders' priority). In terms of an equitable remedy, there was no evidence that the lenders committed a wrong or that they engaged in inequitable conduct. The constructive trust remedy was not available, because proprietary remedies are generally awarded only with respect to property that is directly related to a wrong or that can be traced to such property. There was agreement with Cromwell J. that this condition was not met. It was unreasonable for the Court of Appeal to re-order the priorities in this case. It was difficult to see what gains the plan members would have secured had they received notice of the motion that resulted in the amended initial order. The plan members were allowed to fully argue their case.

There was agreement with Cromwell J. on the appeal from the costs endorsement.

Per Cromwell J. (concurring in the result) (McLachlin C.J.C., Rothstein J. concurring): The deemed trust did not apply to the disputed funds. The Court of Appeal erred in finding that the s. 57(4) (PBA) deemed trust applied to the wind-up deficiency. There could be no deemed trust for the executive plan, because the plan had not been wound up at the relevant

date. At issue was the salaried plan. The most plausible grammatical and ordinary sense of the words "accrued to the date of the wind-up" was that the amounts referred to were precisely ascertained immediately before the effective date of the plan's wind-up. The wind-up deficiency only arose upon wind-up and it was neither ascertained nor ascertainable on the date fixed for wind-up. The broader statutory context reinforced this view: the language of the deemed trusts in s. 57(3) and (4) was virtually exactly repeated in s. 75(1)(a), suggesting that both deemed trusts referred to the liability on wind-up referred to in s. 75(1)(a) and not to the further and distinct wind-up deficiency liability created under s. 75(1)(b). The legislative evolution and history of these provisions showed that the legislature never intended to include the wind-up deficiency in a statutory deemed trust. There was disagreement with Deschamps J.'s position that the wind-up deficiency could be said to have accrued to the date of wind-up.

The corporation failed in its duty to the plan beneficiaries as their administrator, and the beneficiaries ought to have been afforded more procedural protections in the CCAA proceedings. The Court of Appeal took too expansive a view of the fiduciary duties owed by I Ltd. as plan administrator. The only breach of fiduciary duty occurred when, upon insolvency, I Ltd.'s corporate interests were in obvious conflict with its fiduciary duty as plan administrator to ensure that all contributions were made to the plans when due. The breach was not in failing to avoid this conflict — the conflict itself was unavoidable. The breach was in failing to address the conflict to ensure that the plan beneficiaries had the opportunity to have representation in the CCAA proceedings as if there were independent plan administrators.

The Court of Appeal erred in using the equitable remedy of constructive trust to defeat the super priority ordered by the CCAA judge. The Court of Appeal erred in principle in finding that the asset in this case resulted from the breach of fiduciary duty such that it would be unjust for the party in breach to retain it. I Ltd.'s failure to meaningfully address conflicts of interest that arose during the CCAA proceedings did not result in any such asset. Imposing a constructive trust was wholly disproportionate to I Ltd.'s breach of fiduciary duty.

Although there was disagreement with Deschamps J. with respect to the scope of the s. 57(4) deemed trust, there was agreement that if there was a deemed trust in this case, it would have been superseded by the DIP loan because of the operation of the doctrine of federal paramountcy.

The union's submissions as to costs were largely based on an inaccurate reading of the Court of Appeal's costs endorsement. The Court of Appeal did not require the consent of plan beneficiaries as a prerequisite to ordering payment of costs from the fund. It was not correct to suggest that the costs endorsement would restrict recovery of beneficiary costs to instances when there is a surplus in the pension trust fund or preclude financing of beneficiary action when a fund was in deficit. The costs endorsement did not lay down a rule that a union representing pension beneficiaries cannot recover costs from the fund because the union itself is not a beneficiary. The litigation raised novel points of law with all of the uncertainty and risk inherent in such an undertaking. The failure of that litigation left no basis to impose the costs consequences of taking the risk on all of the plan members of an already underfunded plan. The union's apparent premise that if the executive plan members had their costs paid out of the fund, so too should the salaried plan members, was not an accurate statement of the order made with respect to the executive plan. The Court of Appeal did not apply what the union referred to as the "costs payment test" to the executive plan because the costs order was the product of an agreement and did not order payment of costs out of the fund as a whole. In the case of the union request, there was no such agreement and no such limitation of risk to the supporters of the litigation. There was no error in principle in the Court of Appeal's refusal to order the union costs to be paid out of the pension fund, particularly in light of the disposition of the present appeal.

Per LeBel J. (dissenting) (Abella J. concurring): There was agreement that no deemed trust could arise under s. 57(4) of the PBA in the case of the executive plan because that plan had not been wound up when the CCAA proceedings were initiated. In the case of the salaried plan, there was agreement with Deschamps J. that a deemed trust arose in respect of the wind-up deficiency, but also that the DIP super-priority prevailed because of the federal paramountcy doctrine.

However, the remedy of a constructive trust was available and it was appropriate to impose it in the circumstances of this case. A view different from that of the majority in the present decision was taken with regard to the nature and extent of the fiduciary duties of an employer who elects to act as administrator of a pension plan governed by the PBA. This dual status did not entitle the employer to greater leniency in the determination and exercise of its fiduciary duties or excuse wrongful actions. I Ltd. not only neglected its obligations towards the beneficiaries, but took a course of action that was actively inimical to their interests. The seriousness of these breaches amply justified the decision of the Court of Appeal to impose a constructive trust. The conditions that generally justify the imposition of a constructive trust were met. The imposition of the trust did not disregard the different corporate personalities of I Ltd. and I Corp. U.S. It properly acknowledged the close relationship between the two companies, the second in effect controlling the first. This relationship needed to be taken into consideration.

I Ltd. était une filiale canadienne de la société I É.-U. Le groupe I Ltd. est devenu insolvable. I É.-U. s'est placée sous la protection des règles applicables en matière de faillite. I Ltd. a obtenu une ordonnance de suspension sous le régime de la Loi sur les arrangements avec les créanciers des compagnies (« LACC »). I Ltd. administrait deux régimes de retraite enregistrés. Le régime des salariés était en cours de liquidation lorsque les procédures sous le régime de la LACC ont été engagées. Le régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé. La protection du régime de la LACC a été accordée, et les deux régimes de retraite accusaient un déficit de capitalisation. Une ordonnance initiale modifiée a été rendue autorisant I Ltd. à emprunter aux prêteurs au débiteur-exploitant (« DE ») et accordant à ces derniers une priorité sur tous les autres créanciers. I Ltd. a vendu tous ses actifs. Les participants des régimes ont déposé des requêtes en vue d'obtenir un jugement déclaratoire portant que le produit de la vente était grevé d'une fiducie présumée d'un montant équivalent au passif non capitalisé au titre des pensions.

En rejetant les requêtes, le tribunal a conclu que la fiducie présumée ne s'appliquait pas aux déficits de liquidation parce que les paiements afférents n'étaient pas [TRADUCTION] « échus » ou « à échoir » à la date de la liquidation. Le tribunal a conclu que l'on ne pouvait pas parler de déficit de liquidation relativement au régime des cadres puisqu'il n'était pas encore liquidé. Les participants des régimes ont interjeté appel avec succès. La Cour d'appel a conclu que la fiducie présumée créée à l'art. 57(4) de la Loi sur les régimes de retraite (« LRR ») s'appliquait à toutes les sommes dues au titre des déficits de liquidation des régimes. La Cour d'appel a conclu que les participants au régime des cadres pouvaient faire valoir une réclamation contre I Ltd. pour manquement à son obligation fiduciaire de protéger adéquatement leurs intérêts. La Cour d'appel a jugé que d'imposer une fiducie par interprétation grevant le fonds de réserve au profit des participants était une réparation appropriée. La Cour d'appel a conclu que la fiducie présumée avait priorité sur la charge DE parce que la question de la prépondérance fédérale n'avait pas été invoquée lorsque l'ordonnance initiale modifiée a été rendue et qu'I Ltd. avait déclaré qu'elle allait se conformer à toutes les exigences d'une fiducie présumée. La Cour d'appel a ordonné au contrôleur désigné par le tribunal de combler le déficit de chacun des régimes par prélèvement sur le fonds de réserve. Dans sa décision relative à l'adjudication des dépens, elle a également approuvé le paiement des dépens des participants au régime des cadres sur leur caisse de retraite, mais elle a refusé d'ordonner que les dépens du syndicat soient acquittés sur la caisse de retraite du régime des salariés. I Ltd., le contrôleur, un créancier garanti et le syndic de faillite d'I É.-U. ont formé un pourvoi à l'encontre de l'ordonnance principale et le syndicat a formé un pourvoi à l'encontre de l'adjudication des dépens.

Arrêt: Le pourvoi à l'encontre de l'ordonnance principale a été accueillie et le pourvoi du syndicat à l'encontre de l'adjudication des dépens a été rejeté. Les ordonnances de la Cour d'appel relatives aux dépens afférents aux appels interjetés devant elle ont été annulées et il a été ordonné que chacune des parties paie ses propres dépens devant la Cour d'appel et devant la Cour suprême du Canada.

Deschamps, J. (Moldaver, J., souscrivant à son opinion) : C'était à bon droit que la Cour d'appel a jugé qu'I Ltd. était présumée détenir en fiducie le montant nécessaire pour combler le déficit de liquidation du régime des salariés, dont la liquidation avait pris effet. Le texte, l'historique législatif et l'objet des dispositions pertinentes concordaient tous avec l'inclusion du déficit de liquidation dans la protection offerte aux participants à l'égard des cotisations de l'employeur à la liquidation des régimes. La fiducie présumée ne s'appliquait pas au déficit de liquidation de l'employeur relativement au

régime des cadres. Contrairement à l'art. 57(3) de la LRR, selon lequel la fiducie présumée protégeant les cotisations de l'employeur existe pendant que le régime est en vigueur, l'art. 57(4) prévoit que la fiducie présumée en cas de liquidation ne prend naissance qu'à la liquidation du régime.

L'application de la doctrine de la prépondérance fédérale donnait à la charge DE priorité sur la fiducie présumée. Sous réserve de l'application des règles régissant l'admissibilité de nouveaux éléments de preuve, la doctrine de la prépondérance fédérale pouvait être soulevée même si elle n'avait pas été invoquée dans une procédure initiale. En l'espèce, les dispositions fédérales et provinciales étaient inconciliables, car elles produisaient des ordres de priorité différents et conflictuels. L'article 30(7) de la Loi sur les sûretés mobilières (provinciale) exigeait qu'une partie du produit de la vente soit versée à l'administrateur du régime de retraite par priorité sur les paiements aux autres créanciers garantis. Toutefois, l'ordonnance initiale modifiée accordait à la charge DE priorité sur toutes les autres sûretés, y compris les fiducies, privilèges, charges et grèvements, d'origine législative ou autre. Cette priorité d'origine judiciaire fondée sur la LACC (fédérale) avait le même effet qu'une priorité d'origine législative.

Il y avait un conflit entre les obligations fiduciaires qui incombaient à I Ltd. en sa qualité d'administrateur des régimes et les décisions de gestion qu'elle devait prendre dans le meilleur intérêt de la société. Le fait qu'I Ltd. pouvait, en sa qualité d'administrateur des régimes de retraite, avoir à se réclamer à elle-même les cotisations accumulées l'amènerait à devoir adopter simultanément des positions opposées quant à savoir si des cotisations s'étaient accumulées à la date de la liquidation et si les déficits de capitalisation étaient protégés par une fiducie présumée. Cet exemple démontrait qu'il existait manifestement un conflit entre les intérêts d'I Ltd. et ceux des participants au régime. I Ltd. aurait dû prendre des mesures pour assurer la protection des intérêts des participants au régime, mais ne l'a pas fait. Elle a, au contraire, contesté la position défendue par les participants au régime.

La règle interdisant les contestations indirectes ne pouvait donc être invoquée pour empêcher les participants de défendre leurs intérêts. La prétention selon laquelle les participants auraient dû interjeter appel de l'ordonnance initiale modifiée autorisant la charge DE et qu'ils ne devaient pas être admis à prétendre plus tard que leur créance avait priorité sur celle des prêteurs DE n'était pas convaincante. Entre autres choses, les participants n'ont pas reçu avis de la requête demandant au tribunal d'autoriser le financement DE.

Bien qu'I Ltd. ait manqué à son obligation fiduciaire d'informer les participants de la requête en modification de l'ordonnance initiale, leur créance demeurait subordonnée à celle d'I É.-U. (I É.-U. étant subrogée aux prêteurs DE en conséquence de la priorité). À propos d'une réparation en equity, la preuve ne révélait aucune inconduite ni injustice de la part des prêteurs. La fiducie par interprétation n'était pas une réparation que l'on pouvait imposer, car la réparation de la nature d'un droit de propriété n'était généralement accordée qu'à l'égard d'un bien ayant un lien direct avec un acte fautif ou d'un bien qui pouvait être rattaché à un tel bien. On partageait l'avis du juge Cromwell que cette condition n'était pas remplie. Il était déraisonnable pour la Cour d'appel de modifier l'ordre de priorité en l'espèce. Il était difficile de voir comment les participants auraient pu améliorer leur position même s'ils avaient reçu avis de la requête en modification de l'ordonnance initiale. Les participants ont pu faire valoir pleinement leur position.

On convenait avec le juge Cromwell au sujet de l'adjudication des dépens.

Cromwell, J. (souscrivant au résultat des juges majoritaires) (McLachlin, J.C.C., Rothstein, J., souscrivant à son opinion) : La fiducie présumée ne visait pas les fonds en cause. La Cour d'appel a commis une erreur en concluant que la fiducie présumée prévue à l'art. 57(4) de la LRR s'appliquait au déficit de liquidation. Il ne pouvait y avoir de fiducie présumée au bénéfice du régime des cadres, car celui-ci n'avait pas encore été liquidé à la date considérée. Le litige ne portait que sur le régime des salariés. Suivant son sens ordinaire et grammatical le plus plausible, l'expression « accumulées à la date de la liquidation » renvoyait aux sommes déterminées de façon précise immédiatement avant la date de prise d'effet de la liquidation du régime. Le déficit de liquidation n'était constaté qu'à l'issue de la liquidation, et il n'était ni déterminé ni déterminable à la date de liquidation prévue. Le contexte législatif général confortait ce point de vue. Le texte de l'art.

57(3) et (4) qui dispose qu'il y a fiducie présumée est repris presque en tous points à l'art. 75(1)a), ce qui permettait de conclure que, dans les deux cas de fiducie présumée, le législateur renvoyait à l'obligation qui existait à la liquidation suivant l'art. 75(1)a) et non à celle, supplémentaire et distincte, qui était liée au déficit de liquidation et qui découlait de l'art. 75(1)b). L'évolution et l'historique de ces dispositions laissaient croire que le législateur n'a jamais voulu que le déficit de liquidation fasse l'objet d'une fiducie présumée d'origine législative. On ne partageait pas l'opinion de la juge Deschamps selon laquelle on pouvait considérer que le déficit de liquidation était accumulé à la date de la liquidation.

La société a manqué à ses obligations d'administrateur des régimes, et les bénéficiaires auraient dû obtenir de meilleures garanties procédurales dans le cadre de la procédure fondée sur la LACC. La Cour d'appel a conféré une portée excessive aux obligations fiduciaires d'I Ltd. en tant qu'administrateur des régimes. I Ltd. a seulement manqué à son obligation fiduciaire lorsque, une fois devenue insolvable, ses intérêts sont clairement entrés en conflit avec son obligation fiduciaire d'administrateur d'assurer le versement aux régimes de toutes les cotisations devenues exigibles. Son manquement résidait dans l'omission non pas d'éviter ce conflit, qui était en soi inévitable, mais de pallier le problème en veillant à ce que les bénéficiaires des régimes puissent être représentés dans le cadre de la procédure fondée sur la LACC comme si l'administrateur des régimes avait été indépendant.

La Cour d'appel a eu tort de recourir à la fiducie par interprétation, une réparation en equity, pour écarter la superpriorité accordée par le tribunal saisi sur le fondement de la LACC. La Cour d'appel a commis une erreur de principe lorsqu'elle a conclu que l'actif convoité résultait du manquement à l'obligation fiduciaire, de sorte qu'il serait injuste que la partie fautive se l'approprie. L'omission d'I Ltd. de véritablement pallier les conflits d'intérêts auxquels donnait lieu la procédure fondée sur la LACC n'a pas donné lieu à un tel actif. L'imposition d'une fiducie par interprétation était clairement une mesure disproportionnée par rapport au manquement d'I Ltd. à son obligation fiduciaire.

Bien que l'on ne partageait pas l'opinion de la juge Deschamps concernant la portée de la fiducie présumée prévue à l'art. 57(4), on s'accordait avec elle pour affirmer que si l'on devait conclure à l'existence d'une fiducie présumée dans le présent dossier, elle devait prendre rang avant la créance DE en application de la doctrine de la prépondérance fédérale.

Les prétentions du syndicat au sujet des frais reposaient en grande partie sur une interprétation erronée de la décision de la Cour d'appel à cet égard. La Cour d'appel ne considérait pas que le consentement des bénéficiaires du régime était une condition préalable au paiement des dépens à partir de la caisse de retraite. Il était erroné de laisser entendre que la décision relative aux dépens faisait en sorte que les bénéficiaires ne pouvaient être indemnisés des dépens que lorsqu'il existait un surplus dans la caisse de retraite en fiducie ou qu'ils ne pouvaient financer l'exercice d'un recours lorsque la caisse était déficitaire. La décision de la Cour d'appel relativement aux frais n'établissait pas la règle qu'un syndicat représentant les bénéficiaires d'une caisse de retraite ne pouvait être indemnisé de ses dépens par la caisse de retraite parce qu'il n'était pas lui-même bénéficiaire. Comme l'instance engagée en l'espèce portait sur des points de droit nouveaux, il était entendu que son issue était incertaine. L'échec du recours ne saurait justifier que tous les participants d'un régime déjà sous-capitalisé subissent les conséquences pécuniaires du risque couru. L'argument du syndicat reposait apparemment sur la prémisse que les participants du régime des salariés devraient obtenir paiement de leurs dépens à partir de leur caisse de retraite puisque c'est ce à quoi les participants au régime des cadres avaient droit. Or, telle n'était pas la teneur exacte de l'ordonnance de la Cour d'appel relative au régime des cadres. La Cour d'appel n'appliquait pas au régime des cadres le critère qui, selon le syndicat, vaudrait pour le paiement des dépens, car l'ordonnance relative aux dépens découlait d'un accord et elle ne prévoyait pas le paiement des dépens par prélèvement sur la caisse de retraite dans sa globalité. S'agissant de la demande du syndicat, nul accord n'était intervenu au même effet, et ce n'était pas seulement les participants derrière le recours qui s'exposaient au risque lié à l'issue de celui-ci. Il n'y avait aucune erreur de principe dans le refus de la Cour d'appel d'ordonner que les dépens du syndicat soient payés à partir de la caisse de retraite, étant donné surtout l'issue du présent appel.

LeBel, J. (dissident) (Abella, J., souscrivant à son opinion) : On s'accordait à dire que le régime des cadres ne pouvait être protégé par aucune fiducie présumée résultant de l'application de l'art. 57(4) de la LRR, puisque ce régime n'avait pas été

liquidé lorsque la procédure fondée sur la LACC a été enclenchée. On partageait l'opinion de la juge Deschamps, laquelle reconnaissait l'existence d'une fiducie présumée dans le cas du déficit de liquidation du régime des salariés mais aussi que la créance des prêteurs DE avait priorité sur toutes les autres créances, par application du principe de la prépondérance fédérale.

Toutefois, la fiducie par interprétation pouvait s'appliquer aux présentes circonstances et devrait être imposée en l'espèce. On a adopté un point de vue différent de celui des juges majoritaires en ce qui a trait à la nature et la portée des obligations fiduciaires d'un employeur qui choisit d'administrer un régime de retraite régi par la LRR. Sa double fonction n'autorisait pas l'employeur à faire preuve de laxisme dans la définition et l'exercice de ses obligations fiduciaires, ni ne justifiait ses actes répréhensibles. I Ltd. a non seulement manqué à ses obligations envers les bénéficiaires, mais a adopté en fait une démarche qui allait à l'encontre de leurs intérêts. La gravité de ces manquements justifiait amplement la décision de la Cour d'appel d'imposer une fiducie par interprétation. Les conditions qui justifient généralement l'imposition d'une fiducie par interprétation étaient satisfaites. En imposant la fiducie, la Cour n'a pas négligé le fait qu'I Ltd. et I É.-U. constituaient des personnes morales distinctes. Elle a tenu compte à juste titre de leurs rapports étroits, la seconde contrôlant dans les faits la première. Il fallait prendre ces rapports en compte.

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Generally — referred to

s. 2(1) "secured creditor" — considered

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s. 22(2) — considered

s. 23a [en. 1973, c. 113, s. 6] — considered

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Generally — referred to

Pension Benefits Act, R.S.O. 1980, c. 373
s. 23(4)(a) [en. 1983, c. 2, s. 3] — considered

s. 23(4)(b) [en. 1983, c. 2, s. 3] — considered

Pension Benefits Act, R.S.O. 1990, c. P.8
Generally — referred to

s. 1(1) "administrator" — considered

s. 8(1)(a) — considered

s. 22(4) — considered

s. 56(1) — considered

s. 56(2) — considered

s. 57(3) — considered

s. 57(4) — considered

s. 59 — considered

s. 69(1) — considered

s. 69(1)(d) — considered

s. 75(1)(a) — considered

s. 75(1)(b) — considered

s. 75(1)(b)(i) — considered

s. 75(1)(b)(ii) — considered

s. 75(1)(b)(iii) — considered

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s. 30(7) — considered

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Generally — referred to

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s. 23(4)(b) — considered

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s. 21(2) — considered

s. 21(2)(a) — considered

s. 23(3) — considered

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s. 23(4)(a)(i) [en. 1983, c. 2, s. 3] — considered

s. 23(4)(a)(ii) [en. 1983, c. 2, s. 3] — considered

s. 23(4)(b) [en. 1983, c. 2, s. 3] — considered

s. 23(5) [en. 1983, c. 2, s. 3] — considered

s. 32 — considered

s. 32(2) — considered

Pension Benefits Act, R.S.O. 1990, c. P.8
Generally — referred to

s. 1(1) "wind up" — considered

s. 8(1)(a) — considered

s. 9 — referred to

s. 10(1) ¶ 12 — referred to

s. 12 — referred to

s. 19 — referred to

s. 20 — referred to

s. 22(1) — considered

s. 22(2) — considered

s. 22(4) — considered

s. 25 — referred to

s. 26 — referred to

s. 42 — referred to

s. 56 — considered

s. 57 — considered

s. 57(3) — considered

s. 57(4) — considered

s. 58(1) — considered

s. 58(3) — considered

s. 58(4) — considered

s. 59 — referred to

s. 68(2)(c) — considered

s. 70 — referred to

s. 70(1) — considered

s. 70(6) — considered

s. 73 — referred to

s. 74 — considered

s. 75 — considered

s. 75(1) — considered

s. 75(1)(a) — considered

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Generally — referred to

s. 22(4) — considered

s. 57(4) — considered

Regulations considered by *Deschamps J.*:

Pension Benefits Act, R.S.O. 1990, c. P.8
General, R.R.O. 1990, Reg. 909

s. 31 — considered

Regulations considered by *Cromwell J.*:

Pension Benefits Act, R.S.O. 1990, c. P.8
General, R.R.O. 1990, Reg. 909

s. 4(4) ¶ 3 — considered

s. 5(1)(b) — considered

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Words and phrases considered:

amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations

[Per Deschamps J. (Moldaver J. concurring):] Since both the amount with respect to payments (s. 75(1)(a)) [*Pension Benefits Act*, R.S.O. 1990, c. P.8] and the one ascertained by subtracting the assets from the liabilities accrued as of the date of the wind up (s. 75(1)(b)) are to be paid upon wind up as employer contributions, they are both included in the ordinary meaning of the words of s. 57(4) of the *PBA*: "amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations". . . .

. . . . .

[A] contribution has "accrued" when the liabilities are completely constituted, even if the payment itself will not fall due until a later date. If this principle is applied to the facts of this case, the liabilities related to contributions to the fund allocated for payment of the pension benefits contemplated in s. 75(1)(b) are completely constituted at the time of the wind up, because no pension entitlements arise after that date. In other words, no new liabilities accrue at the time of or after the wind up. Even the portion of the contributions that is related to the elections plan members may make upon wind up has "accrued to the date of the wind up", because it is based on rights employees earned before the wind-up date.

The fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes (*Canadian Pacific Ltd. v. Ontario (Minister of Revenue)* (1998), 41 O.R. (3d) 606 (Ont. C.A.), at p. 621). The use of the word "accrued" does not limit liabilities to amounts

that can be determined with precision. As a result, the words "contributions accrued" can encompass the contributions mandated by s. 75(1)(b) of the *PBA*.

accrued to the date of the wind up

[Per Cromwell J. (concurring in the result) (McLachlin C.J.C. and Rothstein J. concurring):] [T]he most plausible grammatical and ordinary sense of the words "accrued to the date of the wind up" is that the amounts referred to are precisely ascertained immediately before the effective date of the plan's wind-up. The wind-up deficiency only arises upon wind-up and it is neither ascertained nor ascertainable on the date fixed for wind-up. . . . the broader statutory context reinforces this view: the language of the deemed trusts in s. 57(3) and (4) [*Pension Benefits Act*, R.S.O. 1990, c. P.8] is virtually exactly repeated in s. 75(1)(a), suggesting that both deemed trusts refer to the liability on wind-up referred to in s. 75(1)(a) and not to the further and distinct wind-up deficiency liability created under s. 75(1)(b). . . . the legislative evolution and history of these provisions show, in my view, that the legislature never intended to include the wind-up deficiency in a statutory deemed trust.

. . . . .

In my view, the most plausible grammatical and ordinary sense of the phrase "accrued to the date of the wind up" in s. 57(4) is that it refers to the sums that are ascertained immediately before the effective wind-up date of the plan.

In the context of s. 57(4), the grammatical and ordinary sense of the term "accrued" is that the amount of the obligation is "fully constituted" and "ascertained" although it may not yet be payable. The amount of the wind-up deficiency is not fully constituted or ascertained (or even ascertainable) before or even on the date fixed for wind up and therefore cannot fall under s. 57(4).

Of course, the meaning of the word "accrued" may vary with context. In general, when the term "accrued" is used in relation to legal rights, its common meaning is that the right has become fully constituted even though the monetary implications of its enforcement are not yet known or knowable. Thus, we speak of the "accrual" of a cause of action in tort when all of the elements of the cause of action come into existence, even though the extent of the damage may well not be known or knowable at that time: see, e.g., *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53 (S.C.C.). However, when the term is used in relation to a sum of money, it will generally refer to an amount that is at the present time either quantified or exactly quantifiable but which may or may not be due.

. . . . .

In other contexts, an amount which has accrued may not yet be due. For example, we speak of "accrued interest" meaning a precise, quantified amount of interest that has been earned but may not yet be payable. The term "accrual" is used in the same way in "accrual accounting". In accrual method accounting, "transactions that give rise to revenue or costs are recognized in the accounts when they are earned and incurred respectively": B. J. Arnold, *Timing and Income Taxation: The Principles of Income Measurement for Tax Purposes* (1983), at p. 44. Revenue is earned when the recipient "substantially completes performance of everything he or she is required to do as long as the amount due is ascertainable and there is no uncertainty about its collection": P. W. Hogg, J. E. Magee and J. Li, *Principles of Canadian Income Tax Law* (7th ed., 2010), at s. 6.5(b); see also Canadian Institute of Chartered Accountants, *CICA Handbook — Accounting*, Part II, s. 1000, at paras. 41-44. In this context, the amount must be ascertained at the time of accrual.

. . . . .

I turn next to the ordinary and grammatical sense of the words "to the date of the wind up" in s. 57(4). In my view, these words indicate that only those contributions that accrue before the date of wind up, and not those amounts the liability for which arises only on the day of wind up — that is, the wind-up deficiency — are included.

Where the legislature intends to include the date of wind up, it has used suitable language to effect that purpose. For example, the English version of a provision amending the *PBA* in 2010 (c. 24, s. 21(2)), s. 68(2)(c), indicates which trade unions are entitled to notice of the wind up:

(2) If the employer or the administrator, as the case may be, intends to wind up the pension plan, the administrator shall give written notice of the intended wind up to,

. . . . .

(c) each trade union that represents members of the pension plan or that, on the date of the wind up, represented the members, former members or retired members of the pension plan;

In contrast to the phrase "to the date of wind up", "on the date of wind up" clearly includes the date of wind up. (The French version does not indicate a different intention.) Similarly, s. 70(6), which formed part of the *PBA* until 2012 (rep. S.O. 2010, c. 9, s. 52(5)), read as follows:

(6) On the partial wind up of a pension plan, members, former members and other persons entitled to benefits under the pension plan shall have rights and benefits that are not less than the rights and benefits they would have on a full wind up of the pension plan on the effective date of the partial wind up.

The words "on the effective date of the partial wind up" indicate that the members are entitled to those benefits from the date of the partial wind up, in the sense that members can claim their benefits beginning on the date of the wind up itself. This is how the legislature expresses itself when it wants to speak of a period of time including a specific date. By comparison, "to the date of the wind up" is devoid of language that would include the actual date of wind up.

To sum up with respect to the ordinary and grammatical meaning of the phrase "accrued to the date of the wind up", the most plausible ordinary and grammatical meaning is that such amounts are fully constituted and precisely ascertained immediately before the date fixed as the date of wind up. Thus, according to the ordinary and grammatical meaning of the words, the wind-up deficiency obligation set out in s. 75(1)(b) has not "*accrued* to the date of the wind up" as required by s. 57(4). Moreover, the liability for the wind-up deficiency arises where a pension plan is wound up (s. 75(1)(b)) and so it cannot be a liability that "accrued *to the date of the wind up*" (s. 57(4)).

fiduciary relationship

[Per LeBel J. (dissenting) (Abella J. concurring):] A fiduciary relationship is a relationship, grounded in fact and law, between a vulnerable beneficiary and a fiduciary who holds and may exercise power over the beneficiary in situations recognized by law.

Termes et locutions cités:

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

[Deschamps, J. (Moldaver, J., souscrivant à son opinion):] Puisque le montant des paiements (al. 75(1)a) [*Loi sur les régimes de retraite*, L.R.O. 1990, ch. P.8] et le montant établi en soustrayant l'actif du passif accumulé à la date de la liquidation (al. 75(1)b)) doivent tous les deux être versés à la liquidation à titre de cotisations de l'employeur, ils entrent tous les deux dans le sens ordinaire des mots employés au par. 57(4) de la *LRR*: 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 ». . . .

. . . . .

[U]ne cotisation est « accumulée » lorsque le passif est entièrement constitué, même si le paiement lui-même ne devient exigible que plus tard. Cela signifie en l'espèce que le passif au titre des cotisations à la caisse destinée au paiement des prestations de retraite visées à l'al. 75(1)b) est entièrement constitué lorsque la liquidation a lieu, parce qu'aucun droit au titre de la pension ne prend naissance après cette date. Autrement dit, aucun passif ne s'accumule pendant ni après la liquidation. Même la portion des cotisations afférente aux options que les participants peuvent exercer lorsqu'il y a liquidation est « accumulé[e] à la date de la liquidation » parce qu'elle est fondée sur des droits que les employés ont acquis avant la date de la liquidation.

Le fait que le montant précis des cotisations n'est pas établi au moment de la liquidation ne confère pas aux cotisations un caractère éventuel qui ferait en sorte qu'elles ne seraient pas accumulées d'un point de vue comptable (*Canadian Pacific Ltd. c. M.N.R.* (1998), 41 O.R. (3d) 606 (C.A.), p. 621). L'emploi du mot « accumulé » ne limite pas le passif aux seuls montants qui peuvent être établis avec précision. On peut donc considérer que le passif « accumulé » englobe les cotisations exigées au par. 75(1)b) de la *LRR*.

accumulées à la date de la liquidation

[Cromwell, J. (souscrivant au résultat des juges majoritaires) (McLachlin, J.C.C., Rothstein, J., souscrivant à son opinion):] [S]uivant son sens ordinaire et grammatical le plus plausible, l'expression « accumulées à la date de la liquidation » renvoie aux sommes déterminées de façon précise immédiatement avant la date de prise d'effet de la liquidation du régime. Le déficit de liquidation n'est constaté qu'à l'issue de la liquidation, et il n'est ni déterminé ni déterminable à la date de liquidation prévue. . . . [L]e contexte législatif général me conforte dans ce point de vue. Le texte des par. 57(3) et (4) [*Loi sur les régimes de retraite*, L.R.O. 1990, ch. P.8] qui dispose qu'il y a fiducie réputée est repris presque en tous points à l'al. 75(1)a), ce qui permet de conclure que, dans les deux cas de fiducie réputée, le législateur renvoie à l'obligation qui existe à la liquidation suivant l'al. 75(1)a) et non à celle, supplémentaire et distincte, qui est liée au déficit de liquidation et qui découle de l'al. 75(1)b). . . . [I]l appert à mon sens de l'évolution et de l'historique de ces dispositions que le législateur n'a jamais voulu que le déficit de liquidation fasse l'objet d'une fiducie réputée d'origine législative.

. . . . .

À mon avis, suivant son sens ordinaire et grammatical le plus plausible, l'expression « accumulées à la date de la liquidation » employée au par. 57(4) renvoie aux sommes déterminées immédiatement avant la date de prise d'effet de la liquidation du régime.

Dans le contexte du par. 57(4), le sens ordinaire et grammatical d'« accumulées » veut que l'obligation soit « entièrement constituée » et que son montant soit « déterminé », même si elle peut ne pas être encore payable. Le déficit de liquidation n'est pas entièrement constitué ni son montant déterminé (ou déterminable) avant la date prévue pour la liquidation, ou le jour même, et ne peut donc pas être visé au par. 57(4).

Certes, le sens du terme « accumulées » [et plus encore celui de son équivalent anglais « accrued »] peut varier selon le contexte. En général, lorsque ce terme est employé de pair avec des droits légaux, son sens courant veut que le droit soit entièrement constitué, même si les répercussions financières de son exécution ne sont pas encore connues et ne peuvent l'être. Ainsi, en responsabilité délictuelle, on parle d'accumulation (au sens d'acquisition ou de naissance) de la cause d'action lorsque tous ses éléments sont réunis, même lorsque l'étendue du préjudice n'est pas encore connue ou ne peut l'être (voir, p. ex., *Ryan c. Moore*, 2005 CSC 38, [2005] 2 R.C.S. 53 (S.C.C.). Toutefois, lorsque le terme qualifie une somme, il renvoie généralement à un élément dont la valeur est actuellement mesurée ou mesurable, mais qui peut ou non être dû.

. . . . .

