File Number:

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

BETWEEN:

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

Applicant
(Respondent)

-and-

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

Respondents
(Appellants)

-and-

MORNEAU SOBECO LIMITED PARTNERSHIP and THE SUPERINTENDENT OF FINANCIAL SERVICES

Interveners
(Interveners)

APPLICATION FOR LEAVE TO APPEAL OF FTI CONSULTING CANADA ULC, IN ITS CAPACITY AS THE COURT-APPOINTED MONITOR OF INDALEX LIMITED, ON BEHALF OF INDALEX LIMITED, APPLICANT

Pursuant to Subsection 40(1) of the *Supreme Court Act,* RSC 1985, C S-26 and Rules 25 of the *Rules of the Supreme Court of Canada*

VOLUME III of III

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ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

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

(the "Applicants")

AFFIDAVIT OF KEITH COOPER

(Sworn August 24, 2009)

I, Keith Cooper, of the City of Atlanta, in the State of Georgia, United States of America, **MAKE OATH AND SAY AS FOLLOWS:**

1. I am a Senior Managing Director with FTI Consulting Inc. On March 19, 2009, I was appointed as Chief Restructuring Officer of each of the Applicants' U.S. based affiliates, Indalex Holdings Finance, Inc., Indalex Holding Corp. ("Indalex Holding"), Indalex Inc., Caradon Lebanon, Inc., and Dolton Aluminium Company, Inc. (collectively "Indalex US" and together with the Applicants, "Indalex").

2. Indalex is an interdependent enterprise. Although I did not engage in the day to day management of the Applicants, throughout the course of these proceedings, I have worked closely and cooperatively with the Applicants and the Monitor, in order to achieve a going concern solution for Indalex's business. Accordingly, I have knowledge of the matters deposed to in this affidavit. Where this affidavit is

not based on my direct personal knowledge, it is based on information and belief and I verily believe such information to be true.

3. This affidavit is sworn in support of the Applicants' motion for an order lifting the stay of proceedings for the purposes of allowing the Applicants to file a voluntary assignment in bankruptcy. It is also sworn supplementary to the affidavit of Bob Kavanaugh sworn August 12, 2009 and in response to the motion of the Retired Executives and the USW (as both terms are defined herein) in connection with their motion requesting, *inter alia*, a declaration that the proceeds from the sale of the Applicants' business is subject to a deemed trust for the benefit of beneficiaries to certain pension plans administered by the Applicants.

BACKGROUND

4. On March 20, 2009, Indalex US commenced reorganization proceedings under Chapter 11 of Title 11 of the United States Code (the "Chapter 11 Cases") before the United States Bankruptcy Court for the District of Delaware.

5. On April 3, 2009, the Applicants commenced parallel proceedings and filed for and obtained protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"), pursuant to an order (the "Initial Order") of the Honourable Mr. Justice Morawetz.

6. Pursuant to the Initial Order, FTI Consulting Canada ULC was appointed as Monitor of the Applicants.

7. On April 8, 2009, the Initial Order was amended and restated (the "Amended and Restated Initial Order") to, *inter alia*, authorize the Applicants to exercise certain restructuring powers and authorize Indalex Limited to borrow funds (the "DIP Borrowings") pursuant to a debtor-in-possession credit agreement (as amended, the "DIP Credit Agreement") among Indalex US, the Applicants and a syndicate of lenders (the "DIP Lenders") for which JPMorgan Chase Bank, N.A. is administrative agent (the "DIP Agent").

8. Pursuant to the terms of the Amended and Restated Initial Order, the Applicants' obligation to repay the DIP Borrowings were secured by a Court-ordered charge in priority to all liens and encumbrances, including deemed trusts and statutory liens, other than the "Administration Charge" and the "Directors' Charge".

9. DIP Borrowings were used to fund the working capital needs of the Applicants, including payment of employee wages and benefits, payment of post-filing goods and services and payment of regular course contributions to the Applicants' registered pension plans, among other cost and expenses necessary for the preservation of the Applicants' business and assets. The DIP Credit Agreement contemplated that the DIP Borrowings would be repaid from the proceeds derived from a going concern sale of Indalex's assets, on or before August 1, 2009.

10. The Applicants obligation to repay the DIP Borrowings was guaranteed by Indalex US. The guarantee by Indalex US was a condition to the extension of credit by the DIP Lenders to the Applicants. The DIP Credit Agreement providing for this guarantee was approved by the Court.

11. On April 22, 2009, the Court granted an order which, *inter alia*, extended the stay of proceedings to June 26, 2009, and approved a marketing process (the "Marketing Process") to identify a stalking horse bidder for the assets of the Applicants'. Indalex's assets were marketed in a single, consolidated process.

12. By order dated May 12, 2009, the Court further amended the Amended and Restated Initial Order (now the "Amended Amended and Restated Initial Order"). The Amended Amended and Restated Initial Order is attached hereto as **Exhibit "A"**.

13. By Order dated July 2, 2009, (the "Stalking Horse Order") SAPA Holding AB (including any assignees, "SAPA") was designated as the stalking horse bidder in accordance with the Marketing Process. The Stalking Horse Order also approved bidding procedures to solicit higher and better offers for the Applicants' assets (the "Bidding Procedures"). The asset purchase agreement (the "APA") between

Indalex and SAPA was also designated as a "Qualifying Bid" pursuant to the terms of the Bidding Procedures.

14. The Stalking Horse Order was issued over the objection of a group of eight former executives of Indalex Limited (collectively, the "Former Executives"). The endorsement of Mr. Justice Morawetz issued in connection with the granting of the Stalking Horse Order and the dismissal of the Former Executives' objection is attached hereto as **Exhibit "B"**.

15. The same day of the hearing of the motion seeking the issuance of the Approval and Vesting Order, the Former Executives brought a motion seeking the reinstatement of payments owing to them by Indalex Limited pursuant to a Supplemental Executive Retirement Plan ("SERP"), which payments were suspended by the Applicants immediately following the commencement of the CCAA proceedings. The Former Executives' motion was dismissed by the Court. The endorsement of Mr. Justice Morawetz issued in connection with the dismissal of the Former Executives' motion is attached hereto as **Exhibit "C"**. The Former Executives have sought leave to appeal this decision.

16. As no "Qualifying Bids" were received in accordance with the Bidding Procedures, by Order dated July 20, 2009 (the "Approval and Vesting Order"), the Court approved the sale of the Applicants' assets as a going concern to SAPA, and ordered that upon closing of the SAPA transaction, the proceeds of sale (the "Canadian Sale Proceeds") were to be paid to the Monitor.

17. The Former Executives objected to the granting of the Approval and Vesting Order. The objection was dismissed by the Court.

18. Pursuant to the Approval and Vesting Order, the Monitor was ordered and directed to make a distribution to the DIP Lenders, from the Canadian Sale Proceeds, in satisfaction of the Applicants' obligations to the DIP Lenders, subject to a reserve that the Monitor considered to be appropriate in the circumstances (the "Undistributed Proceeds").

19. At the hearing, the Former Executives, through counsel, advised that they intended to bring a motion before the Court to assert a deemed trust claim over the Canadian Sale Proceeds in respect of the underfunded deficiency owing by Indalex Limited to the Executive Pension Plan, from which the Former Executives receive benefits. The Former Executives requested that an amount of $3.25 million representing their estimate of the underfunded deficiency be included in the amount retained by the Monitor as Undistributed Proceeds. The Monitor agreed to include such amount, in addition to the other amounts retained.

20. The Executive Plan was not at the time of the issuance of the Approval and Vesting Order wound up and it has not been wound up as of the date hereof.

21. The United Steel Workers ("USW"), which represented the Applicants unionized workforce supported the Approval and Vesting Order. The SAPA transaction provided for the assumption of the USW collective agreements by SAPA and the continuation of employment with SAPA of all USW members employed by the Applicants. The USW, however, through counsel, reserved its rights with respect to any deemed trust claim it may have with respect to the Salaried Plan, in which certain USW members participate. I am advised by Bob Kavanaugh, the former Vice-President, Corporate Controller of Indalex Limited, that the Salaried Plan is in the process of being fully wound up with an effective date of December 31, 2006.

22. As a result of the USW's reservation of rights, the Monitor also retained the amount of $3.5 million as part of the Undistributed Proceeds, in addition to other amounts reserved by the Monitor. The total amount retained by the Monitor includes not only amounts relating to the asserted deemed trust claims, but also for amounts relating to the payment of cure costs (provided for under the APA) other costs associated with the completion of the SAPA transaction, legal and professional fees and amounts owing under the DIP Lenders Charge. Of this, $6.75 million represents the amount related to the deemed trust claims. Pursuant to the endorsement of the Honourable Mr. Justice Campbell dated July 20, 2009,

there is no obligation for the Monitor to hold this amount in a separate account, and accordingly, the Monitor has advised that this amount is being held in a general account, commingled with other funds of the estate. The funds in the account will be distributed in accordance with existing and future orders of the Court.

23. The DIP Agent advised Indalex US that to the extent the effect of the Monitor retaining the Undistributed Proceeds was that the Applicants could not repay the DIP Borrowings in full at the closing of the SAPA transaction, the DIP Agent would call on the guarantee granted by Indalex US to satisfy the deficiency.

24. On July 31, 2009, the sale of Indalex's assets to SAPA closed. A total payment of US$17,041,391.80 was made from the Canadian Sale Proceeds by the Monitor, on behalf of the Applicants, to the DIP Agent. As this resulted in a deficiency of US$10,751,247.22, the DIP Agent called on the guarantee granted to the DIP Lenders by Indalex US for the amount of the deficiency (the "Guarantee Payment") and Indalex US has satisfied the obligation of the Applicants.

25. Pursuant to paragraph 14 of the Approval and Vesting Order, Indalex US is fully subrogated to the rights of the DIP Lenders under the DIP Lenders Charge for the amount of the Guarantee Payment.

26. By Order dated July 30, 2009, the Court implemented a claims procedure (the "Claims Procedure") that called for claims against the Applicants and directors of the Applicants, in order to facilitate a determination of entitlement to the Canadian Sale Proceeds.

DEEMED TRUST CLAIM

27. August 28, 2009 was scheduled for the hearing of the deemed trust motion and the Former Executives served and filed their motion record on August 5, 2009, asserting a deemed trust claim over the underfunded deficiency of the Executive Plan.

28. On or about August 5, 2009, the USW filed its motion seeking a deemed trust over the underfunded deficiency of the Salaried Plan.

29. Indalex US has considered its options in light of the allegations and positions set out in the motion records filed by these parties.

VOLUNTARY ASSIGNMENT IN BANKRUPTCY

30. The Applicants and Indalex US strongly dispute the validity of the deemed trust claim, and are of the view that the wind-up liability is an unsecured claim, and any deemed trust, even if it were valid, does not rank in priority to the DIP Lenders Charge.

31. I understand that any purported priority claimed by the USW and the Former Executives (which priority is disputed by the Applicants) is extinguished on bankruptcy. In order to provide conclusive certainty that any purported deemed trust claim does not rank in priority to the DIP Lenders Charge, pursuant to a unanimous shareholder declaration executed by Indalex Limited's immediate parent, Indalex Holding, dated as of July 31, 2009, Indalex Holding has instructed the Applicants to seek approval of the Court to file a voluntary assignment in bankruptcy to ensure that the priority regime set out in the *Bankruptcy and Insolvency Act* (Canada) applies to the distribution of the Canadian Sale Proceeds.

32. While the Claims Procedure was commenced in the within proceedings, at no point in time did the Applicants rule out an eventual filing of a voluntary assignment in bankruptcy.

CORPORATE GOVERNANCE

33. The Applicants are no longer carrying on business, have no active employees and no tangible assets, other than cash (including sale proceeds) and certain tax refunds. The board of directors of the Applicants has resigned and the former directors are all currently employed by SAPA. The Applicants are insolvent shells.

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34. The only material obligation remaining by Indalex under the APA is the completion of the post-closing working capital adjustment. $2.75 million is currently being held in escrow by the Monitor, to ensure any adjustment in favour of SAPA will be satisfied with any balance to ultimately be made available to the Applicants' creditors, in accordance with their entitlement and priority.

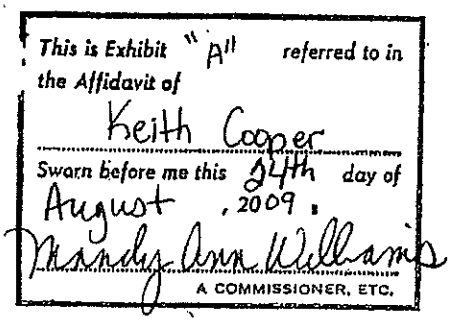
35. For the reasons set out above, including that the Applicants are insolvent shells and no longer carrying on business, an assignment in bankruptcy is appropriate in the circumstances.

SWORN BEFORE ME at the City of)
Atlanta, in the State of Georgia)
this 24th day of August, 2009)
)
)

Mandy Ann Williams)
A NOTARY PUBLIC

Keith Cooper
KEITH COOPER

Exhibit "A"


This is Exhibit "A" referred to in
the Affidavit of
Keith Cooper
Sworn before me this 24th day of
August , 2009 .
A COMMISSIONER, ETC.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	TUESDAY, THE
	)	
JUSTICE MORAWETZ	)	12th DAY OF MAY, 2009

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

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

AMENDED AMENDED AND RESTATED INITIAL ORDER

THIS APPLICATION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") was heard this day at 330 University Avenue, Toronto, Ontario.

WHEREAS AN INITIAL ORDER in this matter was issued on April 3, 2009, which order was subsequently amended and restated by an order dated April 8, 2009, and such order is hereby further amended and restated.

ON READING the affidavit of Timothy R.J. Stubbs sworn April 3, 2009 and the Exhibits thereto, the supplemental affidavit of Patrick Lawlor sworn April 8, 2009 and the Exhibits thereto, (the "Supplemental Affidavit"), the affidavit of Michelle Schwartzberg sworn May 6, 2009 and the Exhibits thereto, the pre-filing report of FTI Consulting Canada ULC ("FTI Canada" or the "Monitor") in its capacity as proposed Monitor and the First Report of the Monitor for the Applicants, and on hearing the submissions of counsel for the Applicants, counsel for the Monitor, and counsel for the DIP Agent, JPMorgan Chase Bank, N.A. ("JPM")

under the Prepetition Credit Agreement (in such capacity, the "Prepetition Agent") and as administrative agent for the proposed DIP Lenders (in such capacity, the "DIP Agent"), and on reading the consent of FTI Canada to act as the Monitor,

SERVICE

1. 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.

APPLICATION

2. THIS COURT ORDERS AND DECLARES that the Applicants are companies to which the CCAA applies.

PLAN OF ARRANGEMENT

3. THIS COURT ORDERS that the Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court one or more plans of compromise or arrangement with respect to one or more of the Applicants (hereinafter referred to as the "Plan") between, *inter alia*, the Applicants and one or more classes of their secured and/or unsecured creditors as they deem appropriate.

POSSESSION OF PROPERTY AND OPERATIONS

4. THIS COURT ORDERS that the Applicants shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "Property"). Subject to further Order of this Court, the Applicants shall continue to carry on business in a manner consistent with the preservation of their businesses (the "Business") and Property. The Applicants shall 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 them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

5. THIS COURT ORDERS that the Applicants are authorized and directed to remit to the DIP Agent immediately upon the Applicants' receipt thereof or otherwise in accordance with the Applicants' current practices all cash, monies and collection of account receivables and other book debts (collectively, "Cash Collateral") in its possession or control and all Cash Collateral so remitted shall be applied in accordance with the DIP Documents. The DIP Agent is hereby authorized, as of the Effective Date (as defined in the DIP Credit Agreement, as defined below), to (i) send a notice to each Receivables Account Bank (as defined in the Canadian Security Agreement referred to in the DIP Credit Agreement) to commence a period during which the applicable Receivables Account Bank shall cease complying with any instructions originated by any applicable Applicant and shall comply with instructions originated by the DIP Agent directing dispositions of funds, without further consent of the applicable Applicant, and (ii) apply (and allocate) the funds in each Receivables Account (as defined in the Canadian Security Agreement referred to in the DIP Credit Agreement) pursuant to sections 2.09(d) of the DIP Credit Agreement without further order or approval of this Court. Each Receivables Account Bank is hereby authorized to comply with any instructions originated by the DIP Agent on or after the Effective Date directing disposition of funds, without further consent of the applicable Applicant or further order or approval of this Court, and is further authorized to comply with any instructions delivered by the DIP Agent or JPM in its capacity as Prepetition Agent under that certain Credit Agreement among, *inter alia*, the Applicants, dated May 21, 2008 as amended from time to time (the "Prepetition Credit Agreement") to such Receivables Account Bank prior to the Effective Date directing disposition of funds, without further consent of the applicable Applicant or further order or approval of this Court. As of the Effective Date, each "Deposit Account Control Agreement" and "Receivables Account Control Agreement" (as each such term is defined in the Domestic Security Agreement or the Canadian Security Agreement referred to in the Prepetition Credit Agreement) will continue and remain in full force and effect, in each case substituting the Prepetition Agent as the secured party thereunder with the DIP Agent. The Applicants shall maintain their cash management and accounts receivable collection system (the "Cash Management System") in existence prior to the date of this Order, including the Collateral Accounts (as defined below) associated therewith. Each Receivable Account Bank shall not be under any obligation whatsoever to inquire into the propriety validity, or legality of any transfer, payment, collection, or other action taken under this paragraph, or as to the use or application by

the Applicants of funds transferred, paid, collected, or otherwise dealt with in accordance with this paragraph, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Applicants, pursuant to the terms of this paragraph or any documentation applicable to the Cash Management System, and shall be, in its capacity as a Receivable Account Bank, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

6. [RESERVED]

7. THIS COURT ORDERS that subject to the terms of the DIP Documents (as defined below), the Applicants shall be entitled to but not required to pay the following expenses whether incurred prior to or after this Order:

(a) all outstanding and future wages and salaries (for greater certainty wages and salaries shall not include severance or termination pay), employee and pension benefits, current service contributions to pension plans (which for greater certainty shall not include special payments) vacation pay, bonuses 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 Applicants in respect of these proceedings, at their standard rates and charges;

8. THIS COURT ORDERS that, except as otherwise provided to the contrary herein and pursuant to the terms and conditions of the DIP Documents, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course after the date of 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;

(b) payment for goods or services actually supplied to the Applicants following the date of this Order; and

(c) with the consent of the Monitor, in consultation with the DIP Lenders or their financial advisors, costs and expenses incurred prior to the date of this Order, up to the maximum amount approved by the DIP Lenders pursuant to the DIP Credit Agreement, where in the opinion of the Applicants and the Monitor such payments (i) are necessary to preserve the Property, Business and/or ongoing operations of the Applicants and (ii) can be made on such terms and conditions as will provide a material benefit to the Applicants and their stakeholders as a whole.

9. THIS COURT ORDERS that the Applicants 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, and (iv) income taxes;

(b) current service ("normal cost") contributions to pension plans when due (which, for greater certainty, shall not include special payments);

(c) all goods and services or other applicable sales taxes (collectively, "Sales Taxes") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, 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

(d) 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 Applicants.

10. THIS COURT ORDERS that until such time as an Applicant delivers a notice in writing to repudiate a real property lease in accordance with paragraph 12(c) of this Order (a "Notice of Repudiation"), the Applicant shall 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 to the landlord under the lease) or as otherwise may be negotiated between the Applicant and the landlord from time to time ("Rent"), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any arrears relating to the period commencing from and including the date of this Order shall also be paid. Upon delivery of a Notice of Repudiation, the Applicant shall pay all Rent due for the notice period stipulated in paragraph 12(c) of this Order, to the extent that Rent for such period has not already been paid.

11. THIS COURT ORDERS that, except as specifically permitted herein and the DIP Documents or with the consent of the Monitor and the DIP Agent, the Applicants are 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 Applicants to any of their creditors as of this date; provided, however, that the Applicants shall make all such payments under the Prepetition Credit Agreement as required pursuant to the terms of the DIP Documents and contemplated in the Applicants' cash flow projections and budget approved by the DIP Agent;

(b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of the Property; and

(c) to not grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

12. THIS COURT ORDERS that the Applicants shall, subject to such covenants as may be contained in the DIP Documents (as hereinafter defined), have the right to:

(a) with the consent of the Monitor and the DIP Agent, 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 $250,000 in any one transaction or $1,000,000 in the aggregate, subject to paragraph 12(c) if applicable;

(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;

(c) in accordance with paragraphs 13 and 14, vacate, abandon or quit the whole but not part of any leased premises and/or repudiate any real property lease and any ancillary agreements relating to any leased premises, on not less than seven (7) days notice in writing to the relevant landlord on such terms as may be agreed upon between the Applicant and such landlord, or failing such agreement, to deal with the consequences thereof in the Plan;

(d) repudiate such of its arrangements or agreements of any nature whatsoever, whether oral or written, other than collective agreements, as the Applicant deems appropriate on such terms as may be agreed upon between the Applicant and such counter-parties, or failing such agreement, to deal with the consequences thereof in the Plan; and

(e) pursue all avenues of refinancing and offers for material parts of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing or any sale (except as permitted by subparagraph (a), above),

all of the foregoing to permit the Applicant to proceed with an orderly restructuring of the Business (the "Restructuring").

13. THIS COURT ORDERS that each 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 and, 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 repudiates the lease governing such leased premises in accordance with paragraph 12(c) of this Order, 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 paragraph 12(c) of this Order), and the repudiation of the lease shall be without prejudice to the Applicant's claim to the fixtures in dispute.

14. THIS COURT ORDERS that if a Notice of Repudiation is delivered, then (a) during the notice period prior to the effective time of the repudiation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the applicable Applicant and the Monitor 24 hours' prior written notice, and (b) at the effective time of the repudiation, 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 APPLICANTS OR THE PROPERTY

15. THIS COURT ORDERS that until and including May 1, 2009, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, except with the written

consent of the applicable Applicant, the Monitor and the DIP Agent, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

16. THIS COURT ORDERS that 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") against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the applicable Applicant and the Monitor, or leave of this Court, provided that nothing in this Order shall (a) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on, (b) exempt the Applicants from compliance with statutory or regulatory provisions relating to health, safety or the environment, (c) prevent the filing of any registration to preserve or perfect a security interest, or (d) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

17. THIS COURT ORDERS that during the Stay Period, no Person shall 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 Applicants, except with the written consent of the relevant Applicant and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

18. THIS COURT ORDERS that during the Stay Period, all Persons having oral or written agreements with an Applicant or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, employee benefits, transportation, services, utility or other services to the Business or an Applicant (including, where a notice of termination may have been given with an effective date after the date of this Order), are hereby restrained until further Order of this Court from discontinuing, altering,

interfering with or terminating the supply of such goods or services as may be required by an Applicant, and that the Applicants shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with normal payment practices of the Applicants or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

19. THIS COURT ORDERS that, notwithstanding anything else contained herein, no creditor of the Applicants shall be under any obligation after the making of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

20. THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.5(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of an Applicant with respect to any claim against the directors or officers that arose before or after 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 in respect of the Applicant, is sanctioned by this Court or is refused by the relevant creditors or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

21. THIS COURT ORDERS that the Applicants shall indemnify their respective directors and officers from all claims, costs, charges and expenses relating to the failure of the Applicants, after the date hereof, to make payments of the nature referred to in subparagraphs 7(a), 9(a), 9(b), 9(c) and 9(d) of this Order which they sustain or incur by reason of or in relation to their respective capacities as directors and/or officers of the Applicants except to the extent that, with

respect to any officer or director, such officer or director has actively participated in the breach of any related fiduciary duties or has been grossly negligent or guilty of wilful misconduct.

22. THIS COURT ORDERS that the directors and officers of the Applicants 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 U.S.$3,300,000, as security for the indemnity provided in paragraph 21 of this Order. The Directors' Charge shall have the priority set out in paragraphs 42 and 45 herein.

23. THIS COURT ORDERS that, 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 Applicants' 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 21 of this Order, or the insurer fails to fund defence costs on a timely basis; provided, however, any defence costs paid in respect of the same claim by the insurer shall first be used to reimburse the amounts paid under this paragraph to fund such costs.

APPOINTMENT OF MONITOR

24. THIS COURT ORDERS that FTI Canada is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Property and the Applicants' conduct of the Business with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and their respective shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations.

25. THIS COURT ORDERS that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants' receipts and disbursements;

(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;

(c) assist the Applicants, to the extent required by the Applicants, in their dissemination, to the DIP Agent and its counsel on a periodic basis of financial and other information as agreed to between the Applicants and the DIP Agent which may be used in these proceedings including reporting on a basis to be agreed with the DIP Agent;

(d) advise the Applicants in their preparation of the Applicants' cash flow statements and any reporting required by the DIP Agent, which information shall be reviewed with the Monitor and delivered to the DIP Agent and its counsel on a periodic basis, as agreed to by the DIP Agent;

(e) advise the Applicants in their development of any one or more Plans and any amendments to such Plan or Plans;

(f) assist the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on any Plan or Plans;

(g) have full and complete access to the books, records and management, employees and advisors of the Applicants and to the Business and the Property to the extent required 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, including being at liberty to retain and utilize the services of entities related to the Monitor as may be necessary to perform its duties hereunder;

(i) be at liberty to act as a Foreign Representative in any foreign proceedings in respect of the Applicants;

(j) consider, and if deemed advisable by the Monitor, prepare a report and assessment on the Plan;

(k) advise and assist the Applicants, as requested in its negotiations with suppliers, customers, creditors and other stakeholders; and

(l) perform such other duties as are required by this Order or by this Court from time to time.

26. THIS COURT ORDERS that 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, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

27. THIS COURT ORDERS that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, 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 of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "Environmental Legislation"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

28. THIS COURT ORDERS that the Monitor shall provide the DIP Agent and any other creditor of an Applicant 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 an 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 relevant Applicant may agree.

29. THIS COURT ORDERS that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, 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.

30. THIS COURT ORDERS that the Monitor, counsel to the Monitor, counsel to the Applicants and counsel for the Applicants' directors and officers shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicants on a weekly basis and, in addition, the Applicants are hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Applicants, retainers in the amounts of $50,000, each, respectively, and a retainer to counsel for the Applicants' directors and officers in the amount of $20,000, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

31. THIS COURT ORDERS that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

32. THIS COURT ORDERS that the Monitor, counsel to the Monitor, the Applicants' counsel and counsel for the Applicants' directors and officers shall be entitled to the benefit of and are hereby granted a charge (the "Administration Charge") on the Property, which charge shall not exceed an aggregate amount of U.S.$500,000 as security for their professional fees and disbursements incurred at the standard 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 42 and 45 hereof.

DIP FINANCING

33. THIS COURT ORDERS that the Canadian Subsidiary Borrower (as defined in the DIP Credit Agreement) is hereby authorized and empowered to obtain, borrow and repay under a credit facility pursuant to an agreement, substantially in the form of Exhibit "D" to the Supplemental Affidavit (subject to such non-material amendments thereto as may be consented to in advance to the Monitor) (the "DIP Credit Agreement") among the Applicants, Indalex Holdings Finance, Inc., Indalex Holding Corp., the non-Applicant affiliates party thereto, the lenders party thereto (the "DIP Lenders") and the DIP Agent as administrative agent for the purposes set out in the DIP Credit Agreement provided that the aggregate principal amount of the borrowings by the Applicants under such credit facility outstanding at any time shall not exceed a sub-facility in the amount of U.S. $24,360,000 and shall be made in accordance with the terms of the DIP Loan Documents.

34. THIS COURT ORDERS that the Applicants other than Indalex Limited are hereby authorized and empowered to guarantee to and in favour of the DIP Agent and the DIP Lenders the Canadian Obligations under the DIP Credit Agreement (as those are defined in the DIP Credit Agreement).

35. [RESERVED]

36. THIS COURT ORDERS that the Applicants are hereby authorized and empowered to guarantee to and in favour of the DIP Agent and the DIP Lenders the "Secured Obligations" subject to and in accordance with the DIP Credit Agreement (as those terms are defined in the DIP Credit Agreement).

37. THIS COURT ORDERS that notwithstanding paragraph 36, the guarantee by the Applicants of the Secured Obligations under the DIP Credit Agreement in an amount equal to the amount of any reduction of the U.S. Revolving Exposure (as defined in the Prepetition Credit Agreement) plus the amount of the Swap Obligations (as defined in the DIP Credit Agreement) after the Effective Date shall not be enforceable only to the extent that this Court issues an order

declaring that any guarantee given by the Applicants and any security granted by the Applicants related to such guarantee in respect of the U.S. Guaranteed Obligations under the Prepetition Credit Agreement is voidable or not valid, not binding or not enforceable, provided, however, that the guarantee granted by the Applicants under the DIP Credit Agreement as to all other amounts constituting Secured Obligations under the DIP Credit Agreement is hereby deemed to be fully enforceable as against the Applicants and third parties, including any trustee in bankruptcy appointed in respect of any of the Applicants.

38. THIS COURT ORDERS that the Applicants are hereby authorized and empowered to execute and deliver the DIP Credit Agreement and such commitment letters, fee letters, credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "DIP Documents"), as are contemplated by the DIP Credit Documents or as may be reasonably required by the DIP Agent and the DIP Lenders pursuant to the terms thereof, and subject to paragraph 37, the Applicants are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the DIP Lenders and the DIP Agent under and pursuant to the DIP Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

39. THIS COURT ORDERS that the DIP Agent and the DIP Lenders shall be entitled to the benefit of and is hereby granted a charge (the "DIP Lenders Charge") on the Property, which charge shall not exceed the aggregate amount owed to the DIP Lenders under the DIP Documents. The DIP Lenders Charge shall have the priority set out in paragraphs 42 and 45 hereof.

40. THIS COURT ORDERS that, notwithstanding any other provision of this Order, but subject to paragraph 37:

(a) the DIP Agent and the DIP Lenders may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Agent and the DIP Lenders Charge or any of the DIP Documents;

(b) upon the occurrence of an event of default under the DIP Documents or the DIP Lenders Charge, the DIP Agent, on behalf of the DIP Lenders, upon three business

days notice to the Applicants and the Monitor, may exercise any and all of its rights and remedies against the Applicants or the Property under or pursuant to DIP Documents and the DIP Lenders Charge, including without limitation, to cease making advances to the Applicants and set off and/or consolidate any amounts owing by the DIP Lenders to the Applicants against the obligations of the Applicants to the DIP Lenders under the DIP Documents or the DIP Lenders 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 bankruptcy orders against the Applicants and for the appointment of a trustee in bankruptcy of the Applicants, and upon the occurrence of an event of default under the terms of the DIP Documents, the DIP Lenders, upon three business days notice to the Applicants and the Monitor, shall be entitled to seize and retain proceeds from the sale of the Property and the cash flow of the Applicants to repay amounts owing to the DIP Lenders in accordance with the DIP Documents and the DIP Lenders Charge, but subject to the priorities as set out in paragraphs 42 and 45 of this Order; and

(c) the foregoing rights and remedies of the DIP Agent and the DIP Lenders shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicants or the Property.

41. THIS COURT ORDERS AND DECLARES that, unless otherwise agreed, the DIP Agent and the DIP Lenders shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicants under the CCAA, or any proposal filed by the Applicants under the *Bankruptcy and Insolvency Act* of Canada (the "BIA"), with respect to any advances made under the DIP Documents.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

42. THIS COURT ORDERS that the priorities of the Administration Charge, the Directors' Charge and the DIP Lenders Charge, as among them, shall be as follows:

First – Administration Charge;

Second – Directors' Charge (up to a maximum amount of U.S.$1.0 million);

Third – DIP Lenders Charge; and

Fourth – Directors Charge (for the balance thereof, being U.S.$2.3 million).

43. THIS COURT ORDERS that any distribution in respect of the DIP Lenders Charge as amongst the beneficiaries thereto shall be governed by the DIP Documents.

44. THIS COURT ORDERS that the filing, registration or perfection of the Administration Charge, the Directors' Charge or the DIP Lenders Charge (collectively, the "Charges") shall not be required, and that 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.

45. 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, trusts, liens, charges and encumbrances, statutory or otherwise (collectively, "Encumbrances") in favour of any Person.

46. THIS COURT ORDERS that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants 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 DIP Lenders Charge, unless the Applicants also obtain the prior written consent of the Monitor, the DIP Agent and the beneficiaries of the Directors' Charge and the Administration Charge, or further Order of this Court.

47. THIS COURT ORDERS that subject to paragraph 37, the Directors' Charge, the Administration Charge, the DIP Documents and the DIP Lenders 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 DIP Lenders thereunder shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to the 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 Applicants, or any of them, and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the DIP Documents shall create or be deemed to constitute a breach by any of the Applicants of any Agreement to which it is a party;

(b) 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 Applicants entering into the DIP Credit Agreement, the creation of the Charges, or the execution, delivery or performance of the DIP Documents; and

(c) the payments made by the Applicants pursuant to this Order or the DIP Documents, and the granting of the Charges, do not and will not constitute fraudulent preferences, fraudulent conveyances, oppressive conduct, settlements or other challengeable, voidable or reviewable transactions under any applicable law.

48. THIS COURT ORDERS that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the relevant Applicant's interest in such real property leases.