Dans d'autres cas, la somme qui s'est accumulée [en anglais, « accrued »] peut ne pas être encore exigible. Par exemple, on parle d'« intérêts accumulés » [« accrued interests »] au sens du montant précis des intérêts qui sont courus, mais qui ne sont pas encore exigibles. En anglais, accrual est utilisé dans le même sens dans l'expression « accrual accounting » (en français,

comptabilité d'exercice). Suivant cette méthode, les [traduction] « opérations qui génèrent des revenus ou occasionnent des dépenses sont comptabilisées lorsque les revenus sont gagnés ou que les dépenses sont engagées » (B. J. Arnold, *Timing and Income Taxation: The Principles of Income Measurement for Tax Purposes* (1983), à la p. 44). Le revenu est gagné lorsque le bénéficiaire [traduction] « a essentiellement accompli tout ce qu'il devait accomplir, à condition que la somme due puisse être déterminée et que sa perception ne fasse l'objet d'aucune incertitude » (P. W. Hogg, J. E. Magee et J. Li, *Principles of Canadian Income Tax Law* (7e éd. 2010), à l'al. 6.5b); voir également le Manuel de l'Institut canadien des comptables agréés, *Manuel de l'ICCA - Comptabilité*, partie II, ch. 1000, aux par. 41 à 44). La somme en cause doit alors être déterminée au moment où le droit de la toucher est acquis [« accrued »].

. . . . .

J'examine maintenant le sens ordinaire et grammatical des mots « à la date de la liquidation » (en anglais, « to the date of the wind up ») employés au par. 57(4). À mon avis, cette expression fait en sorte que seules sont visées les cotisations accumulées avant la date de la liquidation, et non les sommes qui font l'objet d'une obligation qui ne prend naissance que le jour de la liquidation (en anglais, « on the date of the wind up ») et qui correspondent au déficit de liquidation.

Si l'intention du législateur avait été d'englober la date de la liquidation, il aurait employé le libellé voulu. Par exemple, l'al. 68(2)c) de la *LRR*, modifié en 2010 (ch. 24, par. 21(2)), précise dans sa version anglaise quels syndicats doivent recevoir avis de la liquidation:

(2) If the employer or the administrator, as the case may be, intends to wind up the pension plan, the administrator shall give written notice of the intended wind up to,

. . . . .

(c) each trade union that represents members of the pension plan or that, on the date of the wind up [à la date de la liquidation], represented the members, former members or retired members of the pension plan;

Contrairement à la formule « to the date of wind up », l'expression « on the date of wind up » englobe clairement la date de la liquidation. (La version française ne se prête pas à une autre interprétation.) De même, le par. 70(6), qui figurait dans la *LRR* jusqu'en 2012 (abr. L.O. 2010, ch. 9, par. 52(5)), énonce ce qui suit:

(6) À la liquidation partielle d'un régime de retraite, les participants, les anciens participants et les autres personnes qui ont droit à des prestations en vertu du régime de retraite ont des droits et prestations qui ne sont pas inférieurs aux droits et prestations qu'ils auraient à la liquidation totale du régime de retraite à la date de prise d'effet de la liquidation partielle [on the effective date of the partial wind up].

Il appert de l'expression anglaise « on the effective date of the partial wind up » que les participants ont droit aux prestations à compter de la date de la liquidation partielle, c'est-à-dire qu'ils peuvent les réclamer à compter de la liquidation elle-même. Le législateur s'exprime ainsi lorsqu'il veut qu'une période englobe une date précise. À l'opposé, lorsqu'il dit en anglais « to the date of the wind up » (en français, à la date de la liquidation), il n'entend pas englober la date où survient la liquidation.

Bref, le sens ordinaire et grammatical le plus plausible d'« accumulées à la date [to the date] de la liquidation » veut que soient visées les sommes entièrement constituées et déterminées immédiatement avant la date prévue de liquidation. Ainsi, l'obligation liée au déficit de liquidation visé à l'al. 75(1)b) n'est donc pas « accumul[é] à la date [to the date] de la liquidation » comme l'exige le par. 57(4). De plus, comme cette obligation naît lorsque le régime de retraite est liquidé (al. 75(1)b)), son objet ne peut donc pas être « accumul[é] à la date de la liquidation » (par. 57(4)).

relation fiduciaire

[LeBel, J. (dissident) (Abella, J., souscrivant à son opinion):] Une relation fiduciaire s'entend de la relation factuelle et juridique entre un bénéficiaire vulnérable et un fiduciaire qui détient et peut exercer un pouvoir sur le bénéficiaire dans les situations prévues par la loi.

APPEAL by company, monitor, secured creditor, and trustee in bankruptcy from judgment reported at *Indalex Ltd., Re* (2011), 89 C.C.P.B. 39, 276 O.A.C. 347, 331 D.L.R. (4th) 352, 17 P.P.S.A.C. (3d) 194, 75 C.B.R. (5th) 19, 104 O.R. (3d) 641, 2011 C.E.B. & P.G.R. 8433, 2011 ONCA 265, 2011 CarswellOnt 2458 (Ont. C.A.), ordering distribution from reserve fund to pay amount of pension plan deficiencies; APPEAL by union from judgment reported at *Indalex Ltd., Re* (2011), 81 C.B.R. (5th) 165, 92 C.C.P.B. 277, 2011 ONCA 578, 2011 CarswellOnt 9077 (Ont. C.A.), issuing costs endorsement.

POURVOI formé par une société, un contrôleur, un créancier garanti et un syndic de faillite à l'encontre d'une décision publiée à *Indalex Ltd., Re* (2011), 89 C.C.P.B. 39, 276 O.A.C. 347, 331 D.L.R. (4th) 352, 17 P.P.S.A.C. (3d) 194, 75 C.B.R. (5th) 19, 104 O.R. (3d) 641, 2011 C.E.B. & P.G.R. 8433, 2011 ONCA 265, 2011 CarswellOnt 2458 (Ont. C.A.), ayant ordonné de combler le déficit des régimes par prélèvement sur le fonds de réserve; POURVOI formé par un syndicat à l'encontre d'un jugement publié à *Indalex Ltd., Re* (2011), 81 C.B.R. (5th) 165, 92 C.C.P.B. 277, 2011 ONCA 578, 2011 CarswellOnt 9077 (Ont. C.A.), ayant adjugé les dépens.

***Deschamps J.*:**

1 Insolvency can trigger catastrophic consequences. Often, large claims of ordinary creditors are left unpaid. In insolvency situations, the promise of defined benefits made to employees during their employment is put at risk. These appeals illustrate the materialization of such a risk. Although the employer in this case breached a fiduciary duty, the harm suffered by the pension plans' beneficiaries results not from that breach, but from the employer's insolvency. For the following reasons, I would allow the appeals of the appellants Sun Indalex Finance, LLC; George L. Miller, Indalex U.S.'s trustee in bankruptcy and FTI Consulting Canada ULC.

2 To improve the prospect of pensioners receiving their full benefits after a pension plan is wound up, the Ontario legislature has protected contributions to the pension fund that have accrued but are not yet due at the time of the wind up by providing for a deemed trust that supersedes all other provincial priorities over certain assets of the plan sponsor (s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), and s. 30(7) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*")). The parties disagree on the scope of the deemed trust. In my view, the relevant provisions and the context lead to the conclusion that it extends to contributions the employer must make to ensure that the pension fund is sufficient to cover liabilities upon wind up. In the instant case, however, the deemed trust is superseded by the security granted to the creditor that loaned money to the employer, Indalex Limited ("Indalex"), during the insolvency proceedings. In addition, although the employer, as plan administrator, may have put itself in a position of conflict of interest by failing to give the plan's members proper notice of a motion requesting financing of its operations during a restructuring process, there was no realistic possibility that, had the members received notice and had the *CCAA* court found that they were secured creditors, it would have ordered the priorities differently. Consequently, it would not be appropriate to order an equitable remedy such as the constructive trust ordered by the Court of Appeal.

I. Facts

3 Indalex is a wholly owned Canadian subsidiary of a U.S. company, Indalex Holding Corp. ("Indalex U.S."). Indalex and its related companies formed a corporate group (the "Indalex Group") that manufactured aluminum extrusions. The U.S. and Canadian operations were closely linked.

4 In 2009, a combination of high commodity prices and the economic recession's impact on the end-user market for aluminum extrusions plunged the Indalex Group into insolvency. On March 20, 2009, Indalex U.S. filed for Chapter 11 bankruptcy protection in Delaware. On April 3, 2009, Indalex applied for a stay under the *Companies' Creditors Arrangement Act*, R.S.C.

1985, c. C-36 ("*CCAA*"), and Morawetz J. granted the stay in an initial order. He also appointed FTI Consulting Canada ULC (the "Monitor") to act as monitor.

5 At that time, Indalex was the administrator of two registered pension plans. One was for its salaried employees (the "Salaried Plan"), the other for its executives (the "Executive Plan"). Members of the Salaried Plan included seven employees for whom the United Steelworkers ("USW") acted as bargaining agent. The Salaried Plan was in the process of being wound up when the *CCAA* proceedings began. The effective date of the wind up was December 31, 2006. The Executive Plan had been closed but not wound up. Overall, the deficiencies of the pension plans' funds concern 49 persons (members of the Salaried Plan and the Executive Plan are referred to collectively as the "Plan Members").

6 Pursuant to the initial order made by Morawetz J. on April 3, 2009, Indalex obtained protection under the *CCAA*. Both plans faced funding deficiencies when Indalex filed for the *CCAA* stay. The wind-up deficiency of the Salaried Plan was estimated at $1.8 million as of December 31, 2008. The funding deficiency of the Executive Plan was estimated at $3.0 million on a wind-up basis as of January 1, 2008.

7 From the beginning of the insolvency proceedings, the Indalex Group's reorganization strategy was to sell both Indalex and Indalex U.S. as a going concern while they were under *CCAA* and Chapter 11 protection. To this end, Indalex and Indalex U.S. sought to enter into a common agreement for debtor-in-possession ("DIP") financing under which the two companies could draw from joint credit facilities and would guarantee each other's liabilities.

8 Indalex's financial distress threatened the interests of all the Plan Members. If the reorganization failed and Indalex were liquidated under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), they would not have recovered any of their claims against Indalex for the underfunded pension liabilities, because the priority created by the provincial statute would not be recognized under the federal legislation: *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.). Although the priority was not rendered ineffective by the *CCAA*, the Plan Members' position was uncertain.

9 The Indalex Group solicited terms from a variety of possible DIP lenders. In the end, it negotiated an agreement with a syndicate consisting of the pre-filing senior secured creditors. On April 8, 2009, the *CCAA* court issued an Amended and Restated Initial Order ("Amended Initial Order") authorizing Indalex to borrow US$24.4 million from the DIP lenders and grant them priority over all other creditors ("DIP charge") in that amount. In his endorsement of the order, Morawetz J. made a finding that Indalex would be unable to achieve a going-concern solution without DIP financing. Such financing was necessary to support Indalex's business until the sale could be completed.

10 The Plan Members did not participate in the initial proceedings. The initial stay had been granted *ex parte*. The *CCAA* judge ordered Indalex to serve a copy of the stay order on every creditor owed $5,000 or more within 10 days of the initial order of April 3. As of April 8, when the motion to amend the initial order was heard, none of the Executive Plan's members had been served with that order; nor did any of them receive notice of the motion to amend it. The USW did receive short notice, but chose not to attend. Morawetz J. authorized Indalex to proceed on the basis of an abridged time for service. The Plan Members were given notice of all subsequent proceedings. None of the Plan Members appealed the Amended Initial Order to contest the DIP charge.

11 On June 12, 2009, Indalex applied for authorization to increase the DIP loan amount to US$29.5 million. At the hearing, the Executive Plan's members initially opposed the motion, seeking to reserve their rights. After it was confirmed that the motion was merely to increase the amount of the DIP charge (without changing the terms of the loan), they withdrew their opposition and the court granted the motion.

12 On April 22, 2009, the court extended the stay of proceedings and approved a marketing process for the sale of Indalex's assets. The Plan Members did not oppose the application to approve the marketing process. Under the approved bidding procedure, the Indalex Group solicited a wide variety of potential buyers.

13 Indalex received a bid from SAPA Holding AB ("SAPA"). It was for approximately US$30 million, and SAPA did not assume responsibility for the pension plans' wind-up deficiencies. According to the Monitor's estimate, the liquidation

value of Indalex's assets was US$44.7 million. Indalex brought an application for an order approving a bidding procedure for a competitive auction and deeming SAPA's bid to be a qualifying bid. The Executive Plan's members opposed the application, expressing concern that the pension liabilities would not be assumed. Morawetz J. nevertheless issued the order on July 2, 2009; in it, he approved the bidding procedure for sale, noting that the Executive Plan's members could raise their objections at the time of approval of the final bid.

14 The bidding procedure did not trigger any competing bids. On July 20, 2009, Indalex and Indalex U.S. brought motions before their respective courts to approve the sale of substantially all their assets under the terms of SAPA's bid. Indalex also moved for approval of an interim distribution of the sale proceeds to the DIP lenders. The Plan Members opposed Indalex's motion. First, they argued that it was estimated that a forced liquidation would produce greater proceeds than SAPA's bid. Second, they contended that their claims had priority over that of the DIP lenders because the unfunded pension liabilities were subject to a statutory deemed trust under the *PBA*. They also contended that Indalex had breached its fiduciary obligations by failing to meet its obligations as a plan administrator throughout the insolvency proceedings.

15 The court dismissed the Plan Members' first objection, holding that there was no evidence supporting the argument that a forced liquidation would be more beneficial to suppliers, customers and the 950 employees. It approved the sale on July 20, 2009. The order in which it did so directed the Monitor to make a distribution to the DIP lenders. With respect to the second objection, however, Campbell J. ordered the Monitor to hold a reserve in an amount to be determined by the Monitor, leaving the Plan Members' arguments based on their right to the proceeds of the sale open for determination at a later date.

16 The sale to SAPA closed on July 31, 2009. The Monitor collected $30.9 million in proceeds. It distributed US$17 million to the DIP lenders, paid certain fees, withheld a portion to cover various costs and retained $6.75 million in reserve pending determination of the Plan Members' rights. At the closing, Indalex owed US$27 million to the DIP lenders. The payment of US $17 million left a US$10 million shortfall in the amount owed to these lenders. The DIP lenders called on Indalex U.S. to cover this shortfall under the guarantee contained in the DIP lending agreement. Indalex U.S. paid the amount of the shortfall. Since Indalex U.S. was, as a term of the guarantee, subrogated to the DIP lenders' priority, it became the highest ranking creditor of Indalex, with a claim for US$10 million.

17 Following the sale of Indalex's assets, its directors resigned. Indalex U.S., a part of Indalex Group, took over the management of Indalex, whose assets were limited to the sale proceeds held by the Monitor. A Unanimous Shareholder Declaration was executed on August 12, 2009; in it, Mr. Keith Cooper was appointed to manage Indalex's affairs. Mr. Cooper was an employee of FTI Consulting Inc.

18 In accordance with the right reserved by the court on July 20, 2009, the Plan Members brought motions on August 28, 2009 for a declaration that a deemed trust equal in amount to the unfunded pension liability was enforceable against the proceeds of the sale. They contended that they had priority over the secured creditors pursuant to s. 57(4) of the PBA and s. 30(7) of the *PPSA*. Indalex, in turn, brought a motion for an assignment in bankruptcy to secure the priority regime it argued for in opposing the Plan Members' motions.

19 On October 14, 2009, while judgment was pending, Indalex U.S. converted the Chapter 11 restructuring proceeding in the U.S. into a Chapter 7 liquidation proceeding. On November 5, 2009, the Superintendent of Financial Services ("Superintendent") appointed the actuarial firm of Morneau Sobeco Limited Partnership ("Morneau") to replace Indalex as administrator of the plans.

20 On February 18, 2010, Campbell J. dismissed the Plan Members' motions, concluding that the deemed trust did not apply to the wind-up deficiencies, because the associated payments were not "due" or "accruing due" as of the date of the wind up. He found that the Executive Plan did not have a wind-up deficiency, since it had not yet been wound up. He thus found it unnecessary to rule on Indalex's motion for an assignment in bankruptcy (2010 ONSC 1114, 79 C.C.P.B. 301 (Ont. S.C.J. [Commercial List])). The Plan Members appealed the dismissal of their motions.

21 The Ontario Court of Appeal allowed the Plan Members' appeals. It found that the deemed trust created by s. 57(4) of the *PBA* applies to all amounts due with respect to plan wind-up deficiencies. Although the court noted that it was likely that no deemed trust existed for the Executive Plan on the plain meaning of the provision, it declined to address this question, because it found that the Executive Plan's members had a claim arising from Indalex's breach of its fiduciary obligations in failing to adequately protect the Plan Members' interests (2011 ONCA 265, 104 O.R. (3d) 641 (Ont. C.A.)).

22 The Court of Appeal concluded that a constructive trust was an appropriate remedy for Indalex's breach of its fiduciary obligations. The court was of the view that this remedy did not harm the DIP lenders, but affected only Indalex U.S. It imposed a constructive trust over the reserved fund in favour of the Plan Members. Turning to the question of distribution, it also found that the deemed trust had priority over the DIP charge because the issue of federal paramountcy had not been raised when the Amended Initial Order was issued, and that Indalex had stated that it intended to comply with any deemed trust requirements. The Court of Appeal found that there was nothing in the record to suggest that not applying the paramountcy doctrine would frustrate Indalex's ability to restructure.

23 The Court of Appeal ordered the Monitor to make a distribution from the reserve fund in order to pay the amount of each plan's deficiency. It also issued a costs endorsement that approved payment of the costs of the Executive Plan's members from that plan's fund, but declined to order the payment of costs to the USW from the fund of the Salaried Plan (2011 ONCA 578, 81 C.B.R. (5th) 165 (Ont. C.A.)).

24 The Monitor, together with Sun Indalex, a secured creditor of Indalex U.S., and George L. Miller, Indalex U.S.'s trustee in bankruptcy, appeals the Court of Appeal's order. Both the Superintendent and Morneau support the Plan Members' position as respondents. A number of stakeholders are also participating in the appeals to this Court. In addition, USW appeals the costs endorsement. As I agree with my colleague Cromwell J. on the appeal from the costs endorsement, I will not deal with it in these reasons.

II. Issues

25 The appeals raise four issues:

1. Does the deemed trust provided for in s. 57(4) of the *PBA* apply to wind-up deficiencies?

2. If so, does the deemed trust supersede the DIP charge?

3. Did Indalex have any fiduciary obligations to the Plan Members when making decisions in the context of the insolvency proceedings?

4. Did the Court of Appeal properly exercise its discretion in imposing a constructive trust to remedy the breaches of fiduciary duties?

III. Analysis

A. Does the Deemed Trust Provided for in Section 57(4) of the PBA Apply to Windup Deficiencies?

26 The first issue is whether the statutory deemed trust provided for in s. 57(4) of the *PBA* extends to wind-up deficiencies. This question is one of statutory interpretation, which requires examination of both the wording and context of the relevant provisions of the *PBA*. Section 57(4) of the *PBA* affords protection to members of a pension plan with respect to their employer's contributions upon wind up of the plan. The provision reads:

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.

27 The most obvious interpretation is that where a plan is wound up, this provision protects all contributions that have accrued but are not yet due. The words used appear to include the contribution the employer is to make where a plan being wound up is in a deficit position. This quite straightforward interpretation, which is consistent with both the historical broadening of the protection and the remedial purpose of the provision, is being challenged on the basis of a narrow definition of the word "accrued". I do not find that this argument justifies limiting the protection afforded to plan members by the Ontario legislature.

28 The *PBA* sets out the rules for the operation of funded contributory defined benefit pension plans in Ontario. In an ongoing plan, an employer must pay into a fund all contributions it withholds from its employees' salaries. In addition, while the plan is ongoing, the employer must make two kinds of payments. One relates to current service contributions — the employer's own regular contributions to the pension fund as required by the plan. The other ensures that the fund is sufficient to meet the plan's liabilities. The employees' interest in having the contributions made while the plan is ongoing is protected by a deemed trust provided for in s. 57(3) of the *PBA*.

29 The *PBA* also establishes a comprehensive scheme for winding up a pension plan. Section 75(1)(a) imposes on the employer the obligation to "pay" an amount equal to the total of all "payments" that are due or that have accrued and have not been paid into the fund. In addition, s. 75(1)(b) sets out a formula for calculating the amount that must be paid to ensure that the fund is sufficient to cover all liabilities upon wind up. Within six months after the effective date of the wind up, the plan administrator must file a wind-up report that lists the plan's assets and liabilities as of the date of the wind up. If the wind-up report shows an actuarial deficit, the employer must make wind-up deficiency payments. Consequently, s. 75(1)(a) and (b) jointly determine the amount of the contributions owed when a plan is wound up.

30 It is common ground that the contributions provided for in s. 75(1)(a) are covered by the wind-up deemed trust. The only question is whether it also applies to the deficiency payments required by s. 75(1)(b). I would answer this question in the affirmative in view of the provision's wording, context and purpose.

31 It is readily apparent that the wind-up deemed trust provision (s. 57(4) PBA) does not place an express limit on the "employer contributions accrued to the date of the wind up but not yet due", and I find no reason to exclude contributions paid under s. 75(1)(b). Section 75(1)(a) explicitly refers to "an amount equal to the total of all payments" that have *accrued*, even those that were not yet due as of the date of the wind up, whereas s. 75(1)(b) contemplates an "amount" that is calculated on the basis of the value of assets and of liabilities that have *accrued* when the plan is wound up. Section 75(1) reads as follows:

75. (1) Where a pension plan is wound up, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

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

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

> exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

32 Since both the amount with respect to payments (s. 75(1)(a)) and the one ascertained by subtracting the assets from the liabilities accrued as of the date of the wind up (s. 75(1)(b)) are to be paid upon wind up as employer contributions, they are both included in the ordinary meaning of the words of s. 57(4) of the *PBA*: "amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations". As I mentioned above, this reasoning is challenged in respect of s. 75(1)(b), not of s. 75(1)(a).

33 The appellant Sun Indalex argues that since the deficiency is not finally quantified until well after the effective date of the wind up, the liability of the employer cannot be said to have accrued. The Monitor adds that the payments the employer must make to satisfy its wind-up obligations may change over the five-year period within which s. 31 of the *PBA* Regulations, R.R.O. 1990, Reg. 909, requires that they be made. These parties illustrate their argument by referring to what occurred to the Salaried Plan's fund in the case at bar. In 2007-8, Indalex paid down the vast majority of the $1.6 million wind-up deficiency associated with the Salaried Plan as estimated in 2006. By the end of 2008, however, this deficiency had risen back up to $1.8 million as a result of a decline in the fund's asset value. According to this argument, the amount could not have accrued as of the date of the wind up, because it could not be calculated with certainty.

34 Unlike my colleague Cromwell J., I find this argument unconvincing. I instead agree with the Court of Appeal on this point. The wind-up deemed trust concerns "employer contributions accrued to the date of the wind up but not yet due under the plan or regulations". Since the employees cease to accumulate entitlements when the plan is wound up, the entitlements that are used to calculate the contributions have all been accumulated before the wind-up date. Thus the liabilities of the employer are complete — have accrued — before the wind up. The distinction between my approach and the one Cromwell J. takes is that he requires that it be possible to perform the calculation before the date of the wind up, whereas I am of the view that the time when the calculation is actually made is not relevant as long as the liabilities are assessed as of the date of the wind up. The date at which the liabilities are *reported* or the employer's *option* to spread its contributions as allowed by the regulations does not change the legal nature of the contributions.

35 In *Ontario Hydro-Electric Power Commission v. Albright* (1922), 64 S.C.R. 306 (S.C.C.), Duff J. considered the meaning of the word "accrued" in interpreting the scope of a covenant. He found that

> the word "accrued" according to well recognized usage has, as applied to rights or liabilities the meaning simply of completely constituted — and it may have this meaning although it appears from the context that the right completely constituted or the liability completely constituted is one which is only exercisable or enforceable *in futuro* — a debt for example which is *debitum in praesenti solvendum in futuro*.
>
> [Emphasis added; pp. 312-13.]

36 Thus, a contribution has "accrued" when the liabilities are completely constituted, even if the payment itself will not fall due until a later date. If this principle is applied to the facts of this case, the liabilities related to contributions to the fund allocated for payment of the pension benefits contemplated in s. 75(1)(b) are completely constituted at the time of the wind up, because no pension entitlements arise after that date. In other words, no new liabilities accrue at the time of or after the wind up. Even the portion of the contributions that is related to the elections plan members may make upon wind up has "accrued to the date of the wind up", because it is based on rights employees earned before the wind-up date.

37 The fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes (*Canadian Pacific Ltd. v. Ontario (Minister of Revenue)* (1998), 41 O.R. (3d) 606 (Ont. C.A.), at p. 621). The use of the word "accrued" does not limit liabilities to amounts that can be determined with precision. As a result, the words "contributions accrued" can encompass the contributions mandated by s. 75(1)(b) of the *PBA*.

38 The legislative history supports my conclusion that wind-up deficiency contributions are protected by the deemed trust provision. The Ontario legislature has consistently expanded the protection afforded in respect of pension plan contributions. I cannot therefore accept an interpretation that would represent a drawback from the protection extended to employees. I will not reproduce the relevant provisions, since my colleague Cromwell J. quotes them.

39 The original statute provided solely for the employer's obligation to pay all amounts required to be paid to meet the test for solvency (*The Pension Benefits Act, 1965*, S.O. 1965, c. 96, s. 22(2)), but the legislature subsequently afforded employees the protection of a deemed trust on the employer's assets in an amount equal to the sums withheld from employees as contributions and sums due from the employer as service contributions (s. 23*a*, added by *The Pension Benefits Amendment Act, 1973*, S.O. 1973, c. 113, s. 6). In a later version, it protected not only contributions that were due, but also those that had accrued, with the amounts being calculated as if the plan had been wound up (*The Pension Benefits Amendment Act, 1980*, S.O. 1980, c. 80).

40 Whereas *all* employer contributions were originally covered by a single provision, the legislature crafted a separate provision in 1980 that specifically imposed on the employer the obligation to fund the wind-up deficiency. At the time, it was clear from the words used in the provision that the amount related to the wind-up deficiency was excluded from the deemed trust protection (*The Pension Benefits Amendment Act, 1980*). In 1983, the legislature made a distinction between the deemed trust for ongoing employer contributions and the one for certain payments to be made upon wind up (ss. 23(4)(a) and 23(4)(b), added by *Pension Benefits Amendment Act, 1983*, S.O. 1983, c. 2, s. 3). In that version, the wind-up deficiency payments were still excluded from the deemed trust. However, the legislature once again made changes to the protection in 1987. The 1987 version is, in substance, the one that applies in the case at bar. In the *Pension Benefits Act, 1987*, S.O. 1987, c. 35, a specific wind-up deemed trust was maintained, but the wind up deficiency payments were no longer excluded from it, because the limitation that had been imposed until then with respect to payments that were due or had accrued while the plan was ongoing had been eliminated. My comments to the effect that the previous versions excluded the wind-up deficiency payments do not therefore apply to the 1987 statute, since it was materially different.

41 Whereas it is clear from the 1983 amendments that the deemed trust provided for in s. 23(4)(b) was intended to include only current service costs and special payments, this is less clear from the subsequent versions of the *PBA*. To give meaning to the 1987 amendment, I have to conclude that the words refer to a deemed trust in respect of *all* "employer contributions accrued to the date of the wind up but not yet due under the plan or regulations".

42 The employer's liability upon wind up is now set out in a single section which elegantly parallels the wind-up deemed trust provision. It can be seen from the legislative history that the protection has expanded from (1) only the service contributions that were due, to (2) amounts payable calculated as if the plan had been wound up, to (3) amounts that were due and had accrued upon wind up but excluding the wind-up deficiency payments, to (4) all amounts due and accrued upon wind up.

43 Therefore, in my view, the legislative history leads to the conclusion that adopting a narrow interpretation that would dissociate the employer's payment provided for in s. 75(1)(b) of the *PBA* from the one provided for in s. 75(1)(a) would be contrary to the Ontario legislature's trend toward broadening the protection. Since the provision respecting wind-up payments sets out the amounts that are owed upon wind up, I see no historical, legal or logical reason to conclude that the wind-up deemed trust provision does not encompass all of them.

44 Thus, I am of the view that the words and context of s. 57(4) lend themselves easily to an interpretation that includes the wind-up deficiency payments, and I find additional support for this in the purpose of the provision. The deemed trust provision is a remedial one. Its purpose is to protect the interests of plan members. This purpose militates against adopting the limited scope proposed by Indalex and some of the interveners. In the case of competing priorities between creditors, the remedial purpose favours an approach that includes all wind-up payments in the value of the deemed trust in order to achieve a broad protection.

45 In sum, the relevant provisions, the legislative history and the purpose are all consistent with inclusion of the wind-up deficiency in the protection afforded to members with respect to employer contributions upon the wind up of their pension

plan. I therefore find that the Court of Appeal correctly held with respect to the Salaried Plan, which had been wound up as of December 31, 2006, that Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency.

46 The situation is different with respect to the Executive Plan. Unlike s. 57(3), which provides that the deemed trust protecting employer contributions exists while a plan is ongoing, s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up. This is a choice made by the Ontario legislature. I would not interfere with it. Thus, the deemed trust entitlement arises only once the condition precedent of the plan being wound up has been fulfilled. This is true even if it is certain that the plan will be wound up in the future. At the time of the sale, the Executive Plan was in the process of being, but had not yet been, wound up. Consequently, the deemed trust provision does not apply to the employer's wind-up deficiency payments in respect of that plan.

47 The Court of Appeal declined to decide whether a deemed trust arose in relation to the Executive Plan, stating that it was unnecessary to decide this issue. However, the court expressed concern that a reasoning that deprived the Executive Plan's members of the benefit of a deemed trust would mean that a company under *CCAA* protection could avoid the priority of the *PBA* deemed trust simply by not winding up an underfunded pension plan. The fear was that Indalex could have relied on its own inaction to avoid the consequences that flow from a wind up. I am not convinced that the Court of Appeal's concern has any impact on the question whether a deemed trust exists, and I doubt that an employer could avoid the consequences of such a security interest simply by refusing to wind up a pension plan. The Superintendent may take a number of steps, including ordering the wind up of a pension plan under s. 69(1) of the *PBA* in a variety of circumstances (see s. 69(1)(d), *PBA*). The Superintendent did not choose to order that the plan be wound up in this case.

B. Does the Deemed Trust Supersede the DIP Charge?

48 The finding that the interests of the Salaried Plan's members in all the employer's wind-up contributions to the Salaried Plan are protected by a deemed trust does not mean that part of the money reserved by the Monitor from the sale proceeds must be remitted to the Salaried Plan's fund. This will be the case only if the provincial priorities provided for in s. 30(7) of the *PPSA* ensure that the claim of the Salaried Plan's members has priority over the DIP charge. Section 30(7) reads as follows:

> (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*.

The effect of s. 30(7) is to enable the Salaried Plan's members to recover from the reserve fund, insofar as it relates to an account or inventory and its proceeds in Ontario, ahead of all other secured creditors.

49 The Appellants argue that any provincial deemed trust is subordinate to the DIP charge authorized by the *CCAA* order. They put forward two central arguments to support their contention. First, they submit that the *PBA* deemed trust does not apply in *CCAA* proceedings because the relevant priorities are those of the federal insolvency scheme, which do not include provincial deemed trusts. Second, they argue that by virtue of the doctrine of federal paramountcy the DIP charge supersedes the *PBA* deemed trust.

50 The Appellants' first argument would expand the holding of *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.), so as to apply federal bankruptcy priorities to *CCAA* proceedings, with the effect that claims would be treated similarly under the *CCAA* and the *BIA*. In *Century Services*, the Court noted that there are points at which the two schemes converge:

> Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. [para. 23]

51 In order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements. Yet this does not mean that courts may read bankruptcy priorities into the *CCAA* at will. Provincial legislation defines the priorities to which creditors are entitled until that legislation is ousted by Parliament. Parliament did not

expressly apply all bankruptcy priorities either to *CCAA* proceedings or to proposals under the *BIA*. Although the creditors of a corporation that is attempting to reorganize may bargain in the shadow of their bankruptcy entitlements, those entitlements remain only shadows until bankruptcy occurs. At the outset of the insolvency proceedings, Indalex opted for a process governed by the *CCAA*, leaving no doubt that although it wanted to protect its employees' jobs, it would not survive as their employer. This was not a case in which a failed arrangement forced a company into liquidation under the *BIA*. Indalex achieved the goal it was pursuing. It chose to sell its assets under the *CCAA*, not the *BIA*.

52 The provincial deemed trust under the *PBA* continues to apply in *CCAA* proceedings, subject to the doctrine of federal paramountcy (*Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, [2004] 1 S.C.R. 60 (S.C.C.), at para. 43). The Court of Appeal therefore did not err in finding that at the end of a *CCAA* liquidation proceeding, priorities may be determined by the *PPSA*'s scheme rather than the federal scheme set out in the *BIA*.

53 The Appellants' second argument is that an order granting priority to the plan's members on the basis of the deemed trust provided for by the Ontario legislature would be unconstitutional in that it would conflict with the order granting priority to the DIP lenders that was made under the *CCAA*. They argue that the doctrine of paramountcy resolves this conflict, as it would render the provincial law inoperative to the extent that it is incompatible with the federal law.

54 There is a preliminary question that must be addressed before determining whether the doctrine of paramountcy applies in this context. This question arises because the Court of Appeal found that although the *CCAA* court had the power to authorize a DIP charge that would supersede the deemed trust, the order in this case did not have such an effect because paramountcy had not been invoked. As a result, the priority of the deemed trust over secured creditors by virtue of s. 30(7) of the *PPSA* remained in effect, and the Plan Members' claim ranked in priority to the claim of the DIP lenders established in the *CCAA* order.

55 With respect, I cannot accept this approach to the doctrine of federal paramountcy. This doctrine resolves conflicts in the application of overlapping valid provincial and federal legislation (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 (S.C.C.), at paras. 32 and 69). Paramountcy is a question of law. As a result, subject to the application of the rules on the admissibility of new evidence, it can be raised even if it was not invoked in an initial proceeding.

56 A party relying on paramountcy must "demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law" (*Canadian Western Bank*, at para. 75). This Court has in fact applied the doctrine of paramountcy in the area of bankruptcy and insolvency to come to the conclusion that a provincial legislature cannot, through measures such as a deemed trust, affect priorities granted under federal legislation (*Husky Oil*).

57 None of the parties question the validity of either the federal provision that enables a *CCAA* court to make an order authorizing a DIP charge or the provincial provision that establishes the priority of the deemed trust. However, in considering whether the *CCAA* court has, in exercising its discretion to assess a claim, validly affected a provincial priority, the reviewing court should remind itself of the rule of interpretation stated in *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.) (at p. 356), and reproduced in *Canadian Western Bank* (at para. 75):

> When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.