SERVICE AND NOTICE

49. THIS COURT ORDERS that the Applicants shall, within ten (10) business days of the date of entry of this Order, send notice of this Order to their known creditors, other than employees and creditors to which the Applicants owe less than $5000, at their addresses as they appear on the Applicants' records, advising that such creditor may obtain a copy of this Order on the internet at the website of the Monitor, http://cfcanada.fticonsulting.com/indalex (the "Website") and, if such creditor is unable to obtain it by that means, such creditor may obtain a copy from the Monitor. The Monitor shall promptly send a copy of this Order to any interested

Person requesting a copy of this Order, and the Monitor is relieved of its obligation under Section 11(5) of the CCAA to provide similar notice, other than to supervise this process.

50. THIS COURT ORDERS that the Applicants and the Monitor 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 or electronic transmission to the Applicants' creditors or other interested parties at their respective addresses as last shown on the records of the Applicants and that any such service or notice by courier, personal delivery or electronic transmission 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.

51. THIS COURT ORDERS that the Applicants, the Monitor, and any party who has filed a Notice of Appearance may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, in accordance with the E-filing protocol of the Commercial List to the extent practicable, and the Monitor may post a copy of any or all such materials on the Website.

GENERAL

52. THIS COURT ORDERS that the Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of their powers and duties hereunder.

53. THIS COURT ORDERS that 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 Applicants, the Business or the Property.

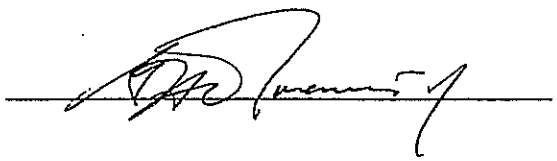
54. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants 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 Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

55. THIS COURT ORDERS that each of the Applicants 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.

56. THIS COURT ORDERS that any interested party (including the Applicants 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; provided however, the DIP Agent and the DIP Lenders shall be entitled to rely on this Order as issued for all advances made under the DIP Credit Agreement up to and including the date this Order may be varied or amended.

57. THIS COURT ORDERS that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Daylight Time on the date of this Order.



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MAY 12 2009

PER / PAR:

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

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

AMENDED AMENDED AND RESTATED INITIAL ORDER

BLAKE, CASSELS & GRAYDON LLP
Barristers and Solicitors
199 Bay Street, Suite 2800
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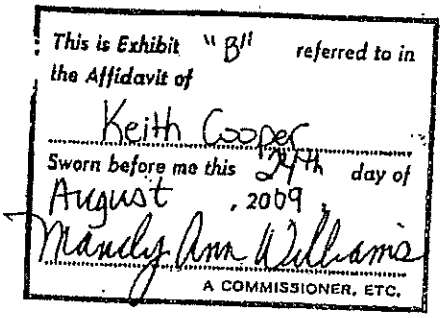
Lawyers for the Applicants

Exhibit "B"


This is Exhibit "B" referred to in the Affidavit of
Keith Cooper
Sworn before me this 27th day of
August , 2009
Mandy Ann Williams
A COMMISSIONER, ETC.

COURT FILE NO.: CV-09-8122-00CL

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

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

Applicants

BEFORE: MORAWETZ J.

COUNSEL: Linc Rogers, Katherine McEachern and Jackie Moher, for the Applicants

Ashley Taylor and Lesley Mercer, for FTI Consulting Canada ULC, Monitor

Paul Macdonald and Jeff Levine, for JPMorgan (DIP Lender)

Kenneth D. Kraft, for SAPA Holding AB

Andrew Hatnay and Demetrios Yiokaris and Andrew Mckinnon, for Keith Carruthers and SERP Retirees

Brian Empey, for Sun Indalex

John D. Leslie, for the U.S. Unsecured Creditors' Committee

G. Finlayson, for U.S. Bank as Trustee for the Noteholders

HEARD: JULY 2, 2009

ENDORSEMENT

[1] The Applicants seek an Order approving the Bidding Procedures as well as an Order deeming the Stalking Horse Bid to be a Qualified Bid pursuant to the Bidding Procedures as well as approval of the Breakup Fee.

[2] The Monitor recommends that the relief be granted. No party, with the exception of Mr. Carruthers and the SERP Retirees, is opposed.

[3] This motion stems directly from the Marketing Process which was approved by the Court on April 22, 2009. The conduct of the Marketing Process is set out both in the Affidavit of Mr. Fazio and in the Monitor's Reports. The Stalking Horse Bid of SAPA Holdings was executed on June 16, 2009. The Notice of Motion was served on June 17, 2009.

[4] The Marketing Process was conducted in both U.S. and Canada. Mr. Rogers advised that the Bidding Procedures were approved, with minor modification, by the U.S. Bankruptcy Court earlier today.

[5] It is also noted that it is a condition precedent to the performance of the Stalking Horse Bidder that the Bidding Procedures be Court approved by today.

[6] Mr. Rogers expressed the view that the Stalking Horse Bid is a worst-case scenario – but that it does represent a "bird in the hand".

[7] This is not a motion to approve the transaction. This issue will be addressed at a future time.

[8] The approval of the Bidding Procedures is opposed by Mr. Hatnay on behalf of certain retirees. Mr. Hatnay requests a 7-day adjournment. That request is problematic in view of the aforementioned condition precedent. The main concern of the retirees is that their position and views have not been considered in this process. The Stalking Horse Bidder is not assuming the pension liabilities. Further, Mr. Hatnay submits that there are a number of unanswered questions relating to both the Executive Pension and the Supplementary Pension.

[9] 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. In addressing this objective, the Applicants put forth a process – the Marketing Process – which has already been Court approved. No party objected to the previous approval. In my view, the Applicants have adhered to the Court approved process and there is no basis to either delay the consideration of this motion or to give effect to the objection raised by the retirees. To hold otherwise would be to jeopardize the Stalking Horse Bid.

[10] 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. The *Soundair* principles raised by Mr. Hatnay are more applicable, in my view, to any sale approval motion. For today's motion, the process that is relevant is the Marketing Process as approved on April 22, 2009 which the Applicants have followed.

[11] The Bidding Procedures are therefore approved. The Stalking Horse Bid is deemed to be a Qualifying Bid and the Breakup Fee is approved.

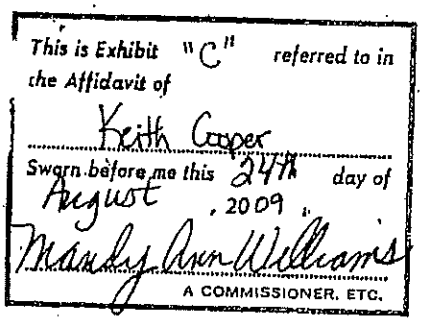
[12] The Monitor filed a Supplement to the Sixth Report. In my view, this document contains confidential information the release of which could be prejudicial to the interests of the Applicants and stakeholders. In my view, it is appropriate to grant a sealing order with respect to this Supplement. The document is to be sealed pending further order.

MORAWETZ J.

DATE: **July 2, 2009**

Typed Version Released: July 16, 2009

Exhibit "C"


This is Exhibit "C" referred to in the Affidavit of
Keith Cooper
Sworn before me this 24th day of August, 2009.
Mandy Ann Williams
A COMMISSIONER, ETC.

COURT FILE NO.: CV-09-8122-00CL
DATE: 20090724

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

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

Applicants

BEFORE: MORAWETZ J.

COUNSEL: Linc Rogers, Katherine McEachern and Jackie Moher, for the Applicants

Ashley Taylor and Lesley Mercer, for FTI Consulting Canada ULC, Monitor

Paul Macdonald and Jeff Levine, for JPMorgan (DIP Lender)

Kenneth D. Kraft, for SAPA Holding AB

Andrew Hatnay and Demetrios Yiokaris and Andrew Mckinnon, for Keith Carruthers and SERP Retirees

B. Empey, for Sun Indalex Finance LLC

John D. Leslie, for the U.S. Unsecured Creditors' Committee

G. Finlayson, for U.S. Bank as Trustee for the Noteholders

HEARD & DECIDED: JULY 2, 2009

ENDORSEMENT

[1] I heard argument in this matter on July 2, 2009 at the conclusion of which I dismissed the motion with reasons to follow. These are those reasons.

[2] Members of the Indalex Supplemental Executive Retirement Plan or "SERP", (referred to collectively as the "SERP Group") brought this motion for an order requiring the Indalex Applicants to reinstate payment of supplemental pension benefits retroactive to April 2009.

[3] The motion is opposed by the Indalex Applicants, the Noteholders and by the DIP Lender. Counsel to the DIP Lender submits that if these payments are made, they would constitute an event of default under the DIP Agreement. Such payments would need the consent or waiver from the DIP Lender which counsel submits, is not forthcoming.

[4] The SERP Group have a contractual entitlement to pension benefits under the Supplemental Retirement Plan for executive employees of Indalex Limited and associated companies (the "Supplemental Plan").

[5] The Supplemental Plan is an unfunded and non-registered supplemental pension plan. Benefits under the Supplemental Plan are paid out of the general revenues of the Indalex Applicants.

[6] Immediately after filing for CCAA protection on April 3, 2009, the Indalex Applicants informed the SERP Group that their supplemental pension benefits were being stopped.

[7] The situation confronting members of the SERP Group is very similar to that faced by certain former employees of Nortel Networks ("Former Nortel Employees") who recently brought a motion requesting an order requiring the Applicants in Nortel's CCAA proceedings (the "Nortel Applicants") to make payments which the Nortel Applicants were contractually obligated to pay to Former Nortel Employees, relating to the Transitional Retirement Allowance and any pension benefit payments Former Nortel Employees were entitled to receive in excess of the pension plan. The motion was dismissed. (See *Nortel Networks Corp., Re 2009* CarswellOnt. 3583).

[8] The reasons provided for the dismissal of the motion of the Former Nortel Employees are applicable to this case.

[9] SERP payments are based on services provided to Indalex prior to April 2009. These obligations are, in my view, pre-filing unsecured obligations. A breach of the SERP payment obligations gives rise to an unsecured claim of the SERP Group against the Indalex Applicants. The SERP Group is stayed from enforcing these payment obligations.

[10] The SERP Group has not established that they are entitled to any priority with respect to their SERP benefits and there is, in my view, no basis in principle, to treat the SERP Group differently than any other unsecured creditors of the Indalex Applicants. The reinstatement of the SERP payments would, in my view, represent an improper re-ordering of the existing priority regime.

[11] The Amended and Restated Order authorizes the Indalex Applicants to pay all reasonable expenses incurred by the Indalex Applicants in carrying on their business in the ordinary course. SERP payments are not, in my view, payments required to carry on the business and, accordingly, the Indalex Applicants are not authorized to pay the monthly SERP payments.

[12] In certain CCAA proceedings, the court has granted relief to permit payment of pre-filing unsecured debt. However, in these cases, such payments have for the most part, been considered to be crucial to the ongoing business of the debtor company. In this case, the Indalex Applicants are seeking a going concern solution for the benefit of all stakeholders and their resources should be used for such purposes. I have not been persuaded that the SERP payments are crucial to the ongoing business of the Indalex Applicants and such payments offer no apparent benefit to the Indalex Applicants. (*Re Nortel, supra,* at paragraphs 80 and 86.)

[13] The SERP Group submits that there are hardship issues that should be taken into account. In Nortel, a hardship exception was made. However, the Nortel exception was predicated, in part, on the reasonable expectation that there will be a meaningful distribution to unsecured creditors, including the Former Nortel Employees. The Nortel hardship exception recognizes that any distribution would represent an advance on the general distribution. The situation facing the Indalex Applicants is different. The Indalex Applicants have significant secured creditors and unlike the situation in Nortel, it is premature to comment on the prospects of any meaningful distribution to unsecured creditors.

[14] Counsel to SERP Group also submitted that CCAA protection in this case had been obtained for a company that was liquidating its assets. Counsel for the SERP Group submitted that Indalex had put itself up for sale and commenced a "marketing process" and as such it was not restructuring, rather, it was selling itself. This led to the submission that the cutting of benefits payable to the SERP Group was not necessary or justified for the sale of the company under the CCAA.

[15] I fail to see the relevance of this submission. At the present time, the Applicants are properly under CCAA protection. No motion has been brought to challenge the appropriateness of the CCAA proceedings and, in my view, nothing in the CCAA precludes the ability of a debtor applicant to sell its assets. See *Re Nortel Networks Corporation* – endorsement released July 23, 2009 on this point.

[16] Finally, counsel to SERP Group placed emphasis on the fact that the amount required to satisfy the obligations to SERP Group is not significant. While this submission may be attractive on the surface, to give effect to this argument would violate a fundamental tenet of insolvency law, namely, that all unsecured creditors receive equal treatment. In my view, there is no basis to prefer the SERP Group or, indeed, any retired executive who is entitled to SERP payments in priority to other unsecured creditors.

[17] Counsel to SERP Group also relied upon *Doman Industries et al* (2004) B.C.S.C. 7333 for the proposition that, the fact that a company can reduce its costs if it can terminate contracts, is not sufficient for a CCAA court to authorize the termination of the contract. In *Doman, supra,* the point at issue concerned licences under the *Forest Act* which created the concept of

replaceable contracts. Doman held certain licences. As noted by Tysoe J. (as he then was), at paragraph 7, a replaceable contract is a form of evergreen contract which contains statutorily mandated provisions, the most important of which is that the licence holder must offer a new or replacement contract to the contractor upon each expiry of the term of the contract as long as the contractor is not in default under the contract. That is not the situation in this case. The contractual situation in *Doman, supra,* is not, in my view, comparable to this case. *Doman* is clearly distinguishable on the facts.

[18] For the forgoing reasons, the motion of SERP Group for reinstatement of SERP benefits is dismissed.

MORAWETZ J.

Heard and Decided: **July 2, 2009**

Typed Version Released: **July 24, 2009**

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

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C., 1985 c. C-36
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
INDALEX LIMITED et al.

Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

AFFIDAVIT OF KEITH COOPER
(Sworn August 24, 2009)

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Lawyers for the Applicants

Court File No.:

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

BETWEEN:

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

Appellant
(Respondent)

- and -

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

Respondents
(Respondents)

- and -

MORNEAU SOBECO LIMITED PARTNERSHIP

(Intervenor)

AFFIDAVIT OF JAY A. SWARTZ
(Sworn June 6, 2011)

(Filed on behalf of the Insolvency Institute of Canada in support of the Appellant's Motion for Leave to Appeal pursuant to Rule 25 of the *Rules of the Supreme Court of Canada*)

I, **JAY A. SWARTZ**, Barrister and Solicitor, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

Introduction

1. I am President of the Insolvency Institute of Canada ("IIC"), which is a non-profit, non-partisan and non-political organization of Canada's leading insolvency and restructuring professionals.

2. For the first time in its 21 year history, the IIC has decided to participate in an appeal process to support a request that leave be granted to appeal the Ontario Court of Appeal's decision in this matter. The IIC is taking this step as a result of the potentially far-reaching consequences of the decision, primarily in the areas of (a) credit granting and risk assessment, both within restructuring proceedings and in the ordinary course of lending in Canada; (b) practice and procedures to be used in insolvency and restructuring matters; and (c) priorities among creditors generally.

3. If leave is granted, the IIC will seek intervener status on the appeal. The IIC wishes to ensure the Court is made aware of the consequences of granting or not granting leave to appeal.

Background

4. I am a partner in the national law firm of Davies Ward Phillips & Vineberg LLP ("Davies") in the corporate commercial, corporate finance and securities, financial restructuring and insolvency, mergers and acquisitions, private equity, structured finance and public private partnership practices areas. I have been practicing in these areas since my call to the Bar of Ontario in 1975. Attached hereto and marked as Exhibit "**A**" is a summary of my credentials and experience as profiled on Davies' website.

5. I have been a member of the IIC since June, 2000 and have served on the Board of Directors since 2008. I was appointed to the executive position of President in 2010.

6. The IIC's mission is to promote excellence and thought leadership in commercial insolvency and restructuring policy and practice in Canada.

7. This affidavit is sworn on behalf of the IIC and is filed in connection with the appellants' motion for leave to appeal the Ontario Court of Appeal's decision in this case ("*Indalex*").

8. IIC's membership is comprised of approximately 145 regular and *emeritus* members of the most senior and experienced practitioners in the insolvency field in Canada, drawn from the legal, accounting and financial professions, all of whom have been admitted to the IIC by invitation after rigorous peer review. In addition, the IIC has awarded special status to representatives of regulatory bodies, major financial institutions and prominent members of the academic community. Members of the judiciary are regular participants at its events but are not members.

9. The cross-disciplinary nature of the IIC provides a broad yet specialized forum for leading members of the insolvency community to share experiences and advance worthwhile discussions in the field with other members, senior representatives of the federal and provincial governments and members of the judiciary. The IIC supports research studies and analyses of restructuring and insolvency issues and plays a prominent role in the review and reform of Canada's insolvency legislation.