58 In the instant case, the *CCAA* judge, in authorizing the DIP charge, did not consider the fact that the Salaried Plan's members had a claim that was protected by a deemed trust, nor did he explicitly note that ordinary creditors, such as the Executive Plan's members, had not received notice of the DIP loan motion. However, he did consider factors that were relevant to the remedial objective of the *CCAA* and found that Indalex had in fact demonstrated that the *CCAA*'s purpose would be frustrated without the DIP charge. It will be helpful to quote the reasons he gave on April 17, 2009 in authorizing the DIP charge ((2009), 52 C.B.R. (5th) 61 (Ont. S.C.J. [Commercial List])):

> (a) the Applicants are in need of the additional financing in order to support operations during the period of a going concern restructuring;

(b) there is a benefit to the breathing space that would be afforded by the DIP Financing that will permit the Applicants to identify a going concern solution;

(c) there is no other alternative available to the Applicants for a going concern solution;

(d) a stand-alone solution is impractical given the integrated nature of the business of Indalex Canada and Indalex U.S.;

(e) given the collateral base of Indalex U.S., the Monitor is satisfied that it is unlikely that the Post-Filing Guarantee with respect to the U.S. Additional Advances will ever be called and the Monitor is also satisfied that the benefits to stakeholders far outweighs the risk associated with this aspect of the Post-Filing Guarantee;

(f) the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing against the assets of the Applicants;

(g) the Pre-Filing Security has been reviewed by counsel to the Monitor and it appears that the unsecured creditors of the Canadian debtors will be in no worse position as a result of the Post-Filing Guarantee than they were otherwise, prior to the CCAA filing, as a result of the limitation of the Canadian guarantee set forth in the draft Amended and Restated Initial Order ...; and

(h) the balancing of the prejudice weighs in favour of the approval of the DIP Financing. [para. 9]

59 Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the *CCAA* judge's findings of fact, but case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve their rights on June 12, 2009 are instructive. He indicated that any uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate" (2009 CanLII 37906 [2009 CarswellOnt 4263 (Ont. S.C.J.)], at paras. 7 and 8).

60 In this case, compliance with the provincial law necessarily entails defiance of the order made under federal law. On the one hand, s. 30(7) of the *PPSA* required a part of the proceeds from the sale related to assets described in the provincial statute to be paid to the plan's administrator before other secured creditors were paid. On the other hand, the Amended Initial Order provided that the DIP charge ranked in priority to "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise" (para. 45). Granting priority to the DIP lenders subordinates the claims of other stakeholders, including the Plan Members. This court-ordered priority based on the *CCAA* has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

C. Did Indalex Have Fiduciary Obligations to the Plan Members?

61 The fact that the DIP financing charge supersedes the deemed trust or that the interests of the Executive Plan's members are not protected by the deemed trust does not mean that Plan Members have no right to receive money out of the reserve fund. What remains to be considered is whether an equitable remedy, which could override all priorities, can and should be granted for a breach by Indalex of a fiduciary duty.

62 The first stage of a fiduciary duty analysis is to determine whether and when fiduciary obligations arise. The Court has recognized that there are circumstances in which a pension plan administrator has fiduciary obligations to plan members both

at common law and under statute (*Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273 (S.C.C.), at para. 41). It is clear that the indicia of a fiduciary relationship attach in this case between the Plan Members and Indalex as plan administrator. Sun Indalex and the Monitor do not dispute this proposition.

63 However, Sun Indalex and the Monitor argue that the employer has a fiduciary duty only when it acts as plan administrator — when it is wearing its administrator's "hat". They contend that, outside the plan administration context, when directors make decisions in the best interests of the corporation, the employer is wearing solely its "corporate hat". On this view, decisions made by the employer in its corporate capacity are not burdened by the corporation's fiduciary obligations to its pension plan members and, consequently, cannot be found to conflict with plan members' interests. This is not the correct approach to take in determining the scope of the fiduciary obligations of an employer acting as plan administrator.

64 Only persons or entities authorized by the *PBA* can act as plan administrators (ss. 1(1) and 8(1)(a)). The employer is one of them. A corporate employer that chooses to act as plan administrator accepts the fiduciary obligations attached to that function. Since the directors of a corporation also have a fiduciary duty to the corporation, the fact that the corporate employer can act as administrator of a pension plan means that s. 8(1)(a) of the *PBA* is based on the assumption that not all decisions taken by directors in managing a corporation will result in conflict with the corporation's duties to the plan's members. However, the corporate employer must be prepared to resolve conflicts where they arise. Reorganization proceedings place considerable burdens on any debtor, but these burdens do not release an employer that acts as plan administrator from its fiduciary obligations.

65 Section 22(4) of the *PBA* explicitly provides that a plan administrator must not permit its own interest to conflict with its duties in respect of the pension fund. Thus, where an employer's own interests do not converge with those of the plan's members, it must ask itself whether there is a potential conflict and, if so, what can be done to resolve the conflict. Where interests do conflict, I do not find the two hats metaphor helpful. The solution is not to determine whether a given decision can be classified as being related to either the management of the corporation or the administration of the pension plan. The employer may well take a sound management decision, and yet do something that harms the interests of the plan's members. An employer acting as a plan administrator is not permitted to disregard its fiduciary obligations to plan members and favour the competing interests of the corporation on the basis that it is wearing a "corporate hat". What is important is to consider the consequences of the decision, not its nature.

66 When the interests the employer seeks to advance on behalf of the corporation conflict with interests the employer has a duty to preserve as plan administrator, a solution must be found to ensure that the plan members' interests are taken care of. This may mean that the corporation puts the members on notice, or that it finds a replacement administrator, appoints representative counsel or finds some other means to resolve the conflict. The solution has to fit the problem, and the same solution may not be appropriate in every case.

67 In the instant case, Indalex's fiduciary obligations as plan administrator did in fact conflict with management decisions that needed to be taken in the best interests of the corporation. Indalex had a number of responsibilities as plan administrator. For example, s. 56(1) of the *PBA* required it to ensure that contributions were paid when due. Section 56(2) required that it notify the Superintendent if contributions were not paid when due. It was also up to Indalex under s. 59 to commence proceedings to obtain payment of contributions that were due but not paid. Indalex, as an employer, paid all the contributions that were due. However, its insolvency put contributions that had accrued to the date of the wind up at risk. In an insolvency context, the administrator's claim for contributions that have accrued is a provable claim.

68 In the context of this case, the fact that Indalex, as plan administrator, might have to claim accrued contributions from itself means that it would have to simultaneously adopt conflicting positions on whether contributions had accrued as of the date of liquidation and whether a deemed trust had arisen in respect of wind-up deficiencies. This is indicative of a clear conflict between Indalex's interests and those of the Plan Members. As soon as it saw, or ought to have seen, a potential for conflict, Indalex should have taken steps to ensure that the interests of the Plan Members were protected. It did not do so. On the contrary, it contested the position the Plan Members advanced. At the very least, Indalex breached its duty to avoid conflicts of interest (s. 22(4), *PBA*).

69 Since the Plan Members seek an equitable remedy, it is important to identify the point at which Indalex should have moved to ensure that their interests were safeguarded. Before doing so, I would stress that factual contexts are needed to analyse conflicts between interests, and that it is neither necessary nor useful to attempt to map out all the situations in which conflicts may arise.

70 As I mentioned above, insolvency puts the employer's contributions at risk. This does not mean that the decision to commence insolvency proceedings entails on its own a breach of a fiduciary obligation. The commencement of insolvency proceedings in this case on April 3, 2009 in an emergency situation was explained by Timothy R. J. Stubbs, the then-president of Indalex. The company was in default to its lender, it faced legal proceedings for unpaid bills, it had received a termination notice effective April 6 from its insurers, and suppliers had stopped supplying on credit. These circumstances called for urgent action by Indalex lest a creditor start bankruptcy proceedings and in so doing jeopardize ongoing operations and jobs. Several facts lead me to conclude that the stay sought in this case did not, in and of itself, put Indalex in a conflict of interest.

71 First, a stay operates only to freeze the parties' rights. In most cases, stays are obtained *ex parte*. One of the reasons for refraining from giving notice of the initial stay motion is to avert a situation in which creditors race to court to secure benefits that they would not enjoy in insolvency. Subjecting as many creditors as possible to a single process is seen as a way to treat all of them more equitably. In this context, plan members are placed on the same footing as the other creditors and have no special entitlement to notice. Second, one of the conclusions of the order Indalex sought was that it was to be served on all creditors, with a few exceptions, within 10 days. The notice allowed any interested party to apply to vary the order. Third, Indalex was permitted to pay all pension benefits. Although the order excluded special solvency payments, no ruling was made at that point on the merits of the creditors' competing claims, and a stay gave the Plan Members the possibility of presenting their arguments on the deemed trust rather than losing it altogether as a result of a bankruptcy proceeding, which was the alternative.

72 Whereas the stay itself did not put Indalex in a conflict of interest, the proceedings that followed had adverse consequences. On April 8, 2009, Indalex brought a motion to amend and restate the initial order in order to apply for DIP financing. This motion had been foreseen. Mr. Stubbs had mentioned in the affidavit he signed in support of the initial order that the lenders had agreed to extend their financing, but that Indalex would be in need of authorization in order to secure financing to continue its operations. However, the initial order had not yet been served on the Plan Members as of April 8. Short notice of the motion was given to the USW rather than to all the individual Plan Members, but the USW did not appear. The Plan Members were quite simply not represented on the motion to amend the initial stay order requesting authorization to grant the DIP charge.

73 In seeking to have a court approve a form of financing by which one creditor was granted priority over all other creditors, Indalex was asking the *CCAA* court to override the Plan Members' priority. This was a case in which Indalex's directors permitted the corporation's best interests to be put ahead of those of the Plan Members. The directors may have fulfilled their fiduciary duty to Indalex, but they placed Indalex in the position of failing to fulfil its obligations as plan administrator. The corporation's interest was to seek the best possible avenue to survive in an insolvency context. The pursuit of this interest was not compatible with the plan administrator's duty to the Plan Members to ensure that all contributions were paid into the funds. In the context of this case, the plan administrator's duty to the Plan Members meant, in particular, that it should at least have given them the opportunity to present their arguments. This duty meant, at the very least, that they were entitled to reasonable notice of the DIP financing motion. The terms of that motion, presented without appropriate notice, conflicted with the interests of the Plan Members. Because Indalex supported the motion asking that a priority be granted to its lender, it could not at the same time argue for a priority based on the deemed trust.

74 The Court of Appeal found a number of other breaches. I agree with Cromwell J. that none of the subsequent proceedings had a negative impact on the Plan Members' rights. The events that occurred, in particular the second DIP financing motion and the sale process, were predictable and, in a way, typical of reorganizations. Notice was given in all cases. The Plan Members were represented by able counsel. More importantly, the court ordered that funds be reserved and that a full hearing be held to argue the issues.

75 The Monitor and George Miller, Indalex U.S.'s trustee in bankruptcy, argue that the Plan Members should have appealed the Amended Initial Order authorizing the DIP charge, and were precluded from subsequently arguing that their claim ranked in priority to that of the DIP lenders. They take the position that the collateral attack doctrine bars the Plan Members from challenging the DIP financing order. This argument is not convincing. The Plan Members did not receive notice of the motion to approve the DIP financing. Counsel for the Executive Plan's members presented the argument of that plan's members at the first opportunity and repeated it each time he had an occasion to do so. The only time he withdrew their opposition was at the hearing of the motion for authorization to increase the DIP loan amount after being told that the only purpose of the motion was to increase the amount of the authorized loan. The *CCAA* judge set a hearing date for the very purpose of presenting the arguments that Indalex, as plan administrator, could have presented when it requested the amendment to the initial order. It cannot now be argued, therefore, that the Plan Members are barred from defending their interests by the collateral attack doctrine.

D. Would an Equitable Remedy Be Appropriate in the Circumstances?

76 The definition of "secured creditor" in s. 2 of the *CCAA* includes a trust in respect of the debtor's property. The Amended Initial Order (at para. 45) provided that the DIP lenders' claims ranked in priority to all trusts, "statutory or otherwise". Indalex U.S. was subrogated to the DIP lenders' claim by operation of the guarantee in the DIP lending agreement.

77 Counsel for the Executive Plan's members argues that the doctrine of equitable subordination should apply to subordinate Indalex U.S.'s subrogated claim to those of the Plan Members. This Court discussed the doctrine of equitable subordination in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558 (S.C.C.), but did not endorse it, leaving it for future determination (p. 609). I do not need to endorse it here either. Suffice to say that there is no evidence that the lenders committed a wrong or that they engaged in inequitable conduct, and no party has contested the validity of Indalex U.S.'s payment of the US$10 million shortfall.

78 This leaves the constructive trust remedy ordered by the Court of Appeal. It is settled law that proprietary remedies are generally awarded only with respect to property that is directly related to a wrong or that can be traced to such property. I agree with my colleague Cromwell J. that this condition is not met in the case at bar. I adopt his reasoning on this issue.

79 Moreover, I am of the view that it was unreasonable for the Court of Appeal to reorder the priorities in this case. The breach of fiduciary duty identified in this case is, in substance, the lack of notice. Since the Plan Members were allowed to fully argue their case at a hearing specifically held to adjudicate their rights, the *CCAA* court was in a position to fully appreciate the parties' positions.

80 It is difficult to see what gains the Plan Members would have secured had they received notice of the motion that resulted in the Amended Initial Order. The *CCAA* judge made it clear, and his finding is supported by logic, that there was no alternative to the DIP loan that would allow for the sale of the assets on a going-concern basis. The Plan Members presented no evidence to the contrary. They rely on conjecture alone. The Plan Members invoke other cases in which notice was given to plan members and in which the members were able to fully argue their positions. However, in none of those cases were plan members able to secure any additional benefits. Furthermore, the Plan Members were allowed to fully argue their case. As a result, even though Indalex breached its fiduciary duty to notify the Plan Members of the motion that resulted in the Amended Initial Order, their claim remains subordinate to that of Indalex U.S.

IV. Conclusion

81 There are good reasons for giving special protection to members of pension plans in insolvency proceedings. Parliament considered doing so before enacting the most recent amendments to the *CCAA*, but chose not to (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36, in force September 18, 2009, SI/2009-68; see also Bill C-501, *An Act to amend the Bankruptcy and Insolvency Act and other Acts (pension protection)*, 3rd Sess., 40th Parl., March 24, 2010 (subsequently amended by the Standing Committee on Industry, Science and Technology, March 1, 2011)). A report of the Standing Senate Committee on Banking, Trade and Commerce gave the following reasons for this choice:

> Although the Committee recognizes the vulnerability of current pensioners, we do not believe that changes to the BIA regarding pension claims should be made at this time. Current pensioners can also access retirement benefits from the Canada/Quebec Pension Plan, and the Old Age Security and Guaranteed Income Supplement programs, and may have private savings and Registered Retirement Savings Plans that can provide income for them in retirement. The desire expressed by some of our witnesses for greater protection for pensioners and for employees currently participating in an occupational pension plan must be balanced against the interests of others. As we noted earlier, insolvency — at its essence — is characterized by insufficient assets to satisfy everyone, and choices must be made.
>
> The Committee believes that granting the pension protection sought by some of the witnesses would be sufficiently unfair to other stakeholders that we cannot recommend the changes requested. For example, we feel that super priority status could unnecessarily reduce the moneys available for distribution to creditors. In turn, credit availability and the cost of credit could be negatively affected, and all those seeking credit in Canada would be disadvantaged. *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at p. 98; see also p. 88.)

82 In an insolvency process, a *CCAA* court must consider the employer's fiduciary obligations to plan members as their plan administrator. It must grant a remedy where appropriate. However, courts should not use equity to do what they wish Parliament had done through legislation.

83 In view of the fact that the Plan Members were successful on the deemed trust and fiduciary duty issues, I would not order costs against them either in the Court of Appeal or in this Court.

84 I would therefore allow the main appeals without costs in this Court, set aside the orders made by the Court of Appeal, except with respect to orders contained in paras. 9 and 10 of the judgment of the Court of Appeal in the former executive members' appeal and restore the orders of Campbell J. dated February 18, 2010. I would dismiss USW's costs appeal without costs.

***Cromwell J.*:**

I. Introduction

85 When a business becomes insolvent, many interests are at risk. Creditors may not be able to recover their debts, investors may lose their investments and employees may lose their jobs. If the business is the sponsor of an employee pension plan, the benefits promised by the plan are not immune from that risk. The circumstances leading to these appeals show how that risk can materialize. Pension plans and creditors find themselves in a zero-sum game with not enough money to go around. At a very general level, this case raises the issue of how the law balances the interests of pension plan beneficiaries with those of other creditors.

86 Indalex Limited, the sponsor and administrator of employee pension plans, became insolvent and sought protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). Although all current contributions were up to date, the company's pension plans did not have sufficient assets to fulfill the pension promises made to their members. In a series of court-sanctioned steps, which were judged to be in the best interests of all stakeholders, the company borrowed a great deal of money to allow it to continue to operate. The parties injecting the operating money were given a super priority over the claims by other creditors. When the business was sold, thereby preserving hundreds of jobs, there was a shortfall between the sale proceeds and the debt. The pension plan beneficiaries thus found themselves in a dispute about the priority of their claims. The appellant, Sun Indalex Finance LLC, claimed it had priority by virtue of the super priority granted in the *CCAA* proceedings. The trustee in bankruptcy of the U.S. Debtors (George Miller) and the Monitor (FTI Consulting) joined in the appeal. The plan beneficiaries claimed that they had priority by virtue of a statutory deemed trust under the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), and a constructive trust arising from the company's alleged breaches of fiduciary duty.

87 The Ontario Court of Appeal sided with the plan beneficiaries and Sun Indalex, the trustee in bankruptcy and the Monitor all appeal. The specific legal points in issue are:

A. Did the Court of Appeal err in finding that the statutory deemed trust provided for in s. 57(4) of the *PBA* applied to the salaried plan's wind-up deficiency?

B. Did the Court of Appeal err in finding that Indalex breached the fiduciary duties it owed to the pension plan beneficiaries as the plans' administrator and in imposing a constructive trust as a remedy?

C. Did the Court of Appeal err in concluding that the super priority granted in the *CCAA* proceedings did not have priority by virtue of the doctrine of federal paramountcy?

D. Did the Court of Appeal err in its cost endorsement respecting the United Steelworkers ("USW")?

88 My view is that the deemed trust does not apply to the disputed funds, and even if it did, the super priority would override it. I conclude that the corporation failed in its duty to the plan beneficiaries as their administrator and that the beneficiaries ought to have been afforded more procedural protections in the *CCAA* proceedings. However, I also conclude that the Court of Appeal erred in using the equitable remedy of a constructive trust to defeat the super priority ordered by the *CCAA* judge. I would therefore allow the main appeals.

II. Facts and Proceedings Below

A. Overview

89 These appeals concern claims by pension fund members for amounts owed to them by the plans' sponsor and administrator which became insolvent.

90 Indalex Limited is the parent company of three non-operating Canadian companies. I will refer to both Indalex Limited individually and to the group of companies collectively as "Indalex", unless the context requires further clarity. Indalex Limited is the wholly owned subsidiary of its U.S. parent, Indalex Holding Corp. which owned and conducted related operations in the U.S. through its U.S. subsidiaries which I will refer to as the "U.S. debtors".

91 In late March and early April of 2009, Indalex and the U.S. debtors were insolvent and sought protection from their creditors, the former under the Canadian *CCAA*, and the latter under the United States Bankruptcy Code, 11 U.S.C., Chapter 11. The dispute giving rise to these appeals concern the priority granted to lenders in the *CCAA* process for funds advanced to Indalex and whether that priority overrides the claims of two of Indalex's pension plans for funds owed to them.

92 Indalex was the sponsor and administrator of two registered pension plans relevant to these proceedings, one for salaried employees and the other for executive employees. At the time of seeking *CCAA* protection, the salaried plan was being wound up (with a wind-up date of December 31, 2006) and was estimated to have a wind-up deficiency (as of the end of 2007) of roughly $2.252 million. The executive plan, while it was not being wound up, had been closed to new members since 2005. It was estimated to have a deficiency of roughly $2.996 million on wind up. At the time the *CCAA* proceedings were started, all regular current service contributions had been made to both plans.

93 Shortly after Indalex received *CCAA* protection, the *CCAA* judge authorized the company to enter into debtor in possession ("DIP") financing in order to allow it to continue to operate. The court granted the DIP lenders, a syndicate of banks, a "super priority" over "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise": initial order, at para. 35 (joint A.R., vol. I, at pp. 123-24). Repayment of these amounts was guaranteed by the U.S. debtors.

94 Ultimately, with the approval of the *CCAA* court, Indalex sold its business; the purchaser did not assume pension liabilities. A reserve fund was established by the *CCAA* Monitor to answer any outstanding claims. The proceeds of the sale were not

sufficient to pay back the DIP lenders and so the U.S. debtors, as guarantors, paid the shortfall and stepped into the shoes of the DIP lenders in terms of priority.

95 The appellant Sun Indalex is a pre-*CCAA* secured creditor of both Indalex and the U.S. debtors. It claims the reserve fund on the basis that the US$10.75 million paid by the guarantors would otherwise have been available to Sun Indalex as a secured creditor of the U.S. debtors in the U.S. bankruptcy proceedings. The respondent plan beneficiaries claim the reserve fund on the basis that they have a wind-up deficiency which is covered by a deemed trust created by s. 57(4) of the *PBA*. This deemed trust includes "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" (s. 57(4)). They also claim the reserve fund on the basis of a constructive trust arising from Indalex's failure to live up to its fiduciary duties as plan administrator.

96 The reserve fund is not sufficient to pay back both Sun Indalex and the pension plans and so the main question on the main appeals is which of the creditors is entitled to priority for their respective claims.

97 The judge at first instance rejected the plan beneficiaries' deemed trust arguments and held that, with respect to the wind-up deficiency, the plan beneficiaries were unsecured creditors, ranking behind those benefitting from the "super priority" and secured creditors (2010 ONSC 1114, 79 C.C.P.B. 301 (Ont. S.C.J. [Commercial List])). The Court of Appeal reversed this ruling and held that pension plan deficiencies were subject to deemed and constructive trusts which had priority over the DIP financing and over other secured creditors (2011 ONCA 265, 104 O.R. (3d) 641 (Ont. C.A.)). Sun Indalex, the trustee in bankruptcy and the Monitor appeal.

B. Indalex's CCAA Proceedings

(1) The Initial Order (Joint A.R., vol. I, at p. 112)

98 As noted earlier, Indalex was in financial trouble and, on April 3, 2009, sought and obtained protection from its creditors under the *CCAA*. The order (which I will refer to as the initial order) also contained directions for service on creditors and others: paras. 39-41. The order also contained a so-called "comeback clause" allowing any interested party to apply for a variation of the order, provided that that party served notice on any other party likely to be affected by any such variation: para. 46. It is common ground that the plan beneficiaries did not receive notice of the application for the initial order but the *CCAA* court nevertheless approved the method of and time for service. Full particulars of the deficiencies in the pension plans were before the court in the motion material and the initial order addressed payment of the employer's current service pension contributions.

(2) The DIP Order (Joint A.R., vol. I, at p. 129)

99 On April 8, 2009, in what I will refer to as the DIP order, the *CCAA* judge, Morawetz J., authorized Indalex to borrow funds pursuant to a DIP credit agreement. The judge ordered among many other things, the following:

- He approved abridged notice: para. 1;

- He allowed Indalex to continue making current service contributions to the pension plans, but not special payments: paras. 7(a) and 9(b);

- He barred all proceedings against Indalex, except by consent of Indalex and the Monitor or leave of the court, until May 1, 2009: para. 15;

- He granted the DIP lenders a so-called super priority:

> THIS COURT ORDERS that each of the Administration Charge, the Directors' Charge and the DIP Lenders Charge (all as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trust, liens, charges and encumbrances, statutory or otherwise (collectively, "Encumbrances") in favour of any Person. [Emphasis added; para. 45.]

• He required Indalex to send notice of the order to all known creditors, other than employees and creditors to which Indalex owed less than $5,000 and stated that Indalex and the Monitor were "at liberty" to serve the Initial Order to interested parties: paras. 49-50.

100 In his endorsement for the DIP order, Morawetz J. found that "there is no other alternative available to the Applicants [Indalex] for a going concern solution" and that DIP financing was necessary: (2009), 52 C.B.R. (5th) 61 (Ont. S.C.J. [Commercial List]), at para. 9(c). He noted that the Monitor in its report was of the view that approval of the DIP agreement was both necessary and in the best interests of Indalex and its stakeholders, including its creditors, employees, suppliers and customers: paras. 14-16.

101 The USW, which represented some of the members of the salaried plan, was served with notice of the motion that led to the DIP order, but did not appear. Morawetz J. specifically ordered as follows with regard to service:

> THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged so that this Application is properly returnable today and hereby dispenses with further service thereof. [DIP order, at para. 1]

(3) The DIP Extension Order (Joint A.R., vol. I, at p. 156)

102 On June 12, 2009, Morawetz J. heard and granted an application by Indalex to allow them to borrow approximately $5 million more from the DIP lenders, thus raising the allowed total to US$29.5 million.

103 Counsel for the former executives received the motion material the night before. Counsel for USW was also served with notice. At the motion, the former executives (along with second priority secured noteholders) sought to "reserve their rights with respect to the relief sought": 2009 CanLII 37906 [2009 CarswellOnt 4263 (Ont. S.C.J.)], at para. 4. Morawetz J. wrote that any "reservation of rights" would create uncertainty for the DIP lenders with regard to priority, and may prevent them from extending further advances. Moreover, the parties had presented no alternative to increased DIP financing, which was both "necessary and appropriate" and would, it was to be hoped, "improve the position of the stakeholders": paras. 5-9.

(4) The Bidding Order ((2009), 79 C.C.P.B. 101 (Ont. S.C.J. [Commercial List]))

104 On July 2, 2009, Indalex brought a motion for approval of proposed bidding procedures for Indalex's assets. Morawetz J. decided that a stalking horse bid by SAPA Holding AB ("SAPA") for Indalex's assets could count as a qualifying bid. Counsel on behalf of the members of the executive plan appeared, with the concern that "their position and views have not been considered in this process": para. 8. In his decision, Morawetz J. decided that these arguments could be dealt with later, at a sale approval motion: para. 10. The judge said:

> The position facing the retirees is unfortunate. The retirees are currently not receiving what they bargained for. However, reality cannot be ignored and the nature of the Applicants' insolvency is such that there are insufficient assets to meet its liabilities. The retirees are not alone in this respect. The objective of these proceedings is to achieve the best possible outcome for the stakeholders.
>
> [Emphasis added; para. 9.]

(5) The Sale Approval Order (Joint A.R., vol. I, at p. 166)

105 On July 20, 2009, Indalex brought two motions before Campbell J.

106 The first motion sought approval for the sale of Indalex's assets as a going concern to SAPA. SAPA was not to assume any pension liabilities. Campbell J. granted an order approving this sale.

107 The second motion sought approval for an interim distribution of the sale proceeds to the DIP lenders. Counsel on behalf of the executive plan members and the USW, representing some of the salaried employees, objected to the planned distribution of the sale proceeds on grounds that a statutory deemed trust applied to the deficiencies in their plans and that Indalex had breached fiduciary duties that it owed to them. Campbell J. ordered the Monitor to pay the DIP agent from the sale proceeds, but also ordered the Monitor to set up a reserve fund in an amount sufficient to answer, among other things, the claims of the plan beneficiaries pending resolution of those matters. Campbell J. ordered that the U.S. debtors be subrogated to the DIP lenders to the extent that the U.S. debtors were required under the guarantee to satisfy the DIP lenders' claims: para. 14.

(6) The Sale and Distribution of Funds

108 SAPA bought Indalex's assets on July 31, 2009. Taking the reserve fund into account, the sale did not produce sufficient funds to repay the DIP lenders in full and so the U.S. debtors paid US$10,751,247 as guarantor to the DIP lenders: C.A. reasons, at para. 65.

(7) The Order Under Appeal

109 On August 28, 2009, Campbell J. heard claims by the USW (appearing on behalf of some members of the salaried plan) and counsel appearing on behalf of the executive plan members that the wind-up deficiency was subject to a deemed trust. He rejected these claims in a written decision on February 18, 2010. He decided that the s. 57(4) *PBA* deemed trust did not apply to wind-up deficiencies. The executive plan had not been wound up, and therefore there was no wind-up deficiency to be the subject of the deemed trust. As for the salaried plan, Campbell J. held that the windup deficiency was not an obligation that had "accrued to the date of the wind up" and as a result did not fall within the terms of the s. 57(4) deemed trust.

110 Indalex had asked for the stay granted under the initial order to be lifted so that it could assign itself into bankruptcy. Because he did not find a deemed trust, Campbell J. did not feel that he needed to decide on the motion to lift the stay.

(8) The Decision of the Ontario Court of Appeal

111 The Ontario Court of Appeal allowed an appeal from the decision of Campbell J.

112 Writing for a unanimous panel, Gillese J.A. decided that the s. 57(4) deemed trust is applicable to wind-up deficiencies. She took the view that s. 57(4)'s reference to "employer contributions accrued to the date of the wind up but not yet due" included all amounts that the employer owed on the wind-up of its pension plan: para. 101. In particular, she concluded that the deemed trust applied to the wind-up deficiency in the salaried plan. Gillese J.A. declined, however, to decide whether the deemed trust also applied to deficiencies in the executive plan, which had not been wound up by the relevant date: paras. 110-12. A decision on this latter point was unnecessary given her finding on the applicability of a constructive trust in this case.

113 Gillese J.A. found that the super priority provided for in the DIP order did not trump the deemed trust over the salaried plan's wind-up deficiency. Morawetz J. had not "invoked" the issue of paramountcy or made an explicit finding that the requirements of federal law required that the provincially created deemed trust must be overridden: paras. 178-79. Gillese J.A. also took the view that this Court's decision in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.), did not mean that provincially created priorities that would be ineffective under the *Bankruptcy and Insolvency* Act, R.S.C. 1985, c. B-3 ("BIA"), were also ineffective under the *CCAA*: paras. 185-96. The deemed trust therefore ranked ahead of the DIP security.

114 In addition to her findings regarding deemed trusts, Gillese J.A. granted the plan beneficiaries a constructive trust over the amount of the reserve fund on the ground that Indalex, as pension plan administrator, had breached fiduciary duties that it owed to the plan beneficiaries during the *CCAA* proceedings.

115 She held that as a plan administrator who was also an employer, Indalex had fiduciary duties both to the plan beneficiaries and to the corporation: para. 129. In her view, Indalex was subject to both sets of duties throughout the *CCAA* proceedings and it had breached its duties to the plan beneficiaries in several ways. While Indalex had the right to initiate *CCAA* proceedings, this action made the plan beneficiaries vulnerable and therefore triggered its fiduciary obligations as plan administrator: paras.

132-33. Gillese J.A. enumerated the many ways in which she thought Indalex subsequently failed as plan administrator: it did nothing in the *CCAA* proceedings to fund the deficit in the underfunded plans; it applied for *CCAA* protection without notice to the beneficiaries; it obtained DIP financing on the condition that DIP lenders be granted a super priority over "statutory trusts"; it obtained this financing without notice to the plan beneficiaries; it sold its assets knowing the purchaser was not taking over the plans; and it attempted to enter into voluntary bankruptcy, which would defeat any deemed trust claims the beneficiaries might have asserted: para. 139. Gillese J.A. also noted that throughout the *CCAA* proceedings Indalex was in a conflict of interest because it was acting for both the corporation and the beneficiaries.

116 Indalex's failure to live up to its fiduciary duties meant that the plan beneficiaries were entitled to a constructive trust over the amount of the reserve fund: para. 204. Since the beneficiaries had been wronged by Indalex, and the U.S. debtors were not, with respect to Indalex, an "arm's length innocent third party" the appropriate response was to grant the beneficiaries a constructive trust: para. 204. Her conclusion on this point applied equally to the salaried and executive plans.

III. Analysis

A. First Issue: Did the Court of Appeal Err in Finding That the Deemed Statutory Trust Provided for in Section 57(4) of the PBA Applied to the Salaried Plan's Wind-up Deficiency?

(1) Introduction

117 The main issue addressed here concerns whether the statutory deemed trust provided for in s. 57(4) of the *PBA* applies to wind-up deficiencies, the payment of which is provided for in s. 75(1)(b).

118 The deemed trust created by s. 57(4) applies to "employer contributions accrued to the date of the wind-up but not yet due under the plan or regulations". Thus, to be subject to the deemed trust, the pension plan must be wound up and the amounts in question must meet three requirements. They must be (1) "employer contributions", (2) "accrued to the date of the wind-up" and (3) "not yet due". A wind-up deficiency arises "[w]here a pension plan is wound up": s. 75(1). I agree with my colleagues that there can be no deemed trust for the executive plan, because that plan had not been wound up at the relevant date. What follows, therefore, is relevant only to the salaried plan.

119 The wind-up deficiency payments are "employer contributions" which are "not yet due" as of the date of wind-up within the meaning of the *PBA*. The main issue before us, therefore, boils down to the narrow interpretative question of whether the wind-up deficiency described in s. 75(1)(b) is "accrued to the date of the windup".

120 Campbell J. at first instance found that it was not, while the Court of Appeal reached the opposite conclusion. In essence, the Court of Appeal reasoned that the deemed trust in s. 57(4) "applies to all employer contributions that are required to be made pursuant to s. 75", that is, to "all amounts owed by the employer on the wind-up of its pension plan": para. 101.

121 I respectfully disagree with the Court of Appeal's conclusion for three main reasons. First, the most plausible grammatical and ordinary sense of the words "accrued to the date of the wind up" is that the amounts referred to are precisely ascertained immediately before the effective date of the plan's wind-up. The wind-up deficiency only arises upon wind-up and it is neither ascertained nor ascertainable on the date fixed for wind-up. Second, the broader statutory context reinforces this view: the language of the deemed trusts in s. 57(3) and (4) is virtually exactly repeated in s. 75(1)(a), suggesting that both deemed trusts refer to the liability on wind-up referred to in s. 75(1)(a) and not to the further and distinct wind-up deficiency liability created under s. 75(1)(b). Finally, the legislative evolution and history of these provisions show, in my view, that the legislature never intended to include the wind-up deficiency in a statutory deemed trust.

122 Before turning to the precise interpretative issue, it will be helpful to provide some context about the employer's wind-up obligations and the deemed trust provisions that are the subject of this dispute.

(2) Employer Obligations on Wind Up

123 A "wind up" means that the plan is terminated and the plan assets are distributed: see *PBA*, s. 1(1), definition of "wind up". The employer's liability on wind-up consists of two main components. The first is provided for in s. 75(1)(a) and includes "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". This liability applies to contributions that were due as at the wind-up date but does *not* include payments required by s. 75(1)(b) that arise as a result of the wind up: A. N. Kaplan, *Pension Law* (2006), at pp. 541-42. This second liability is known as the wind-up deficiency amount. The employer must pay all additional sums to the extent that the assets of the pension fund are insufficient to cover the value of all immediately vested and accelerated benefits and grow-in benefits: Kaplan, at p. 542. Without going into detail, there are certain statutory benefits that may arise only on wind-up, such as certain benefit enhancements and the potential for acceleration of pension entitlements. Thus, wind-up will usually result in additional employer liabilities over and above those arising from the obligation to pay all benefits provided for in the plan itself: see, e.g., ss. 73 and 74; Kaplan, at p. 542. As the Court of Appeal concluded, the payments provided for under s. 75(1)(a) are those which the employer had to make while the plan was ongoing, while s. 75(1)(b) refers to the employer's obligation to make up for any wind-up deficiency: paras. 90-91.