10. The IIC sponsors and supports conferences on insolvency-related topics, publishes papers on insolvency issues, grants awards to students, has provided fellowships for post-graduate

studies in insolvency-related subjects at leading Canadian universities and has commissioned research projects on important issues in Canada's insolvency and restructuring system.

11. Over the years, the IIC has made submissions to numerous bodies and the federal government in connection with proposed amendments to existing legislation, including the recent amendments to the *Bankruptcy and Insolvency Act* (Canada) (the "BIA"), the *Companies' Creditors Arrangement Act* (Canada) (the "CCAA") and the *Winding-Up and Restructuring Act* (Canada). Recurring themes in the IIC's submissions are the need for consistency and certainty in the application of Canada's insolvency legislation to encourage the successful restructuring of insolvent companies, equitable treatment of those affected by insolvency and to ensure that financing remains available to insolvent companies for the benefit of all stakeholders.

12. On August 31, 2010, the IIC Task Force on Pension Reform submitted a report to Industry Canada in response to its request for comments on the proposed changes to Canadian insolvency legislation and related acts[1] that were on the agenda of the 40th session of Parliament. The proposed legislative changes included the treatment of pension obligations in an insolvency context. The IIC Task Force Report was developed based on the IIC's practical, in-depth knowledge of business insolvencies and of the existing Canadian insolvency system. Annexed hereto and marked as Exhibit "**B**" is a true copy of the IIC Task Force Report submitted to Industry Canada on August 31, 2010.

13. The subject matter of the appeal for which leave is sought has had, and will continue to have, a profound effect on many aspects of insolvency law and corporate restructurings in

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[1] Specifically, Bills C-476, C-487, C-501, S-214 and S-216

Canada. The uncertainty within the legal, accounting and lending communities that has resulted from the Ontario Court of Appeal's decision in this matter requires clarification of legal principles that are fundamental to lending practices, including the availability and cost of credit in Canada, and to insolvency and restructuring practice generally. In my view, and in the view of the board of directors of the IIC, these are issues of national importance.

14. Support for the IIC's participation in the appeal was obtained from IIC's board of directors, who unanimously approved the decision to participate[2]. The IIC membership was informed of the board's decision and intended course of action through an electronic mail message sent to all members on May 12, 2011, inviting comments. Only one objection was received from the IIC's members and that objection was qualified by noting that the individual member may be retained to seek intervener status on behalf of a potential party whose perspective may differ from the submissions to be made by the IIC on any appeal. Attached hereto and marked as Exhibit "**C**" is a true copy of the memo sent by electronic mail on my behalf to all IIC members on May 12, 2011.

Issues of National Importance

15. The issues that the IIC believes are of national importance in considering whether leave to appeal ought to be granted relate to the following consequences (intended or unintended) flowing from the Ontario Court of Appeal's decision in this matter:

(a) uncertainty of priorities, in that the decision grants priority to certain pension deficiency claims not previously considered to have priority under established lending

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[2] No board members whose firm represented a party in the *Indalex* case participated in the vote.

and insolvency practices in Canada, as determined in accordance with previous court decisions;

(b) conflicting public policy objectives, arising from the Ontario Court of Appeal's determination that there is a statutory priority for the entire deficit in an underfunded pension plan. Such priority was recently rejected by Parliament in enacting amendments to the BIA and CCAA that granted only a limited priority to unpaid amounts owing to a pension plan and no priority for the entire deficit;

(c) unachievable practical thresholds, arising from the requirements imposed by the Ontario Court of Appeal for giving prior notice of the relief sought by an insolvent company when it needs to obtain super-priority debtor in possession ("DIP") financing to stabilize a distressed business on an urgent basis;

(d) the uncertain application of equitable remedies by an appellate court to alter statutory priorities among creditors; and

(e) the need for a consistent, harmonious application of both federal insolvency statutes, to avoid "statute shopping" and encourage the successful restructuring of insolvent businesses for the benefit of all stakeholders and the public.

A. Legal Uncertainty

(i) Ordinary Course Lending

16. In Canada, secured loans providing operating financing to borrowers are usually secured by the granting of a security interest over the company's accounts receivable and inventory (in addition to other assets) of the borrowers and, in some cases, affiliated entities. One such form of financing is asset based lending ("ABL"), which is provided by banks and other credit

granting financial institutions. ABL and other operating loans are a significant source of operating capital in the Canadian market.

17. Typically these loans require periodic reporting of the value of the assets that are pledged in support of the loan together with a statement of liabilities that represent potential priority payables of the borrower. These potential priority payables are deducted pursuant to a formula which generates net credit availability for the company.

18. This structure allows the credit granting institution to ensure that there is sufficient collateral coverage such that its loans will be repaid even in the event of a liquidation and to price the credit and other risks accordingly. Prior to the decision of the Ontario Court of Appeal in this matter, the list of potential priority payables was well understood by the lending community and its borrowers and such list did not include, in my experience, any provision for the entire deficit that may exist or that may arise in future in a defined benefit pension plan upon wind-up.

19. The effects of this decision on credit facilities and lending practices in Canada are far reaching but have three principle implications for credit markets:

(a) Existing loans are currently outstanding on terms that may not allow for deduction of the wind-up deficiency as a priority payable in the calculation of available credit. Those banking arrangements are based upon an understanding of the law, including the Ontario Court of Appeal's 2006 decision in *Re Ivaco Inc.* If the *Indalex* decision is upheld and *Ivaco* is no longer good law as it relates to priority for pension claims, it could have a material impact on lenders who have advanced funds based on the law as it had previously been understood. As such, financial institutions are now bearing risk within

their existing loan portfolios that was not accounted for in their internal credit and pricing assessment at the time the loan was made and for which no remedy may be readily available under their existing contractual loan arrangements. In cases where the lender has discretion to deduct a wind-up deficiency, there is now uncertainty for both lenders and borrowers as to when this deduction should be made and for how much, thus creating uncertainty about credit availability.

(b) New credit facilities will need to account for the risk of a wind-up deficiency existing or arising in future, that may result in either or both of a reduction in immediately available liquidity and/or increased interest rates or fees due to the increased risk assumed by the lender. For reasons discussed below, the magnitude of the risk and the size of the potential deficit at any given time is difficult to quantify, unlike other priority payables.

(c) Credit assessment, including credit rating of, among others, public companies, will be made more difficult, since identifying a pension plan wind-up deficiency is typically done every three years and can fluctuate greatly within that period. In addition, credit ratings of certain Canadian companies with underfunded defined benefit pension plans and which have lower credit ratings will likely be lowered further in the marketplace when the implications of this decision are fully understood. This will put further pressure on the availability or cost of credit to those companies and, in turn, will increase the risk passed on to creditors and other stakeholders of such companies, including pension plan beneficiaries.

20. The Court of Appeal's application of the deemed trust in this case is not limited to inventory and accounts receivable, as provided by section 30(7) of the *Personal Property*

Security Act (Ontario). In addition, its scope extends to the entire deficit in a pension plan, which was not previously understood to be the case and appears to fall outside any statutory authority.

21. I am advised by Nathalie Clark, General Counsel and Corporate Secretary of the Canadian Bankers' Association (the "CBA") that CBA members have voiced concerns regarding the uncertainty resulting from the Ontario Court of Appeal's decision in this matter and its implications on lending, both in the ordinary course and in an insolvency situation. Annexed hereto and marked as Exhibit "**D**" is a true copy of a letter I received on June 6, 2011 from Ms. Clark on behalf of the CBA, expressing support for the IIC's involvement and the appellants' motion for leave to appeal.

22. I am also advised by Katherine Tew Darras, General Counsel – Americas of the International Swaps and Derivatives Association ("ISDA") that the ISDA and its member organizations have serious concerns regarding the impact of the Ontario Court of Appeal's decision on the future business and practices of the derivatives industry in Canada and the participation of Canadian entities in international markets. The ISDA's concern relates primarily to the priority claims that might be made against cash pledged as collateral and the serious adverse effect that the decision could have on the ability of certain Canadian businesses and financial institutions to participate in the international derivatives market, where cash collateral is an important component of such transactions. Annexed hereto and marked as Exhibit "**E**" is a true copy of a letter I received on June 2, 2011 from Ms. Darras on behalf of the ISDA.

23. In its Funding of Defined Benefit Pension Plans in Ontario Seventh Annual Report (the "FSCO Report") released in March, 2011, the Financial Services Commission of Ontario

("FSCO") confirms that funding valuation reports prepared by an actuarial firm must generally be filed every three years on both a going concern and solvency basis. If solvency concerns are indicated, annual filing of valuation reports is required until these concerns are eliminated. Annexed hereto and marked as Exhibit "**F**" is a true copy of the FSCO Report.

24. The existence and quantum of a pension deficit is therefore determined through an actuarial calculation prepared once every three years (or at most annually) and cannot accurately or practically be used on a monthly or similar basis for the purpose of calculating a company's current loan availability pursuant to ABL or other operating loan facilities. The deficiency in a pension plan is dependent upon a variety of factors including the value of the assets and assumed interest rates, both of which vary with fluctuations in financial markets.

25. The FSCO Report also indicates that, of the 1,506 registered defined benefit pension plans in Ontario that are reviewed in the Report, more than 1,250 have deficits. When viewed in terms of aggregate dollars, the FSCO Report indicates that the aggregate deficit of these plans on a solvency basis is approximately $26.9 billion. As noted in the FSCO Report, this number represents the aggregate level of under-funding for defined benefit pension plans registered in Ontario, exclusive of seven large public sector plans and certain other excluded plans. When viewed in terms of the aggregate *wind up* funding shortfall taking into account all obligations under the plan, it translates into an aggregate wind up funding deficit of $40.9 billion.

26. What is not known is the extent to which those companies having deficits in their defined benefit pension plans in Ontario are relying upon financing provided by operating and ABL lenders. However, if the uncertainty arising from this decision causes lenders to those companies to remove the aggregate amount of the wind up deficiency from their existing loan availability

calculations, this could result in the potential disappearance of an enormous amount, potentially billions of dollars, of liquidity in Ontario alone.

27. A similar contraction in available liquidity could likely be predicted in every Province that has similar deemed trust provisions under their pension legislation, which I understand includes all Provinces except Prince Edward Island. Similar issues are also likely to apply to federally regulated pension plans.

(ii) Lending in CCAA Proceedings

28. This decision has also created uncertainty for lenders considering whether to advance financing to an insolvent company to permit it to restructure, as an alternative to immediate bankruptcy. The ability of a lender to rely upon a super-priority charge granted pursuant to a court order made in a CCAA proceeding has been called into question as a result of the decision. At a minimum, such reliance is now qualified by the necessity for certain findings to be made by the presiding judge and additional notice and service requirements being complied with that are impractical, as discussed below. The combined effect is likely to be to thwart the sought-after stability provided to an insolvent debtor through DIP financing that has been obtained prior to this decision under court Orders made at the outset or very early in a CCAA proceeding.

29. Lenders to an insolvent company who advance new funds upon the strength of a court Order and in reliance upon section 142 of the *Courts of Justice Act* (Ontario) may lose priority for such funds. These additional risks that a lender must assume will likely result in a higher cost of borrowing and/or a decrease of availability of funding for insolvent companies seeking to restructure. To the extent that restructurings are made more difficult or more costly, all

stakeholders suffer. In many cases, the absence of such financing would preclude an orderly restructuring and could force a debtor to liquidate.

30. Another consequence flowing from the uncertainty regarding the absolute priority of DIP loans in CCAA proceedings in Canada will be felt in cross-border restructurings. Unless clear priority for DIP loans is re-established in Canada, it is likely that insolvent companies with operations in both the U.S. and Canada will file primary restructuring cases under Chapter 11 of the U.S. Bankruptcy Code, where DIP lending priority is an established certainty, with only ancillary proceedings in Canada, including for Canadian subsidiaries. In practical terms, this means that primary decision-making for the restructuring of cross-border enterprises having operations in Canada will occur outside of Canada, applying U.S. law.

31. The concerns raised by the *Indalex* decision are not necessarily limited to the facts in that case. Certain findings made by the Ontario Court of Appeal in *Indalex* represent a material departure from the law as understood by counsel and other advisors to lenders, pension plan beneficiaries and administrators, and court officers such as monitors operating within a CCAA proceeding.

32. It is not uncommon for various companies within a corporate group to file jointly administered proceedings, for members of that corporate group to provide cross-guarantees for each others' obligations, for DIP loans to be made on the basis of cross-guarantees and security and for DIP loans to be advanced by related parties. In some cases, solvent related parties are the only available source of new financing for a distressed company. Loans advanced to (or guaranteed by) related parties, potentially resulting in a subrogated position to an original third-

party DIP lender, are no less in need of a court ordered super-priority charge to secure such financing, without which restructuring may not be possible.

(iii) Administrators of Pension Plans

33. This decision has created uncertainty for companies that act as plan sponsor and administrator of a defined benefit pension plan, as permitted by the *Pension Benefits Act* (Ontario). Prior to this decision it had been understood, based on existing jurisprudence, that a corporation could fulfill its fiduciary obligations as administrator of the plan and at the same time carry out its functions as plan sponsor and employer. There now exists uncertainty as to whether such roles and duties are irreconcilable if the company becomes insolvent. This presents an additional challenge, as a company cannot immediately or easily divest itself of its duties as plan administrator and any such change would require regulatory approval.

B. Departure from Legislative Mandate

34. The recent amendments to the BIA and CCAA were made by Parliament after extensive public consultation and public hearings. It was thought that those amendments settled (i) the priority to be granted to claims in respect of pension plans upon the insolvency of the plan sponsor; and (ii) the ability of the Court to grant super-priority charges to facilitate restructurings pursuant to federal insolvency legislation. The IIC actively participated in the dialogue leading to the amendments to the BIA and CCAA, including the preparation of a Position Paper on Bill C-55 dated October 12, 2005.

35. Certain groups had lobbied for priority to be given for pension deficits over all other creditors, including secured lenders. This request for priority status for pension deficits was not

granted by Parliament. Rather, priority for pension claims in insolvency was limited to unpaid normal cost contributions and did not extend to pension plan solvency or wind-up deficits.

36. The Ontario Court of Appeal's decision holds that the entire deficit owing upon wind-up of a defined benefit pension plan may be supported by a deemed trust and that such deemed trust, absent a bankruptcy, has a priority even over a lender holding a super-priority charge. In doing so, the decision has introduced uncertainty in the critically sensitive area of priorities, notwithstanding the recently enacted legislative amendments.

C. Notice Requirements

37. The Ontario Court of Appeal's decision indicates that, before any super-priority financing is approved by a Court as part of a CCAA restructuring, prior notice to pension plan beneficiaries should be given (where priority over the deemed trust is sought) and those beneficiaries should have input into the process whereby the Court is asked to grant such relief.

38. As a practical matter, this will present significant challenges to debtor companies, DIP financiers and their counsel.

39. First, pension plan beneficiaries are unlikely to be organized as a cohesive group with a commonality of interests. For example, they may or may not be represented by a union. Attempts to organize plan beneficiaries, such as by way of obtaining a representative counsel to look after their interests, would take time and require public disclosure. DIP financing is an emergency life line of liquidity offered at a time when a business is in its hour of most urgent need. A DIP facility grants the liquidity that a business requires when all other sources of financing may no longer be available to it.

40. Prior notice to any large, unorganized stakeholder group, including pension beneficiaries, would be tantamount to giving notice to the world, particularly when dealing with public companies where such selective disclosure would be improper and could contravene securities laws. This would allow other stakeholders an opportunity to advance their own agenda through pre-emptive strikes, a "race to the swift", contrary to a cornerstone principle of the CCAA, which is that the *status quo* is to be maintained from the date of the initial filing.

D. Constructive Trust to Alter Creditor Priorities in Insolvency

41. The ordinary rule in insolvency proceedings is that all unsecured creditors share rateably in any available proceeds.

42. On the facts as found in this case, the Ontario Court of Appeal imposed a constructive trust for the benefit of one creditor group (pension plan beneficiaries) thereby giving them, in effect, a priority claim over other creditors, including a guarantor who had become lawfully subrogated to the position of the DIP lender.

43. A practical consequence of the Ontario Court of Appeal's retroactive use of the constructive trust is that it increases the uncertainty associated with priorities in an insolvency.

44. Furthermore, a probable consequence of the availability of such a remedy in an insolvency situation is the promotion of litigation by special interest groups to advance the cause of one particular creditor group at the expense of other stakeholders because of the potential for an unforeseen windfall. The existence of such a remedy and result will add to the already significant challenge of trying to garner support and build consensus around a plan of arrangement. It will also add to the cost of such proceedings and will likely result in delays.

E. Consistency between Liquidating CCAA and Bankruptcy

45. It is often the case that, at some point during a CCAA proceeding, it is determined that all assets and operations should be sold such that the debtor company will no longer carry on business. There are many reasons why this process continues to be undertaken pursuant to the CCAA, rather than through a bankruptcy pursuant to the BIA. The most common reason for continuing the CCAA proceeding is to permit the debtor company to continue in possession and control of its assets to facilitate a sale of its business operations on a "going concern" basis to a new purchaser in order to maximize the recovery. This is beneficial for employees, suppliers, customers and other stakeholders and generally provides greater value than can be obtained through a piecemeal sale of assets or liquidation where the operations are not continued.

46. Effecting a liquidation pursuant to the CCAA provides the benefit of optionality to the company, its creditors and other stakeholders in keeping all possible options open rather than proceeding immediately to liquidation through bankruptcy.

47. The CCAA is also useful in facilitating cross-border restructurings where proceedings for some entities within a related corporate group are commenced under Chapter 11 of the U.S. Bankruptcy Code. The flexibility of the CCAA allows for greater coordination of proceedings than would occur in a bankruptcy, including coordinating sales efforts involving integrated cross-border business assets.

48. In a liquidating CCAA, that is, one in which no plan of arrangement is put forward, an order is usually sought within the CCAA proceeding approving the distribution of proceeds to various stakeholders in accordance with their legal entitlements. A determination of their legal entitlements is made by reference to the scheme of distribution established pursuant to the BIA.

49. If the distribution to creditors: (i) in a bankruptcy under the BIA and (ii) on a distribution motion within a liquidating CCAA produced different results, this would encourage parties to choose one result over the other and could lead to costly disputes between creditor groups. A more desirable result is to have both federal insolvency statutes interpreted and implemented in a consistent and harmonious manner.

50. For all these reasons, the IIC views the issues raised by the *Indalex* decision as being matters of national importance.

51. I swear this Affidavit on behalf of IIC in connection with and in support of the appellants' motion for leave to appeal the Ontario Court of Appeal's decision in this matter, and for no other or improper purpose.

SWORN before me at the City of Toronto, in the Province of Ontario, this 6th day of June, 2011.

Commissioner for Taking Affidavits

JAY A. SWARTZ

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Counsel for the Insolvency Institute of Canada

This is Exhibit "A" referred to in the affidavit of Jay A. Swartz sworn before me, this 6 day of June, 2011

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Fellow, American College of Commercial Finance Lawyers
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BAR ADMISSIONS
Ontario, 1975

EDUCATION
Osgoode Hall Law School, LL.B., 1973
York University, B.A. (with Distinction) (Economics), 1970

Jay Swartz is a partner in the Corporate/Commercial, Corporate Finance & Securities, Financial Restructuring & Insolvency, Mergers & Acquisitions, Private Equity, Structured Finance, Communications & Media and Public-Private Partnerships practices. He has a diverse commercial practice with particular emphasis on banking, debt financings, financial product development, structured finance, corporate restructurings, private equity funds and private company acquisitions.

Jay has been involved with numerous corporate restructurings, representing borrowers, lenders, investors, boards and receivers/monitors. He has been active in the establishment of numerous domestic and international funds for private equity investment in a variety of sectors, including mezzanine debt, venture capital, technology investment, distress investing and buy-out funds. In addition, Jay has been involved in all aspects of merchant banking transactions dealing with acquisitions, multi-tiered financings, equity ownership, corporate governance and employee incentive and compensation arrangements. This involved a co-ordination of the multi-disciplinary team of legal specialists at the firm as well as other advisors.

Jay, together with other partners at the firm, has been instrumental in the development of the asset-backed securities business in Canada, having developed a variety of products to be sold to short and medium-term investors and to provide financing for mortgage receivables, lease receivables, government obligations, automobile loans, mutual fund deferred charges, car rental revenue and similar financial obligations.

In the financial products area, Jay has worked with bankers and investment dealers to develop products designed to strip and repackage corporate debt obligations, monetize future commodity production, defease corporate debt and provide tax-assisted financing for companies in financial distress. Jay has been involved in Canada's first financings secured by highway toll revenues, airport revenues and funding for school boards. In addition, Jay has been involved in numerous project financings, including several involving public sector assets. He has significant experience in bank regulatory matters and the regulation of financial institutions generally. A significant portion of this work has been related to the role of foreign banks in the Canadian banking system.

REPRESENTATIVE WORK

- Acted for Postmedia Network Inc. in the acquisition of the publishing business of Canwest LP under a sale proceeding conducted pursuant to the *Companies' Creditors Arrangement Act*. The assets included the largest publisher of English-language newspapers in Canada as well as an extensive portfolio of digital media

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and online assets. The aggregate enterprise value of the assets was estimated to be $1.1 billion. Also acted throughout the CCAA proceedings for an Ad Hoc Committee of Noteholders, comprised of 18 investment funds, which held the majority of Canwest LP's outstanding indebtedness and which provided a $250 million equity commitment to permit the acquisition.

- Acted as counsel to Newshore Financial and the conduits sponsored by it in connection with the restructuring of $7 billion of assets in such conduits as part of the recent restructuring of $32 billion of non-bank sponsored asset-backed commercial paper.
- Acted as counsel for the monitor of Quebecor World Inc. in connection with restructuring under the *Companies' Creditors Arrangement Act* and Chapter 11 of the U.S. Bankruptcy Code.
- Acted as counsel for Dura Automotive Inc. in connection with its restructuring under Chapter 11 of the U.S. Bankruptcy Code and the *Companies' Creditors Arrangement Act*.
- Acted for the Province of Ontario in connection with the formation of a fund of funds for investment in venture capital.
- Acted for Sleep Country Canada Income Fund in connection with its sale to private equity investors.

RECOGNITION

- Recognized in Chambers Global's *The World's Leading Lawyers* and *Leaders in their Field* in the banking and finance, restructuring/insolvency and corporate/M&A categories and has been ranked in that publication since 2001. In 2008 his peers commented that he "is a strategic and intelligent lawyer who can do everything well".
- Annually recognized in the *Canadian Legal Lexpert® Directory* as being a most frequently recommended banking law practitioner, as well as being consistently recommended in the areas of asset/equipment finance and leasing, corporate and commercial, corporate finance and securities, insolvency and project finance, and repeatedly recommended in the areas of asset securitization, derivatives and mergers and acquisitions.
- Included in the Lexpert®/American Lawyer *Guide to the Leading 500 Lawyers in Canada*, the *Lexpert® Guide to the Leading US/Canada Cross-border Corporate Lawyers*, Lexpert®/Thomson's *Guide to Canada's 100 Most Creative Lawyers* and IFLR 1000's *Guide to the World's Leading Business Law Firms*.
- Recognized as a leader in capital markets law and as a highly recommended

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corporate finance, restructuring and insolvency, M&A and joint ventures lawyer in *Global Counsel 3000*.

- Recognized as a leading business law practitioner in Law Business Research's *Who's Who Legal: Canada* in the areas of Banking and Insolvency & Restructuring.
- Recognized in Law Business Research's *The International Who's Who of Business Lawyers* 2009 as a foremost banking and project finance legal practitioner.
- Recognized in *The International Who's Who of Insolvency & Restructuring Lawyers* and *Who's Who of Capital Markets Lawyers* 2009 as a leading practitioner.
- Cited in Euromoney Legal Media Group's *Guide to the World's Leading Structured Finance and Securitization Lawyers*.
- Cited in the *PLC Which lawyer? Yearbook* as a highly recommended lawyer for corporate/M&A and restructuring and insolvency, as well as being listed as a recommended lawyer in the banking and finance and the private equity/venture capital areas.
- Cited in *The Best Lawyers in Canada*® in the areas of Banking, Corporate, Derivatives, Equipment Finance, Insolvency & Financial Restructuring, Mergers & Acquisitions and Project Finance.

TEACHING ENGAGEMENTS

Jay has acted as an instructor in the Advanced Business Law Workshop which is taught to a selected group of third year law students at Osgoode Hall Law School. Jay has been a guest lecturer at Osgoode Hall Law School, the University of Western Ontario Law School and the York University Faculty of Business Administration.

SPEAKING ENGAGEMENTS

Jay has spoken at numerous conferences and seminars on a variety of topics, including bank financings, asset securitization, financial product development, swap and derivative transactions, corporate governance, shareholder arrangements and insolvency matters.

This is Exhibit "B" referred to in the affidavit of Jay A. Swartz sworn before me, this 6 day of June 20 11.

A COMMISSIONER FOR TAKING AFFIDAVITS

THE INSOLVENCY INSTITUTE OF CANADA
TASK FORCE ON PENSION REFORM

REPORT

Industry Canada
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Room 561-F
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Attention: Mr. Roger Charland

Introduction

The Insolvency Institute of Canada ("**IIC**") Task Force on Pension Reform (the "**Task Force**") respectfully submits this report on behalf of the leading organization of insolvency professionals in Canada. A brief description of IIC is attached as Schedule "**A**" hereto.

This report has been prepared in response to your request for comments on the proposed changes to Canadian insolvency legislation and related acts, which have been set out in various bills, specifically Bill C-476, C-487, C-501, S-214 and S-216 that are currently on the agenda of the 40th Parliament (collectively, the "**Proposed Legislation**") and other initiatives currently in process relating to the treatment of pension and long term disability ("**LTD**") obligations in an insolvency context. The report is based upon the volunteer efforts of many members of the IIC who participated in a number of meetings organized by the Task Force, and the comments herein have been formally approved by the IIC.

For the purpose of this Report, we have grouped the concepts in the Proposed Legislation into the following three areas:

1. Changes to the *Bankruptcy and Insolvency Act* (the "**BIA**") and the *Companies' Creditors Arrangement Act* (the "**CCAA**") to provide super-priority status for unremitted pension amounts and any amount determined to meet the standards for solvency of the plan, as well as restrictions on the ability of the Court to approve BIA

proposals or CCAA plans unless provision is made for the payment of same (the "**Pension Proposal**");

2. Changes to the BIA to give super-priority status to employees' severance and termination pay in bankruptcy and receiverships (the "**Severance and Termination Pay Proposal**"); and

3. Changes to the BIA and the CCAA to: (i) require trustees and receivers to continue LTD benefits post-bankruptcy/receivership; (ii) provide super-priority status for unfunded health related and LTD obligations; and (iii) restrict the ability of the Court to approve BIA proposals or CCAA plans unless provision is made for the payment of same (the "**Health/LTD Proposal**").

It has been the objective of the Task Force to approach the formulation of these comments on a principled basis, to use our practical in-depth knowledge of business insolvencies and of the existing Canadian insolvency system to comment on the Proposed Legislation. It should be noted that the IIC in general, and the Task Force in particular, do not represent any special or other interests in advancing the submissions contained herein.

The Executive Summary of the Report is set out on the following pages, with the contents of the Report set out thereafter.

EXECUTIVE SUMMARY

Recent insolvency filings (particularly, Nortel) have focused concern on the impact of the insolvency on employees and the risk they face in respect of the insolvent companies' inability to pay pension, health or LTD obligations and/or termination/severance pay. There is no question that the impact on employees of these unpaid claims is significant.

Attempting to address the issues by protecting the employee claims through insolvency legislation reform presents (at least) one fundamental problem. Once the rules for the insolvency proceeding are set by the Proposed Legislation, every other person (whether they are lenders, investors, suppliers, etc.) involved in establishing relationships with debtor companies must, by necessity, modify their relationships to protect themselves in the event of an insolvency that is governed by the Proposed Legislation. For example, if a priority charge is created against the debtor company's assets, those who provide funds to solvent debtors (whether secured or unsecured) must take into account such priority claims when making decisions about funding the solvent entity. Although the impact of the priority charge is theoretical until an insolvency occurs, an insolvency event must be factored into making the appropriate assessment of the debtor's ability to repay the debt. Most operating lines are on a demand basis and/or have strict review provisions – which would undoubtedly be triggered by the imposition of priority charges. Moreover, the margining requirements and ability to impose additional discretionary reserves on the borrowing base will significantly curtail the availability of financing under existing facilities, even in the absence of a demand or termination of the facility.

As a result, amendments to the insolvency legislation to provide for priority charges or restrictions on restructuring will likely create material new impediments for access to funding. Even if the scope of claims protected by the priority charge were easily quantifiable (and, as we describe in more detail below, they are not), the impact would be significant. Where, as with the Proposed Legislation, the quantum of claims is both substantial and volatile, the prospect of creating priority claims is likely to deal a crippling blow to many companies' ability to access capital.

To what end? The yoke of these additional financial burdens will encumber all Canadian employers with defined benefit plans, but will be irrelevant to the employees of Canadian companies who do not become subject to insolvency proceedings. The Proposed Legislation will, without question, worsen the situation for the vast majority of solvent companies, while providing limited impact for the employees of the very small minority of companies that become insolvent. The risk is that the Proposed Legislation negatively impacts an already sensitive equilibrium and causes more insolvencies as a result of a tighter credit market. As importantly, the financial burden placed on Canadian employers will present material impediments to their ability to be competitive in a global marketplace – all of which will occur in what is currently a very sensitive stage of economic recovery for Canadian companies.

The fundamental conclusions of our report are that substantial reforms are required in Canada's pension law. Many of these reforms are being advanced in a non-insolvency context and it is more likely that employees will be more effectively assisted by the other measures taken to initiate wider reforms to protect pensioners, such as Bill C-9. Attempting to address the related issues in the context of business insolvencies, particularly through the Proposed Legislation, is commercially imprudent, ineffective and inappropriate (with the possible exception of unremitted pre-filing pension contributions – which are discussed below). We are of the view that the provisions of the Proposed Legislation will have a significant negative impact on access to capital in the business environment while doing little to address the economic and social policy goals of Canadians generally. Although much of the discussion in this Report regarding the Proposed Legislation relates to the Pension Proposal, the conclusions regarding the negative impact apply equally to the Severance and Termination Pay Proposal and the Health/LTD Proposal.

REPORT

Background on Pension Deficit Issues

The fundamental and deep-seated societal issues relating to pensions in Canada are a reflection of the concern that Canadians currently in the workforce are at risk of having insufficient income in their retirement years. In a pension context (excluding consideration of RRSP's and CPP), these concerns can be said to be tied almost exclusively to situations where the employee is a member of a defined benefit ("**DB**") plan, as opposed to defined contribution ("**DC**") plan. DC plans reflect a commitment by the employer only to make certain contributions to the pension plan. Assuming that those payments are made (a process which is easily monitored by employees or their representatives and other persons interested in the financial affairs of the employer), the expectation of the employee is limited to the maximization of the available funds in the DC plan. In this context, it is the employees who bear the risk of the investment decisions relative to the accumulated pension funds. On the other hand, DB plans carry with them a more significant series of complicated issues, employee expectations and risks that affect both the employee and the employer – through its guarantee of the level of payments that will be made to the employees in the future – as well as other stakeholders in the enterprise.

The commitment of employers in both DB and DC plans is, in a basic sense, similar – to make the contractually agreed payments to the plans out of their operational funding. Normal and current service payments are made in the ordinary course and for all practical purposes are part of payroll. Normal and current service payments also do not generally have a negative effect on the ability of an enterprise to fund its liquidity needs. Those costs are known to the employer and expected by its secured and unsecured lenders to be made – circumstances that can be confirmed by those parties with minimal due diligence. Similarly, with respect to special payments - those payments required as a result of the pension regulatory regime to gradually reduce an actuarially determined going concern or solvency deficiency in a DB Plan - once a determination has been made that "catch-up" payments are required, the quantum of the special payments is known to the employer and can be easily quantified with minimal due diligence by the employer's secured and unsecured lenders.

In contrast, lenders cannot easily quantify the amount of any final funding shortfall that is determined on an actuarial basis at the time of a winding up of the pension as a result of an insolvency of the employer. The amount of this final deficit in a DB plan is a result of a divergence between the values used in a complex calculation that is made from a series of estimates about future demographic trends, economic trends, assumed rates of return, discount rates and inflation and the actual experience in those economic factors. The estimation process is inherently imperfect. The actuarial valuation takes time to develop, is performed as of a specified date, and the amount of the deficit could change while it is being calculated, due to the passage of time and changes in market conditions. Considering the length of time over which the projections are made, all of the components in the actuarial valuation have a compounding effect and slight amendments to the input variables will have a significant impact.

Pension legislation addresses the uncertainty concerning the actuarial calculation through periodic checks of funding adequacy by requiring two actuarial valuations be conducted at specified intervals. The first check – the going-concern valuation – assesses the adequacy of the fund to pay future benefits assuming the employer will continue the business and plan indefinitely. It requires the actuary to estimate future events and conditions over lengthy periods. If the valuation determines that the current level of funding is inadequate, then pension legislation requires that any funding deficiency be liquidated by special payments made over a long-term period of several years.