124 For convenience, the provision as it then stood is set out here.

> **75.** (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,
>
> (a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and
>
> (b) an amount equal to the amount by which,
>
> (i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,
>
> (ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and
>
> (iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,
>
> exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

125 While a wind up is effective as of a fixed date, a wind up is nonetheless best thought of not simply as a moment or a single event, but as a process. It begins by a triggering event and continues until all of the plan assets have been distributed. To oversimplify somewhat, the wind-up process involves the following components.

126 The assets and liabilities of the plan as of the wind-up date must be determined. As noted earlier, the precise extent of the liability, while *fixed as of that date*, will not be ascertained or ascertainable *on that date*. The extent of the liability may depend on choices open to plan beneficiaries under the plan and on the exercise by them of certain statutory rights beyond the options that would otherwise have been available under the plan itself. The plan members must be notified of the wind-up and have their entitlements and options set out for them and given an opportunity to make their choices. The plan administrator must file a wind-up report which includes a statement of the plan's assets and liabilities, the benefits payable under the terms of the plan, and the method of allocating and distributing the assets including the priorities for the payment of benefits: *PBA*, s. 70(1), and R.R.O. 1990, Reg. 909, s. 29 (the "*PBA* Regulations").

127 Benefits to members may take the form of "cash refunds, immediate or deferred annuities, transfers to registered retirement saving plans, [etc.] ... In principle, the value of these benefits is the present value of the benefits accrued to the date of plan termination": The *Mercer Pension Manual* (loose-leaf), vol. 1, at p. 10-41. That present value is an actuarial calculation performed on the basis of various assumptions including assumptions about investment return, mortality and so forth.

128 If, when the assets and liabilities are calculated, the assets are insufficient to satisfy the liabilities, the employer (i.e. the plan sponsor) must make up for any wind-up deficiency: *PBA*, s. 75(1)(b). An employer can elect to space these payments out over the course of five years: *PBA* Regulations, s. 31(2). Because these payments are based on the extent to which there is a deficit between assets in the pension plan and the benefits owed to beneficiaries, their amount varies with the market and other assumed elements of the calculation over the course of the permitted five years.

129 To take the salaried plan as an example, at the time of wind-up, all regular current service contributions had been made: C.A. reasons, at para. 33. The wind-up deficiency was initially estimated to be $1,655,200. Indalex made special wind-up payments of $709,013 in 2007 and $875,313 in 2008, but as of December 31, 2008, the wind-up deficiency was $1,795,600 — i.e. higher than it had been two years before, notwithstanding that payments of roughly $1.6 million had been made: C.A. reasons, at para. 32. Indalex made another payment of $601,000 in April 2009: C.A. reasons, at para. 32.

(3) The Deemed Trust Provisions

130 The *PBA* contains provisions whose purpose is to exempt money owing to a pension plan, and which is held or owing by the employer, from being seized or attached by the employer's other creditors: Kaplan, at p. 395. This is accomplished by creating a "deemed trust" with respect to certain pension contributions such that these amounts are held by the employer in trust for the employees or pension beneficiaries.

131 There are two deemed trusts that we must examine here, one relating to employer contributions that are *due but have not been paid* and another relating to employer contributions *accrued but not due*. This second deemed trust is the one in issue here, but it is important to understand how the two fit together.

132 The deemed trust relating to employer contributions "due and not paid" is found in s. 57(3). The *PBA* and *PBA* regulations contain many provisions relating to contributions required by employers, the due dates for which are specified. Briefly, the required contributions are these.

133 When a pension is ongoing, employers need to make regular current service cost contributions. These are made monthly, within 30 days after the month to which they relate: *PBA* Regulations, s. 4(4)3. There are also special payments, which relate to deficiencies between a pension plan's assets and liabilities. There are "going-concern" deficiencies and "solvency" deficiencies, the distinction between which is unimportant for the purposes of these appeals. A plan administrator must regularly file actuarial reports, which may disclose deficiencies: *PBA* Regulations, s. 14. Where there is a going-concern deficiency the employer must make equal monthly payments over a 15-year period to rectify it: *PBA* Regulations, s. 5(1)(b). Where there is a solvency deficiency, the employer must make equal monthly payments over a five-year period to rectify it: *PBA* Regulations, s. 5(1)(e). Once these regular or special payments become due but have not been paid, they are subject to the s. 57(3) deemed trust.

134 I turn next to the s. 57(4) deemed trust, which gives rise to the question before us. The subsection provides that "[w]here a pension plan is wound 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."

135 When a pension plan is wound up there will be an interrupted monthly payment period, which is sometimes referred to as the stub period. During this stub period regular and special liabilities will have accrued but not yet become due. Section 58(1) provides that money that an employer is required to pay "accrues on a daily basis". Because the amounts referred to in s. 57(4) are not yet due, they are not covered by the s. 57(3) deemed trust, which applies only to payments that are *due*. The two provisions, then, operate in tandem to create a trust over an employer's unfulfilled obligations, which are "due and not paid" as well as those which have "accrued to the date of the wind up but [are] not yet due".

(4) The Interpretative Approach

136 The issue we confront is one of statutory interpretation and the well-settled approach is 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": E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.), at para. 26. Taking this approach it is clear to me that the sponsor's obligation to pay a wind-up deficiency is not covered by the statutory deemed trust provided for in s. 57(4) of the *PBA*. In my view, the deficiency neither "accrued", nor did it arise within the period referred to by the words "to the date of the wind up".

(a) Grammatical and Ordinary Sense of the Words "Accrued" and "to the Date of the Wind Up"

137 The Court of Appeal failed to take sufficient account of the ordinary and grammatical meaning of the text of the provisions. It held that "the deemed trust in s. 57(4) applies *to all employer contributions that are required to be made pursuant to s. 75*": para. 101 (emphasis added). However, the plain words of the section show that this conclusion is erroneous. Section 75(1)(a) refers to liability for employer contributions that "*are due* ... and that have not been paid". These amounts are thus *not* included in the s. 57(4) deemed trust, because it addresses only amounts that have "accrued to the date of the wind up *but [are] not yet due*". Amounts "due" are covered by the s. 57(3) deemed trust and not, as the Court of Appeal concluded by the deemed trust created by s. 57(4). The Court of Appeal therefore erred in finding, in effect, that amounts which "are due" could be included in a deemed trust covering amounts "not yet due".

138 In my view, the most plausible grammatical and ordinary sense of the phrase "accrued to the date of the wind up" in s. 57(4) is that it refers to the sums that are ascertained immediately before the effective wind-up date of the plan.

139 In the context of s. 57(4), the grammatical and ordinary sense of the term "accrued" is that the amount of the obligation is "fully constituted" and "ascertained" although it may not yet be payable. The amount of the wind-up deficiency is not fully constituted or ascertained (or even ascertainable) before or even on the date fixed for wind up and therefore cannot fall under s. 57(4).

140 Of course, the meaning of the word "accrued" may vary with context. In general, when the term "accrued" is used in relation to legal rights, its common meaning is that the right has become fully constituted even though the monetary implications of its enforcement are not yet known or knowable. Thus, we speak of the "accrual" of a cause of action in tort when all of the elements of the cause of action come into existence, even though the extent of the damage may well not be known or knowable at that time: see, e.g., *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53 (S.C.C.). However, when the term is used in relation to a sum of money, it will generally refer to an amount that is at the present time either quantified or exactly quantifiable but which may or may not be due.

141 In some contexts, a liability is said to accrue when it becomes due. An accrued liability is said to be "properly chargeable" or "owing on a given day" or "completely constituted": see, e.g., *Black's Law Dictionary* (9th ed. 2009), at p. 997, "accrued liability"; D.A. Dukelow, *The Dictionary of Canadian Law* (4th ed. 2011), at p. 13, "accrued liability"; *Ontario Hydro-Electric Power Commission v. Albright* (1922), 64 S.C.R. 306 (S.C.C.).

142 In other contexts, an amount which has accrued may not yet be due. For example, we speak of "accrued interest" meaning a precise, quantified amount of interest that has been earned but may not yet be payable. The term "accrual" is used in the same way in "accrual accounting". In accrual method accounting, "transactions that give rise to revenue or costs are recognized in the accounts when they are earned and incurred respectively": B. J. Arnold, *Timing and Income Taxation: The Principles of Income Measurement for Tax Purposes* (1983), at p. 44. Revenue is earned when the recipient "substantially completes performance of everything he or she is required to do as long as the amount due is ascertainable and there is no uncertainty about its collection": P. W. Hogg, J. E. Magee and J. Li, *Principles of Canadian Income Tax Law* (7th ed., 2010), at s. 6.5(b); see also Canadian Institute of Chartered Accountants, *CICA Handbook — Accounting*, Part II, s. 1000, at paras. 41-44. In this context, the amount must be ascertained at the time of accrual.

143 The *Hydro-Electric Power Commission* case offers a helpful definition of the word "accrued" in this sense. On a sale of shares, the vendor undertook to provide on completion "a sum estimated by him to be equal to sinking fund payments [on the bonds and debentures] *which shall have accrued but shall not be due* at the time for completion": p. 344 (emphasis added). The bonds and debentures required the company to pay on July 1 of each year a fixed sum for each electrical horsepower sold and paid for during the preceding calendar year. A dispute arose as to what amounts were payable in this respect on completion. Duff J. held that in this context accrued meant "completely constituted", referring to this as a "well recognized usage": p. 312. He went on:

> Where ... a lump sum is made payable on a specified date and where, having regard to the purposes of the payment or to the terms of the instrument, this sum must be considered to be made up of an accumulation of sums in respect of which the right to receive payment is completely constituted before the date fixed for payment, then it is quite within the settled usage of lawyers to describe each of such accumulated parts as a sum accrued or accrued due before the date of payment: p. 316.

Thus, at every point at which a liability to pay a fixed sum arose under the terms of the contract, that liability accrued. It was fully constituted even though not yet due because the obligation to make the payment was in the future. In reaching this conclusion, Duff J. noted that the bonds and debentures used the word "accrued" in contrast to "due" and that this strengthened the interpretation of "accrued" as an obligation fully constituted but not yet payable. Similarly in s. 57(4), the word "accrued" is used in contrast to the word "due".

144 Given my understanding of the ordinary meaning of the word "accrued", I must respectfully disagree with my colleague, Justice Deschamps' position that the wind-up deficiency can be said to have "accrued" to the date of wind up. In her view, "[s]ince the employees cease to accumulate entitlements when the plan is wound up, the entitlements that are used to calculate the contributions have all been accumulated before the wind-up date" (para. 34) and "no new liabilities accrue at the time of or after the wind up" (para. 36). My colleague maintains that "[t]he fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes" (para. 37 referring to *Canadian Pacific Ltd. v. Ontario (Minister of Revenue)* (1998), 41 O.R. (3d) 606 (Ont. C.A.)).

145 I cannot agree that no new liability accrues on or after the wind up. As discussed in more detail earlier, the wind-up deficiency in s. 75(1)(b) is made up of the difference between the plan's assets and liabilities calculated as of the date of wind up. On wind up, the *PBA* accords statutory entitlements and protections to employees that would not otherwise be available: Kaplan, at p. 532. Wind up therefore gives rise to new liabilities. In particular, on wind up, and only on wind up, plan beneficiaries are entitled, under s. 74, to make elections regarding the payment of their benefits. The plan's liabilities cannot be determined until those elections are made. Contrary to what my colleague Justice Deschamps suggests, the extent of the wind-up deficiency depends on employee rights that arise only upon wind up and with respect to which employees make elections only after wind up.

146 Moreover, the wind-up deficiency will vary after wind up because the amount of money necessary to provide for the payment of the plan sponsor's liabilities will vary with the market. Section 31 of the *PBA* Regulations allows s. 75 payments to be spaced out over the course of five years. As we have seen, the amount of the wind-up deficiency will fluctuate over this period (I set out earlier how this amount in fact fluctuated markedly in the case of the salaried plan in issue here). Thus, while estimates are periodically made and reported after the wind up to determine how much the employer needs to pay, the precise amount of the wind-up deficiency is not ascertained or ascertainable on the date of the wind up.

147 I turn next to the ordinary and grammatical sense of the words "to the date of the wind up" in s. 57(4). In my view, these words indicate that only those contributions that accrue before the date of wind up, and not those amounts the liability for which arises only on the day of wind up — that is, the wind-up deficiency — are included.

148 Where the legislature intends to include the date of wind up, it has used suitable language to effect that purpose. For example, the English version of a provision amending the *PBA* in 2010 (c. 24, s. 21(2)), s. 68(2)(c), indicates which trade unions are entitled to notice of the wind up:

> (2) If the employer or the administrator, as the case may be, intends to wind up the pension plan, the administrator shall give written notice of the intended wind up to,
>
> . . . . .
>
> (c) each trade union that represents members of the pension plan or that, on the date of the wind up, represented the members, former members or retired members of the pension plan;

In contrast to the phrase "to the date of wind up", "on the date of wind up" clearly includes the date of wind up. (The French version does not indicate a different intention.) Similarly, s. 70(6), which formed part of the *PBA* until 2012 (rep. S.O. 2010, c. 9, s. 52(5)), read as follows:

> (6) On the partial wind up of a pension plan, members, former members and other persons entitled to benefits under the pension plan shall have rights and benefits that are not less than the rights and benefits they would have on a full wind up of the pension plan on the effective date of the partial wind up.

The words "on the effective date of the partial wind up" indicate that the members are entitled to those benefits from the date of the partial wind up, in the sense that members can claim their benefits beginning on the date of the wind up itself. This is how the legislature expresses itself when it wants to speak of a period of time including a specific date. By comparison, "to the date of the wind up" is devoid of language that would include the actual date of wind up. This conclusion is further supported by the structure of the *PBA* and its legislative history and evolution, to which I will turn shortly.

149 To sum up with respect to the ordinary and grammatical meaning of the phrase "accrued to the date of the wind up", the most plausible ordinary and grammatical meaning is that such amounts are fully constituted and precisely ascertained immediately before the date fixed as the date of wind up. Thus, according to the ordinary and grammatical meaning of the words, the wind-up deficiency obligation set out in s. 75(1)(b) has not "*accrued* to the date of the wind up" as required by s. 57(4). Moreover, the liability for the wind-up deficiency arises where a pension plan is wound up (s. 75(1)(b)) and so it cannot be a liability that "accrued *to the date of the wind up*" (s. 57(4)).

(b) The Scheme of the Act

150 As discussed earlier, s. 57 establishes deemed trusts over funds which must be contributed to a pension plan, including the one in s. 57(4), which is at issue here. It is helpful to consider these deemed trusts in the context of the obligations to pay funds which give rise to them. Specifically, the relationship between the deemed trust provisions in s. 57(3) and (4), on one hand, and s. 75(1), which sets out liabilities on wind up on the other. According to my colleague Justice Deschamps, s. 75(1) "elegantly parallels the wind-up deemed trust provision" (para. 42) such that the deemed trusts must include the wind-up deficiency. I disagree. In my view, the deemed trusts parallel only s. 75(1)(a), which does not relate to the wind-up deficiency. The correspondence between the deemed trusts and s. 75(1)(a), and the absence of any such correspondence with s. 75(1)(b), makes it clear that the wind-up deficiency is not covered by the deemed trust provisions.

151 I would recall here the difference between the deemed trusts created by s. 57(3) and (4). While a plan is ongoing, there may be payments which the employer is required to, but has failed to make. The s. 57(3) trust applies to these payments because they are "*due and not paid*". When a plan is wound up, however, there will be payments that are outstanding in the sense that they are fully constituted, but not yet due. This occurs with respect to the so-called stub period referred to earlier. During this stub period, regular and special liabilities will accrue on a daily basis, as provided for in s. 58(1), but may not be due at the time of wind up. While s. 57(3) cannot apply to these payments because they are not yet due, the deemed trust under s. 57(4) applies to these payments because liability for them has "accrued to the date of the wind up" and they are "*not yet due*".

152 The important point is how these two deemed trust provisions relate to the wind-up liabilities as described in ss. 75(1)(a) and 75(1)(b). The two paragraphs refer to sums of money that are different in kind: while s. 75(1)(a) refers to liabilities that accrue before wind up and that are created elsewhere in the Act, s. 75(1)(b) creates a completely new liability that comes into existence only once the plan is wound up. There is no dispute, as I understand it, that these two paragraphs refer to different

liabilities and that it is the liability described in s. 75(1)(b) that is the wind-up deficiency in issue here. The parties do not dispute that s. 75(1)(a) does *not* include wind-up deficiency payments.

153 It is striking how closely the text of s. 75(1)(a) — which does not relate to the wind-up deficiency — tracks the language of the deemed trust provisions in s. 57(3) and (4). As noted, s. 57(3) deals with "employer contributions due and not paid", while s. 57(4) deals with "employer contributions accrued to the date of the wind up but not yet due." Section 75(1)(a) includes both of these types of employer contributions. It refers to "payments that ... are due ... and that have not been paid" (i.e. subject to the deemed trust under s. 57(3)) or that have "accrued and that have not been paid" (i.e. subject to the deemed trust under s. 57(4) to the extent that these payments accrued to the date of wind up). This very close tracking of the language between s. 57(3) and (4) on the one hand and s. 75(1)(a) on the other, and the absence of any correspondence between the language of these deemed trust provisions with s. 75(1)(b), suggests that the s. 57(3) and (4) deemed trusts refer to the liability described in s. 75(1)(a) and not to the wind-up deficiency created by s. 75(1)(b). It is difficult to understand why, if the intention had been for s. 57(4) to capture the windup deficiency liability under s. 75(1)(b), the legislature would have so closely tracked the language of s. 75(1)(a) alone in creating the deemed trusts. Thus, in my respectful view, the elegant parallel to which my colleague, Justice Deschamps refers exists only between the deemed trust and s. 75(1)(a), and not between the deemed trust and the wind-up deficiency.

154 I conclude that the scheme of the *PBA* reinforces my conclusion that the ordinary grammatical sense of the words in s. 57(4) does not extend to the wind-up deficiency provided for in s. 75(1)(b).

(c) Legislative History and Evolution

155 Legislative history and evolution may form an important part of the overall context within which a provision should be interpreted. Legislative evolution refers to the various formulations of the provision while legislative history refers to evidence about the provision's conception, preparation and enactment: see, e.g., *Canada (Attorney General) v. Mowat*, 2011 SCC 53, [2011] 3 S.C.R. 471 (S.C.C.), at para. 43.

156 Both the legislative evolution and history of the *PBA* show that it was never the legislature's intention to include the wind-up deficiency in the deemed trust. The evolution and history of the *PBA* are rather intricate and sometimes difficult to follow so I will review them briefly here before delving into a more detailed analysis.

157 The deemed trust was first introduced into the *PBA* in 1973. At that time, it covered employee contributions held by the employer and employer contributions that were due but not paid. In 1980, the *PBA* was amended so that the deemed trust was expanded to include employer contributions whether they were due or not. Also, new provisions were added allowing for employee elections and requiring additional payments by the employer where a plan was wound up. The 1980 amendments gave rise to confusion on two fronts: first, it was unclear whether the payments that were required on wind up were subject to the deemed trust; second, it was unclear whether a lien over some employer contributions covered the same amount as the deemed trust. In 1983, both these points were clarified. The sections were reworded and rearranged to make it clear that the wind-up deficiency was distinct from the amounts covered by the deemed trust, and that the lien and the deemed trust covered the same amount. A statement by the responsible Minister in 1982 confirms that *the deemed trusts were never intended to cover the wind-up deficiency.*

158 My colleague, Justice Deschamps maintains that this history suggests an evolution in the intention of the legislature from protecting "only the service contributions that were due ... to all amounts due and accrued upon wind up" (para. 42). I respectfully disagree. In my view, the history and evolution of the *PBA* leading up to and including 1983 show that the legislature never intended to include the windup deficiency in the deemed trust. Moreover, legislative evolution after 1983 confirms that this intention did not change.

(i) The Pension Benefits Amendment Act, 1973, S.O. 1973, c. 113

159 So far as I can determine, statutory deemed trusts were first introduced into the *PBA* by *The Pension Benefits Amendment Act, 1973*, S.O. 1973, c. 113, s. 6. Those amendments created deemed trusts over two amounts: employee pension contributions received by employers (s. 23*a*(1), similar to the deemed trust in the current s. 57(1)) and employer contributions that had fallen

due under the plan (s. 23*a*(3), similar to the current s. 57(3) deemed trust for employer contributions "due and not paid"). The full text of these provisions and those referred to below, up to the current version of the 1990 Act, are found in the Appendix.

(ii) The Pension Benefits Amendment Act, 1980, S.O. 1980, c. 80

160 Ontario undertook significant pension reform leading to *The Pension Benefits Amendment Act, 1980*, S.O. 1980, c. 80; see Kaplan at pp. 54-56. I will concentrate on the deemed trust provisions and how they related to the liabilities on wind up and, for ease of reference, I will refer to the sections as they were renumbered in the 1980 consolidation: R.S.O. 1980, c. 373. The 1980 legislation expanded the deemed trust relating to employer contributions. Although far from clear, the new provisions appear to have created a deemed trust and lien over the employer contributions whether otherwise payable or not and calculated as if the plan had been wound up on the relevant date.

161 It was unclear after the reforms of 1980 whether the deemed trust applied to all employer contributions that arose on wind up. According to s. 23(4), on any given date, the trust extended to an amount to be determined "as if the plan had been wound up on that date". However, the provisions of the 1980 version of the Act did not explicitly state what such a calculation would include. Under s. 21(2) of the 1980 statute, the employer was obligated to pay on wind up "all amounts that would otherwise have been required to be paid to meet the tests for solvency ..., up to the date of such termination or winding up". Under s. 32, however, the employer had to make a payment on wind up that was to be "[i]n addition" to that due under s. 21(2). Whether the legislature intended that the trust should cover this latter payment was left unclear.

162 It was also unclear whether the lien applied to a different amount than was subject to the deemed trust. According to s. 23(3), "the members have a lien upon the assets of the employer in such amount that in the ordinary course of business would be entered into the books of account whether so entered or not". This comes in the middle of two portions of the provision which explicitly refer to the deemed trust, but it is not clear whether the legislature intended to refer to the same amount throughout the provision.

(iii) The Pension Benefits Amendment Act, 1983, S.O. 1983, c. 2

163 The 1983 amendments substantially clarified the scope of the deemed trust and lien for employer contributions. They make clear that neither the deemed trust nor the lien applied to the wind-up deficiency; the responsible Minister confirmed that this was the intention of the amendments.

164 The new provision was amended by s. 3 of the 1983 amendments and is found in s. 23(4) which provided:

> (4) An employer who is required by a pension plan to contribute to the pension plan shall be deemed to hold in trust for the members of the pension plan an amount of money equal to the total of,
>
> (a) all moneys that the employer is required to pay into the pension plan to meet,
>
> (i) the current service cost, and
>
> (ii) the special payments prescribed by the regulations,
>
> that are due under the pension plan or the regulations and have not been paid into the pension plan; and
>
> (b) where the pension plan is terminated or wound up, any other money that the employer is liable to pay under clause 21 (2) (a).

Section 21(2)(a) provides that on wind up, the employers must pay an amount equal to *the current service cost and the special payments* that "have accrued to and including the date of the termination winding up but, under the terms of the pension plan or the regulations, are not due on that date"; the provision adds that these amounts shall be deemed to accrue on a daily basis. These provisions make it clear that the s. 23(4) deemed trust applies only to the special payments and current service costs

that have accrued, on a daily basis, up to and including the date of wind up. The deemed trust clearly does not extend to the wind-up deficiency.

165 The provision referring to the additional payments required on wind up also makes clear that those payments are not within the scope of the deemed trust. These additional liabilities were described by s. 32, a provision very similar to s. 75(1)(b). These amounts are first, the amount guaranteed by the Guarantee Fund and, second, the value of pension benefits vested under the plan that exceed the value of the assets of the plan. Section 32(2) specifies that these amounts *are* "*in addition* to the amounts that the employer is liable to pay under subsection 21(2)" (which are the payments comparable to the current s. 75(1)(a) payments) and that *only the latter* fall within the deemed trust. The inevitable conclusion is that, in 1983, the wind-up deficiency was not included in the scope of the deemed trust.

166 The 1983 amendments also clarified the scope of the lien. They indicated that the scope of the lien was identical to the scope of the deemed trust. Section 23(5) specified that the lien extended only to the amounts that were deemed to be held in trust under s. 23(4) (i.e. the *current service costs and special payments that had accrued to and including the date of the wind up but are not yet due).*

167 This makes two things clear: that the lien covers the same amounts as the deemed trust, and that neither covers the wind-up deficiency.

168 A brief, but significant piece of legislative history seems to me to dispel any possible doubt. In speaking at first reading of the 1983 amendments, the Minister responsible, the Honourable Robert Elgie said this:

> The first group of today's amendments makes up the housekeeping changes needed for us to do what we set out to do in late 1980; that is, to guarantee pension benefits following the windup of a defined pension benefit plan. These amendments will clarify the ways in which we can attain that goal.
>
> In Bill 214 [i.e. the 1980 amendments] the employees were given a lien on the employer's assets for employee contributions to a pension plan collected by the employer, as well as accrued employer contributions....
>
> Unfortunately, this protection has resulted in different legal interpretations on the extent of the lien. An argument has been advanced that the amount of the lien includes an employer's potential future liability on the windup of a pension plan. This was never intended and is not necessary to provide the required protection. The amendment to section 23 clarified the intent of Bill 214. [Emphasis added.]
>
> (*Legislature of Ontario Debates: Official Report (Hansard)*, No. 99, 2nd Sess., 32nd Parl., July 7, 1982, p. 3568)

The 1983 amendments made the scope of the lien correspond precisely to the scope of the deemed trust over the employer's accrued contributions. It is thus clear from this statement that it was never the legislative intention that either should apply to "an employer's potential future liability" on wind up (i.e. the wind-up deficiency). In 1983, there is therefore, in my view, virtually irrefutable evidence of legislative intent to do exactly the opposite of what the Court of Appeal held in this case had been done.

169 Subsequent legislative evolution shows no change in this legislative intent. In fact, subsequent amendments demonstrate a clear legislative intent to exclude from the deemed trust employer liabilities that arise only upon wind up of the plan.

(iv) Pension Benefits Act, 1987, S.O. 1987, c. 35

170 Amendments to the *PBA* in 1987 resulted in it being substantially in its current form. With those amendments, the extent of the deemed trusts was further clarified. The provision in the 1983 version of the Act combined within a single subsection a deemed trust for employer contributions that were due and not paid (s. 23(4)(a)) and employer contributions that had accrued to and including the date of wind up but which were not yet due (s. 23(4)(b), referring to s. 21(2)(a)). In the 1987 amendments, these two trusts were each given their own subsection and their scope was further clarified. Moreover, after the 1987 revision, one no longer had to refer to a separate provision (formerly s. 21(2)(a)) to determine the scope of the trust covering payments that were accrued but not yet due. Thus, while the substance of the provisions did not change in 1987, their form was simplified.

171 The new s. 58(3) (which is exactly the same as the current s. 57(3)) replaced the former s. 23(4)(a). This created a trust for employer contributions due and not paid. Section 58(4) (which is exactly the same as s. 57(4) stood at the time) replaced the former s. 23(4)(b) and part of s. 21(2)(a) and created a trust that arises on wind up and covers "employer contributions accrued *to the date of the wind up* but not yet due".

172 The 1987 amendment also shows that the legislature adverted to the difference between "to the date of the wind up" and "to and including" the date of wind up and chose the former. This is reflected in a small but significant change in the wording of the relevant provisions. The former provision, s. 23(4)(b), by referring to s. 21(2)(a) captured current service costs and special payments that "have *accrued to and including* the date of the termination or winding up." The new version in s. 58(4) deletes the words "and including", putting the section in its present form. This deletion, to my way of thinking, reinforces the legislative intent to *exclude* from the deemed trust liabilities that arise only *on* the date of wind up. Respectfully, the legislative record does not support Deschamps J.'s view that there was a legislative evolution towards a more expanded deemed trust. Quite the opposite.

173 To sum up, I draw the following conclusions from this review of the legislative evolution and history. The legislation differentiates between two types of employer liability relevant to this case. The first is the contributions required to cover current service costs and any other payments that are either due or have accrued on a daily basis up to the relevant time. These are the payments referred to in the current s. 75(1)(a), that is, payments due or accrued but not paid. The second relates to additional contributions required when a plan is wound up which I have referred to as the wind-up deficiency. These payments are addressed in s. 75(1)(b). The legislative history and evolution show that the deemed trusts under s. 57(3) and (4) were intended to apply only to the former amounts and that it was never the intention that there should be a deemed trust or a lien with respect to an employer's potential future liabilities that arise once the plan is wound up.

(d) The Purpose of the Legislation

174 Excluding the wind-up deficiency from the deemed trust is consistent with the broader purposes of the legislation. Pension legislation aims at important protective purposes. These protective purposes, however, are not pursued at all costs and are clearly intended to be balanced with other important interests within the context of a carefully calibrated scheme: *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152 (S.C.C.), at paras. 13-14.

175 In this instance, the legislature has created trusts over contributions that were due or accrued to the date of the wind up in order to protect, to some degree, the rights of pension plan beneficiaries and employees from the claims of the employer's other creditors. However, there is also good reason to think that the legislature had in mind other competing objectives in not extending the deemed trust to the wind-up deficiency.

176 First, if there were to be a deemed trust over all employer liabilities that arise when a plan is wound up, much simpler and clearer words could readily be found to achieve that objective.

177 Second, extending the deemed trust protections to the wind-up deficiency might well be viewed as counter-productive in the greater scheme of things. A deemed trust of that nature might give rise to considerable uncertainty on the part of other creditors and potential lenders. This uncertainty might not only complicate creditors' rights, but it might also affect the availability of funds from lenders. The wind-up liability is potentially large and, while the business is ongoing, the extent of the liability is unknown and unknowable for up to five years. Its amount may, as the facts of this case disclose, fluctuate dramatically during this time. A liability of this nature could make it very difficult to assess the creditworthiness of a borrower and make an appropriate apportionment of payment among creditors extremely difficult.

178 While I agree that the protection of pension plans is an important objective, it is not for this Court to decide the extent to which that objective will be pursued and at what cost to other interests. In her conclusion, Justice Deschamps notes that although the protection of pension plans is a worthy objective, courts should not use the law of equity to re-arrange the priorities that Parliament has established under the *CCAA*. This is a matter of policy where courts must defer to legislatures (reasons of Justice Deschamps, at para. 82). In my view, my colleague's comments on this point are equally applicable to the policy decisions

reflected in the text of the *PBA*. The decision as to the level of protection that should be provided to pension beneficiaries is one to be left to the Ontario legislature. Faced with the language in the *PBA*, I would be slow to infer that the broader protective purpose, with all its potential disadvantages, was intended. In short, the interpretation I would adopt is consistent with a balanced approach to protection of benefits which the legislature intended.

179 For these reasons, I am of the respectful view that the Court of Appeal erred in finding that the s. 57(4) deemed trust applied to the wind-up deficiency.

B. Second Issue: Did the Court of Appeal Err in Finding That Indalex Breached the Fiduciary Duties it Owed to the Pension Beneficiaries as the Plans' Administrator and in Imposing a Constructive Trust as a Remedy?

(1) Introduction

180 The Court of Appeal found that during the *CCAA* proceedings Indalex breached its fiduciary obligations as administrator of the pension plans: para. 116. As a remedy, it imposed a remedial constructive trust over the reserve fund, effectively giving the plan beneficiaries recovery of 100 cents on the dollar in priority to all other creditors, including creditors entitled to the super priority ordered by the *CCAA* court.

181 The breaches identified by the Court of Appeal fall into three categories. First, Indalex breached the prohibition against a fiduciary being in a position of conflict of interest because its interests in dealing with its insolvency conflicted with its duties as plan administrator to act in the best interests of the plans' members and beneficiaries: para. 142. According to the Court of Appeal, the simple fact that Indalex found itself in this position of conflict of interest was, of itself, a breach of its fiduciary duty as plan administrator. Second, Indalex breached its fiduciary duty by applying, without notice to the plans' beneficiaries, for *CCAA* protection: para. 139. Third, Indalex breached its fiduciary duty by seeking and/or obtaining various relief in the *CCAA* proceedings including the "super priority" in favour of the DIP lenders, approval of the sale of the business knowing that no payment would be made to the underfunded plans over the statutory deemed trusts and seeking to be put into bankruptcy with the intention of defeating the deemed trust claims: para. 139. As a remedy for these breaches of fiduciary duty the court imposed a constructive trust.

182 In my view, the Court of Appeal took much too expansive a view of the fiduciary duties owed by Indalex as plan administrator and found breaches where there were none. As I see it, the only breach of fiduciary duty committed by Indalex occurred when, upon insolvency, Indalex's corporate interests were in obvious conflict with its fiduciary duty as plan administrator to ensure that all contributions were made to the plans when due. The breach was not in failing to avoid this conflict — the conflict itself was unavoidable. Its breach was in failing to address the conflict to ensure that the plan beneficiaries had the opportunity to have representation in the *CCAA* proceedings as if there were independent plan administrators. I also conclude that a remedial constructive trust is not available as a remedy for this breach.

183 This part of the appeals requires us to answer two questions which I will address in turn:

(i) What fiduciary duties did Indalex have in its role as plan administrator and did it breach them?

(ii) If so, was imposition of a constructive trust an appropriate remedy?

(2) What Fiduciary Duties did Indalex Have in its Role as Plan Administrator and Did it Breach Those Duties?

(a) Legal Principles

184 The appellants do not dispute that Indalex, in its role of administrator of the plans, had fiduciary duties to the members of the plan and that when it is acting in that role it can only act in the interests of the plans' beneficiaries. It is not necessary for present purposes to decide whether a pension plan administrator is a *per se* or *ad hoc* fiduciary, although it must surely be rare that a pension plan administrator would not have fiduciary duties in carrying out that role: *Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273 (S.C.C.), at para. 41, aff'g 2008 ONCA 394, 67 C.C.P.B. 1 (Ont. C.A.), at para. 55.

185 However, the conclusion that Indalex as plan administrator had fiduciary duties to the plan beneficiaries is the beginning, not the end of the inquiry. This is because fiduciary duties do not exist at large, but arise from and relate to the specific legal interests at stake: *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24, [2011] 2 S.C.R. 261 (S.C.C.), at para. 31. As La Forest J. put it in *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.):

> The obligation imposed [on a fiduciary] may vary in its specific substance depending on the relationship ... [N]ot every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty.... It is only in relation to breaches of the specific obligations imposed because the relationship is one characterized as fiduciary that a claim for breach of fiduciary duty can be founded.
>
> [Emphasis added; pp. 646-47.]

186 The nature and scope of the fiduciary duty must, therefore, be assessed in the legal framework governing the relationship out of which the fiduciary duty arises: see, e.g., *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, [2011] 2 S.C.R. 175 (S.C.C.), at para. 141; *Perez v. Galambos*, 2009 SCC 48, [2009] 3 S.C.R. 247 (S.C.C.), at paras. 36-37; *B. (K.L.) v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403 (S.C.C.), at para. 41. So, for example, as a general rule, a fiduciary has a duty of loyalty including the duty to avoid conflicts of interest: see, e.g., *3464920 Canada Inc. v. Strother*, 2007 SCC 24, [2007] 2 S.C.R. 177 (S.C.C.), at para. 35; *Lac Minerals*, at pp. 646-47. However, this general rule may have to be modified in light of the legal framework within which a particular fiduciary duty must be exercised. In my respectful view, this is such a case.