The second check – the solvency valuation – assesses the adequacy of the pension fund by assuming that the plan will be immediately terminated. In this type of valuation, future benefits are not taken into consideration and only accrued liabilities are valued as liabilities. The ability of the fund to pay those accrued liabilities is determined using the current market value of the fund's assets, without regard for any future earnings or increases in value that are not incorporated into the current market price. If the value of the accrued liabilities exceeds the current market value of the fund's assets, then this funding deficiency must be liquidated by special payments made over a five year period (although recent and proposed legislative changes would allow a doubling of this period in certain circumstances).

Thus an employer with a DB pension plan who becomes insolvent may have some or all of the following obligations: the normal cost pension contributions; special payments for a going-concern funding deficiency; special payments for a solvency valuation deficiency; and/or, if the plan is terminated, the entire amount of any solvency deficiency. The issues become how should any payment obligation or deficit that has been determined to exist be treated in the insolvency proceeding and what are the implications for that treatment.

It is important to stress that, in any circumstance where the amount of a liability is being determined by an actuarial valuation, the frailties of the actuarial process and the resulting consequences are clearly understood. The "actuarial science" involves applying the mathematics of probability and statistics to define, analyse and resolve the financial implications of future events. Almost every component of the predictors is a variable, many of which are tied to economic factors that are both volatile and inherently unpredictable. The variables never perform in a straight line as assumed, whether they are related to estimating the liability side of the equation or the value of the pension fund to address the estimated liabilities. The implications of the volatility are material – even slight adjustments in assumptions regarding, inter alia, interest rates, mortality or market performance can result in very large changes to the resulting calculations of the liabilities, asset values and deficiencies.

Status of Pension Deficits

The BIA and the CCAA as they presently exist provide a measure of protection for unremitted normal or current service payments in the case of proposals or plans of arrangement (by making the payment of these amounts a precondition to the ratification of the proposal or plan by the Court) and in the case of bankruptcy (by creating a super priority secured status for these unremitted amounts).

In cases involving bankruptcies or receiverships, subsections 81.5(1) and 81.6(1) of the BIA provide that where the bankrupt is an employer who participates in a prescribed pension plan, the following amounts are secured by security over all of the assets of the bankrupt employer (if they remain unpaid on the bankruptcy date):

- the sum of all contribution amounts deducted from employees' salaries, but not remitted to the pension plan fund;
- the "normal cost", which is defined by subsection 2(1) of the *Pension Benefits Standards Regulations,* 1985 (the "**PBSR**") as meaning the cost of benefits, excluding special payments, that are to accrue during a plan year as determined on the basis of a going concern valuation; and
- the sum of all contribution amounts owed by an employer to a DC pension plan.

Collectively hereinafter referred to as the "**Unremitted Pension Plan Contributions**".

The security granted by subsections 81.5(1) and 81.6(1) of the BIA is provided with priority pursuant to subsections 81.5(2) and 81.6(2) of the BIA, respectively, over every other claim, right, charge or security interest against the assets of the bankrupt or person subject to receivership (for ease of drafting, these will be hereinafter referred to as the "**bankrupt**"), regardless of when that other claim, right, charge or security interest arose except in respect of certain specified claims (e.g., the rights of unpaid suppliers to repossess goods, the rights of employees to security for unpaid wages and deemed trusts for payroll source deductions).

In cases involving proposals under the BIA or restructuring proceedings under the CCAA, subsections 60(1.5) and (1.6) of the BIA and subsections 6(6) and (7) of the CCAA provide that, where an employer participates in a prescribed pension plan for the benefit of its employees, the court will not approve a BIA proposal or a CCAA plan of compromise or arrangement unless:

(a) the BIA proposal or the CCAA plan of compromise or arrangement provides for the payment of Unremitted Pension Plan Contributions; or

(b) the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of these Unremitted Pension Plan Contributions.

These provisions effectively provide Unremitted Pension Plan Contributions with a preferential status, given that the BIA proposal and the CCAA plan of compromise or arrangement cannot be implemented unless they provide that the Unremitted Pension Plan Contributions will be fully paid or all the relevant parties agree otherwise.

Currently, Unfunded Pension Plan Liabilities (as defined below) are not afforded "super priority" nor preferential treatment rights under the BIA and the CCAA that rank ahead of secured creditors.

(a) Rationale for protection of unremitted payments

Comparing the insolvency law treatment of pension claims (and pension guarantee regimes) in Canada, the United States and the United Kingdom, the following policy rationale has been suggested for the protection of contribution arrears:

> Pension legislation in all three countries requires regular contributions be made to both defined contribution and defined benefit plans. Any contribution arrears will thus likely involve a deliberate decision by the employer to postpone or avoid remitting the contributions in order to use the funds to keep the business going. Such an action amounts to a preference in favour of the non-pension plan creditors that is contrary to the statutory obligations of the employer. Thus, granting contribution arrears claims a preference in the claims over remaining assets can be seen as an attempt to recognize that the non-payment may have been the result of preferences granted to other creditors while committing an offence. To the extent that insolvency law can serve to provide appropriate incentives to financially distressed employers and their creditors to comply with statutory obligations, granting a post-insolvency preference for those statutory obligations can provide such incentives. (Davis 2009, 145)

The rationale is consistent with that used in other areas of insolvency law that try to discourage distressed debtors from attempting to prefer some creditors over others through risk-shifting strategies, such as voidable preferences (Duggan and Telfer 2007). Additional policy justifications for priority treatment include the likelihood of assets being available because of the significantly lower order of magnitude of contribution arrears in comparison with the total shortfall in the pension fund and the support for the pension guarantee funds in the U.K and U.S (Davis 2009, 145). Similar rationales would apply to amending insolvency legislation to include special payment arrears in the statutory secured charge for pension contribution arrears. There is no difference in the type of deliberate and illegal behaviour involved in a decision to postpone or avoid remitting special payments and normal cost contributions. The only difference is the size of the contribution involved, and accordingly one might therefore conclude that there is no principled reason to distinguish the two types of arrears.

From the perspective of protecting the position of employees, it is noteworthy that plan members have no effective remedy in the event of a default in pension plan contributions (including normal cost and special payments). It is the provincial pension regulator that must take action in response to a default, but the pension regulator can only act after the default is reported or otherwise comes to its attention. Any delay in reporting the default or effective action by the pension regulator will likely prejudice the interests of plan members.

As a result of the foregoing, there are a number of factors supporting a reasonable manner of protection of all unremitted payments.

Though not currently protected, special payments could receive some measure of priority protection without impairing liquidity. Suggested provisions could include:

1. Special payments which have accrued up to the date of filing based upon an actuarial report existing at the time of the filing could receive similar priority protection as normal or current cost payments. Any special payment protection should only be based upon the actuarial report existing at the time of the filing. In St. Marys, the pre-filing report indicated a shortfall of less than $1 million, but the amounts jumped after filing to over $10 million. In Nortel the yearly increase for special payments post filing would have increased dramatically (probably by over $20 million per year during its restructuring) if Nortel had not been able to settle its pension and other benefits.

2. Unlike normal and current cost payments, the special payments priority should only attach to current assets. The current situation, which provides for a priority charge against all assets for normal and current costs is already problematic. Any further extension of the charge to special payments might well inhibit access to secured term lending (which is typically secured by a charge on fixed assets). Unlike asset-based and liquidity lenders, term lenders do not have control after the funds have been lent and they typically lack the ability to constantly monitor the borrower's performance in making the payments. Their primary recourse is to call the loan in default. Such a situation lends itself to the trigger of more early insolvencies. However, it is fair to

note that this potential consequence could be mitigated by limiting any priority charge for special payments to current assets.

3. Because of the magnitude of the special payments, any statutory provision that contemplates a priority charge or payment requirement must include a cap or maximum amount of charge/priority so as not to materially restrict liquidity needs. This "cap" should be determined after consultation in the legislative process with actuaries and other stakeholders.

4. In cases where operations continue after the initiation of the insolvency process, the termination of special payments accruing after the filing should be a matter of discretion, after consulting with the Monitor/trustee and obtaining court approval. It is critical to any restructuring process that there be flexibility in this process as, among other things, it directly impacts the availability of DIP funding. In Abitibi-Bowater, the company was authorized by the Court not to continue making the special payments during the restructuring. In Nortel, the company was authorized to continue to make these payments until an overall settlement was reached with the retirees, employees, Unions, pension regulators, noteholders and other stakeholders. The settlement was finally approved by the Court and leave to appeal by some dissenting disability retirees was dismissed.

(b) Protection for Pension Deficiencies other than Pre-filing Accruals

As set out above, an employer with a DB plan initiating insolvency proceedings may have a number of different statutorily prescribed normal cost and special payment obligations. In addition, the most recent actuarial valuation may have disclosed a funding deficiency that the special payments are supposed to liquidate. However, the total funding deficiency does not become an obligation until a decision is made to terminate the pension plan, either by the employer or pension regulator.

Differing policy considerations apply when considering the case for increasing the priority of the claim for the funding deficiency after all contribution arrears have been remitted. There are two main reasons why the policy considerations are different. First, a shortfall in a DB

plan can arise without any wrongdoing or statutorily prescribed fault, or even any deficient management decisions on the part of the employer.

Second, the magnitude of pension shortfalls makes it less likely that the employer's assets could satisfy the claim in many insolvency proceedings. Any inability to fully pay the priority charge means all other creditors (unsecured or subordinate secured) would receive nothing on their claims.

In addition, the effect on credit markets should be considered, especially given the volatility of pension shortfalls that will make any credit granting decision uncertain because of the unknown dimensions and probability of the credit risk involved in the DB pension fund. This concern has been cited as being behind the decision not to change priorities for pension claims in insolvency proceedings in the U.K. Pensions Act (2004). (Stewart 2007, 22)

Thus, the option of changing priorities under insolvency law to address the problem of pension fund shortfalls lacks a compelling policy rationale. This appears to be recognized by a number of other countries – none of which create the type of super-priority charge for pension deficiency claims contemplated by the Pension Proposal[1].

More importantly, however, from a strictly Canadian perspective, the extension of such a significant priority charge as provided for in the Pension Proposal will present a critical and immediate negative impact on all operating companies that are employers with DB plans for a number of reasons, including:

(a) It will cause lenders to restrict credit, particularly working capital, to borrowers with DB pension plans whether or not they are in deficit. Already, many working capital facilities reserve (deduct from the borrowing base) an amount in respect of existing priority claims (a payroll cycle plus one cycle of pension contributions). Credit Agreements will now have to reserve for special payments and indeed, may need to start to reserve for special payments that may be required in the future given the potential for regulators to demand new solvency valuations from

[1] See attached table, which sets out a summary of the status of pension claims on bankruptcy in certain selected countries based on information from OECD publications listed in the table.

time to time. The impact of this will be to deprive pension plan sponsors of the same access to credit that non-sponsors enjoy if indeed it does not cause some lenders to restrict credit to only the most financially stable companies. Credit availability will decline and credit cost will increase in a significant way, putting Canadian companies at a competitive disadvantage to companies in other countries that do not have to give preferred creditor status to Unfunded Pension Plan Liabilities.

(b) Because of (a), there will be very major incentives to the few remaining private sector plan sponsors to convert their plans to DC or simply close them down altogether. Unionized operations (the bulk of surviving private sector DB plans) will be under further competitive pressure and there may be fewer options available to restructure, attract capital or otherwise take steps necessary to adapt or survive.

(c) The consequences of (a) must also be measured in the impact on the general economy, which is at risk of deteriorating if Canadian companies' competitiveness in the global marketplace is hindered by being subject to a more burdensome regime through the application of additional priority charges on their assets.

(d) The Pension Proposal will provide little to no benefit to pensioners or employees. As a result of successor employer rules and the immunity of collective bargaining agreements from restructuring, pension plans cannot be terminated without the active participation of the union in any event. As such, pension deficits have a *de facto* priority in that pension plans cannot be terminated to crystallize the deficit unless the union agrees. This already causes needless liquidations.

(e) If the Pension Proposal comes into effect, a wide array of creditors, such as banks and bondholders, would see their interests suddenly become subordinate to potentially substantial Unfunded Pension Plan Liabilities. Directly affecting that calculation are the currently changing International Financial Reporting Standards

("**IFRS**"), which will likely impact pension plan accounting and create more volatility from quarter to quarter. This increased lending risk would likely have the effect of instantly depressing the value of the debt instruments, issued by such employers. Such corporate bonds are widely held by Canadians in their retirement savings portfolios and registered pension plans.

(f) In addition to these potential adverse effects on the credit market, in extreme cases the Proposed Legislation may cause plan sponsors to borrow to make immediate further contributions to fully fund their pension plans in order to get continued access to credit – the additional debt burden could put some employers out of business. Another unintentional consequence of a sudden increase in the total amount of secured debt carried by plan sponsors, is that it may trigger an event of default under existing financing agreements. In addition, lenders may refuse to take on the increased risk of offering new financing to distressed sponsors (in the form of either DIP or exit financing) which could accelerate bankruptcies.

(g) Lastly, if one assumes the correctness of the premise that the most significant components that create a pension funding deficit are market related (whether it is stocks/bonds performance or interest rate fluctuations), the creation of the priority charge has the direct effect of shifting all of the market risk's impact onto the creditors of the employer. There is no compelling policy reason for such a drastic result.

Other Alternatives

Instead of focussing the discussion on legislative reform in an insolvency context, other options must be considered. One option is to institute a national system of pension benefit guarantees funded by premiums charged to employers who have DB pension plans. The other option is to attempt to address the policy objectives through legislative reform in pension and related matters without limiting the legislative initiative to an insolvency context. These options are not mutually exclusive.

(a) Pension Guarantee

A pension guarantee fund is probably the least urgent option, but we should recognize that there already have been taxpayer-funded *ad hoc* forms of pension guarantee through (a) government bailouts of various industries on the grounds of industrial policy and (b) the "loan" of funds to the Pension Benefits Guarantee Fund ("**PBGF**") to cover the Nortel (and prior) deficits.

Although it is acknowledged that international experience shows that designing a premium structure that will make a guarantee fund sustainable without driving weaker employers/pension funds into insolvency is a significant hurdle, the size of the Canadian problem is significant. Mercers has estimated that the wind-up deficit for private sector Canadian DB plans is approximately $38 Billion as at December 31, 2009. If the Ontario PBGF provisions were to apply to all these plans, then the total "national PBGF" exposure would be approximately $15 Billion. The estimates are based on a combination of Mercer data and Stats Canada information. While not setting out a split between Ontario plans and those of other provinces/territories, it is believed that Ontario would be at least half of the total exposure.

There are other avenues that would likely prove more fruitful in terms of strengthening the security of the pension promise, many of which can be found in the Ontario Expert Commission on Pensions Report.[2] These include strengthening the existing funding rules, addressing the ambiguities and conflicts in the role of the pension actuary, increasing the economic efficiency of small and medium sized pension plans' investment activities, and vastly improving the governance regime for pension plans. However, all of these actions lie within the legislative purview of the provinces, except for that portion of pension funds under the legislative authority of Parliament.

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[2] Arthurs, Harry W. 31/10 2008. *A Fine Balance: Safe Pensions, Affordable Plans, Fair Rules.* Report of the Ontario Expert Commission on Pensions. *Queen's Printer for Ontario*. Ontario Ministry of Finance. 15/11/08 <http://www.fin.gov.on.ca/en/consultations/pensions/report/Pensions_Reort_Eng_web.pdf>

(b) Wider Reform

The Government has already taken significant steps to address certain of the concerns noted above through the passage of Bill C-9 (the *Jobs and Economic Growth Act*, which received Royal Assent on July 12, 2010). The Act provides for, among other things:

- the extension of the statutory deemed trust to include unpaid wind-up deficit amortization payments. This protects part of the Unfunded Pension Plan Liabilities;
- a distressed pension plan workout scheme to facilitate a negotiated funding arrangement; and
- plan sponsors to satisfy funding obligations with letters of credit.

If one believes the concept that pension reform is a problem that reflects a deeper societal issue that needs more than a mere insolvency legislation change, it would seem that employees' retirement income could be better protected by:

- Creating incentives to encourage employers to leave reasonable surpluses in a plan, rather than limit the contributions to the strict minimum available amount. This would require eliminating the natural aversion of employers to contribute any excess amount to the fund. This could be accomplished by relaxing the rules to make a pension surplus available to the employer, on termination or wind up of a plan, so that there is no perception that any fund invested in the pension plan is forever lost to the enterprise. However, care should be taken that such changes do not create incentives for employers to terminate plans in order to gain access to surplus amounts at some point when market conditions generate such a surplus.
- Allowing the pension plans to become overfunded, by eliminating the possibility of an enterprise taking a pension plan premium holiday when investment yields are high. The enterprise would always be required to contribute to the plan notwithstanding an over funding status. Conversely, to increase stability, the special payments required to be made upon an actuarial revaluation of the plan could be scaled over a longer period. This would provide some recognition of the fact that yields can be cyclical, creating plan surplus and deficits that are merely temporary. The amount of overfunding required could be linked to the degree of volatility in the plan's investments pursuant to some reasonable and pragmatic formula.
- A multi-employer type of solution that, to the greatest extent possible, allocates the funding burden fairly, without the spectre of a priority charge that could choke off funding availability at a time when the economy needs to grow.

- To explore whether to prescribe certain minimum requirements in terms of insurance and then allow for optional, additional coverage for those that want it. This model would balance the societal concern and risks by ensuring minimum coverage for vulnerable employees who need protection and may not be able to choose for themselves, while allowing others to obtain (and pay for) enhanced coverage, hopefully as part of an integrated retirement plan.

- Reviewing the practice/requirements put in place in connection with the termination of pension plans to purchase annuities with the employee's distribution. If the plan is terminated at the bottom of the economic cycle, a process of committing employees to purchase annuities puts them into an annuity at the bottom of market thereby exasperating the situation. This is a difficult scenario, amplified by the lack of a vibrant market in Canada for annuities. It may be more appropriate to allow employees to have the option of taking funds out and putting them into new DC plans that would allow them to ride the market cycle rather than freezing them at bottom.

- Policy makers should not ignore the needs of the large number of Canadians who do not have access to pensions. Strategies could include further material enhancements to the RRSP and TFSA regimes.

Health/LTD obligations

Bill C-487 proposes to amend the BIA and the CCAA such that priority for payment (ahead of secured creditors) would be given in both bankruptcy and restructurings for the actuarial value of: (1) the income replacement portion of LTD benefits until the recipients reach the age of 65; (2) health care benefits and pension accruals for employees who were receiving LTD benefits until the recipients reach the age of 65; and (3) five years worth of health care benefits for all other employees. Bill S-216 proposes to amend the BIA and CCAA such that, in bankruptcy or receivership, the actuarial value of LTD benefits and health-related benefits owed to LTD recipients would be given priority for payment ahead of unsecured creditors and that, in restructurings, such amounts would be given priority for payment ahead of secured creditors.

The issue of terminating health related/LTD benefits arises where the business is being carried on in some form or other through a receivership or CCAA proceeding and the employer/interim lender (colloquially, "DIP lender") wishes to terminate benefits to retirees or to everyone. If the benefits are insured through group policies there is usually a short period during which individuals may convert their benefits into individual policies. Where LTD benefits are provided through an insurance policy, those employees in receipt of the benefits when the

employer becomes insolvent should not have their benefits affected by the termination of the insurance policy. However, continued receipt of other benefits such as life insurance, supplementary health and dental coverage is dependent on the continued payment of policy premiums. If the employer's LTD program is self-funded, then it can be directly affected by the employer's insolvency. The issue is one of termination of an "executory" contract during the receivership or CCAA. The conditions for court approval of a disclaimer in the context of the CCAA are:

> 32(4) In deciding whether to make the order, the court is to consider, among other things:
>
> (a) whether the monitor approved the proposed disclaimer or resiliation;
>
> (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

By way of contrast, we note the criteria and procedure adopted by the U.S. in s.1114 of the Bankruptcy Code regarding retiree medical benefits could be adapted to our system and would be preferable to an abrupt cut-off occasioned by the filing of an application under the CCAA. The procedure is as follows:

> "... s.1114 sets out conditions that must be met in order to successfully apply to the court for an order modifying or rejecting the obligation to pay vested retiree health benefits. It begins by prohibiting an employer from failing to pay or modifying retiree benefits unless a court has ordered the modification of the benefits or an agreement on modification has been reached with the retirees' authorized representative. Before the employer can apply to the court for an order modifying retirees' vested benefits, it must comply with similar procedural requirements to s.1113, i.e., it must make a proposal to the retirees' representative after providing that representative with information about the proposal and why it is necessary to the employer's restructuring. The employer must negotiate the modification in good faith with the retirees' representative and may only go to court if the

proposal is rejected without cause. Once at court, the employer must show that the modifications are necessary and that all affected parties are treated fairly and equitably."[3]

Thus, rather than merely having to show that disclaimer enhances the prospect of the restructuring, employers would have to make a reasonable offer of compromise, negotiate in good faith and then demonstrate both necessity and fair and equitable treatment before they could modify or terminate the benefits. This is conceptually close to the actual experience in the Nortel proceeding.

> "In the United States Senate Committee report on the legislation enacting s.1114 of the U.S. *Bankruptcy Code*, the impetus for the legislative initiatives was described as follows:
>
> > This bill recognizes the conflict between the interests of all other unsecured creditors in a Chapter 11 proceeding and the special problems associated with the cut-off of health and insurance benefits to retirees. The special treatment accorded retiree benefit payments is appropriate because of the hardship imposed on elderly recipients when such benefits are suddenly curtailed. However, this bill addresses the needs of retirees within context of the traditional structure of the Bankruptcy Code. The broader issues associated with retiree benefits remain to be addressed by other committees of appropriate jurisdiction.
>
> Thus, it would appear that the legislators wanted to provide some balance in the relationship between vested retiree benefit claimants and all other unsecured creditors that recognized the hardship imposed on retirees when they are denied access to medical insurance."[4]

> "... although the immediate impact of cancellation of health insurance may not be as devastating as that experienced by a U.S. retiree, the impact on a Canadian retiree will still be substantial, given the role of private sector financing in both the overall expenditures and those on prescription drugs. The potential that serious health effects may follow from delay in obtaining medication or other types of privately-funded

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[3] A fuller description of the US procedure and the rationale for choosing this over the current standard in respect of the termination of medical benefits is found in "Doomed to Repeat History" Retiree Benefits and the Reform of Canada's Insolvency Laws", *Annual Review of Insolvency Law – 2004,* 199.

[4] *Ibid.* at 231-32.

medical equipment or treatment remains an important factor in evaluating the hardship that may follow termination of retiree medical benefits."[5]

"A second reason to intervene in the process of disclaiming retiree benefits has its roots in the retirees' unusual strategic disadvantage in restructuring proceedings, resulting from the particulars of their executory contract with the employer. These particulars leave them practically unable to take steps to protect themselves while they are still employed and vulnerable to undue pressure in any insolvency negotiations."[6]

For these reasons the risk to employees relating to the non-payment of health related or LTD benefits should be mitigated by a more stringent different disclaimer procedure. Protection for fair treatment in the disclaimer process balances the restructuring requirements of the insolvent employer with the unfortunate (but sometimes necessary) consequences to the employee. It also recognizes that, in Canada, the mitigating effects of the disclaimer are more likely to be offered by access to public health programs (an area where, regardless of recent U.S. reforms, Canadian residents/employees have greater benefits available to them) than in the U.S. Simply providing a priority claim for these speculative amounts will, for the reasons noted above relating to Pension Deficits, also lead to a restriction on the availability of credit.

It is worth noting that one unintended consequence of the Health/LTD Proposal and the resultant situation of tighter access to capital is that employers may have no alternative but to reduce or eliminate the types of voluntarily provided employee benefits (such as LTD benefits).

Termination Pay

Similar conclusions can be reached with respect to the Proposed Legislation concepts of giving termination and severance pay a super-priority charge over working capital lenders. It should be noted that:

(a) Severance and termination are not concepts that are inherently quantifiable. The existing super-priority for wages is a capped amount of $2,000 per employee (with an additional amount for certain expenses). As a result, lenders understand how to quantify any reserve when making their credit decisions. Termination and

[5] *Ibid.* at 233.
[6] *Ibid.* at 234.

severance pay are not defined terms – they include the greater of statutory *Employment Standards Act* amounts (which vary by Province) or common law/contractual severance. The latter are not ascertainable by a lender in advance with any degree of certainty (the "one month per year" rule of thumb is no more than that) and "reasonable notice" is a standard which varies from employee to employee and case to case. Where there is a large employee base, the calculated entitlements will be massive and grow constantly with the seniority of the workforce. In addition, the larger the workforce the greater the uncertainty in the calculation.

(b) Severance and termination pay are different from wages in that they are payable to employees without regard to loss – the employee who gains new employment immediately has the same entitlement as the employee who enters the ranks of the long-term unemployed.

(c) In addition to the negative effect that a super-priority will have on working capital credit for all plan sponsors, a priority for termination and severance will see reserves against borrowing base for all employers increase dramatically as lenders take a conservative view of what the amount of the super priority might be. As the amounts can be highly material (an individual's entitlement may be up to 12-18 months' salary in severance/termination pay based on the cases), the impact on lending could be catastrophic.

Summary

While it cannot be disputed that substantial reforms are required in Canada's pension law, attempting to address the protection of pension and related employee benefit issues in the context of business insolvencies, particularly through the Proposed Legislation, is both ineffective and inappropriate. While the Proposed Legislation initially appears to be aimed at protecting the interests of Canadian employees - a laudable goal - a more detailed analysis reveals that most of the provisions of the Proposed Legislation will have a significant negative impact on access to capital in the business environment while doing little to address the economic and social policy goals of Canadians generally. The Proposed Legislation will also impair, in a significant way, the ability of insolvent companies to undertake a restructuring in an attempt to continue operations. One of the most significant aspects of protecting employee-related obligations in the context of a restructuring is that the employer's business be provided with a reasonable opportunity to continue as a going concern. Creating roadblocks to that objective, through priority charges for employee related claims or mandatory (but difficult to

value) criteria for a restructuring, will create both financial difficulty for employers that are already struggling and significant impediments to their ability to restructure.

All of which is respectfully submitted on behalf of the Insolvency Institute of Canada and the members of the IIC Task Force. We would be pleased to discuss with you any questions or comments you may have.

August 31, 2010

The Honourable James Farley, Q.C., Co-Chair, McCarthy Tétrault LLP
Craig J. Hill, Co-Chair, Borden Ladner Gervais LLP

IIC Task Force Members

The Honourable Yoine Goldstein, McMillan LLP
Ronald Davis, Faculty of Law, University of British Columbia
Jean-Daniel Breton, Ernst & Young Inc.
Sean Collins, McCarthy Tétrault LLP
Marc Germain, Stein Monast LLP
Howard Gorman, Macleod Dixon LLP
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Louis Gouin, Ogilvy Renault LLP
Alex Morrison, Ernst & Young Inc.
John Swidler, RSM Richter

Resource Participants

Greg Winfield, McCarthy Tétrault LLP
Paul Forrestal, Mercer LLC

SCHEDULE "A"

The Insolvency Institute of Canada/L'institut d'insolvabilité du Canada

The Insolvency Institute of Canada is Canada's premier private sector insolvency organization. The Institute is a non-profit organization dedicated to the recognition and promotion of excellence in the field of insolvency. Its members are drawn from the most senior experienced members of the insolvency community in Canada. Membership is by invitation and is limited to 125 insolvency practitioners (trustees and lawyers) who are joined by representatives of regulatory and compensation bodies, major financial institutions and prominent members of the academic community.

The Institute provides a forum for leading members of the insolvency community to exchange ideas and share experiences with other members, senior representatives of the federal and provincial governments and members of the judiciary. The Institute supports and encourages research studies and analysis of restructuring, insolvency and creditors' rights issues. Since its inception, members of the Institute have always had prominent roles in the review and reform of Canada's insolvency legislation.

The Institute has sponsored and supported public conferences on insolvency related topics and publishes papers that are delivered at its Annual General Meetings. The Institute has provided Insolvency Institute Fellowships for post-graduate studies in insolvency related subjects at leading Canadian universities and has commissioned research projects on important issues in Canada's insolvency and restructuring system. Through The Insolvency Institute's/Judicial Liaison Council, the Institute has established links with Canada's leading bankruptcy and insolvency judges. The Institute, in association with one of Canada's leading publishers, makes its collection of insolvency cases and materials available electronically.

The Institute, through its members, brings a wealth of judgment and experience to its activities and projects and is becoming increasingly recognized as the most authoritative multidisciplinary insolvency organization in Canada.

August, 2010

STATUS OF PENSION CLAIMS ON BANKRUPTCY IN SELECTED COUNTRIES[7]

Country	Predominant Occupational Pension Arrangement	Status of Pension Claims on Bankruptcy	Pension Fund Guarantee Schemes
Australia	• Defined contribution pension plans	• Pension contributions due but not paid are given priority over unsecured debts but rank behind secured creditors, liquidation expenses and unpaid wages	• No pension fund guarantee scheme
Canada	• Defined benefit/defined contribution pension plans	• Contributions due but not paid to pension funds have a preferred status • Pension deficit is treated as an unsecured debt.	• The Pension Benefit Guarantee Fund (Ontario) guarantees pension benefits in the event of plan sponsor's bankruptcy (only up to certain limits)
Denmark	• Defined contribution pension plans	N/A	• No pension fund guarantee scheme
Finland	• Mandatory defined benefit arrangement	N/A	• There is a joint and collective guarantee system for certain plans • The government guarantees all or part of the benefits under other plans
France	• Limited number of occupational pension plans due to generous	N/A	• No pension fund guarantee scheme

[7] Information appearing in this table has been derived from the OECD publications listed at the end of the table. Please note that the table only provides a high level summary of the OECD publications. For a more detailed description please refer to the actual publications.

Country	Predominant Occupational Pension Arrangement	Status of Pension Claims on Bankruptcy	Pension Fund Guarantee Schemes
	state pension schemes • Occupational plans are mainly insured or savings plans		
Germany	• Defined benefit pension plans	• Pension obligations are treated as unsecured debts	Upon bankruptcy, the Pension Guarantee Fund ("PSVaG") takes on obligations of plan sponsor (up to a certain level) and purchases annuities. About 2/3 of pension liabilities are covered by the PSVaG. The other third is held by insurers and "Pensionskassen" (these funds are being supervised as insurance funds and are subject to stringent solvency standards).
Ireland	• Defined benefit pension plans	• Unpaid pension contributions (up to certain limits) are given priority over floating secured creditors and unsecured creditors but rank behind fixed secured creditors and liquidation expenses	• Payment may be made out of the Social Insurance Fund in respect of unpaid contributions
Italy	• Severance pay or "Trattamento di Fine Rapporto" ("TFR") (i.e. lump sum paid to an employee on termination of employment) • Defined contribution pension	• Salary owed to employees (incl. TFR) has priority over unsecured debts • Same priority status for contributions to public pension	• Protection Fund for unpaid contributions

Country	Predominant Occupational Pension Arrangement	Status of Pension Claims on Bankruptcy	Pension Fund Guarantee Schemes
	plans	schemes and other forms of social protection (theoretically includes contributions to employer-sponsored plans)	
Japan	• Severance pay • Defined benefit pension plans ("employee pension funds" or "EPFs" are large DB plans; there are also other types of DB arrangements)	• Severance pay ranks behind secured creditors but ahead of other preferential claims • Employer contributions to EPFs rank behind wages/taxes but ahead of unsecured creditors • Contributions to other pension arrangements are unsecured debts	• Pension guarantee program covers a portion of the pension benefits accrued by members of EPFs only
Korea	• Severance pay • Defined benefit pension plans	• Severance pay (up to certain limits) and contributions to defined benefits rank ahead of secured creditors	• No pension fund guarantee scheme
Netherlands	• Defined benefit pension plans	• Contributions to pension arrangements are unsecured debts (preferential status for unpaid contributions under consideration)	• No pension fund guarantee scheme but a special fund can pay contributions owed by sponsor (up to a maximum of one year of unpaid contributions)
Norway	• Mandatory defined benefit pension plans		• No pension fund guarantee scheme

Country	Predominant Occupational Pension Arrangement	Status of Pension Claims on Bankruptcy	Pension Fund Guarantee Schemes
Poland	• Mandatory defined contribution pension plans (with a guaranteed minimum rate of return)	N/A	• A guarantee fund covers the deficit of a pension fund (i.e. where the rate of return is below the minimum rate) in case of bankruptcy
Portugal	• Defined benefit pension plans	• No priority or preferential status for pension-related claims	• No pension fund guarantee scheme
Spain	• Defined contribution pension plans	N/A	• No pension fund guarantee scheme
Sweden	• Defined contribution pension plans	• Contributions to pension funds which are not covered under the pension guarantee scheme rank behind secured creditors and liquidation expenses but ahead of unsecured creditors	• Pension Guarantee Mutual Insurance Company (only covers plans for white-collar workers)
Switzerland	• Mandatory defined benefit pension plans and hybrid plans	• Preferential treatment with respect to the portion of entitlements which is not covered by the guarantee fund	• There is a guarantee fund which covers any shortfall up to a certain limit in case of bankruptcy

Country	Predominant Occupational Pension Arrangement	Status of Pension Claims on Bankruptcy	Pension Fund Guarantee Schemes
United Kingdom	• Defined benefit pension plans	• Preferential status for unpaid contributions (the government ranks as the preferred creditor if it paid those contributions to the pension fund)	• National Insurance Fund can pay employee contributions deducted as well as contributions owed by sponsor (up to certain limits) • Pension Protection Fund provides compensation to members of eligible defined benefit plans in case of shortfalls
United States	• A significant number of plans continue to have defined benefit obligations; a strong trend has been observed where employers either replace the DB plan with a DC plan or close the DB plan to new entrants	• No priority or preferential status for pension-related claims	• Pension Benefit Guarantee Corporation offers some protection of defined benefits if employer is unable to fund the plan

Sources:

1. *Protecting Pensions: Policy Analysis and Examples from OECD Countries*, OECD, 2007 [Note: The OECD's report on priority pension claims in case of bankruptcy found that pension claims, (unlike wages), do not always receive priority over other creditors. Difficulties with providing such status come from problems with changing bankruptcy laws and potential impacts on the capital markets. The OECD's report concludes that priority rights should be given to unpaid and due contributions and care should be taken that pension beneficiaries be treated at least as well as other creditors in any bankruptcy or restructuring process (e.g. ensuring their representation on creditor committees).]