(b) The Legal Framework of Indalex's Dual Role as a Plan Administrator and Employer

187 In order to define the nature and scope of Indalex's role and fiduciary obligations as a plan administrator, we must examine the legal framework within which the administrator functions. This framework is established primarily by the plan documents and the relevant provisions of the *PBA*. It is to these sources, first and foremost, that we look in order to shape the specific fiduciary duties owed in this context.

188 Turning first to the plan documents, I take the salaried plan as an example. Under it, the company is appointed the plan administrator: art. 13.01. The term "Company" is defined to mean Indalex Limited and any reference in the plan to actions taken or discretion to be exercised by the Company means Indalex acting through the board of directors or any person authorized by the board for the purposes of the plan: art. 2.09. Article 13.01 provides that the "Management Committee of the Board of Directors of the Company will appoint a Pension and Benefits Committee to act on behalf of the Company in its capacity as administrator of the Plan. The Pension and Benefits Committee will decide conclusively all matters relating to the operation, interpretation and application of the Plan." Thus, the Pension and Benefits Committee is to act on behalf of the company and by virtue of art. 2.09 its acts are considered those of the company. Article 13.02 sets out the duties of the Pension and Benefits Committee which include the "performance of all administrative functions not performed by the Funding Agent, the Actuary or any group annuity contract issuer": art. 13.02(1).

189 The plan administrator also has statutory powers and duties by virtue of the *PBA*. Section 22 lists the general duties of plan administrators, three of which are particularly relevant to these appeals:

> **22.** (1) [Care, diligence and skill] The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.
>
> (2) [Special knowledge and skill] 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.
>
> . . . . .

(4) [Conflict of interest] 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.

190 Not surprisingly, the powers and duties conferred on the administrator by the legislation are administrative in nature. For the most part they pertain to the internal management of the pension fund and to the relationship among the pension administrator, the beneficiaries, and the Superintendent of Financial Services ("Superintendent"). The list includes: applying to the Superintendent for registration of the plan and any amendments to it as well as filing annual information returns: ss. 9, 12 and 20 of the *PBA*; providing beneficiaries and eligible potential beneficiaries with information and documents: ss. 10(1)12 and 25; ensuring that the plan is administered in accordance with the *PBA* and its regulations and plan documents: s. 19; notifying beneficiaries of proposed amendments to the plan that would reduce benefits: s. 26; paying commuted value for pensions: s. 42; and filing wind-up reports if the plan is terminated: s. 70.

191 Of special relevance for this case are two additional provisions. Under s. 56, the administrator has a duty to ensure that pension payments are made when due and to notify the Superintendent if they are not and, under s. 59, the administrator has the authority to commence court proceedings when pension payments are not made.

192 The fiduciary duties that employer-administrators owe to plan beneficiaries relate to the statutory and other tasks described above; these are the "specific legal interests" with respect to which the employer-administrator's fiduciary duties attach.

193 Another important aspect of the legal context for Indalex's fiduciary duties as a plan administrator is that it was acting in the dual role of an employer-administrator. This dual role is expressly permitted under s. 8(1)(a) of the *PBA*, but this provision creates a situation where a single entity potentially owes two sets of fiduciary duties (one to the corporation and the other to the plan members).

194 This was the case for Indalex. As an employer-administrator, Indalex acted through its board of directors and so it was that body which owed fiduciary duties to the plan members. The board of directors also owed a fiduciary duty to the company to act in its best interests: *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 122(1)(*a*); *BCE Inc., Re*, 2008 SCC 69, [2008] 3 S.C.R. 560 (S.C.C.), at para. 36. In deciding what is in the best interests of the corporation, a board may look to the interests of shareholders, employees, creditors and others. But where those interests are not aligned or may conflict, it is for the directors, acting lawfully and through the exercise of business judgment, to decide what is in the overall best interests of the corporation. Thus, the board of Indalex, as an employer-administrator, could not always act exclusively in the interests of the plan beneficiaries; it also owed duties to Indalex as a corporation.

(c) Breaches of Fiduciary Duty

195 Against the background of these legal principles, I turn to consider the Court of Appeal's findings in relation to Indalex's breach of its fiduciary duties as administrator of the plans. As noted, they fall into three categories: being in a conflict of interest position; taking steps to reduce pension obligations in the *CCAA* proceedings; and seeking bankruptcy status.

(i) Conflict of Interest

196 The questions here are first what constitutes a conflict of interest or duty between Indalex as business decision-maker and Indalex as plan administrator and what must be done when a conflict arises?

197 The Court of Appeal in effect concluded that a conflict of interest arises whenever Indalex makes business decisions that have "the potential to affect the Plans beneficiaries' rights" (para. 132) and that whenever such a conflict of interest arose, the employer-administrator was immediately in breach of its fiduciary duties to the plan members. Respectfully, this position puts the matter far too broadly. It cannot be the case that a conflict arises simply because the employer, exercising its management powers in the best interests of the corporation, does something that has the potential to affect the plan beneficiaries.

198 This conclusion flows inevitably from the statutory context. The existence of apparent conflicts that are inherent in the two roles being performed by the same party cannot be a breach of fiduciary duty because those conflicts are specifically authorized by the statute which permits one party to play both roles. As noted earlier, the *PBA* specifically permits employers to act as plan administrators (s. 8(1)(a)). Moreover, the broader business interests of the employer corporation and the interests of pension beneficiaries in getting the promised benefits are almost always at least potentially in conflict. Every important business decision has the potential to put at risk the solvency of the corporation and therefore its ability to live up to its pension obligations. The employer, within the limits set out in the plan documents and the legislation generally, has the authority to amend the plan unilaterally and even to terminate it. These steps may well not serve the best interests of plan beneficiaries.

199 Similarly, the simple existence of the sort of conflicts of interest identified by the Court of Appeal — those inherent in the employer's exercise of business judgment — cannot of themselves be a breach of the administrator's fiduciary duty. Once again, that conclusion is inconsistent with the statutory scheme that expressly permits an employer to act as plan administrator.

200 How, then, should we identify conflicts of interest in this context?

201 In *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631 (S.C.C.), Binnie J. referred to the *Restatement Third, The Law Governing Lawyers* (2000), at § 121, to explain when a conflict of interest occurs in the context of the lawyer-client relationship: para. 31. In my view, the same general principle, adapted to the circumstances, applies with respect to employer-administrators. Thus, a situation of conflict of interest occurs when there is a substantial risk that the employer-administrator's representation of the plan beneficiaries would be materially and adversely affected by the employer-administrator's duties to the corporation. I would recall here, however, that the employer-administrator's obligation to represent the plan beneficiaries extends only to those tasks and duties that I have described above.

202 In light of the foregoing, I am of the view that the Court of Appeal erred when it found, in effect that a conflict of interest arose whenever Indalex was making decisions that "had the potential to affect the Plans beneficiaries' rights": para. 132. The Court of Appeal expressed both the potential for conflict of interest or duty and the fiduciary duty of the plan administrator much too broadly.

(ii) Steps in the CCAA Proceedings to Reduce Pension Obligations and Notice of Them

203 The Court of Appeal found that Indalex breached its fiduciary duty simply by commencing *CCAA* proceedings knowing that the plans were underfunded and by failing to give the plan beneficiaries notice of the proceedings: para. 139. As I understand the court's reasons, the decision to commence *CCAA* proceedings was solely the responsibility of the corporation and not part of the administration of the pension plan: para. 131. The difficulty which the Court of Appeal saw arose from the potential of the *CCAA* proceedings to result in a reduction of the corporation's pension obligations to the prejudice of the beneficiaries: paras. 131-32.

204 I respectfully disagree. Like Justice Deschamps, I find that seeking an initial order protecting the corporation from actions by its creditors did not, on its own, give rise to any conflict of interest or duty on the part of Indalex (reasons of Justice Deschamps, at para. 72).

205 First, it is important to remember that the purpose of *CCAA* proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. As my colleague, Deschamps J. observed in *Century Services*, at para. 15:

> ... the purpose of the *CCAA* ... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.

In the same decision, at para. 59, Deschamps J. also quoted with approval the following passage from the reasons of Doherty J.A. in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57 (dissenting):

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

For this reason, I would be very reluctant to find that, simply by virtue of embarking on *CCAA* proceedings, an employer-administrator breaches its duties to plan members.

206 Second, the facts of this case do not support the contention that the interests of the plan beneficiaries and the employer were in conflict with respect to the decision to seek *CCAA* protection. It cannot seriously be suggested that some other course would have protected more fully the rights of the plan beneficiaries. The Court of Appeal did not suggest an alternative to seeking *CCAA* protection from creditors, nor did any of the parties. Indalex was in serious financial difficulty and its options were limited: either make a proposal to its creditors (under the *CCAA* or under the *BIA*), or go bankrupt. Moreover, the plan administrator's duty and authority do not extend to ensuring the solvency of the corporation and an independent administrator could not reasonably expect to be consulted about the plan sponsor's decision to seek *CCAA* protection. Finally, the application for *CCAA* proceedings did not reduce pension obligations other than to temporarily relieve the corporation of making special payments and it was the only step with any prospect of the pension funds obtaining from the insolvent corporation the money that would become due. There was thus no conflict of duty or interest between the administrator and the employer when protective action was taken for the purpose of preserving the *status quo* for the benefit of all stakeholders.

207 The Court of Appeal also found that it was a breach of fiduciary duty not to give the plan beneficiaries notice of the initial application for *CCAA* protection. Again, here, I must join Deschamps J. in disagreeing with the Court of Appeal's conclusion. Section 11(1) of the *CCAA* as it stood at the time of the proceedings, provided that parties could commence *CCAA* proceedings without giving notice to interested persons:

> **11.** (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

208 This provision was renumbered but not substantially changed when the Act was amended in September of 2009 (S.C. 2005, c. 47, s. 128, in force Sept. 18, 2009, SI/2009-68). Although it is not appropriate in every case, *CCAA* courts have discretion to make initial orders on an *ex parte* basis. This may be an appropriate — even necessary — step in order to prevent "creditors from moving to realize on their claims, essentially a 'stampede to the assets' once creditors learn of the debtor's financial distress": J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 55 ("*Rescue!*"); see also *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194 (Ont. C.A.), at para. 7. The respondents did not challenge Morawetz J.'s decision to exercise his discretion to make an *ex parte* order in this case.

209 This is not to say, however, that *ex parte* initial orders will always be required or acceptable. Without attempting to be exhaustive or to express any final view on these issues, I simply note that there have been at least three ways in which courts have mitigated the possible negative effect on creditors of making orders without notice to potentially affected parties. First, courts have been reluctant to grant *ex parte* orders where the situation of the debtor company is not urgent. In *Rescue!*, Janis Sarra explains that courts are increasingly expecting applicants to have given notice before applying for a stay under the *CCAA*: p. 55. An example is *Marine Drive Properties Ltd., Re*, 2009 BCSC 145, 52 C.B.R. (5th) 47 (B.C. S.C.), a case in which Butler J. held that "[i]nitial applications in *CCAA* proceedings should not be brought without notice merely because it is an application under that Act. The material before the court must be sufficient to indicate an emergent situation": para. 27. Second, courts have included "come-back" clauses in their initial orders so that parties could return to court at a later date to seek to set aside some or all of the order: *Rescue!*, at p. 55. Note that such a clause was included in the initial order by Morawetz J.: para. 46. Finally, courts have limited their initial orders to the issues that need to be resolved immediately and have left other issues to be resolved after all interested parties have been given notice. Thus, in *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]), Morawetz J. limited the initial *CCAA* order so that priorities were only granted over the party that had been given notice. The discussion of suspending special payments or granting creditors priority over pension

beneficiaries was left to a later date, after the parties that would be affected had been given notice. A similar approach was taken in the case of *AbitibiBowater Inc., Re*, 2009 QCCS 6459 (C.S. Que.). In his initial *CCAA* order, Gascon J. put off the decision regarding the suspension of past service contributions or special payments to the pension plans in question until the parties likely to be affected could be advised of the applicant's request: para. 7.

210 Failure to give notice of the initial *CCAA* proceedings was not a breach of fiduciary duty in this case. Indalex's decision to act as an employer-administrator cannot give the plan beneficiaries any greater benefit than they would have if their plan was managed by a third party administrator. Had there been a third party administrator in this case, Indalex would not have been under an obligation to tell the administrator that it was planning to enter *CCAA* proceedings. The respondents are asking this Court to give the advantage of Indalex's knowledge as employer to Indalex as the plan administrator in circumstances where the employer would have been unlikely to disclose the information itself. I am not prepared to blur the line between employers and administrators in this way.

211 I conclude that Indalex did not breach its fiduciary duty by commencing *CCAA* proceedings or by not giving notice to the plan beneficiaries of its intention to seek the initial *CCAA* order.

212 I turn next to the Court of Appeal's conclusion that seeking and obtaining the DIP orders without notice to the plan beneficiaries and seeking and obtaining the sale approval order constituted breaches of fiduciary duty.

213 To begin, I agree with the Court of Appeal that "just because the initial decision to commence *CCAA* proceedings is solely a corporate one ... does not mean that all subsequent decisions made during the proceedings are also solely corporate ones": para. 132. It was at this point that Indalex's interests as a corporation came into conflict with its duties as a pension plan administrator.

214 The DIP orders could easily have the effect of making it impossible for Indalex to satisfy its funding obligations to the plan beneficiaries. When Indalex, through the exercise of business judgment, sought *CCAA* orders that would or might have this effect, it was in conflict with its duty as plan administrator to ensure that all contributions were paid when due.

215 I do not think, however, that the simple existence of this conflict of interest and duty, on its own, was a breach of fiduciary duty in these circumstances. As discussed earlier, the *PBA* expressly permits an employer to be a pension administrator and the statutory provisions about conflict of interest must be understood and applied in light of that fact. Moreover, an independent plan administrator would have no decision-making role with respect to the conduct of *CCAA* proceedings. So in my view, the difficulty that arose here was not the existence of the conflict itself, but Indalex's failure to take steps so that the plan beneficiaries would have the opportunity to have their interests protected in the *CCAA* proceedings as if the plans were administered by an independent administrator. In short, the difficulty was not the existence of the conflict, but the failure to address it.

216 Despite Indalex's failure to address its conflict of interest, the plan beneficiaries, through their own efforts, were represented at subsequent steps in the *CCAA* proceedings. The effect of Indalex's breach was therefore mitigated, a point which I will discuss in greater detail when I turn to the issue of the constructive trust.

217 Nevertheless, for the purposes of providing some guidance for future *CCAA* proceedings, I take this opportunity to briefly address what an employer-administrator can do to respond to these sorts of conflicts. First and foremost, an employer-administrator who finds itself in a conflict must bring the conflict to the attention of the *CCAA* judge. It is not enough to include the beneficiaries in the list of creditors; the judge must be made aware that the debtor, as an administrator of the plan is, or may be, in a conflict of interest.

218 Given their expertise and their knowledge of particular cases, *CCAA* judges are well placed to decide how best to ensure that the interests of the plan beneficiaries are fully represented in the context of "real-time" litigation under the *CCAA*. Knowing of the conflict, a *CCAA* judge might consider it appropriate to appoint an independent administrator or independent counsel as *amicus curiae* on terms appropriate to the particular case. Indeed, there have been cases in which representative counsel have been appointed to represent tort claimants, clients, pensioners and non-unionized employees in *CCAA* proceedings on terms determined by the judge: *Rescue!*, at p. 278; see, e.g., *First Leaside Wealth Management Inc., Re*, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]); *Nortel Networks Corp., Re* (2009), 75 C.C.P.B. 206 (Ont. S.C.J. [Commercial List]). In other

circumstances, a *CCAA* judge might find that it is feasible to give notice directly to the pension beneficiaries. In my view, notice, though desirable, may not always be feasible and decisions on such matters should be left to the judicial discretion of the *CCAA* judge. Alternatively, the judge might consider limiting draws on the DIP facility until notice can be given to the beneficiaries: *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]), at para. 24. Ultimately, the appropriate response or combination of responses should be left to the discretion of the *CCAA* judge in a particular case. The point, as well expressed by the Court of Appeal, is that the insolvent corporation which is also a pension plan administrator cannot "simply ignore its obligations as the Plans' administrator once it decided to seek *CCAA* protection": para. 132.

219 I conclude that the Court of Appeal erred in finding that Indalex breached its fiduciary duties as plan administrator by taking the various steps it did in the *CCAA* proceedings. However, I agree with the Court of Appeal that it breached its fiduciary duty by failing to take steps to ensure that the plan beneficiaries had the opportunity to be as fully represented in those proceedings as if there had been an independent plan administrator.

(iii) The Bankruptcy Motion

220 At the same time Indalex applied for the sale approval order, it also applied to lift the *CCAA* stay so that it could file an assignment into bankruptcy. As Campbell J. put it, this was done "to ensure the priority regime [it] urged as the basis for resisting the deemed trust": para. 52. The Court of Appeal concluded that this was a breach of Indalex's fiduciary duties because the motion was brought "with the intention of defeating the deemed trust claims and ensuring that the Reserve Fund was transferred to [the U.S. debtors]": para. 139. I respectfully disagree.

221 It was certainly open to Indalex as an employer to bring a motion to voluntarily enter into bankruptcy. A pension plan administrator has no responsibility or authority in relation to that step. The problem here is not that the motion was brought, but that Indalex failed to meaningfully address the conflict between its corporate interests and its duties as plan administrator.

222 To sum up, I conclude that Indalex did not breach any fiduciary duty by undertaking *CCAA* proceedings or seeking the relief that it did. The breach arose from Indalex's failure to ensure that its pension plan beneficiaries had the opportunity to have their interests effectively represented in the insolvency proceedings, particularly when Indalex sought the DIP financing approval, the sale approval and the motion for bankruptcy.

(3) Was Imposing a Constructive Trust Appropriate in This Case?

223 The next issue is whether a remedial constructive trust is, as the Court of Appeal concluded, an appropriate remedy in response to the breach of fiduciary duty.

224 The Court of Appeal exercised its discretion to impose a constructive trust and its exercise of this discretion is entitled to deference. Only if the discretion has been exercised on the basis of an erroneous principle should the order be overturned on appeal: *Donkin v. Bugoy*, [1985] 2 S.C.R. 85 (S.C.C.), cited in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.), at para. 54, by Sopinka J. (dissenting, but not on this point). In my respectful view, the Court of Appeal's erroneous conclusions about the scope of a plan administrator's fiduciary duties require us to examine the constructive trust issue anew. Moreover, the Court of Appeal, in my respectful opinion, erred in principle in finding that the asset in this case resulted from the breach of fiduciary duty such that it would be unjust for the party in breach to retain it.

225 As noted earlier, the Court of Appeal imposed a constructive trust in favour of the plan beneficiaries with respect to funds retained in the reserve fund equal to the total amount of the wind-up deficiency for both plans. In other words, upon insolvency of Indalex, the plan beneficiaries received 100 cents on the dollar as a result of a judicially imposed trust taking priority over secured creditors, and indeed over other unsecured creditors, assuming there was no deemed trust for the executive plan.

226 I have explained earlier why I take a different view than did the Court of Appeal of Indalex's breach of fiduciary duty. In light of what I conclude was the breach which could give rise to a remedy, my view is that the constructive trust cannot properly be imposed in this case and the Court of Appeal erred in principle in exercising its discretion to impose this remedy.

227 I part company with the Court of Appeal with respect to several aspects of its constructive trust analysis; it is far from clear to me that any of the conditions for imposing a constructive trust were present here. However, I will only address one of them in detail. As I will explain, a remedial constructive trust for a breach of fiduciary duty is only appropriate if the wrongdoer's acts give rise to an identifiable asset which it would be unjust for the wrongdoer (or sometimes a third party) to retain. In my view, Indalex's failure to meaningfully address conflicts of interest that arose during the *CCAA* proceedings did not result in any such asset.

228 As the Court of Appeal recognized, the governing authority concerning the remedial constructive trust outside the domain of unjust enrichment is *Soulos*. In *Soulos*, McLachlin J. (as she then was) wrote that a constructive trust may be an appropriate remedy for breach of fiduciary duty: paras. 19-45. She laid out four requirements that should generally be satisfied before a constructive trust will be imposed: para. 45. Although, in *Soulos*, McLachlin J. was careful to indicate that these are conditions that "generally" must be present, all parties in this case accept that these four conditions must be present before a remedial constructive trust may be ordered for breach of fiduciary duty. The four conditions are these:

> (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
>
> (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
>
> (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
>
> (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected. [para. 45]

229 My concern is with respect to the second requirement, that is, whether the breach resulted in an asset in the hands of Indalex. A constructive trust arises when the law imposes upon a party an obligation to hold specific property for another: D. W. M. Waters, M. R. Gillen and L. D. Smith, *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 454 ("*Waters*"). The purpose of imposing a constructive trust as a remedy for a breach of duty or unjust enrichment is to prevent parties "from retaining property which in 'good conscience' they should not be permitted to retain": *Soulos*, *at* para. 17. It follows, therefore, that while the remedial constructive trust may be appropriate in a variety of situations, the wrongdoer's conduct toward the plaintiff must generally have given rise to assets in the hands of the wrongdoer (or of a third party in some situations) which cannot in justice and good conscience be retained. That cannot be said here.

230 The Court of Appeal held that this second condition was present because "[t]he assets [i.e. the reserve fund monies] are directly connected to the process in which Indalex committed its breaches of fiduciary obligation": para. 204. Respectfully, this conclusion is based on incorrect legal principles. To satisfy this second condition, it must be shown that the breach *resulted in* the assets being in Indalex's hands, not simply, as the Court of Appeal thought, that there was a "connection" between the assets and "the process" in which Indalex breached its fiduciary duty. Recall that in *Soulos* itself, *the defendant's acquisition of the disputed property was a direct result of his breach of his duty of loyalty* to the plaintiff: para. 48. This is not our case. As the Court observed, in the context of an unjust enrichment claim in *Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.), at p. 995;

> ... for a constructive trust to arise, the plaintiff must establish a direct link to the property which is the subject of the trust by reason of the plaintiff's contribution.

231 While cases of breach of fiduciary duty are different in important ways from cases of unjust enrichment, La Forest J. (with Lamer J. concurring on this point) applied a similar standard for proprietary relief in *Lac Minerals*, a case in which wrongdoing was the basis for the constructive trust: p. 678, quoted in *Waters'*, at p. 471. His comments demonstrate the high standard to be met in order for a constructive trust to be awarded:

> The constructive trust awards a right in property, but that right can only arise once a right to relief has been established. In the vast majority of cases a constructive trust will not be the appropriate remedy.... [A] constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property. [p. 678]

232 The relevant breach in this case was the failure of Indalex to meaningfully address the conflicts of interest that arose in the course of the *CCAA* proceedings. (The breach that arose with respect to the bankruptcy motion is irrelevant because that motion was not addressed and therefore could not have given rise to the assets.) The "assets" in issue here are the funds in the reserve fund which were retained from the proceeds of the sale of Indalex as a going concern. Indalex's breach in this case did not give rise to the funds which were retained by the Monitor in the reserve fund.

233 Where does the respondents' claim of a procedural breach take them? Taking their position at its highest, it would be that the DIP approval proceedings and the sale would not have been approved. This position, however, is fatally flawed. Turning first to the DIP approval, there is no evidence to support the view that, had Indalex addressed its conflict in the DIP approval process, the DIP financing would have been rejected or granted on different terms. The *CCAA* judge, being fully aware of the pension situation, ruled that the DIP financing was "required", that there was "no other alternative available to the Applicants for a going concern solution", and that "the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing": endorsement of Morawetz J., April 8, 2009, at paras. 6 and 9. In effect, the respondents are claiming funds which arose only because of the process to which they now object. Taking into account that there was an absence of any evidence that more favourable financing terms were available, that the judge's decision was made with full knowledge of the plan beneficiaries' claims, and that he found that the DIP financing was necessary, the respondents' contention is not only speculative, it also directly contradicts the conclusions of the *CCAA* judge.

234 Turning next to the sale approval and the approval of the distribution of the assets, it is clear that the plan beneficiaries had independent representation but that this did not change the result. Although, perhaps with little thanks to Indalex, the interests of both plans were fully and ably represented before Campbell J. at the sale approval and interim distribution motions in July of 2009.

235 The executive plan retirees, through able counsel, objected to the sale on the basis that the liquidation values set out in the Monitor's seventh report would provide greater return for unsecured creditors. The motions judge dismissed this objection "on the basis *that there was no clear evidence to support the proposition and in any event the transaction as approved did preserve value for suppliers, customers and preserve approximately 950 jobs*": trial reasons of Campbell J., at para. 13 (emphasis added). Both the executive plan retirees and the USW, which represented some members of the salaried plan, objected to the proposed distribution of the sale proceeds. In response to this objection, it was agreed that those objections would be heard promptly and that the Monitor would retain sufficient funds to satisfy the pensioners' claims if they were upheld: trial reasons of Campbell J., at paras. 14-16.

236 There is no evidence to support the contention that Indalex's breach of its fiduciary duty as pension administrator resulted in the assets retained in the reserve fund. I therefore conclude that the Court of Appeal erred in law in finding that the second condition for imposing a constructive trust — i.e. that the assets in the defendant's hands must be shown to have resulted from the defendant's breaches of duty to the plaintiff — had been established.

237 I would add only two further comments with respect to the constructive trust. A major concern of the Court of Appeal was that unless a constructive trust were imposed, the reserve funds would end up in the hands of other Indalex entities which were not operating at arm's length from Indalex. The U.S. debtors claimed the reserve fund because it had paid on its guarantee of the DIP loans and thereby stepped into the shoes of the DIP lender with respect to priority. Sun Indalex claims in the U.S. bankruptcy proceedings as a secured creditor of the U.S. debtors. The Court of Appeal put its concern this way: "To permit Sun Indalex to recover on behalf of [the U.S. debtors] would be to effectively permit the party who breached its fiduciary obligations to take the benefit of those breaches, to the detriment of those to whom the fiduciary obligations were owed": para. 199.

238 There are two difficulties with this approach, in my respectful view. The U.S. debtors paid real money to honour their guarantees. Moreover, unless there is a legal basis for ignoring the separate corporate personality of separate corporate entities, those separate corporate existences must be respected. Neither the parties nor the Court of Appeal advanced such a reason.

239 Finally, I would note that imposing a constructive trust was wholly disproportionate to Indalex's breach of fiduciary duty. Its breach — the failure to meaningfully address the conflicts of interest that arose during the *CCAA* process — had no adverse impact on the plan beneficiaries in the sale approval process which gave rise to the "asset" in issue. Their interests were fully represented and carefully considered before the sale was approved and the funds distributed. The sale was nonetheless judged to be in the best interests of the corporation, all things considered. In my respectful view, imposing a $6.75 million penalty on the other creditors as a remedial response to this breach is so grossly disproportionate to the breach as to be unreasonable.

240 A judicially ordered constructive trust, imposed long after the fact, is a remedy that tends to destabilize the certainty which is essential for commercial affairs and which is particularly important in financing a workout for an insolvent corporation. To impose a constructive trust in response to a breach of fiduciary duty to ensure for the plan beneficiaries some procedural protections that they in fact took advantage of in any case is an unjust response in all of the circumstances.

241 I conclude that a constructive trust is not an appropriate remedy in this case and that the Court of Appeal erred in principle by imposing it.

C. Third Issue: Did the Court of Appeal Err in Concluding That the Super Priority Granted in the CCAA Proceedings Did Not Have Priority by Virtue of the Doctrine of Federal Paramountcy?

242 Although I disagree with my colleague Justice Deschamps with respect to the scope of the s. 57(4) deemed trust, I agree that if there was a deemed trust in this case, it would be superseded by the DIP loan because of the operation of the doctrine of federal paramountcy: paras. 48-60.

D. Fourth Issue: Did the Court of Appeal Err in its Cost Endorsement Respecting the USW?

(1) Introduction

243 The disposition of costs in the Court of Appeal was somewhat complex. Although the costs appeal relates only to the costs of the USW, it is necessary in order to understand their position to set out the costs order below in full.

244 With respect to the costs of the appeal to the Court of Appeal, no order was made for or against the Monitor due to its prior agreement with the former executives and the USW. However, the court ordered that the former executives and the USW, as successful parties, were each entitled to costs on a partial indemnity basis fixed at $40,000 inclusive of taxes and disbursements from Sun Indalex and the U.S. Trustee, payable jointly and severally: costs endorsement, 2011 ONCA 578, 81 C.B.R. (5th) 165 (Ont. C.A.), at para. 7.

245 Morneau Shepell Ltd., the Superintendent, and the former executives reached an agreement with respect to legal fees and disbursements and the Court of Appeal approved that agreement. The former executives received full indemnity legal fees and disbursements in the amount of $269,913.78 to be paid from the executive plan attributable to each of the 14 former executives' accrued pension benefits, allocated among the 14 former executives in relation to their pension entitlement from the executive plan. In other words, the costs would not be borne by the other three members of the executive plan who did not participate in the proceedings: C.A. costs endorsement, at para. 2. The costs of the appeal payable by Sun Indalex and the U.S. Trustee were to be paid into the fund of the executive plan and allocated among the 14 former executives in relation to their pension entitlement from the executive plan.

246 USW sought an order for payment of its costs from the fund of the salaried plan. However, the Court of Appeal declined to make such an order because the USW was in a "materially different position" than that of the former executives: costs endorsement, at para. 3. The latter were beneficiaries to the pension fund (14 of the 17 members of the plan), and they consented

to the payment of costs from their individual benefit entitlements. Those who had not consented would not be affected by the payment. In contrast, the USW was the bargaining agent (not the beneficiary) for only 7 of the 169 beneficiaries of the salaried plan, none of whom was given notice of, or consented to, the payment of legal costs from the salaried plan. Moreover, the USW sought and seeks an order that its costs be paid out of the fund. This request is significantly different than the order made in favour of the former executives. The former executives explicitly ensured that their choice to pursue the litigation would not put at risk the pension benefits of those members who did not retain counsel even though of course those members would benefit in the event the litigation was successful. The USW is not proposing to insulate the 162 members whom it does not represent from the risk of litigation; it seeks an order requiring all members to share the risk of the litigation even though it represents only 7 of the 169. The proposition advanced by the USW was thus materially different from that advanced on behalf of the executive plan and approved by the court.

(2) Standard of Review

247 In *Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)*, 2009 SCC 39, [2009] 2 S.C.R. 678 (S.C.C.), Rothstein J. held that "costs awards are quintessentially discretionary": para. 126. Discretionary costs decisions should only be set aside on appeal if the court below "has made an error in principle or if the costs award is plainly wrong": *Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9, [2004] 1 S.C.R. 303 (S.C.C.), at para. 27.

(3) Analysis

248 I do not see any basis to interfere with the Court of Appeal's costs endorsement in this case. In my view, the USW's submissions are largely based on an inaccurate reading of the Court of Appeal's costs endorsement. Contrary to what the USW submits, the Court of Appeal did *not* require the consent of plan beneficiaries as a prerequisite to ordering payment of costs from the fund. Nor is it correct to suggest that the costs endorsement would "restrict recovery of beneficiary costs to instances when there is a surplus in the pension trust fund" or "preclude financing of beneficiary action when a fund is in deficit": USW factum, at paras. 71 and 76. Nor would I read the Court of Appeal's brief costs endorsement as laying down a rule that a union representing pension beneficiaries cannot recover costs from the fund because the union itself is not a beneficiary.

249 The premise of the USW's appeal appears to be that it was entitled to costs because it met what it refers to in its submissions as the Costs Payment Test and that if the executive plan members got their costs out of their pension fund, the union should get its costs out of the salaried employees' pension fund. Respectfully, I do not accept the validity of either premise.

250 The decision whether to award costs from the pension fund remains a discretionary matter. In *Nolan*, Rothstein J. surveyed the various factors that courts have taken into account when deciding whether to award a litigant its costs out of a pension trust. The first broad inquiry considered in *Nolan* was into whether the litigation concerned the due administration of the trust. In connection with this inquiry, courts have considered the following factors: (1) whether the litigation was primarily about the construction of the plan documents; (2) whether it clarified a problematic area of the law; (3) whether it was the only means of clarifying the parties' rights; (4) whether the claim alleged maladministration; and (5) whether the litigation had no effect on other beneficiaries of the trust fund: *Nolan*, at para. 126.

251 The second broad inquiry discussed in *Nolan* was whether the litigation was ultimately adversarial: para. 127. The following factors have been considered: (1) whether the litigation included allegations by an unsuccessful party of a breach of fiduciary duty; (2) whether the litigation only benefited a class of members and would impose costs on other members if successful; and (3) whether the litigation had any merit.

252 I do not think that it is correct to elevate these two inquiries (which constitute the Costs Payment Test articulated by the USW) to a test for entitlement to costs in the pension context. The factors set out in *Nolan* and other cases cited therein are best understood as highly relevant considerations guiding the exercise of judicial discretion with respect to costs.

253 The litigation undertaken here raised novel points of law with all of the uncertainty and risk inherent in such an undertaking. The Court of Appeal in essence decided that the USW, representing only 7 of 169 members of the plan, should not without consultation be able to in effect impose the risks of that litigation on all of the plan members, the vast majority

of whom were not union members. Whatever arguments might be raised against the Court of Appeal's decision in light of the success of the litigation and the sharing by all plan members of the benefits, the failure of the litigation seems to me to leave no basis to impose the cost consequences of taking that risk on all of the plan members of an already underfunded plan.

254 The second premise of the USW appeal appears to be that if the executive plan members have their costs paid out of the fund, so too should the salaried plan members. Respectfully, however, this is not an accurate statement of the order made with respect to the executive plan.

255 The Court of Appeal's order with respect to the executive plan meant that only the pension fund attributable to those members of the plan who actually supported the litigation — the vast majority I would add — would contribute to the costs of the litigation even though all members of the plan would benefit in the case of success. As the Court of Appeal noted:

> The individual represented Retirees, who comprise 14 of 17 members of the Executive Plan, have consented to the payment of costs from their individual benefit entitlements. Those who have not consented will not be affected by the payment. [Costs endorsement, at para. 3]

256 The Court of Appeal therefore approved an agreement as to costs which did not put at further risk the pension funds available to satisfy the pension entitlements of those who did not support the litigation. Thus, the Court of Appeal did not apply what the USW refers to as the Costs Payment Test to the executive plan because the costs order was the product of agreement and did not order payment of costs out of the fund as a whole.

257 In the case of the USW request, there was no such agreement and no such limitation of risk to the supporters of the litigation.

258 I see no error in principle in the Court of Appeal's refusal to order the USW costs to be paid out of the pension fund, particularly in light of the disposition of the appeal to this Court. I would dismiss the USW costs appeal but without costs.

IV. Disposition

259 I would allow the Sun Indalex, FTI Consulting and George L. Miller appeals and, except as noted below, I would set aside the orders of the Ontario Court of Appeal and restore the February 18, 2010 orders of Campbell J.

260 With respect to costs, I would set aside the Court of Appeal's orders with respect to the costs of the appeals before that court and order that all parties bear their own costs in the Court of Appeal and in this Court.

261 I would not disturb paras. 9 and 10 of the order of the Court of Appeal in the former executives' appeal so that the full indemnity legal fees and disbursements of the former executives in the amount of $269,913.78 shall be paid from the fund of the executive plan attributable to each of the 14 former executives' accrued pension benefits, and specifically such amounts shall be allocated among the 14 former executives in relation to their pension entitlement from the executive plan and will not be borne by the other three members of the executive plan.

262 I would dismiss the USW costs appeal, but without costs.

***LeBel J.* (dissenting):**

I. Introduction

263 The members of two pension plans set up by Indalex Limited ("Indalex") stand to lose half or more of their pension benefits as a consequence of the insolvency of their employer and of the arrangement approved by the Ontario Superior Court of Justice under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The Court of Appeal for Ontario found that the members were entitled to a remedy. For different and partly conflicting reasons, my colleagues Justices Deschamps and Cromwell would hold that no remedy is available to them. With all due respect for their opinions, I would

conclude, like the Court of Appeal, that the remedy of a constructive trust is open to them and should be imposed in the circumstances of this case, for the following reasons.

264 I do not intend to summarize the facts of this case, which were outlined by my colleagues. I will address these facts as needed in the course of my reasons. Before moving to my areas of disagreement with my colleagues, I will briefly indicate where and to what extent I agree with them on the relevant legal issues.

265 Like my colleagues, I conclude that no deemed trust could arise under s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), in the case of the Executive Plan because this plan had not been wound up when the *CCAA* proceedings were initiated. In the case of the Salaried Employees Plan, I agree with Deschamps J. that a deemed trust arises in respect of the wind-up deficiency. But, like her, I accept that the debtor-in-possession ("DIP") super priority prevails by reason of the application of the federal paramountcy doctrine. I also agree that the costs appeal of the United Steelworkers should be dismissed.

266 But, with respect for the opinions of my colleagues, I take a different view of the nature and extent of the fiduciary duties of an employer who elects to act as administrator of a pension plan governed by the *PBA*. This dual status does not entitle the employer to greater leniency in the determination and exercise of its fiduciary duties or excuse wrongful actions. On the contrary, as we shall see below, I conclude that Indalex not only neglected its obligations towards the beneficiaries, but actually took a course of action that was actively inimical to their interests. The seriousness of these breaches amply justified the decision of the Court of Appeal to impose a constructive trust. To that extent, I propose to uphold the opinion of Gillese J.A. and the judgment of the Court of Appeal (2011 ONCA 265, 104 O.R. (3d) 641).

II. The Employer as Administrator of a Pension Plan: Its Fiduciary Duties

267 Before entering into an analysis of the obligations of an employer as administrator of a pension plan under the *PBA*, it is necessary to consider the position of the beneficiaries. Who are they? At what stage are they in their lives? What are their vulnerabilities? A fiduciary relationship is a relationship, grounded in fact and law, between a vulnerable beneficiary and a fiduciary who holds and may exercise power over the beneficiary in situations recognized by law. Any analysis of such a relationship requires careful consideration of the characteristics of the beneficiary. It ought not stop at the level of a theoretical and detached approach that fails to address how, very concretely, this relationship works or can be twisted, perverted or abused, as was the situation in this case.

268 The beneficiaries were in a very vulnerable position relative to Indalex. They did not enjoy the protection that the existence of an independent administrator might have given them. They had no say and no input in the management of the plans. The information about the plans and their situation came from Indalex in its dual role as employer and manager of the plans. Their particular vulnerability arose from their relationship with Indalex, acting both as their employer and as the administrator of their retirement plans. Their vulnerability was substantially a consequence of that specific relationship (*Perez v. Galambos*, 2009 SCC 48, [2009] 3 S.C.R. 247 (S.C.C.), at para. 68, *per* Cromwell J.). The nature of this relationship had very practical consequences on their interests. For example, as Gillese J.A. noted in her reasons (at para. 40) the consequences of the decisions made in the course of management of the plan and during the *CCAA* proceedings signify that the members of the Executive Plan stand to lose one-half to two-thirds of their retirement benefits, unless additional money is somehow paid into the plan. These losses of benefits are, in all probability, permanent in the case of the beneficiaries who have already retired or who are close to retirement. They deeply affect their lives and expectations. For most of them, what is lost is lost for good. No arrangement will allow them to get a start on a new life. We should not view the situation of the beneficiaries as regrettable but unavoidable collateral damage arising out of the ebbs and tides of the economy. In my view, the law should give the members some protection, as the Court of Appeal intended when it imposed a constructive trust.

269 Indalex was in a conflict of interest from the moment it started to contemplate putting itself under the protection of the *CCAA* and proposing an arrangement to its creditors. From the corporate perspective, one could hardly find fault with such a decision. It was a business decision. But the trouble is that at the same time, Indalex was a fiduciary in relation to the members and retirees of its pension plans. The "two hats" analogy offers no defence to Indalex. It could not switch off the fiduciary

relationship at will when it conflicted with its business obligations or decisions. Throughout the arrangement process and until it was replaced by an independent administrator (Morneau Shepell Ltd.) it remained a fiduciary.

270 It is true that the *PBA* allows an employer to act as an administrator of a pension plan in Ontario. In such cases, the legislature accepts that conflicts of interest may arise. But, in my opinion, nothing in the *PBA* allows that the employer *qua* administrator will be held to a lower standard or will be subject to duties and obligations that are less stringent than those of an independent administrator. The employer remains a fiduciary under the statute and at common law (*PBA*, s. 22(4)). The employer is under no obligation to assume the burdens of administering the pension plans that it has agreed to set up or that are the legacy of previous decisions. However, if it decides to do so, a fiduciary relationship is created with the expectation that the employer will be able to avoid or resolve the conflicts of interest that might arise. If this proves to be impossible, the employer is still "seized" with fiduciary duties, and cannot ignore them out of hand.

271 Once Indalex had considered the *CCAA* process and decided to proceed in that manner, it should have been obvious that such a move would trigger conflicts of interest with the beneficiaries of the pension plans and that these conflicts would become untenable, as per the terms of s. 22(4) of the *PBA*. Given the nature of its obligations as administrator and fiduciary, it was impossible to wear the "two hats". Indalex had to discharge its corporate duties, but at the same time it had to address its fiduciary obligations to the members and beneficiaries of the plans. I do not fault it for applying under the *CCAA*, but rather for not relinquishing its position as administrator of the plans at the time of the application. It even retained this position once it engaged in the arrangement process. Other conflicts and breaches of fiduciary duties and of fundamental rules of procedural equity in the Superior Court flowed from this first decision. Moreover, Indalex maintained a strongly adversarial attitude towards the interest of the beneficiaries throughout the arrangement process, while it was still, at least in form, the administrator of the plans.

272 The option given to employers to act as administrators of pension plans under the *PBA* does not constitute a licence to breach the fiduciary duties that flow from this function. It should not be viewed as an invitation for the courts to whitewash the consequences of such breaches. The option is predicated on the ability of the employer-administrator to avoid the conflicts of interests that cause these breaches. An employer deciding to assume the position of administrator cannot claim to be in the same situation as the Crown when it discharges fiduciary obligations towards certain groups in society under the Constitution or the law. For those cases, the Crown assumes those duties because it is obligated to do so by virtue of its role, not because it chooses to do so. In such circumstances, the Crown must often balance conflicting interests and obligations to the broader society in the discharge of those fiduciary duties (*Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24, [2011] 2 S.C.R. 261 (S.C.C.), at paras. 37-38). If Indalex found itself in a situation where it had to balance conflicting interests and obligations, as it essentially argues, it could not retain the position of administrator that it had willingly assumed. The solution was not to place its function as administrator and its associated fiduciary duties in abeyance. Rather, it had to abandon this role and diligently transfer its function as manager to an independent administrator.

273 Indalex could apply for protection under the *CCAA*. But, in so doing, it needed to make arrangements to avoid conflicts of interests. As nothing was done, the members of the plans were left to play catch up as best they could when the process that put in place the DIP financing and its super priority was initiated. The process had been launched in such a way that it took significant time before the beneficiaries could effectively participate in the process. In practice, the United Steelworkers union, which represented only a small group of the members of the Salaried Employees Plan, acted for them after the start of the procedures. The members of the Executive Plan hired counsel who appeared for them. But, throughout, there were problems with notices, delays and the ability to participate in the process. Indeed, during the *CCAA* proceedings, the Monitor and Indalex seemed to have been more concerned about keeping the members of the plans out of the process rather than ensuring that their voices could be heard. Two paragraphs of the submissions to this Court by Morneau Shepell Ltd., the subsequently appointed administrator of the plan, aptly sums up the behaviour of Indalex and the Monitor towards the beneficiaries, whose representations were always deemed to be either premature or late:

> When counsel for the Retirees again appeared at a motion to approve the bidding procedure, his objections were considered premature:

> In my view, the issues raised by the retirees do not have any impact on the Bidding Procedures. The issues can be raised by the retirees on any application to approve a transaction — but that is for another day. [(2009), 79 C.C.P.B. 101 (Ont. S.C.J.), at para. 10, *per* Morawetz J.]

> Only when counsel appeared at the sale approval motion, as directed by the motions judge, were the concerns of the pension plan beneficiaries heard. At that time, the Appellants complain, the beneficiaries were too late and their motion constituted a collateral attack on the original DIP Order. However, it cannot be the case that stakeholder groups are too early, until they are too late. [Factum, at paras. 54-55]

274 I must also mention the failed attempt to assign Indalex in bankruptcy once the sale of its business had been approved. One of the purposes of this action was essentially to harm the interests of the members of the plans. At the time, Indalex was still wearing its two hats, at least from a legal perspective. But its duties as a fiduciary were clearly not at the forefront of its concerns. There were constant conflicts of interest throughout the process. Indalex did not attempt to resolve them; it brushed them aside. In so acting, it breached its duties as a fiduciary and its statutory obligations under s. 22(4) *PBA*.

III. Procedural Fairness in CCAA Proceedings

275 The manner in which this matter was conducted in the Superior Court was, at least partially, the result of Indalex disregarding its fiduciary duties. The procedural issues that arose in that court did not assist in mitigating the consequences of these breaches. It is true that, in the end, the beneficiaries obtained, or were given, some information pertaining to the proceedings and that counsel appeared on their behalf at various stages of the proceedings. However, the basic problem is that the proceedings were not conducted according to the spirit and principles of the Canadian system of civil justice.

276 I accept that those procedures are often urgent. The situation of a debtor requires quick and efficient action. The turtle-like pace of some civil litigation would not meet the needs of the application of the *CCAA*. However, the conduct of proceedings under this statute is not solely an administrative process. It is also a judicial process conducted according to the tenets of the adversarial system. The fundamentals of such a system must not be ignored. All interested parties are entitled to a fair procedure that allows their voices to be raised and heard. It is not an answer to these concerns to say that nothing else could be done, that no other solution would have been better, that, in substance, hearing the members would have been a waste of time. In all branches of procedure whether in administrative law, criminal law or civil action, the rights to be informed and to be heard in some way remain fundamental principles of justice. Those principles retain their place in the *CCAA*, as some authors and judges have emphasized (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 55-56; *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]), at para. 5, *per* Farley J.). This was not done in this case, as my colleagues admit, while they downplay the consequences of these procedural flaws and breaches.

IV. Imposing a Constructive Trust

277 In this context, I see no error in the decision of the Court of Appeal to impose a constructive trust (paras. 200-207). It was a fair decision that met the requirements of justice, under the principles set out by our Court in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 (S.C.C.), and in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.). The remedy of a constructive trust was justified in order to correct the wrong caused by Indalex (*Soulos*, at para. 36, *per* McLachlin J. (as she then was)). The facts of the situation met the four conditions that generally justify the imposition of a constructive trust (*Soulos*, at para. 45), as determined by Justice Gillese in her reasons, at paras. 203 and 204: (1) the defendant was under an equitable obligation in relation to the activities giving rise to the assets in his or her hands; (2) the assets in the hands of the defendant were shown to have resulted from deemed or actual agency activities of the defendant in breach of his or her equitable obligation to the plaintiff; (3) the plaintiff has shown a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendants remain faithful to their duties; and (4) there are no factors which would render imposition of a constructive trust unjust in all the circumstances of the case, such as the protection of the interests of intervening creditors.

278 In crafting such a remedy, the Court of Appeal was relying on the inherent powers of the courts to craft equitable remedies, not only in respect of procedural issues, but also of substantive questions. Section 9 of the *CCAA* is broadly drafted and does not deprive courts of their power to fill in gaps in the law when this is necessary in order to grant justice to the parties (G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law, 2007* (2008), 41, at pp. 78-79).

279 The imposition of the trust did not disregard the different corporate personalities of Indalex and Indalex U.S. It properly acknowledged the close relationship between the two companies, the second in effect controlling the first. This relationship could and needed to be taken into consideration in order to determine whether a constructive trust was a proper remedy.

280 For these reasons, I would uphold the imposition of a constructive trust and I would dismiss the appeal with costs to the respondents.

Order accordingly.

Ordonnance en conséquence.

Appendix

The Pension Benefits Amendment Act, 1973, S.O. 1973, c. 113

6. The said Act is amended by adding thereto the following sections:

23*a*. — (1) Any sum received by an employer from an employee pursuant to an arrangement for the payment of such sum by the employer into a pension plan as the employee's contribution thereto shall be deemed to be held by the employer in trust for payment of the same after his receipt thereof into the pension plan as the employee's contribution thereto and the employer shall not appropriate or convert any part thereof to his own use or to any use not authorized by the trust.

(2) For the purposes of subsection 1, any sum withheld by an employer, whether by payroll deduction or otherwise, from moneys payable to an employee shall be deemed to be a sum received by the employer from the employee.

(3) Any sum required to be paid into a pension plan by an employer as the employer's contribution to the plan shall, when due under the plan, be deemed to be held by the employer in trust for payment of the same into the plan in accordance with the plan and this Act and the regulations as the employer's contribution and the employer shall not appropriate or convert any part of the amount required to be paid to the fund to his own use or to any use not authorized by the terms of the pension plan.

Pension Benefits Act, R.S.O. 1980, c. 373

21. . . .

(2) Upon the termination or winding up of a pension plan filed for registration as required by section 17, the employer is liable to pay all amounts that would otherwise have been required to be paid to meet the tests for solvency prescribed by the regulations, up to the date of such termination or winding up, to the insurer, administrator or trustee of the pension plan.

. . . . .

23. — (1) Where a sum is received by an employer from an employee under an arrangement for the payment of the sum by the employer into a pension plan as the employee's contribution thereto, the employer shall be deemed to hold the sum in trust for the employee until the sum is paid into the pension plan whether or not the sum has in fact been kept separate and apart by the employer and the employee has a lien upon the assets of the employer for such amount that in the ordinary course of business would be entered in books of account whether so entered or not.

. . . . .

(3) Where an employer is required to make contributions to a pension plan, he shall be deemed to hold in trust for the members of the plan an amount calculated in accordance with subsection (4), whether or not,

(a) the employer contributions are payable into the plan under the terms of the plan or this Act; or

(b) the amount has been kept separate and apart by the employer,

and the members have a lien upon the assets of the employer in such amount that in the ordinary course of business would be entered into the books of account whether so entered or not.

(4) For the purpose of determining the amount deemed to be held in trust under subsection (3) on a specific date, the calculation shall be made as if the plan had been wound up on that date.

. . . . .

32. In addition to any amounts the employer is liable to pay under subsection 21 (2), where a defined benefit pension plan is terminated or wound up or the plan is amended so that it is no longer a defined benefit pension plan, the employer is liable to the plan for the difference between,

(a) the value of the assets of the plan; and

(b) the value of pension benefits guaranteed under subsection 31 (1) and any other pension benefit vested under the terms of the plan,

and the employer shall make payments to the insurer, trustee or administrator of the pension plan to fund the amount owing in such manner as is prescribed by regulation.

Pension Benefits Amendment Act, 1983, S.O. 1983, c. 2

2. Subsection 21 (2) of the said Act is repealed and the following substituted therefor:

(2) Upon the termination or winding up of a registered pension plan, the employer of employees covered by the pension plan shall pay to the administrator, insurer or trustee of the pension plan,

(a) an amount equal to,

(i) the current service cost, and

(ii) the special payments prescribed by the regulations,

that have accrued to and including the date of the termination or winding up but, under the terms of the pension plan or the regulations, are not due on that date; and

(b) all other payments that, by the terms of the pension plan or the regulations, are due from the employer to the pension plan but have not been paid at the date of the termination or winding up.

(2a) For the purposes of clause (2) (a), the current service cost and special payments shall be deemed to accrue on a daily basis.

3. Section 23 of the said Act is repealed and the following substituted therefor:

23. — (1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension plan as the employee's contribution to the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension plan.

(2) For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from moneys payable to an employee shall be deemed to be money received by the employer from the employee.

(3) The administrator or trustee of the pension plan has a lien and charge upon the assets of the employer in an amount equal to the amount that is deemed to be held in trust under subsection (1).

(4) An employer who is required by a pension plan to contribute to the pension plan shall be deemed to hold in trust for the members of the pension plan an amount of money equal to the total of,

(a) all moneys that the employer is required to pay into the pension plan to meet,

(i) the current service cost, and

(ii) the special payments prescribed by the regulations,

that are due under the pension plan or the regulations and have not been paid into the pension plan; and

(b) where the pension plan is terminated or wound up, any other money that the employer is liable to pay under clause 21 (2) (a).

(5) The administrator or trustee of the pension plan has a lien and charge upon the assets of the employer in an amount equal to the amount that is deemed to be held in trust under subsection (4).

(6) Subsections (1) and (4) apply whether or not the moneys mentioned in those subsections are kept separate and apart from other money.

. . . . .

8. Sections 32 and 33 of the said Act are repealed and the following substituted therefor:

32. — (1) The employer of employees who are members of a defined benefit pension plan that the employer is bound by or to which the employer is a party and that is partly or wholly wound up shall pay to the administrator, insurer or trustee of the plan an amount of money equal to the amount by which the value of the pension benefits guaranteed by section 31 plus the value of the pension benefits vested under the defined benefit pension plan exceeds the value of the assets of the plan allocated in accordance with the regulations for payment of pension benefits accrued with respect to service in Ontario.

(2) The amount that the employer is required to pay under subsection (1) is in addition to the amounts that the employer is liable to pay under subsection 21 (2).

(3) The employer shall pay the amount required under subsection (1) to the administrator, insurer or trustee of the defined benefit pension plan in the manner prescribed by the regulations.

Pension Benefits Act, 1987, S.O. 1987, c. 35

58. — (1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.

. . . . .

(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.

(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.

. . . . .

59. — (1) Money that an employer is required to pay into a pension fund accrues on a daily basis.

(2) Interest on contributions shall be calculated and credited at a rate not less than the prescribed rates and in accordance with prescribed requirements.

. . . . .

75. — (1) A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least fifty-five, at the effective date of the wind up of the pension plan in whole or in part, has the right to receive,

(a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;

(b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,

(i) the normal retirement date under the pension plan, or

(ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date; or

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date.

. . . . .

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

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Commission declares that the Guarantee Fund applies to the pension plan,

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

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 40 (3) (50 per cent rule) and section 75,

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.

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

57. (1) [Trust property] Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.

(2) [Money withheld] For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from money payable to an employee shall be deemed to be money received by the employer from the employee.

(3) [Accrued contributions] 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.

(4) [Wind up] 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.

. . . . .

58. (1) [Accrual] Money that an employer is required to pay into a pension fund accrues on a daily basis.

(2) [Interest] Interest on contributions shall be calculated and credited at a rate not less than the prescribed rates and in accordance with prescribed requirements.

. . . . .

74. (1) [Activating events] This section applies if a person ceases to be a member of a pension plan on the effective date of one of the following activating events:

1. The wind up of a pension plan, if the effective date of the wind up is on or after April 1, 1987.

2. The employer's termination of the member's employment, if the effective date of the termination is on or after July 1, 2012. However, this paragraph does not apply if the termination occurs in any of the circumstances described in subsection (1.1).

3. The occurrence of such other events as may be prescribed in such circumstances as may be specified by regulation.

(1.1) [Same, termination of employment] Termination of employment is not an activating event if the termination is a result of wilful misconduct, disobedience or wilful neglect of duty by the member that is not trivial and has not been condoned by the employer or if the termination occurs in such other circumstances as may be prescribed.

(1.2) [Exceptions, election by certain pension plans] This section does not apply with respect to a jointly sponsored pension plan or a multi-employer pension plan while an election made under section 74.1 for the plan and its members is in effect.

(1.3) [Benefit] A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least 55 on the effective date of the activating event has the right to receive,

(a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;

(b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,

(i) the normal retirement date under the pension plan, or

(ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the activating event had not occurred and if the member's membership continued to that date; or

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the activating event had not occurred and if the member's membership continued to that date.

(2) [Part year] In determining the combination of age plus employment or membership, one-twelfth credit shall be given for each month of age and for each month of continuous employment or membership on the effective date of the activating event.

(3) [Member for 10 years] Bridging benefits offered under the pension plan to which a member would be entitled if the activating event had not occurred and if his or her membership were continued shall be included in calculating the pension benefit under subsection (1.3) of a person who has at least 10 years of continuous employment with the employer or has been a member of the pension plan for at least 10 years.

(4) [Prorated bridging benefit] For the purposes of subsection (3), if the bridging benefit offered under the pension plan is not related to periods of employment or membership in the pension plan, the bridging benefit shall be prorated by the ratio that the member's actual period of employment bears to the period of employment that the member would have to the earliest date on which the member would be entitled to payment of pension benefits and a full bridging benefit under the pension plan if the activating event had not occurred.

(5) [Notice of termination of employment] Membership in a pension plan that is wound up includes the period of notice of termination of employment required under Part XV of the *Employment Standards Act, 2000*.

(6) [Application of subs. (5)] Subsection (5) does not apply for the purpose of calculating the amount of a pension benefit of a member who is required to make contributions to the pension fund unless the member makes the contributions in respect of the period of notice of termination of employment.

(7) [Consent of employer] For the purposes of this section, where the consent of an employer is an eligibility requirement for entitlement to receive an ancillary benefit, the employer shall be deemed to have given the consent.

(7.1) [Consent of administrator, jointly sponsored pension plans] For the purposes of this section, where the consent of the administrator of a jointly sponsored pension plan is an eligibility requirement for entitlement to receive an ancillary benefit, the administrator shall be deemed to have given the consent.

(8) [Use in calculating pension benefit] A benefit described in clause (1.3) (a), (b) or (c) for which a member has met all eligibility requirements under this section shall be included in calculating the member's pension benefit or the commuted value of the pension benefit.

. . . . .

75. (1) [Liability of employer on wind up] Where a pension plan is wound up, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

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

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

End of Document

TAB 4

2015 ONSC 7371
Ontario Superior Court of Justice

Victorian Order of Nurses for Canada, Re

2015 CarswellOnt 19150, 2015 ONSC 7371, 261 A.C.W.S. (3d) 517

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

In the Matter of Section 101 of the Courts of Justice Act, R.S.O. 1990 c. C-43 as Amended

In the Matter of a Plan of Compromise or Arrangement of Victorian Order of Nurses for Canada, Victorian Order of Nurses for Canada - Eastern Region, and Victorian Order of Nurses for Canada - Western Region

Penny J.

Heard: November 25, 2015
Judgment: November 27, 2015
Docket: CV-15-11192-00CL

Counsel: Evan Cobb, Matthew Halpin, for Applicants
Joseph Bellissimo, for Bank of Nova Scotia
Mark Laugesen, for Collins Barrow Toronto Limited (Proposed Monitor)
Kenneth Kraft, for Board of Directors of the Applicants

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.a Procedure
XIX.2.a.iv Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Procedure — Miscellaneous

Applicants, VON, provided home and community care services that addressed healthcare needs in various locations across country on non-profit basis — Current net losses from 2012 to 2015 totalled over $13 million and cash flows from operations from 2012 to 2015 were negative $8 million — Applicants brought application for initial order under Companies' Creditors Arrangement Act (CCAA) — Application granted — Applicants were unable to meet obligations as they became due and fair value of property was not sufficient to enable them to pay all obligations — While corporate structure of applicants did not conform to parent/subsidiary structure typically found in business corporation context, regional subsidiaries were under control of VON Canada from practical perspective — Applicants as group clearly faced claims in excess of $5 million — Applicants complied with s. 10(2) of CCAA, and court had jurisdiction to make order sought — Prior notice to all creditors or potential creditors was not feasible or practical in circumstances, but application was made on notice to VON group, proposed monitor/receiver, proposed restructuring officer and most significant secured creditor,

bank — Stay of proceedings against applicants was granted — Administration charge of $250,000 was required and was reasonable in circumstances to allow applicants to have access to necessary professional advice to carry out proposed restructuring — As all known secured creditors had not been provided with notice of initial application, administration charge was to initially rank subordinate to security interests of all secured creditors except for bank — Directors' charge of $750,000 was appropriate in circumstances, but priority was to be handled in same way as administration charge — As this was specialized business where experience and knowledge of critical employees was very valuable to applicants, key employee retention plan of up to $240,00, payable to key employees, was approved — Appointment of receiver over goodwill and intellectual property of applicants was just and convenient — Proposed notice procedure was reasonable and appropriate and was approved.

Table of Authorities

Cases considered by *Penny J.*:

Priszm Income Fund, Re (2011), 2011 ONSC 2061, 2011 CarswellOnt 2258, 75 C.B.R. (5th) 213 (Ont. S.C.J.) — considered

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 287 N.R. 203, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, 2002 CSC 41 (S.C.C.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 243(2) "receiver" — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 10(2) — considered

s. 11.02 [en. 2005, c. 47, s. 128] — considered

s. 11.7 [en. 1997, c. 12, s. 124] — considered

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

Courts of Justice Act, R.S.O. 1990, c. C.43
Generally — referred to

APPLICATION by home and community nursing care service for initial order under Companies' Creditors Arrangement Act.

***Penny J.*:**

Overview

1 On November 25, 2015 I heard an application for an initial order under the *Companies' Creditors Arrangement Act* for court protection of certain Victorian Order of Nurses entities. I treated the application as essentially *ex parte*. In a brief handwritten endorsement, I granted the application and signed an initial order under the CCAA and an order appointing a receiver of certain of the VON group's assets, with written reasons to follow. These are those reasons.

Background

2 The Victorian Order of Nurses for Canada and the other entities in the VON group have, for over 100 years, provided home and community care services which address the healthcare needs of Canadians in various locations across the country on a not-for-profit basis.

3 The VON group delivers its programs through four regional entities:

(1) VON — Eastern Region

(2) VON — Western Region

(3) VON — Ontario and

(4) VON — Nova Scotia.

VON Canada does not itself provide direct patient service but functions as the "head office" infrastructure supporting the operations of the regional entities.

4 The VON group has, for a number of years, suffered liquidity problems. Current liabilities have consistently exceeded current assets by a significant margin; current net losses from 2012 to 2015 total over $13 million; and cash flows from operations from 2012 to 2015 were similarly negative in the amount of over $8 million. The VON group faces a significant working capital shortfall. A number of less drastic restructuring efforts have been ongoing since 2006 but these efforts have not turned the tide. Current forecasts suggest that the VON group will face a liquidity crisis in the near future if restructuring steps are not taken.

5 Financial analysis of the VON group reveals that VON Canada, VON East and VON West account for a disproportionately high share of the VON group's overall losses and operating cash shortfalls relative to the revenues generated from these entities.

6 As a result of these circumstances, VON Canada, VON East and VON West seek protection from their creditors under the *Companies' Creditors Arrangement Act*. The applicants also seek certain limited protections for VON Ontario and VON Nova Scotia, which carry on a core aspect of the VON group's business but are not applicants in these proceedings. The applicants also seek the appointment of a receiver of certain of the VON group's assets.

7 The goal of the contemplated restructuring is to modify the scope of the VON group's operations and focus on its core business and regions. This will involve winding down the non-viable operations of VON East and VON West in an orderly fashion and restructuring and downsizing the management services provided by VON Canada in order to have a more efficient and cost-effective operating structure.

Jurisdiction

8 The CCAA applies to a "debtor company" with total claims against it of more than $5 million. A debtor company is "any company that is bankrupt or insolvent." "Insolvent" is not defined in the CCAA but has been found to include a corporation that is reasonably expected to run out of liquidity within the period of time reasonably required to implement a restructuring.

9 In any event, based on the affidavit evidence of the VON group's CEO, Jo-Anne Poirier, the applicants are each unable to meet their obligations that have become due and the aggregate fair value of their property is not sufficient to enable them to pay all of their obligations.

10 The corporate structure of the applicants does not conform to the parent/subsidiary structure that would be typically found in the business corporation context. I am satisfied, however, that VON East and VON West are under the control of VON Canada from a practical perspective. They are all affiliated companies with the same board of directors. Accordingly, while VON East and VON West do not, on a standalone basis, face claims in excess of $5 million, the applicants, as a group, clearly do. The applicants have complied with s. 10(2) of the CCAA. The application for an initial order is accompanied by a statement indicating on a weekly basis the projected cash flow of the applicants, a report containing the prescribed representations of the applicants regarding the preparation of the cash flow statement and copies of all financial statements prepared during the year before the application.

11 I am therefore satisfied that I have the jurisdiction to make the order sought.

Notice

12 The VON group is a large organization with over 4,000 employees operating from coast to coast. I accept that prior notice to all creditors, or potential creditors, is neither feasible nor practical in the circumstances. The application is made on notice to the VON group, the proposed monitor/receiver, the proposed chief restructuring officer and to the VON group's most significant secured creditor, the Bank of Nova Scotia.

13 There shall be a comeback hearing within two weeks of my initial order which will enable any creditor which had no notice of the application to raise any issues of concern.

Stay

14 Under s. 11.02 of the CCAA, the court may in its initial order make an order staying proceedings, restraining further proceedings or prohibiting the commencement of proceedings against the debtor provided that the stay is no longer than 30 days.

15 The CCAA's broad remedial purpose is to allow a debtor the opportunity to emerge from financial difficulty with a view to allowing the business to continue, to maximize returns to creditors and other stakeholders and to preserve employment and economic activity. The remedy of a stay is usually essential to achieve this purpose. I am satisfied that the stay of proceedings against the applicants should be granted.

16 Slightly more unusual is the request for a stay of proceedings against VON Ontario and VON Nova Scotia, neither of which are applicants in these proceedings. However, the evidence of Ms. Poirier establishes that VON Canada is a cost, not a revenue, center and that VON Canada is entirely reliant upon revenues generated by VON Ontario and VON Nova Scotia for its own day-to-day operations. There is a concern that VON Canada's filing of this application could trigger termination or other rights with respect to funding relationships VON Ontario and VON Nova Scotia have with various third party entities which purchase their services. Such actions would create material prejudice to VON Canada's potential restructuring by interrupting its most important revenue stream.

17 In the circumstances, I am satisfied that the stay requested in respect of VON Ontario and VON Nova Scotia, which is limited only to those steps that third party entities might otherwise take against VON Ontario and VON Nova Scotia *due to the applicants being parties to this proceeding*, is appropriate.

Payment of Pre-filing and Other Obligations

18 The initial order authorizes, but does not require, payment of outstanding and future wages as well as fees and disbursements for any restructuring assistance, fees and disbursements of the monitor, counsel to the monitor, the chief restructuring officer, the applicants' counsel and counsel to the boards of directors. These are all payments necessary to operate the business on an ongoing basis or to facilitate the restructuring.

19 The initial order also contemplates payment of liabilities for pre-filing charges incurred on VON group credit cards issued by the Bank of Nova Scotia. The Bank is a secured creditor. It is funding the restructuring (there is no DIP financing or

DIP charge). It has agreed to extend credit by continuing to make these cards available on a go forward basis, but conditioned on payment of the pre-filing credit card liabilities. I am satisfied that these measures are necessary for the conduct of the restructuring.

Modified Cash Management System

20 Historically, net cash flows were not uniform across the VON group entities. This resulted in significant timing differences between inflows and outflows for any particular VON organization. To assist with this lack of uniformity, the VON group entered into an agreement with the Bank of Nova Scotia whereby funds could be effectively pooled among the VON group, outflows and inflows netted out and a net overall cash position for the VON group determined and maintained. At the date of the commencement of these proceedings, the cash balance in the VON Canada pooled account was approximately $1.8 million. These funds will remain available to the applicants during the CCAA proceedings.

21 Immediately upon the granting of the initial order, however, the cash management system will be replaced with a new, modified cash management arrangement. Under the new arrangement, the VON Ontario and VON Nova Scotia cash inflows and outflows will take place in a segregated pooling arrangement pursuant to which the consolidated cash position of only those two entities will be maintained.

22 The applicants will establish their own arrangement under which a consolidated cash position of the applicants will be maintained. Thus, VON Canada, VON East and VON West will continue to utilize their own consolidated cash balance held by those entities collectively.

23 The segregation of the VON Ontario and VON Nova Scotia cash management is necessary because they are not applicants.

24 A consolidated cash management arrangement is, however, necessary for the applicants, *inter se*, in order to ensure that the applicants continue to have sufficient liquidity to cover their costs during these proceedings. Without this arrangement, during the proposed CCAA proceedings VON East and VON West would face periodic cash deficiencies to the detriment of the group as a whole and which would put the orderly wind down of the critical services offered by VON East and VON West at risk.

25 I am satisfied that the introduction of the new cash management is both necessary and appropriate in order to:

(a) segregate the cash operations of the VON group entities which are subject to the CCAA proceedings from the VON group entities which are not; and

(b) allow the applicants in the CCAA proceedings to pool their cash inputs and outputs, which is necessary in order to avoid liquidity crises in respect of VON East and VON West operations during the wind down period.

Proposed Monitor

26 Under s. 11.7 of the CCAA, the court is required to appoint a monitor. The applicants have proposed Collins Barrow Toronto Limited, which has consented to act as the court-appointed monitor. I accept Collins Barrow as the court appointed monitor.

Chief Restructuring Officer (CRO)

27 Section 11 of the CCAA provides the court with authority to allow the applicants to enter into arrangements to facilitate restructuring. This includes the retention of expert advisors where necessary to help with the restructuring efforts. March Advisory Services Inc. has worked extensively with VON Canada to date with its pre-court endorsed restructuring efforts and has extensive background knowledge of the VON group's structure and business operations. The VON group lacks internal business transformation and restructuring expertise. VON Canada's "head office" personnel will be fully engaged simply running the business and implementing necessary changes. I am satisfied that March Advisory Services Inc.'s engagement is both appropriate and essential to a successful restructuring effort and that its appointment as CRO should be approved.

28 Both the VON group and the monitor believe that the quantum and nature of the remuneration to be paid to the CRO is fair and reasonable. I am therefore satisfied that the court should approve the CRO's engagement letter. I am also satisfied that the CRO's engagement letter should be sealed. This sealing order meets the test under the SCC decision in *Sierra Club of Canada v. Canada (Minister of Finance)* [2002 CarswellNat 822 (S.C.C.)]. The information is commercially sensitive, in that it could impair the CRO's ability to obtain market rates in other engagements, and the salutary effects of granting the sealing order (enabling March Advisory Services Inc. to accept this assignment) outweigh the minimal impact on the principle of open courts.

Administration Charge

29 Section 11.52 of the CCAA enables the court to grant an administration charge. In order to grant this charge, the court must be satisfied that notice has been given to the secured creditors likely to be affected by the charge, the amount is appropriate, and the charge extends to all of the proposed beneficiaries.

30 Due to the confidential nature of this application and the operational issues that would have arisen had prior disclosure of these proceedings been given to all secured creditors, all known secured creditors were not been provided with notice of the initial application. The only secured creditor of the applicants provided with notice is the Bank of Nova Scotia.

31 For this reason, the proposed initial order provides that the administration charge shall initially rank subordinate to the security interests of all other secured creditors of the applicants with the exception of the Bank of Nova Scotia. The applicants will seek an order providing for the subordination of all other security interests to the administration charge in the near future following notice to all potentially affected secured creditors.

32 The amount of the administration charge is $250,000. In the scheme of things, this is a relatively modest amount. The proposed monitor has reviewed the administration charge and has found it reasonable. The beneficiaries of the administrative charge are the monitor and its counsel, counsel to the applicants, the CRO, and counsel to the boards of directors.

33 The evidence is that the applicants and the proposed monitor believe that the above noted professionals have played and will continue to play a necessary and integral role in the restructuring activities of the applicants.

34 I am satisfied that the administration charge is required and reasonable in the circumstances to allow the debtor to have access to necessary professional advice to carry out the proposed restructuring.

Directors' Charge

35 In order to secure indemnities granted by the applicants to their directors and officers and to the CRO for obligations that may be incurred in connection with the restructuring efforts after the commencement of the CCAA proceedings, the applicants seek a directors' charge in favor of the directors and officers and the CRO in the amount of $750,000.

36 Section 11.51 of the CCAA allows the court to approve a directors' charge on a priority basis. In order to grant a directors' charge the court must be satisfied that notice has been given to the secured creditors, the amount is appropriate, the applicant could not obtain adequate indemnification for the directors or officers otherwise and the charge does not apply in respect of any obligation incurred by a director or officer as a result of gross negligence or willful misconduct.

37 As noted above, all known secured creditors have not been provided with notice. For this reason, the applicants propose that the priority of the directors' charged be handled in the same manner as the administration charge.

38 The evidence of Ms. Poirier shows that there is already a considerable level of directors' and officers' insurance. There is no evidence that this insurance is likely to be discontinued or that the VON group can not or will not be able to continue to pay the premiums. However, given the size of the VON group's operations, the number of employees, the diverse geographic scope in which the group operates, the potential for coverage disputes which always attends on insurance arrangements and the important fact that this board is composed entirely of volunteers, additional protection for the directors to remain involved post-filing is warranted, *Priszm Income Fund, Re*, 2011 ONSC 2061 (Ont. S.C.J.) at para. 45.

39 The amount of the charge was estimated by taking into consideration the existing directors' and officers' insurance and potential liabilities which may attach including employee related obligations such as outstanding payroll obligations, outstanding vacation pay and liability for remittances to government authorities. This charge only relates to matters arising after the commencement of these proceeding. It also covers the CRO.

40 The proposed monitor has reviewed and has raised no concerns about the proposed directors' charge.

41 The director' charge contemplated by the initial order expressly excludes claims that arise as a result of gross negligence or willful misconduct.

42 For these reasons, I am satisfied that the directors' charge is appropriate in all the circumstances.

Key Employee Retention Plan

43 The applicants seek approval of a key employee retention plan in the amount of up to $240,000, payable to key employees during 2016.

44 This is a specialized business. The experience and knowledge of critical employees is highly valuable to the applicants. These employees have extensive knowledge of and experience with the applicants. The applicants are unlikely to be able to replace critical employees post-filing. Under the contemplated restructuring, the employee ranks of the applicants will be significantly downsized. As a result, there is a strong possibility that certain critical employees will consider other employment options in the absence of retention compensation.

45 The KERP was approved by the board of directors of the applicants. Provided the arrangements are reasonable, decisions of this kind fall within the business judgment rule as a result of which they are not second-guessed by the courts.

46 The amount is relatively modest given the size of the operation and the number of employees. I am satisfied that the KERP is reasonable in all the circumstances. I am also satisfied that the specific allocation of the KERP is reasonably left to the business judgment of the board.

47 Because the KERP involves sensitive personal compensation information about identifiable individuals, disclosure of this information could be harmful to the beneficiaries of the KERP. I am satisfied that the *Sierra Club* test is met in connection with the sealing of this limited information.

Receivership Order

48 The *Wage Earner Protection Program Act* was established to make payments to individuals in respect of wages owed to them by employers who are bankrupt or subject to a receivership. The amounts that may be paid under WEPPA to an individual include severance and termination pay as well as vacation pay accrued.

49 In aggregate, over 300 employees are expected to be terminated at the commencement of these proceedings. These employees will be paid their ordinary course salary and wages up to the date of their terminations. However, the applicants do not have sufficient liquidity to pay these employees' termination or severance pay or accrued vacation pay.

50 The terminated employees would not be able to enjoy the benefit of the WEPPA in the current circumstances. This is because the WEPPA does not specifically contemplate the effect of proceedings under the CCAA.

51 A receiver under the WEPPA includes a receiver within the meaning of s. 243(2) of the *Bankruptcy and Insolvency Act*. A receiver under the BIA includes a receiver appointed under the *Courts of Justice Act* if appointed to take control over the debtor's property. Under the WEPPA, an employer is subject to receivership if any property of the employer is in the possession or control of the receiver.

52 In this case, the applicants seek the appointment of a receiver under s. 101 of the *Courts of Justice Act* to enable the receiver to take possession and control of the applicants' goodwill and intellectual property (i.e., substantially all of the debtor's property *other than* accounts receivable and inventory, which must necessarily remain with the debtors during restructuring).

53 *In Cinram (Re)* (October 19, 2012), Toronto CV-12-9767-00CL, Morawetz R.S.J. found it was just and convenient to appoint a receiver under s. 101 over certain property of a CCAA debtor within a concurrent CCAA proceeding where the purpose of the receivership was to clarify the position of employees with respect to the WEPPA.

54 In this case, the evidence is that no stakeholder will be prejudiced by the proposed receivership order. To the contrary, there could be significant prejudice to the terminated employees if there is no receivership and former employees are not able to avail themselves of benefits under the WEPPA.

55 In the circumstances, I find it is just and convenient to appoint a receiver under s. 101 over the goodwill and intellectual property of the applicants.

Further Notice

56 I am satisfied that the proposed notice procedure is reasonable and appropriate in the circumstances and it is approved.

Comeback Hearing

57 In summary, I am satisfied that it is necessary and appropriate to grant CCAA protection to VON Canada, VON East and VON West. There shall be a comeback hearing at 10 a.m. before me on Wednesday, December 9, 2015.

Application granted.

End of Document

TAB 5

Last Revised : December 2012

Clerk's stamp:

COURT FILE NUMBER: **[Number]**

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE OF ●

I 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 [THE DEBTOR(S)]

APPLICANT:

RESPONDENT(S):

DOCUMENT: **ALBERTA TEMPLATE CCAA INITIAL ORDER**

[LAW FIRM NAME]
[Address]
[Address]
Solicitor: ●
Telephone: ●
Facsimile: ●
Email: ●
File Number: ●

DATE ON WHICH ORDER WAS PRONOUNCED: ●

NAME OF JUDGE WHO MADE THIS ORDER: ●

LOCATION OF HEARING: ●

[*NOTE: DO NOT USE THIS ORDER AS A PRECEDENT WITHOUT REVIEWING THE ACCOMPANYING EXPLANATORY NOTES.]

UPON the application of **[NAME]** (the "Applicant"); **AND UPON** having read the Originating Application, the Affidavit of *; and the Affidavit of Service of * **[if applicable]**, filed; **AND UPON** reading the consent of * to act as Monitor and upon noting that the secured creditors who are likely to be affected by the charges created herein have been provided notice of this application and either do not oppose or alternatively consent to the within Order **[if applicable]**; **AND UPON** hearing counsel for *; **IT IS HEREBY ORDERED AND DECLARED THAT:**

SERVICE

1. The time for service of the notice of application for this order is hereby abridged and deemed good and sufficient **[if applicable]** and this application is properly returnable today.

APPLICATION

2. The Applicant is a company to which the CCAA applies.

PLAN OF ARRANGEMENT

3. The Applicant shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "Plan").

POSSESSION OF PROPERTY AND OPERATIONS

4. The Applicant shall:

   (a) remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "Property");

   (b) subject to further order of this Court, continue to carry on business in a manner consistent with the preservation of its business (the "Business") and Property; and

   (c) be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "Assistants") currently retained or employed by it, with liberty to

retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

5. To the extent permitted by law, the Applicant shall be entitled but not required to pay the following expenses, incurred prior to or after this Order:

   (a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and

   (b) the fees and disbursements of any Assistants retained or employed by the Applicant in respect of these proceedings, at their standard rates and charges.

6. Except as otherwise provided to the contrary herein, the Applicant shall be entitled but not required to pay all reasonable expenses incurred by the Applicant in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

   (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services; and

   (b) payment for goods or services actually supplied to the Applicant following the date of this Order.

7. The Applicant shall remit, in accordance with legal requirements, or pay:

   (a) any statutory deemed trust amounts in favour of the Crown in Right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of:

      (i) employment insurance,

      (ii) Canada Pension Plan,

      (iii) Quebec Pension Plan **[if applicable]**, and

(iv) income taxes,

but only where such statutory deemed trust amounts arise after the date of this Order, or are not required to be remitted until after the date of this Order, unless otherwise ordered by the Court;

(b) all goods and services or other applicable sales taxes (collectively, "Sales Taxes") required to be remitted by the Applicant in connection with the sale of goods and services by the Applicant, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and

(c) any amount payable to the Crown in Right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicant.

8. Until a real property lease is disclaimed or resiliated in accordance with the CCAA, the Applicant may pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable as rent to the landlord under the lease) based on the terms of existing lease arrangements or as otherwise may be negotiated by the Applicant from time to time for the period commencing from and including the date of this Order ("Rent"), but shall not pay any rent in arrears.

9. Except as specifically permitted in this Order, the Applicant is hereby directed, until further order of this Court:

(a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicant to any of its creditors as of the date of this Order;

(b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and

(c) not to grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

10. The Applicant shall subject to such requirements as are imposed by the CCAA **[and such covenants as may be contained in the Definitive Documents (as hereinafter defined in paragraph 33),]** have the right to:

(a) permanently or temporarily cease, downsize or shut down any of its business or operations and to dispose of redundant or non-material assets not exceeding $* in any one transaction or $* in the aggregate, provided that any sale that is either (i) in excess of the above thresholds, or (ii) in favour of a person related to the Applicant (within the meaning of section 36(5) of the CCAA), shall require authorization by this Court in accordance with section 36 of the CCAA;

(b) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate on such terms as may be agreed upon between the Applicant and such employee, or failing such agreement, to deal with the consequences thereof in the Plan; and

(c) pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

all of the foregoing to permit the Applicant to proceed with an orderly restructuring of the Business (the "Restructuring").

11. The Applicant shall provide each of the relevant landlords with notice of the Applicant's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal. If the landlord disputes the Applicant's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicant, or by further order of this Court upon application by the Applicant on at least two (2) days' notice to such landlord and any such secured creditors. If the Applicant disclaims or resiliates the

lease governing such leased premises in accordance with section 32 of the CAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in section 32(5) of the CCAA, and the disclaimer or resiliation of the lease shall be without prejudice to the Applicant's claim to the fixtures in dispute.

12. If a notice of disclaimer or resiliation is delivered pursuant to section 32 of the CCAA, then:

(a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicant and the Monitor 24 hours' prior written notice; and

(b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicant in respect of such lease or leased premises and such landlord shall be entitled to notify the Applicant of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANT OR THE PROPERTY

13. Until and including **[DATE – MAX. 30 DAYS]**, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court (each, a "Proceeding") shall be commenced or continued against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, except with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicant or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

14. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person"), whether judicial or extra-judicial, statutory or non-statutory against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court, provided that nothing in this Order shall:

    (a) empower the Applicant to carry on any business which the Applicant is not lawfully entitled to carry on;

    (b) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by section 11.1 of the CCAA;

    (c) prevent the filing of any registration to preserve or perfect a security interest; or

    (d) prevent the registration of a claim for lien.

15. Nothing in this Order shall prevent any party from taking an action against the Applicant where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be taken by such party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Monitor at the first available opportunity.

NO INTERFERENCE WITH RIGHTS

16. During the Stay Period, no person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicant, except with the written consent of the Applicant and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

17. During the Stay Period, all persons having:

    (a) statutory or regulatory mandates for the supply of goods and/or services; or

(b) oral or written agreements or arrangements with the Applicant, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Business or the Applicant

are hereby restrained until further Order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Applicant or exercising any other remedy provided under such agreements or arrangements. The Applicant shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the usual prices or charges for all such goods or services received after the date of this Order are paid by the Applicant in accordance with the payment practices of the Applicant, or such other practices as may be agreed upon by the supplier or service provider and each of the Applicant and the Monitor, or as may be ordered by this Court. Nothing in this Order has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order.

NO OBLIGATION TO ADVANCE MONEY OR EXTEND CREDIT

18. Notwithstanding anything else contained in this Order, no creditor of the Applicant shall be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicant.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

19. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA and paragraph 15 of this Order, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicant with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicant whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicant, if one

is filed, is sanctioned by this Court or is refused by the creditors of the Applicant or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

20. The Applicant shall indemnify its directors and officers against obligations and liabilities that they may incur as directors and or officers of the Applicants after the commencement of the within proceedings except to the extent that, with respect to any officer or director, the obligation was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

21. The directors and officers of the Applicant shall be entitled to the benefit of and are hereby granted a charge (the "Directors' Charge") on the Property, which charge shall not exceed an aggregate amount of $●, as security for the indemnity provided in paragraph **[20]** of this Order. The Directors' Charge shall have the priority set out in paragraphs **[37]** and **[39]** herein.

22. Notwithstanding any language in any applicable insurance policy to the contrary:

    (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge; and

    (b) the Applicant's directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph **[20]** of this Order.

APPOINTMENT OF MONITOR

23. **[MONITOR'S NAME]** is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Property, Business and financial affairs and the Applicant with the powers and obligations set out in the CCAA or set forth herein and that the Applicant and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicant pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its

obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

24. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicant's receipts and disbursements, Business and dealings with the Property;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein and immediately report to the Court if in the opinion of the Monitor there is a material adverse change in the financial circumstances of the Applicant;

(c) assist the Applicant, to the extent required by the Applicant, in its dissemination to the Interim Lender and its counsel on a **[TIME INTERVAL]** basis of financial and other information as agreed to between the Applicant and the Interim Lender which may be used in these proceedings, including reporting on a basis as reasonably required by the Interim Lender;

(d) advise the Applicant in its preparation of the Applicant's cash flow statements and reporting required by the Interim Lender, which information shall be reviewed with the Monitor and delivered to the Interim Lender and its counsel on a periodic basis, but not less than **[TIME INTERVAL]**, or as otherwise agreed to by the Interim Lender;

(e) advise the Applicant in its development of the Plan and any amendments to the Plan;

(f) advise the Applicant, to the extent required by the Applicant, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(g) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form and other financial documents of the Applicant to the extent that is necessary to adequately assess the Applicant's

Property, Business and financial affairs or to perform its duties arising under this Order;

(h) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(i) hold funds in trust or in escrow, to the extent required, to facilitate settlements between the Applicants and any other Person; and

(j) perform such other duties as are required by this Order or by this Court from time to time.

25. The Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, or by inadvertence in relation to the due exercise of powers or performance of duties under this Order, be deemed to have taken or maintain possession or control of the Business or Property, or any part thereof. Nothing in this Order shall require the Monitor to occupy or to take control, care, charge, possession or management of any of the Property that might be environmentally contaminated, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal or waste or other contamination, provided however that this Order does not exempt the Monitor from any duty to report or make disclosure imposed by applicable environmental legislation.

26. The Monitor shall provide any creditor of the Applicant and the Interim Lender with information provided by the Applicant in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicant is confidential, the Monitor shall not provide such information to creditors

unless otherwise directed by this Court or on such terms as the Monitor and the Applicant may agree.

27. The Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

28. The Monitor, counsel to the Monitor and counsel to the Applicant shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicant as part of the costs of these proceedings. The Applicant is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicant on a **[TIME INTERVAL]** basis and, in addition, the Applicant is hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Applicant, retainers in the respective amount[s] of $●, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

29. The Monitor and its legal counsel shall pass their accounts from time to time.

30. The Monitor, counsel to the Monitor, if any, and the Applicant's counsel, as security for the professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the "Administration Charge") on the Property, which charge shall not exceed an aggregate amount of $*, as security for their professional fees and disbursements incurred at the normal rates and charges of the Monitor and such counsel, both before and after the making of this order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs **[37]** and **[39]** hereof.

INTERIM FINANCING

31. The Applicant is hereby authorized and empowered to obtain and borrow under a credit facility from **[INTERIM LENDER'S NAME]** (the "Interim Lender") in order to finance the Applicant's working capital requirements and other general corporate purposes and

capital expenditures, provided that borrowings under such credit facility shall not exceed $* unless permitted by further order of this Court.

32. Such credit facility shall be on the terms and subject to the conditions set forth in the commitment letter between the Applicant and the Interim Lender dated as of **[DATE]** (the "Commitment Letter"), filed.

33. The Applicant is hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "Definitive Documents"), as are contemplated by the Commitment Letter or as may be reasonably required by the Interim Lender pursuant to the terms thereof, and the Applicant is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the Interim Lender under and pursuant to the Commitment Letter and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

34. The Interim Lender shall be entitled to the benefits of and is hereby granted a charge (the "Interim Lender's Charge") on the Property to secure all obligations under the Definitive Documents incurred on or after the date of this Order which charge shall not exceed the aggregate amount advanced on or after the date of this Order under the Definitive Documents. The Interim Lender's Charge shall have the priority set out in paragraphs 37 and 39 hereof.

35. Notwithstanding any other provision of this Order:

(a) the Interim Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the Interim Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the Definitive Documents or the Interim Lender's Charge, the Interim Lender, upon * days notice to the Applicant and the Monitor, may exercise any and all of its rights and remedies against the Applicant or the Property under or pursuant to the Commitment Letter, Definitive

Documents and the Interim Lender's Charge, including without limitation, to cease making advances to the Applicant and set off and/or consolidate any amounts owing by the Interim Lender to the Applicant against the obligations of the Applicant to the Interim Lender under the Commitment Letter, the Definitive Documents or the Interim Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicant and for the appointment of a trustee in bankruptcy of the Applicant; and

(c) the foregoing rights and remedies of the Interim Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicant or the Property.

36. The Interim Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicant under the CCAA, or any proposal filed by the Applicant under the *Bankruptcy and Insolvency Act* of Canada (the "BIA"), with respect to any advances made under the Definitive Documents.

VALIDITY AND PRIORITY OF CHARGES

37. The priorities of the Directors' Charge, the Administration Charge and the Interim Lender's Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $*);

Second – Interim Lender's Charge; and

Third – Directors' Charge (to the maximum amount of $*).

38. The filing, registration or perfection of the Directors' Charge, the Administration Charge or the Interim Lender's Charge (collectively, the "Charges") shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

39. Each of the Directors' Charge, the Administration Charge and the Interim Lender's Charge (all as constituted and defined herein) shall constitute a charge on the Property and subject always to section 34(11) of the CCAA such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "Encumbrances") in favour of any Person. **[See Explanatory Notes.]**

40. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicant shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Directors' Charge, the Administration Charge or the Interim Lender's Charge, unless the Applicant also obtains the prior written consent of the Monitor, the Interim Lender and the beneficiaries of the Directors' Charge and the Administration Charge, or further order of this Court.

41. The Directors' Charge, the Administration Charge, **[the Commitment Letter, the Definitive Documents]** and the Interim Lender's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "Chargees") and/or the Interim Lender thereunder shall not otherwise be limited or impaired in any way by:

(a) the pendency of these proceedings and the declarations of insolvency made in this Order;

(b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications;

(c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA;

(d) the provisions of any federal or provincial statutes; or

(e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "Agreement") which binds the Applicant, and notwithstanding any provision to the contrary in any Agreement:

(i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof **[, including the Commitment Letter or the Definitive Documents,]** shall create or be deemed to constitute a new breach by the Applicant of any Agreement to which it is a party;

(ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges, or the **[the Applicant entering into the Commitment Letter, or]** execution, delivery or performance of the Definitive Documents; and

(iii) the payments made by the Applicant pursuant to this order, **[including the Commitment Letter or the Definitive Documents,]** and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

ALLOCATION

42. Any interested Person may apply to this Court on notice to any other party likely to be affected, for an order to allocate the Administration Charge, the Interim Lender's Charge and the Directors' Charge amongst the various assets comprising the Property.

SERVICE AND NOTICE

43. The Monitor shall (i) without delay, publish in [newspapers specified by the Court] a notice containing the information prescribed under the CCAA; (ii) within five (5) days after the date of this Order (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicant of more than $1,000 and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with section 23(1)(a) of the CCAA and the regulations made thereunder.

44. The Applicant and the Monitor shall be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, facsimile transmission or e-mail to the Applicant's creditors or other interested Persons at their respective addresses as last shown on the records of the Applicant and that any such service or notice by courier, personal delivery, facsimile transmission or e-mail shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing. The Monitor shall establish and maintain a website in respect of these proceedings at **[insert website address]** and shall post there as soon as practicable:

(a) all materials prescribed by statue or regulation to be made publically available; and

(b) all applications, reports, affidavits, orders or other materials filed in these proceedings by or behalf of the Monitor, or served upon it, except such materials as are confidential and the subject of a sealing order or pending application for a sealing order.

GENERAL

45. The Applicant or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

46. Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Monitor will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence.

47. Nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicant, the Business or the Property.

48. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicant, the Monitor and their respective agents in

carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicant and the Monitor and their respective agents in carrying out the terms of this Order.

49. Each of the Applicant and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Monitor is authorized and empowered to act as a representative in respect of the within proceeding for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

50. Any interested party (including the Applicant and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

51. This Order and all of its provisions are effective as of 12:01 a.m. Mountain Standard Time on the date of this Order.

_____

Justice of the Court of Queen's Bench of Alberta

TAB 6

CITATION: Sino-Forest Corporation (Re), 2012 ONSC 2063
COURT FILE NO.: CV-12-9667-00CL
DATE: 20120402

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

RE: 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 SINO-FOREST CORPORATION, Applicant

BEFORE: MORAWETZ J.

COUNSEL: Robert W. Staley, Kevin Zych, Derek J. Bell and Jonathan Bell, for the Applicant

E. A. Sellers for the Sino Forest Corporation Board of Directors

Derrick Tay and Jennifer Stam for the Proposed Monitor, FTI Consulting Canada, Inc.

R. J. Chadwick, B. O'Neill and C. Descours for the Ad Hoc Noteholders

M. Starnino for counsel in the Ontario class action

P. Griffin for Ernst & Young

Jim Grout and Hugh Craig for the Ontario Securities Commission

Scott Bomhof for Credit Suisse, TD and the underwriter defendants in the Canadian class action

HEARD: MARCH 30, 2012

ENDORSED: MARCH 30, 2012

REASONS: APRIL 2, 2012

ENDORSEMENT

OVERVIEW

[1] The Applicant, Sino-Forest Corporation ("SFC"), moves for an Initial Order and Sale Process Order under the *Companies' Creditors Arrangement Act* ("CCAA").

[2] The factual basis for the application is set out in the affidavit of Mr. W. Judson Martin, sworn March 30, 2012. Additional detail has been provided in a pre-filing report provided by the proposed monitor, FTI Consulting Canada Inc. ("FTI").

[3] Counsel to SFC advise that, after extensive arm's-length negotiations, SFC has entered into a Support Agreement with a substantial number of its Noteholders, which requires SFC to pursue a CCAA plan as well as a Sale Process.

[4] Counsel to SFC advises that the restructuring transactions contemplated by this proceeding are intended to:

(a) separate Sino-Forest's business operations from the problems facing SFC outside the People's Republic of China ("PRC") by transferring the intermediate holding companies that own the "business" and SFC's inter-company claims against its subsidiaries to a newly formed company owned primarily by the Noteholders in compromise of their claims;

(b) effect a Sale Process to determine whether anyone will purchase SFC's business operations for an amount of consideration acceptable to SFC and its Noteholders, with potential excess being made available to Junior Constituents;

(c) create a structure that will enable litigation claims to be pursued for the benefit of SFC's stakeholders; and

(d) allow Junior Constituents some "upside" in the form of a profit participation if Sino-Forest's business operations acquired by the Noteholders are monetized at a profit within seven years from Plan implementation.

[5] The relief sought by SFC in this application includes:

(i) a stay of proceedings against SFC, its current or former directors or officers, any of SFC's property, and in respect of certain of SFC's subsidiaries with respect to the note indentures issued by SFC;

(ii) the granting of a Directors' Charge and Administration Charge on certain of SFC's property;

(iii) the approval of the engagement letter of SFC's financial advisor, Houlihan Lokey;

(iv) the relieving of SFC of any obligation to call and hold an annual meeting of shareholders until further order of this court; and

(v) the approval of sales process procedures.

FACTS

[6] SFC was formed under the *Business Corporations Act (Ontario)*, R.S.O. 1990, c. B-16, and in 2002 filed articles of continuance under the *Canada Business Corporations Act*, R.S.C. 1985 c. C-44 ("CBCA").

[7] Since 1995, SFC has been a publicly-listed company on the TSX. SFC's registered office is in Mississauga, Ontario, and its principal executive office is in Hong Kong.

[8] A total of 137 entities make up the Sino-Forest Companies: 67 PRC incorporated entities (with 12 branch companies), 58 BVI incorporated entities, 7 Hong Kong incorporated entities, 2 Canadian entities and 3 entities incorporated in other jurisdictions.

[9] SFC currently has three employees. Collectively, the Sino-Forest Companies employ a total of approximately 3,553 employees, with approximately 3,460 located in the PRC and approximately 90 located in Hong Kong.

[10] Sino-Forest is a publicly-listed major integrated forest plantation operator and forest productions company, with assets predominantly in the PRC. Its principal businesses include the sale of standing timber and wood logs, the ownership and management of forest plantation trees, and the complementary manufacturing of downstream engineered-wood products.

[11] Substantially all of Sino-Forest's sales are generated in the PRC.

[12] On June 2, 2011, Muddy Waters LLC published a report (the "MW Report") which, according to submissions made by SFC, alleged, among other things, that SFC is a "near total fraud" and a "ponzi scheme".

[13] On the same day that the MW Report was released, the board of directors of SFC appointed an independent committee to investigate the allegations set out in the MW Report.

[14] In addition, investigations have been launched by the Ontario Securities Commission ("OSC"), the Hong Kong Securities and Futures Commissions ("HKSFC") and the Royal Canadian Mounted Police ("RCMP").

[15] On August 26, 2011, the OSC issued a cease trade order with respect to the securities of SFC and with respect to certain senior management personnel. With the consent of SFC, the cease trade order was extended by subsequent orders of the OSC.

[16] SFC and certain of its officers, directors and employees, along with SFC's current and former auditors, technical consultants and various underwriters involved in prior equity and debt offerings, have been named as defendants in eight class action lawsuits in Canada. Additionally, a class action was commenced against SFC and other defendants in the State of New York.

[17] The affidavit of Mr. Martin also points out that circumstances are such that SFC has not been able to release Q3 2011 results and these circumstances could also impact SFC's historical financial statements and its ability to obtain an audit for its 2011 fiscal year. On January 10,

2012, SFC cautioned that its historic financial statements and related audit reports should not be relied upon.

[18] SFC has issued four series of notes (two senior notes and two convertible notes), with a combined principal amount of approximately $1.8 billion, which remain outstanding and mature at various times between 2013 and 2017. The notes are supported by various guarantees from subsidiaries of SFC, and some are also supported by share pledges from certain of SFC's subsidiaries.

[19] Mr. Martin has acknowledged that SFC's failure to file the Q3 results constitutes a default under the note indentures.

[20] On January 12, 2012, SFC announced that holders of a majority in principal amount of SFC's senior notes due 2014 and its senior notes due 2017 agreed to waive the default arising from SFC's failure to release the Q3 results on a timely basis.

[21] The waiver agreements expire on the earlier of April 30, 2012 and any earlier termination of the waiver agreements in accordance with their terms. In addition, should SFC fail to file its audited financial statements for its fiscal year ended December 31, 2011 by March 30, 2012, the indenture trustees would be in a position to accelerate and enforce the approximately $1.8 billion in notes.

[22] The audited financial statements for the fiscal year that ended on December 31, 2011 have not yet been filed.

[23] Mr. Martin also deposes that, although the allegations in the MW Report have not been substantiated, the allegations have had a catastrophic negative impact on Sino-Forest's business activities and there has been a material decline in the market value of SFC's common shares and notes. Further, credit ratings were lowered and ultimately withdrawn.

[24] Mr. Martin contends that the various investigations and class action lawsuits have required, and will continue to require, that significant resources be expended by directors, officers and employees of Sino-Forest. This has also affected Sino-Forest's ability to conduct its operations in the normal course of business and the business has effectively been frozen and ground to a halt. In addition, SFC has been unable to secure or renew certain existing onshore banking facilities and has been unable to obtain offshore letters of credit to facilitate its trading business. Further, relationships with the PRC government, local government, and suppliers have become strained, making it increasingly difficult to conduct any business operations.

[25] As noted above, following arm's-length negotiations between SFC and the Ad Hoc Noteholders, the parties entered into a Support Agreement which provides that SFC will pursue a CCAA plan on the terms set out in the Support Agreement in order to implement the agreed upon restructuring transaction.

APPLICATION OF THE CCAA

[26] SFC is a corporation continued under the CBCA and is a "company" as defined in the CCAA.

[27] SFC also takes the position that it is a "debtor company" within the meaning of the CCAA. A "debtor company" includes a company that is insolvent.

[28] The issued and outstanding convertible and senior notes of SFC total approximately $1.8 billion. The waiver agreements with respect to SFC's defaults under the senior notes expire on April 30, 2012. Mr. Martin contends that, but for the Support Agreement, which requires SFC to pursue a CCAA plan, the indenture trustees under the notes would be entitled to accelerate and enforce the rights of the Noteholders as soon as April 30, 2012. As such, SFC contends that it is insolvent as it is "reasonably expected to run out of liquidity within a reasonable proximity of time" and would be unable to meet its obligations as they come due or continue as a going concern. See *Re Stelco* [2004] O.J. No. 1257 at para. 26; leave to appeal to C.A. refused [2004] O.J. No. 1903; leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336; and *ATB Financial v. Metcalfe and Mansfield Alternative Investments II Corp.*, [2008] O.J. No. 1818 (S.C.J.) at paras. 12 and 32.

[29] For the purposes of this application, I accept that SFC is a "debtor company" within the meaning of the CCAA and is insolvent; and, as a CBCA company that is insolvent with debts in excess of $5 million, SFC meets the statutory requirements for relief under the CCAA.

[30] The required financial information, including cash-flow information, has been filed.

[31] I am satisfied that it is appropriate to grant SFC relief under the CCAA and to provide for a stay of proceedings. FTI Consulting Canada, Inc., having filed its Consent to act, is appointed Monitor.

THE ADMINISTRATION CHARGE

[32] SFC has also requested an Administration Charge. Section 11.52 of the CCAA provides the court with the jurisdiction to grant an Administration Charge in respect of the fees and expenses of FTI and other professionals.

[33] I am satisfied that, in the circumstances of this case, an Administration Charge in the requested amount is appropriate. In making this determination I have taken into account the complexity of the business, the proposed role of the beneficiaries of the charge, whether the quantum of the proposed charge appears to be fair and reasonable, the position of the secured creditors likely to be affected by the charge and the position of FTI.

[34] In this case, FTI supports the Administration Charge. Further, it is noted that the Administration Charge does not seek a super priority charge ranking ahead of the secured creditors.

THE DIRECTORS' CHARGE

[35] SFC also requests a Directors' Charge. Section 11.51 of the CCAA provides the court with the jurisdiction to grant a charge in favour of any director to indemnify the director against obligations and liabilities that they may incur as a director of the company after commencement of the CCAA proceedings.

[36] Having reviewed the record, I am satisfied that the Directors' Charge in the requested amount is appropriate and necessary. In making this determination, I have taken into account that the continued participation of directors is desirable and, in this particular case, absent the Directors' Charge, the directors have indicated they will not continue in their participation in the restructuring of SFC. I am also satisfied that the insurance policies currently in place contain exclusions and limitations of coverage which could leave SFC's directors without coverage in certain circumstances.

[37] In addition, the Directors' Charge is intended to rank behind the Administration Charge. Further, FTI supports the Directors' Charge and the Directors' Charge does not seek a super priority charge ranking ahead of secured creditors.

[38] Based on the above, I am satisfied that the Directors' Charge is fair and reasonable in the circumstances.

THE SALE PROCESS

[39] SFC has also requested approval for the Sale Process.

[40] The CCAA is to be given a broad and liberal interpretation to achieve its objectives and to facilitate the restructuring of an insolvent company. It has been held that a sale by a debtor, which preserves its businesses as a going concern, is consistent with these objectives, and the court has the jurisdiction to authorize such a sale under the CCAA in the absence of a plan. See *Re Nortel Networks Corp.*, [2009] O.J. No. 3169 (S.C.J.) at paras. 47-48.

[41] The following questions may be considered when determining whether to authorize a sale under the CCAA in the absence of a plan (See *Re Nortel Networks Corp.*, *supra* at para. 49):

(i) Is the sale transaction warranted at this time?

(ii) Will the sale benefit the "whole economic community"?

(iii) Do any of the debtors' creditors have a *bone fide* reason to object to the sale of the business?

(iv) Is there a better alternative?

[42] Counsel submits that as a result of the uncertainty surrounding SFC, it is impossible to know what an interested third party might be willing to pay for the underlying business operations of SFC once they are separated from the problems facing SFC outside the PRC. Counsel further contends that it is only by running the Sale Process that SFC and the court can

determine whether there is an interested party that would be willing to purchase SFC's business operations for an amount of consideration that is acceptable to SFC and its Noteholders while also making excess funds available to Junior Constituents.

[43] Based on a review of the record, the comments of FTI, and the support levels being provided by the Ad Hoc Noteholders Committee, I am satisfied that the aforementioned factors, when considered in the circumstances of this case, justify the approval of the Sale Process at this point in time.

ANCILLARY RELIEF

[44] I am also of the view that it is impractical for SFC to call and hold its annual general meeting at this time and, therefore, I am of the view that it is appropriate to grant an order relieving SFC of this obligation.

[45] SFC seeks to have FTI authorized, as a formal representative of SFC, to apply for recognition of these proceedings, as necessary, in any jurisdiction outside of Canada, including as "foreign main proceedings" in the United States pursuant to Chapter 15 of the U.S. Bankruptcy Code. Counsel contends that such an order is necessary to facilitate the restructuring as, among other things, SFC faces class action lawsuits in New York, the notes are governed by New York law, the indenture trustees are located in New York and certain of the SFC subsidiaries may face proceedings in foreign jurisdictions in respect of certain notes issued by SFC. In my view, this relief is appropriate and is granted.

[46] SFC also requests an order approving:

(i) the Financial Advisor Agreement; and

(ii) Houlihan Lokey's retention by SFC under the terms of the agreement.

[47] Both SFC and FTI believe that the quantum and nature of the remuneration provided for in the Financial Advisor Agreement is fair and reasonable and that an order approving the Financial Advisor Agreement is appropriate and essential to a successful restructuring of SFC. This request has the support of parties appearing today and, in my view, is appropriate in the circumstances and is therefore granted.

DISPOSITION

[48] Accordingly, the relief requested by SFC is granted and orders shall issue substantially in the form of the Initial Order and the Sale Process Order included the Application Record.

MISCELLANEOUS

[49] SFC has confirmed that it is bound by the Support Agreement and intends to comply with it.

[50] The come-back hearing is scheduled for Friday, April 13, 2012. The orders granted today contain a come-back clause. The orders were made on extremely short notice and for all practical purposes are to be treated as being made *ex parte*.

[51] The scheduling of future hearings in this matter shall be coordinated through counsel to the Monitor and the Commercial List Office.

[52] Finally, it would be helpful if counsel could also file materials on a USB key in addition to a paper record.

MORAWETZ J.

Date: April 2, 2012

TAB 7

Case Name:

Walter Energy Canada Holdings Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as Amended
AND IN THE MATTER OF the Business Corporations Act, S.B.C. 2002, c. 57, as Amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of Walter Energy Canada Holdings, Inc. and the Other Petitioners Listed on Schedule "A"

[2016] B.C.J. No. 122

2016 BCSC 107

Docket: S1510120

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

S.C. Fitzpatrick J.

Heard: January 5, 2016.
Judgment: January 5, 2016.
Released: January 26, 2016.

(77 paras.)

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Effect on other proceedings -- Stays -- Of concurrent proceedings -- Petition by Walter Canada Group for relief respecting potential restructuring allowed -- Petitioners, who comprised part of Canadian arm of coal exporter, obtained initial order that included stay of union's claims against partnership that operated one of Canadian mines -- Union wanted stay to be lifted -- Proceeding with union's claims would detract managerial and legal focus from primary task of implementing sale and solicitation process and thus potentially interfere with restructuring efforts.

Petition by the Walter Canada Group for relief with respect to a potential restructuring. The petitioners comprised part of the Canadian arm of a major coal exporter with mines in three countries.

The Canadian mines were placed in care and maintenance. The American companies, which had historically supported the Canadian operations with funding and management services, filed a bankruptcy proceeding. The only remaining director of the petitioners was based in the United States and expected to resign when a sale of the American assets completed. The petitioners obtained an initial order that included a stay of the claims of a union that represented employees at one of the Canadian mines against the partnership that operated it. The petitioners now sought the approval of a sale and solicitation process, the appointment of professionals to manage it, a key employee retention and an extension of the stay. The stakeholders were largely supportive of the relief sought, but the union opposed certain aspects as to who should be appointed to conduct the sale process and wanted the stay to be lifted so that the claims against the partnership could continue.

HELD: Petition allowed. Professional advisors were necessary in order to have a chance for a successful restructuring. There was a legitimate risk that the petitioners' ship could become rudderless in the midst of the proceedings. The risk was exacerbated by the fact that the management support traditionally provided by the American entities would not be provided after the American assets were sold. The petitioner's assets and operations were significantly complex so as to justify the appointments. Proceeding with the union's claims would detract managerial and legal focus from the primary task of implementing the sale and solicitation process and thus potentially interfere with the restructuring efforts. It was not imperative to determine the union's claims now.

Statutes, Regulations and Rules Cited:

Bankruptcy Code (US), Chapter 11

Business Corporations Act, S.B.C. 2002, c. 57, as Amended,

Companies Creditors' Arrangement Act, R.S.C. 1985, c. C-36 as Amended, s. 11, s. 11.02(2), s. 11.02 (3), s. 11.52

Employee Retirement Income Security Act of 1974, 29 USC s. 101, as amended,

Labour Relations Code, R.S.B.C. 1996, c. 224, s. 54

Counsel:

Counsel for the Petitioners: Marc Wasserman, Mary I.A. Buttery, Tijana Gavric, Joshua Hurwitz.

Counsel for United Mine Workers of America 1974 Pension Plan and Trust: John Sandrelli, Tevia Jeffries.

Counsel for Steering Committee of First Lien Creditors of Walter Energy, Inc.: Matthew Nied.

Counsel for Her Majesty the Queen in Right of the Province of British Columbia: Aaron Welch.

Counsel for Morgan Stanley Senior Funding, Inc.: Kathryn Esaw.

Counsel for KPMG Inc., Monitor: Peter Reardon, Wael Rostom, Caitlin Fell.

Counsel for Canada Revenue Agency: Neva Beckie.

Counsel for the United States Steel Workers, Local 1-424: Stephanie Drake.

Reasons for Judgment

S.C. FITZPATRICK J.:--

Introduction and Background

1 On December 7, 2015, I granted an initial order in favour of the petitioners, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("*CCAA*").

2 The "Walter Group" is a major exporter of metallurgical coal for the steel industry, with mines and operations in the U.S., Canada and the U.K. The petitioners comprise part of the Canadian arm of the Walter Group and are known as the "Walter Canada Group". The Canadian entities were acquired by the Walter Group only recently in 2011.

3 The Canadian operations principally include the Brule and Willow Creek coal mines, located near Chetwynd, B.C., and the Wolverine coal mine, near Tumbler Ridge, B.C. The mine operations are conducted through various limited partnerships. The petitioners include the Canadian parent holding company and the general partners of the partnerships. Given the complex corporate structure of the Walter Canada Group, the initial order also included stay provisions relating to the partnerships: *Lehndorff General Partner Ltd. (Re)* (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div.); *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319 at para. 21.

4 The timing of the Canadian acquisition could not have been worse. Since 2011, the market for metallurgical coal has fallen dramatically. This in turn led to financial difficulties in all three jurisdictions in which the Walter Group operated. The three Canadian mines were placed in care and maintenance between April 2013 and June 2014. The mines remain in this state today, at an estimated annual cost in excess of $16 million. Similarly, the U.K. mines were idled in 2015. In July 2015, the U.S. companies in the Walter Group filed and sought creditor protection by filing a proceeding under Chapter 11 of the U.S. *Bankruptcy Code*. It is my understanding that the U.S. entities have coal mining operations in Alabama and West Virginia.

5 From the time of the granting of the initial order, it was apparent that the outcome of the U.S. proceedings would have a substantial impact on the Walter Canada Group. A sales process completed in the U.S. proceeding is anticipated to result in a transfer of the U.S. assets to a stalking horse bidder sometime early this year. This is significant because the U.S. companies have historically supported the Canadian operations with funding and provided essential management services. This is a relevant factor in terms of the proposed relief, as I will discuss below.

6 The Walter Canada Group faces various significant contingent liabilities. The various entities are liable under a 2011 credit agreement of approximately $22.6 million in undrawn letters of credit for post-mining reclamation obligations. Estimated reclamation costs for all three mines exceed this amount. Further obligations potentially arise with respect to the now laid-off employees of the Wolverine mine, who are represented by the United Steelworkers, Local 1-424 (the "Union"). If these employees are not recalled before April 2016, the Wolverine partnership faces an estimated claim of $11.3 million. As I will discuss below, an even more significant contingent liability has also recently been advanced.

7 This anticipated "parting of the ways" as between the U.S. and Canadian entities in turn prompted the filing of this proceeding, which is intended to provide the petitioners with time to develop a restructuring plan. The principal goal of that plan, as I will describe below, is to complete a going concern sale of the Canadian operations as soon as possible. Fortunately, as of early December 2015, the Walter Canada Group has slightly in excess of US$40.5 million in cash resources to fund the restructuring efforts. However, ongoing operating costs remain high and are now compounded by the restructuring costs.

8 As was appropriate, the petitioners did not seek extensive orders on December 7, 2015, given the lack of service on certain major stakeholders. A stay was granted on that date, together with other ancillary relief. KPMG Inc. was appointed as the monitor (the "Monitor").

9 The petitioners now seek relief that will set them on a path to a potential restructuring; essentially, an equity and/or debt restructuring or alternatively, a sale and liquidation of their assets. That relief includes approving a sale and solicitation process and the appointment of further professionals to manage that process and complete other necessary management functions. They also seek a key employee retention plan. Finally, the petitioners seek an extension of the stay to early April 2016.

10 For obvious reasons, the financial and environmental issues associated with the coal mines loom large in this matter. For that reason, the Walter Canada Group has engaged in discussions with the provincial regulators, being the B.C. Ministry of Energy and Mines and the B.C. Ministry of the Environment, concerning the environmental issues and the proposed restructuring plan. No issues arise from the regulators' perspective at this time in terms of the relief on this application. Other stakeholders have responded to the application and contributed to the final terms of the relief sought.

11 The stakeholders appearing on this application are largely supportive of the relief sought, save for two.

12 Firstly, the United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Pension Plan") opposes certain aspects of the relief sought as to who should be appointed to conduct the sales process.

13 The status of the 1974 Pension Plan arises from somewhat unusual circumstances. One of the U.S. entities, Jim Walter Resources, Inc. ("JWR") is a party to a collective bargaining agreement with the 1974 Pension Plan (the "CBA"). In late December 2015, the U.S. bankruptcy court issued a decision that allowed JWR to reject the CBA. The court also ordered that the sale of the U.S. assets would be free and clear of any liabilities under the CBA. As a result, the 1974 Pension Plan has filed a proof of claim in the U.S. proceedings advancing a contingent claim against JWR with respect to a potential "withdrawal liability" under U.S. law of approximately US$900 million. The U.S. law in question is the *Employee Retirement Income Security Act of 1974*, 29 USC s. 101, as amended, which is commonly referred to as "*ERISA*".

14 The 1974 Pension Plan alleges that it is only a matter of time before JWR formally rejects the CBA. In that event, the 1974 Pension Plan contends that *ERISA* provides that all companies under common control with JWR are jointly and severally liable for this withdrawal liability, and that some of the entities in the Walter Canada Group come within this provision.

15 It is apparent at this time that neither the Walter Canada Group nor the Monitor has had an opportunity to assess the 1974 Pension Plan's contingent claim. No claims process has even been

contemplated at this time. Nevertheless, the standing of the 1974 Pension Plan to make submissions on this application is not seriously contested.

16 Secondly, the Union only opposes an extension of the stay of certain proceedings underway in this court and the Labour Relations Board in relation to some of its employee claims, which it wishes to continue to litigate.

17 At the conclusion of the hearing, I granted the orders sought by the petitioners, with reasons to follow. Hence, these reasons.

The Sale and Investment Solicitation Process ("SISP")

18 The proposed SISP has been developed by the Walter Canada Group in consultation with the Monitor. By this process, bidders may submit a letter of intent or bid for a restructuring, recapitalization or other form of reorganization of the business and affairs of the Walter Canada Group as a going concern, or a purchase of any or all equity interests held by Walter Energy Canada. Alternatively, any bid may relate to a purchase of all or substantially all, or any portion of the Walter Canada Group assets (including the Brule, Willow Creek and Wolverine mines).

19 It is intended that the SISP will be led by a chief restructuring officer (the "CRO"), implemented by a financial advisor (both as discussed below) and supervised by the Monitor.

20 Approvals of SISPs are a common feature in *CCAA* restructuring proceedings. The Walter Canada Group refers to *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750. At para. 6, Brown J. (as he then was) stated that in reviewing a proposed sale process, the court should consider:

> (i) the fairness, transparency and integrity of the proposed process;
>
> (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
>
> (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

21 Although the court in *CCM Master Qualified Fund* was considering a sales process proposed by a receiver, I agree that these factors are also applicable when assessing the reasonableness of a proposed sales process in a *CCAA* proceeding: see *PCAS Patient Care Automation Services Inc. (Re)*, 2012 ONSC 2840 at paras. 17-19.

22 In this case, the proposed timelines would see a deadline of March 18 for letters of intent, due diligence thereafter with a bid deadline of May 27 and a target closing date of June 30, 2016. In my view, the timeline is reasonable, particularly with regard to the need to move as quickly as possible to preserve cash resources pending a sale or investment; or, in the worst case scenario, to allow the Walter Canada Group to close the mines permanently. There is sufficient flexibility built into the SISP to allow the person conducting it to amend these deadlines if the circumstances justify it.

23 The SISP proposed here is consistent with similar sales processes approved in other Canadian insolvency proceedings. In addition, I agree with the Monitor's assessment that the SISP represents

the best opportunity for the Walter Canada Group to successfully restructure as a going concern, if such an opportunity should arise.

24 No stakeholder, including the 1974 Pension Plan, opposed this relief. All concerned recognize the need to monetize, if possible, the assets held by the Walter Canada Group. I conclude that the proposed SISP is reasonable and it is approved.

Appointment of Financial Advisor and CRO

25 The more contentious issues are who should conduct the SISP and manage the operations of the Walter Canada Group pending a transaction and what their compensation should be.

26 The Walter Canada Group seeks the appointment of a financial advisor and CRO to assist with the implementation of the SISP.

27 In restructuring proceedings it is not unusual that professionals are engaged to advance the restructuring where the existing management is either unable or unwilling to bring the required expertise to bear. In such circumstances, courts have granted enhanced powers to the monitor; otherwise, the appointment of a CRO and/or financial advisor can be considered.

28 A consideration of this issue requires some context in terms of the current governance status of the Walter Canada Group. At present, there is only one remaining director, who is based in West Virginia. The petitioners' counsel does not anticipate his long-term involvement in these proceedings and expects he will resign once the U.S. sale completes. Similarly, the petitioners have been largely instructed to date by William Harvey. Mr. Harvey is the executive vice-president and chief financial officer of Walter Energy Canada Holdings, Inc., one of the petitioners. He lives in Birmingham, Alabama. As with the director, the petitioners' counsel expects him to resign in the near future.

29 The only other high level employee does reside in British Columbia, but his expertise is more toward operational matters, particularly regarding environmental and regulatory issues.

30 Accordingly, there is a legitimate risk that the Walter Canada Group ship may become rudderless in the midst of these proceedings and most significantly, in the midst of the very important sales and solicitation process. This risk is exacerbated by the fact that the management support traditionally provided by the U.S. entities will not be provided after the sale of the U.S. assets. Significant work must be done to effect a transition of those shared services in order to allow the Canadian operations to continue running smoothly. It is anticipated that the CRO will play a key role in assisting in this transition of the shared services.

31 In these circumstances, I am satisfied that professional advisors are not just desirable, but indeed necessary, in order to have a chance for a successful restructuring. Both appointments ensure that the SISP will be implemented by professionals who will enhance the likelihood that it generates maximum value for the Walter Canada Group's stakeholders. In addition, the appointment of a CRO will allow the Canadian operations to continue in an orderly fashion, pending a transaction.

32 The proposal is to retain PJT Partners LP ("PJT") as a financial advisor and investment banker to implement the SISP. PJT is a natural choice given that it had already been retained in the context of the U.S. proceedings to market the Walter Group's assets, which of course indirectly included the Walter Canada Group's assets. As such, PJT is familiar with the assets in this jurisdiction, knowledge that will no doubt be of great assistance in respect of the SISP.

33 In addition, the proposal is to retain BlueTree Advisors Inc. as the CRO, by which it would provide the services of William E. Aziz. Mr. Aziz is a well-known figure in the Canadian insolvency community; in particular, he is well known for having provided chief restructuring services in other proceedings (see for example *Mobilicity Group (Re)*, 2013 ONSC 6167 at para. 17). No question arises as to his extensive qualifications to fulfil this role.

34 The materials as to how Mr. Aziz was selected were somewhat thin, which raised some concerns from the 1974 Pension Plan as to the appropriateness of his involvement. However, after submissions by the petitioners' counsel, I am satisfied that there was a thorough consideration of potential candidates and their particular qualifications to undertake what will no doubt be a time-consuming and complex assignment. In that regard, I accept the recommendations of the petitioners that Mr. Aziz is the most qualified candidate.

35 The Monitor was involved in the process by which PJT and BlueTree/Mr. Aziz were selected. It has reviewed both proposals and supports that both PJT and BlueTree are necessary appointments that will result in the Walter Canada Group obtaining the necessary expertise to proceed with its restructuring efforts. In that sense, such appointments fulfill the requirements of being "appropriate", in the sense that that expertise will assist the debtor in achieving the objectives of the *CCAA*: see s. 11; *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, 2007 SKQB 121 at para. 19.

36 The 1974 Pension Plan does not mount any serious argument against the need for such appointments, other than to note that the costs of these retainers will result in a very expensive process going forward. The matter of PJT and the CRO's compensation was the subject of some negative comment by the 1974 Pension Plan. However, the 1974 Pension Plan did not suggest any alternate way of proceeding with the SISP and the operations generally. When pressed by the Court on the subject, the 1974 Pension Plan acknowledged that time was of the essence in implementing the SISP and it did not contend that a further delay was warranted to canvas other options.

37 PJT is to receive a monthly work fee of US$100,000, although some savings are achieved since this amount will not be charged until the completion of the U.S. sale. In addition, PJT will receive a capital raising fee based on the different types of financing that might be arranged. Lastly, PJT is entitled to a transaction or success fee, based on the consideration received from any transaction.

38 At the outset of the application, the proposed compensation for the CRO was similar to that of PJT. The CRO was to obtain a monthly work fee of US$75,000. In addition, the CRO was to receive a transaction or success fee based on the consideration received from any transaction. After further consideration by the petitioners and BlueTree, this proposed compensation was subsequently renegotiated so as to limit the success fee to $1 million upon the happening of a "triggering event" (essentially, a recapitalization, refinancing, acquisition or sale of assets or liabilities).

39 To secure the success fees of PJT and the CRO, the Walter Canada Group seeks a charge of up to a maximum of $10 million, with each being secured to a limit of half that amount. Any other fees payable by the Walter Canada Group to PJT and the CRO would be secured by the Administration Charge granted in the initial order.

40 The jurisdiction to grant charges for such professional fees is found in s. 11.52 of the *CCAA*:

> 11.52(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part

of the property of a debtor company is subject to a security or charge -- in an amount that the court considers appropriate -- in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

41 In *U.S. Steel Canada Inc. (Re)*, 2014 ONSC 6145 at para. 22, Justice Wilton-Siegel commented on the necessity of such a charge in a restructuring, as it is usually required to ensure the involvement of these professionals and achieve the best possible outcome for the stakeholders. I concur in that sentiment here, as the involvement of PJT and BlueTree is premised on this charge being granted.

42 In *Canwest Publishing Inc.*, 2010 ONSC 222 at para. 54, Justice Pepall (as she then was) set out a non-exhaustive list of factors to consider when determining whether the proposed compensation is appropriate and whether charges should be granted for that compensation:

(a) the size and complexity of the businesses being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the Monitor.

43 I am satisfied that the Walter Canada Group's assets and operations are significantly complex so as to justify both these appointments and the proposed compensation. I have already referred to the significant regulatory and environmental issues that arise. In addition, relevant employment issues are already present. Any transaction relating to these assets and operations will be anything but straightforward.

44 The factors relating to the proposed role of the professionals and whether there is unwarranted duplication can be addressed at the same time. As conceded by the petitioners' and Monitor's counsel, there will undoubtedly be some duplication with the involvement of the Monitor, PJT and the CRO. However, the issue is whether there is *unwarranted* duplication of effort. I am satisfied that the process has been crafted in a fashion that recognizes the respective roles of these professionals but

also allows for a coordinated effort that will assist each of them in achieving their specific goals. Each has a distinct focus and I would expect that their joint enterprise will produce a better result overall.

45 Any consideration of compensation will inevitably be driven by the particular facts that arise in the proceedings in issue. Even so, I have not been referred to any material that indicates that the proposed compensation and charge in favour of PJT and the CRO are inconsistent with compensation structures and protections approved in other similarly complex insolvency proceedings. In that regard, I accept the petitioners' submissions that the task ahead justifies both the amount of the fees to be charged and the protections afforded by the charge. In short, I find that the proposed compensation is fair and reasonable in these circumstances.

46 The secured creditors likely to be affected by the charges for PJT and the CRO's fees have been given notice and do not oppose the relief being sought.

47 Finally, the Monitor is of the view that the agreed compensation of PJT and the CRO and the charge in their favour are appropriate.

48 In summary, all circumstances support the relief sought. Accordingly, I conclude that it is appropriate to appoint the CRO and approve the engagement of PJT on the terms sought. In addition, I grant a charge in favour of PJT and the CRO to a maximum of $10 million to secure their compensation beyond the monthly work fees, subject to the Administration Charge, the Director's Charge and the KERP Charge (as discussed below).

Key Employee Retention Plan ("KERP")

49 The Walter Canada Group also seeks approval of a KERP, for what it describes as a "key" employee needed to maintain the Canadian operations while the SISP is being conducted. In addition, Mr. Harvey states that this employee has specific information which the CRO, PJT and the Monitor will need to draw on during the implementation of the SISP.

50 The detailed terms of the KERP are contained in a letter attached to Mr. Harvey's affidavit #3 sworn December 31, 2015. In the course of submissions, the Walter Canada Group sought an order to seal this affidavit, on the basis that the affidavit and attached exhibit contained sensitive information, being the identity of the employee and the compensation proposed to be paid to him.

51 I was satisfied that a sealing order should be granted with respect to this affidavit, based on the potential disclosure of this personal information to the public: see *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para. 53; *Sahlin v. The Nature Trust of British Columbia*, 2010 BCCA 516 at para. 6. A sealing order was granted on January 5, 2016.

52 The proposed KERP must be considered in the context of earlier events. This individual was to receive a retention bonus from the U.S. entities; however, this amount is now not likely to be paid. In addition, just prior to the commencement of these proceedings, this person was given a salary increase to reflect his additional responsibilities, including those arising from the loss of support and the shared services from the U.S. entities. This new salary level has not been disclosed to the court or the stakeholders.

53 The Walter Canada Group has proposed that this employee be paid a retention bonus on the occurrence of a "triggering event", provided he remains an active employee providing management and other services. The defined triggering events are such that the retention bonus is likely to be paid

whatever the outcome might be. In addition, to secure the payment of the KERP to this employee, Walter Energy Canada seeks a charge up to the maximum amount of the retention bonus.

54 The amount of the retention bonus is large. It has been disclosed in the sealed affidavit but has not been disclosed to certain stakeholders, including the 1974 Pension Plan. The Monitor states in its report:

> The combination of the salary increase and proposed retention bonus ... were designed to replace the retention bonus previously promised to the KERP Participant by Walter Energy U.S.

55 I did not understand the submissions of the 1974 Pension Plan to be that the granting of a KERP for this employee was inappropriate. Rather, the concern related to the amount of the retention bonus, which is to be considered in the context of the earlier salary raise. At the end of the day, the 1974 Pension Plan was content to leave a consideration of the level of compensation to the Court, given the sealing of the affidavit.

56 The authority to approve a KERP is found in the courts' general statutory jurisdiction under s. 11 of the *CCAA* to grant relief if "appropriate": see *U.S. Steel Canada* at para. 27.

57 As noted by the court in *Timminco Ltd. (Re)*, 2012 ONSC 506 at para. 72, KERPs have been approved in numerous insolvency proceedings, particularly where the retention of certain employees was deemed critical to a successful restructuring.

58 Factors to be considered by the court in approving a KERP will vary from case to case, but some factors will generally be present. See for example, *Grant Forest Products Inc. (Re)* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J.); and *U.S. Steel Canada* at paras. 28-33.

59 I will discuss those factors and the relevant evidence on this application, as follows:

a) Is this employee important to the restructuring process?: In its report, the Monitor states that this employee is the most senior remaining executive in the Walter Canada Group, with extensive knowledge of its assets and operations. He was involved in the development of the Wolverine mine and has extensive knowledge of all three mines. He also has strong relationships in the communities in which the mines are located, with the Group's suppliers and with the regulatory authorities. In that sense, this person's expertise will enhance the efforts of the other professionals to be involved, including PJT, the CRO and the Monitor: *U.S. Steel* at para. 28;

b) Does the employee have specialized knowledge that cannot be easily replaced?: I accept that the background and expertise of this employee is such that it would be virtually impossible to replace him if he left the employ of the Walter Canada Group: *U.S. Steel* at para. 29;

c) Will the employee consider other employment options if the KERP is not approved?: There is no evidence here on this point, but I presume that the KERP is more a prophylactic measure, rather than a reactionary one. In any event, this is but one factor and I would adopt

the comments of Justice Newbould in *Grant Forest Products* at paras. 13-15, that a "potential" loss of this person's employment is a factor to be considered;

d) Was the KERP developed through a consultative process involving the Monitor and other professionals?: The Monitor has reviewed the proposed KERP, but does not appear to have been involved in the process. Mr. Harvey confirms the business decision of the Walter Canada Group to raise this employee's salary and propose the KERP. The business judgment of the board and management is entitled to some deference in these circumstances: *Grant Forest Products* at para. 18; *U.S. Steel Canada* at para. 31; and

e) Does the Monitor support the KERP and a charge?: The answer to this question is a resounding "yes". As to the amount, the Monitor notes that the amount of the retention bonus is at the "high end" of other KERP amounts of which it is aware. However, the Monitor supports the KERP amount even in light of the earlier salary increase and after considering the value and type of assets under this person's supervision and the critical nature of his involvement in the restructuring. As this Court's officer, the views of the Monitor are also entitled to considerable deference by this Court: *U.S. Steel* at para. 32.

60 In summary, the petitioners' counsel described the involvement of this individual in the *CCAA* restructuring process as "essential" or "critical". These sentiments are echoed by the Monitor, who supports the proposed KERP and charge to secure it. The Monitor's report states that this individual's ongoing employment will be "highly beneficial" to the Walter Canada Group's restructuring efforts, and that this employee is "critical" to the care and maintenance operations at the mines, the transitioning of the shared services from the U.S. and finally, assisting with efforts under the SISP.

61 What I take from these submissions is that a loss of this person's expertise either now or during the course of the *CCAA* process would be extremely detrimental to the chances of a successful restructuring. In my view, it is more than evident that there is serious risk to the stakeholders if this person does not remain engaged in the process. Such a result would be directly opposed to the objectives of the *CCAA*. I find that such relief is appropriate and therefore, the KERP and charge to secure the KERP are approved.

Cash Collateralization / Intercompany Charge

62 Pursuant to the initial order, the Walter Canada Group was authorized and directed to cash collateralize all letters of credit secured by the 2011 credit agreement within 15 days of any demand to do so from the administrative agent, Morgan Stanley Senior Funding Inc. ("Morgan Stanley"). This order was made on the basis of representations by the Monitor's counsel that it had obtained a legal opinion that the security held by Morgan Stanley was valid and enforceable against the Walter Canada Group.

63 On December 9, 2015, Morgan Stanley demanded the cash collateralization of approximately $22.6 million of undrawn letters of credit. On December 21, 2015, Morgan Stanley requested that the Walter Canada Group enter into a cash collateral agreement (the "Cash Collateral Agreement") to formalize these arrangements.

64 The Walter Canada Group seeks the approval of the Cash Collateral Agreement, which provides for the establishment of a bank account containing the cash collateral and confirms Morgan Stanley's pre-filing first-ranking security interest in the cash in the bank account. The cash collateralization is intended to relate to letters of credit issued on behalf of Brule Coal Partnership, Walter Canadian Coal Partnership, Wolverine Coal Partnership and Willow Creek Coal Partnership. However, only the Brule Coal Partnership has sufficient cash to collateralize all these letters of credit.

65 Accordingly, the Walter Canada Group seeks an intercompany charge in favour of Brule Coal Partnership, and any member of the Walter Canada Group, to the extent that a member of the Walter Canada Group makes any payment or incurs or discharges any obligation on behalf of any other member of the Walter Canada Group in respect of obligations under the letters of credit. The intercompany charge is proposed to rank behind all of the other court-ordered charges granted in these proceedings, including the charges for PJT and the CRO and the KERP.

66 No objection is raised in respect of this relief. The Monitor is of the view that the intercompany charge is appropriate.

67 In my view, this relief is simply a formalization of the earlier authorization regarding the trusting up of these contingent obligations. On that basis, I approve the Cash Collateral Agreement. I also approve the intercompany charge in favour of the Brule Coal Partnership, on the basis that it is necessary to preserve the *status quo* as between the various members of the Walter Canada Group who will potentially benefit from the use of this Partnership's funds. Such a charge will, as stated by the Monitor, protect the interests of creditors as against the individual entities within the Walter Canada Group.

Stay Extension

68 In order to implement the SISP, and further its restructuring efforts in general, the Walter Canada Group is seeking an extension of the stay and other relief granted in the initial order until April 5, 2016.

69 Section 11.02(2) and (3) of the *CCAA* authorizes the court to make an order extending a stay of proceedings granted in the initial application. In this case, the evidence, together with the conclusions of the Monitor, support that an extension is appropriate and that the petitioners are acting in good faith and with due diligence. No stakeholder has suggested otherwise.

70 As noted above, it is anticipated that the Walter Canada Group will have sufficient liquidity to continue operating throughout the requested stay period.

71 Further, as the Phase 1 deadline in the SISP is March 18 2016, an extension of the stay until April 5, 2016 will provide sufficient time for PJT to solicit, and the CRO (in consultation with the Monitor and PJT) to consider, any letters of intent. At that time, the process may continue to Phase 2 of the SISP, if the CRO, in consultation with the Monitor and PJT, deems it advisable. In any event, at the time of the next court date, there will be a formal update to the court and the stakeholders on the progress under the SISP.

72 The only issue relating to the extension of the stay arises from the submissions of the Union, who represents the employees at the Wolverine mine owned and operated by the Wolverine Coal Partnership ("Wolverine LP"). The Union wishes to continue with certain outstanding legal proceedings outstanding against Wolverine LP, as follows:

a) In June 2015, the B.C. Labour Relations Board (the "Board") found that Wolverine LP was in breach of s. 54 of the *Labour Relations Code,* R.S.B.C. 1996, c. 224 (the "*Code*"). The Board ordered Wolverine LP to pay $771,378.70 into trust by way of remedy. This was estimated to be the amount of damages owed by Wolverine LP, but the Union took the position that further amounts are owed. In any event, this amount was paid and is currently held in trust;

b) In November 2015, Wolverine LP filed a proceeding in this court seeking a judicial review of the Board's decision on the s. 54 issue. As a result, the final determination of the damages arising from the *Code* breach has not yet occurred and may never occur if Wolverine LP succeeds in its judicial review; and

c) Following layoffs in April 2014, the Union claimed that a "northern allowance" was payable by Wolverine LP to the employees, including those on layoff. This claim was rejected at arbitration, and upheld on review at the Board. In February 2015, the Union filed a proceeding in this court seeking a judicial review of the Board's decision.

73 The Union's counsel has referred me to my earlier decision in *Yukon Zinc Corporation (Re)*, 2015 BCSC 1961. There, I summarized the principles that govern applications by a creditor to lift the stay of proceedings to litigate claims:

> [26] There is also no controversy concerning the principles which govern applications by creditors under the *CCAA* to lift the stay of proceedings to litigate claims in other courts or forums, other than by the procedures in place in the restructuring proceedings:
>
> a) the lifting of the stay is discretionary: *Canwest Global Communications Corp.*, 2011 ONSC 2215, at paras. 19, 27;
>
> b) there are no statutory guidelines and the applicant faces a "very heavy onus" in making such an application: *Canwest Global Communications Corp. (Re)* (2009), 61 C.B.R. (5th) 200, at para. 32, 183 A.C.W.S. (3d) 634 (Ont. S.C.J.) ("*Canwest* (2009)"), as applied in *Azure Dynamics Corporation (Re)*, 2012 BCSC 781, at para. 5 and *505396 B.C. Ltd. (Re)*, 2013 BCSC 1580, at para. 19;
>
> c) there are no set circumstances where a stay will or will not be lifted, although examples of situations where the courts have lifted stay orders are set out in *Canwest* (2009) at para. 33;
>
> d) relevant factors will include the status of the *CCAA* proceedings and what impact the lifting of the stay will have on the proceedings. The court may consider whether there are sound reasons for doing so consistent with the objectives of the *CCAA*,

including a consideration of the relative prejudice to parties and, where relevant, the merits of the proposed action: *Canwest* (2009) at para. 32;

e) particularly where the issue is one which is engaged by a claims process in place, it must be remembered that one of the objectives of the *CCAA* is to promote a streamlined process to determine claims that reduces expense and delay; and

f) as an overarching consideration, the court must consider whether it is in the interests of justice to lift the stay: *Canwest* (2009); *Azure Dynamics* at para. 28.

74 I concluded that the Union had not met the "heavy onus" on it to justify the lifting of the stay to allow these various proceedings to continue. My specific reasons are:

a) The Union argues that the materials are essentially already assembled and that these judicial reviews can be scheduled for short chambers matters. As such, the Union argues that there is "minimal prejudice" to Wolverine LP. While this may be so, proceeding with these matters will inevitably detract both managerial and legal focus from the primary task at hand, namely to implement the SISP, and as such, potentially interfere with the restructuring efforts;

b) The Union argues that any purchaser of Wolverine LP's mine will inherit outstanding employee obligations pursuant to the *Code*. Accordingly, the Union argues that it will be more attractive to a buyer for the mine to have all outstanding employee claims resolved. Again, while this may come to pass, such an argument presupposes an outcome that is anything less than clear at this time. Such a rationale is clearly premature;

c) The Union argues that it is unable to distribute the $771,378.70 to its members until Wolverine LP's judicial review is addressed. Frankly, I see this delay as the only real prejudice to the Union members. However, on the other hand, one might argue that the Union members are in a favourable position with these monies being held in trust as opposed to being unsecured creditors of Wolverine. In any event, the Union's claim to these monies has not yet been determined and arises from a dispute that dates back to April 2014. Therefore, there is no settled liability that would allow such payment to be made; and

d) The Union claims that these matters must be determined "in any event" and that they should be determined "sooner rather than later". However, the outcome of the SISP may significantly affect what recovery any creditor may hope to achieve in this restructuring. In the happy circumstance where there will be monies to distribute, I expect that a claims process will be implemented to determine valid claims, not only in respect of the Union's claims, but all creditors.

75 In summary, there is nothing to elevate the Union's claims such that it is imperative that they be determined now. There is nothing to justify the distraction and expense of proceeding with these actions to the detriment of the restructuring efforts. If it should come to pass that monies will be distributed to creditors, such as the Union, then I expect that the usual claims process will be implemented to decide the validity of those claims.

76 In the meantime, if it becomes necessary to determine the validity of these claims quickly (such as to clarify potential successor claims for a purchaser), the Union will be at liberty to renew its application to lift the stay for that purpose.

77 Accordingly, I grant an extension of the stay of proceedings and other ancillary relief until April 5, 2016.

S.C. FITZPATRICK J.