2. *Complementary and Private Pensions throughout the World 2008*, ISSA/IOPS/OECD, 2008

3. *OECD Private Pensions Outlook 2008*, OECD, 2009

4. *Pensions at a Glance – Retirement-Income Systems in OECD countries*, OECD, 2009

This is Exhibit "C" referred to in the affidavit of J. A. Swartz sworn before me, this 6 day of June 20 11

A COMMISSIONER FOR TAKING AFFIDAVITS

TO: **Insolvency Institute of Canada Members**

FROM: **Jay Swartz, President (on behalf of the IIC Board)**

DATE: **May 12, 2011**

Indalex

We understand that leave to appeal the Ontario Court of Appeal's recent decision in *Indalex* to the Supreme Court of Canada (SCC) will be sought. The Board of Directors of IIC has determined that it is appropriate that the IIC seek intervener status at the leave to appeal stage and on the appeal, if leave is granted, for the purpose of filing an *amicus* type brief. Thornton Grout Finnigan LLP ("TGF") has graciously agreed to represent IIC on a *pro bono* basis. An *ad hoc* instructing committee of the IIC has been established (Jay Swartz, Avram Fishman, Aubrey Kaufman, Michael MacNaughton, Edward Sellers) for the purpose of providing instructions to TGF on behalf of the IIC.

IIC's decision to seek intervener status is to ensure that the implications of the decision from an insolvency and restructuring perspective are addressed, and to permit the IIC to make the SCC aware of the practical (and potentially unintended) consequences that exist or may arise as a result of the Ontario Court of Appeal's decision.

The purpose of this communication is (i) to advise you of the IIC's intention to seek intervener status; (ii) to ask if any member objects to this course of action being taken; and (iii) to provide all members with an opportunity to advise the Board or TGF of any practical or other difficulties that they see arising, or that they may have already experienced, as a result of the decision.

The broad topics that have been discussed by the *ad hoc* instructing committee with TGF to date are as follows:

(i) Uncertainty for DIP Lenders, Operating Lenders, Credit Rating Agencies and Others;

(ii) Conflicting Duties of Directors where the Company is the Pension Plan Administrator;

(iii) Practical Effect of Notice Requirements – In particular: (i) the urgency associated with DIP financing, (ii) how notice is to be given to pension plan beneficiaries (particularly where no collective bargaining agent represents such beneficiaries), and (iii) determination of a constitutional question where the doctrine of paramouncy is to be invoked;

(iv) Application of the Remedy of Constructive Trust to Re-Order Priorities under the BIA and CCAA;

(v) Availability of Bankruptcy to Reverse Priorities;

(vi) Public Policy in view of 2009 BIA and CCAA Amendments; and

(vii) Which issues are of national importance and which issues apply only in certain provinces as differences may result in unequal treatment of creditors based on local law.

If you object to the IIC seeking intervener status, please advise Jay Swartz by email at jswartz@dwpv.com. It is our intention to make the Court aware of the level of dissent but, unless there are a great number of members who object, we intend to proceed to seek intervener status.

If you wish to raise any practical or other difficulties that you have encountered or are aware of that should be considered in preparing the intervener materials, kindly provide those comments to TGF directly as follows:

Robert I. Thornton
Tel: (416) 304-0560
Email: rthornton@tgf.ca

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June 6, 2011

This is Exhibit "D" referred to in the affidavit of Jay A. Swartz sworn before me, this 6 day of June, 20 11.

A COMMISSIONER FOR TAKING AFFIDAVITS

Jay A. Swartz, President
Insolvency Institute of Canada
c/o Davies Ward Phillips & Vineberg LLP
1 First Canadian Place, 44th Floor
Toronto, Ontario
Canada M5X 1B1

Dear Mr. Swartz:

Re: Indalex Limited, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc. (collectively, "Indalex")

I am writing on behalf of the Canadian Bankers Association (the "**CBA**"). The CBA works on behalf of 52 domestic banks, foreign bank subsidiaries and foreign bank branches operating in Canada and their 267,000 employees. The CBA advocates for effective public policies that contribute to a sound, successful banking system that benefits Canadians and Canada's economy.

The purpose of this letter is to express the CBA's support for the granting of the three leave to appeal applications anticipated to be filed with the Supreme Court of Canada in connection with the decision of the Ontario Court of Appeal in the *Companies' Creditors Arrangement Act* proceedings of Indalex.

The CBA has reviewed the decision of the Court of Appeal and discussed it with the General Counsels of the major domestic banks. The decision deals with many issues which our members confront on a daily basis, not only within insolvency proceedings but also in ordinary lending situations. These issues include the ability of a debtor-in-possession lender to rely upon a super-priority charge granted to the lender by a CCAA judge, as well as the ability of a lender to calculate the appropriate amount to reserve when providing a new loan in order to deal with claims that rank in priority to a secured lender. From our review it appears that the decision may reach a different conclusion than prior decisions of the Ontario Court of Appeal, and is at odds with our previous understanding of the priority position of wind-up deficiencies pursuant to the provisions of the *Pension Benefits Act* in Ontario. We note that the statutory provisions underlying the decision are common to most, if not all, jurisdictions within Canada. The decision, therefore, creates substantial uncertainty on significant issues pertaining to lending in both insolvency and ordinary lending situations on a national scope, which we believe will adversely impact the business and practices of the banking industry generally unless it is resolved by the Supreme Court of Canada.

Sincerely,

Century Services Inc. *Appellant*

v.

Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada *Respondent*

INDEXED AS: CENTURY SERVICES INC. *v.* CANADA (ATTORNEY GENERAL)

2010 SCC 60

File No.: 33239.

2010: May 11; 2010: December 16.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy and Insolvency — Priorities — Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada — Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) — Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Bankruptcy and insolvency — Procedure — Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Trusts — Express trusts — GST collected but unremitted to Crown — Judge ordering that GST be held by Monitor in trust account — Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.

Century Services Inc. *Appelante*

c.

Procureur général du Canada au nom de Sa Majesté la Reine du chef du Canada *Intimé*

RÉPERTORIÉ : CENTURY SERVICES INC. *c.* CANADA (PROCUREUR GÉNÉRAL)

2010 CSC 60

N° du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Faillite et insolvabilité — Priorités — Demande de la Couronne à la société débitrice, la veille de la faillite, sollicitant le paiement au receveur général du Canada de la somme détenue en fiducie au titre de la TPS — La fiducie réputée établie par la Loi sur la taxe d'accise en faveur de la Couronne l'emporte-t-elle sur les dispositions de la Loi sur les arrangements avec les créanciers des compagnies censées neutraliser ces fiducies? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 18.3(1) — Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15, art. 222(3).

Faillite et insolvabilité — Procédure — Le juge en cabinet avait-il le pouvoir, d'une part, de lever partiellement la suspension des procédures pour permettre à la compagnie débitrice de faire cession de ses biens en faillite et, d'autre part, de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11.

Fiducies — Fiducies expresses — Somme perçue au titre de la TPS mais non versée à la Couronne — Ordonnance du juge exigeant que la TPS soit détenue par le contrôleur dans son compte en fiducie — Le fait que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte du contrôleur a-t-il créé une fiducie expresse en faveur de la Couronne?

The debtor company commenced proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"), obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor company's outstanding debts at the commencement of the reorganization was an amount of unremitted Goods and Services Tax ("GST") payable to the Crown. Section 222(3) of the *Excise Tax Act* ("*ETA*") created a deemed trust over unremitted GST, which operated despite any other enactment of Canada except the *Bankruptcy and Insolvency Act* ("*BIA*"). However, s. 18.3(1) of the *CCAA* provided that any statutory deemed trusts in favour of the Crown did not operate under the *CCAA*, subject to certain exceptions, none of which mentioned GST.

Pursuant to an order of the *CCAA* chambers judge, a payment not exceeding $5 million was approved to the debtor company's major secured creditor, Century Services. However, the chambers judge also ordered the debtor company to hold back and segregate in the Monitor's trust account an amount equal to the unremitted GST pending the outcome of the reorganization. On concluding that reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the *BIA*. The Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal allowed the appeal on two grounds. First, it reasoned that once reorganization efforts had failed, the chambers judge was bound under the priority scheme provided by the *ETA* to allow payment of unremitted GST to the Crown and had no discretion under s. 11 of the *CCAA* to continue the stay against the Crown's claim. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the chambers judge had created an express trust in favour of the Crown.

Held (Abella J. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA* can be resolved through an interpretation that properly recognizes the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by

La compagnie débitrice a déposé une requête sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« *LACC* ») et obtenu la suspension des procédures dans le but de réorganiser ses finances. Parmi les dettes de la compagnie débitrice au début de la réorganisation figurait une somme due à la Couronne, mais non versée encore, au titre de la taxe sur les produits et services (« TPS »). Le paragraphe 222(3) de la *Loi sur la taxe d'accise* (« *LTA* ») crée une fiducie réputée visant les sommes de TPS non versées. Cette fiducie s'applique malgré tout autre texte législatif du Canada sauf la *Loi sur la faillite et l'insolvabilité* (« *LFI* »). Toutefois, le par. 18.3(1) de la *LACC* prévoyait que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, les fiducies réputées établies par la loi en faveur de la Couronne ne s'appliquaient pas sous son régime.

Le juge siégeant en son cabinet chargé d'appliquer la *LACC* a approuvé par ordonnance le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars. Toutefois, il a également ordonné à la compagnie débitrice de retenir un montant égal aux sommes de TPS non versées et de le déposer séparément dans le compte en fiducie du contrôleur jusqu'à l'issue de la réorganisation. Ayant conclu que la réorganisation n'était pas possible, la compagnie débitrice a demandé au tribunal de lever partiellement la suspension des procédures pour lui permettre de faire cession de ses biens en vertu de la *LFI*. La Couronne a demandé par requête le paiement immédiat au receveur général des sommes de TPS non versées. Le juge siégeant en son cabinet a rejeté la requête de la Couronne et autorisé la cession des biens. La Cour d'appel a accueilli l'appel pour deux raisons. Premièrement, elle a conclu que, après que la tentative de réorganisation eut échoué, le juge siégeant en son cabinet était tenu, en raison de la priorité établie par la *LTA*, d'autoriser le paiement à la Couronne des sommes qui lui étaient dues au titre de la TPS, et que l'art. 11 de la *LACC* ne lui conférait pas le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne. Deuxièmement, la Cour d'appel a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur, le juge siégeant en son cabinet avait créé une fiducie expresse en faveur de la Couronne.

Arrêt (la juge Abella est dissidente) : Le pourvoi est accueilli.

La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell : Il est possible de résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* en les interprétant d'une manière qui tienne compte adéquatement de l'historique de la *LACC*, de la fonction de cette loi parmi

Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

When faced with the apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*, courts have been inclined to follow *Ottawa Senators Hockey Club Corp. (Re)* and resolve the conflict in favour of the *ETA*. *Ottawa Senators* should not be followed. Rather, the *CCAA* provides the rule. Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. The internal logic of the *CCAA* appears to subject a GST deemed trust to the waiver by Parliament of its priority. A strange asymmetry would result if differing treatments of GST deemed trusts under the *CCAA* and the *BIA* were found to exist, as this would encourage statute shopping, undermine the *CCAA*'s remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the *ETA* does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the *CCAA* in the circumstances of this case. In any event,

l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et des principes d'interprétation de la *LACC* reconnus dans la jurisprudence. L'historique de la *LACC* permet de distinguer celle-ci de la *LFI* en ce sens que, bien que ces lois aient pour objet d'éviter les coûts sociaux et économiques liés à la liquidation de l'actif d'un débiteur, la *LACC* offre plus de souplesse et accorde aux tribunaux un plus grand pouvoir discrétionnaire que le mécanisme fondé sur des règles de la *LFI*, ce qui rend la première mieux adaptée aux réorganisations complexes. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence permettant aux créanciers de savoir s'ils ont la priorité dans l'éventualité d'une faillite. Le travail de réforme législative contemporain a principalement visé à harmoniser les aspects communs à la *LACC* et à la *LFI*, et l'une des caractéristiques importantes de cette réforme est la réduction des priorités dont jouit la Couronne. Par conséquent, la *LACC* et la *LFI* contiennent toutes deux des dispositions neutralisant les fiducies réputées établies en vertu d'un texte législatif en faveur de la Couronne, et toutes deux comportent des exceptions expresses à la règle générale qui concernent les fiducies réputées établies à l'égard des retenues à la source. Par ailleurs, ces deux lois considèrent les autres créances de la Couronne comme des créances non garanties. Ces lois ne comportent pas de dispositions claires et expresses établissant une exception pour les créances relatives à la TPS.

Les tribunaux appelés à résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* ont été enclins à appliquer l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* et à trancher en faveur de la *LTA*. Il ne convient pas de suivre cet arrêt. C'est plutôt la *LACC* qui énonce la règle applicable. Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Il semble découler de la logique interne de la *LACC* que la fiducie réputée établie à l'égard de la TPS est visée par la renonciation du législateur à sa priorité. Il y aurait une étrange asymétrie si l'on concluait que la *LACC* ne traite pas les fiducies réputées à l'égard de la TPS de la même manière que la *LFI*, car cela encouragerait les créanciers à recourir à la loi la plus favorable, minerait les objectifs réparateurs de la *LACC* et risquerait de favoriser les maux sociaux que l'édiction de ce texte législatif visait justement à

recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

prévenir. Le paragraphe 222(3) de la *LTA*, une disposition plus récente et générale que le par. 18.3(1) de la *LACC*, n'exige pas l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. En tout état de cause, par suite des modifications apportées récemment à la *LACC* en 2005, l'art. 18.3 a été reformulé et renuméroté, ce qui en fait la disposition postérieure. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS. Le conflit entre la *LTA* et la *LACC* est plus apparent que réel.

L'exercice par les tribunaux de leurs pouvoirs discrétionnaires a fait en sorte que la *LACC* a évolué et s'est adaptée aux besoins commerciaux et sociaux contemporains. Comme les réorganisations deviennent très complexes, les tribunaux chargés d'appliquer la *LACC* ont été appelés à innover. Les tribunaux doivent d'abord interpréter les dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour établir leur pouvoir de prendre des mesures dans le cadre d'une procédure fondée sur la *LACC*. À cet égard, il faut souligner que le texte de la *LACC* peut être interprété très largement. La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. L'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Il s'agit de savoir si l'ordonnance contribuera utilement à la réalisation de l'objectif d'éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. Ce critère s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. En l'espèce, l'ordonnance du juge siégeant en son cabinet qui a suspendu l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS contribuait à la réalisation des objectifs de la *LACC*, parce qu'elle avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et favorisait une transition harmonieuse entre la *LACC* et la *LFI*, répondant ainsi à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*, mais il n'existe aucun hiatus entre ces lois étant donné qu'elles s'appliquent de concert et que, dans les deux cas, les créanciers examinent le régime de distribution prévu par la *LFI* pour connaître la situation qui serait la leur en cas d'échec de la réorganisation. L'ampleur du pouvoir discrétionnaire conféré au tribunal par la *LACC* suffit pour établir une passerelle vers une liquidation opérée sous le régime de la *LFI*. Le juge siégeant en son cabinet pouvait donc rendre l'ordonnance qu'il a prononcée.

No express trust was created by the chambers judge's order in this case because there is no certainty of object inferrable from his order. Creation of an express trust requires certainty of intention, subject matter and object. At the time the chambers judge accepted the proposal to segregate the monies in the Monitor's trust account there was no certainty that the Crown would be the beneficiary, or object, of the trust because exactly who might take the money in the final result was in doubt. In any event, no dispute over the money would even arise under the interpretation of s. 18.3(1) of the *CCAA* established above, because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount.

Per Fish J.: The GST monies collected by the debtor are not subject to a deemed trust or priority in favour of the Crown. In recent years, Parliament has given detailed consideration to the Canadian insolvency scheme but has declined to amend the provisions at issue in this case, a deliberate exercise of legislative discretion. On the other hand, in upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, courts have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In the context of the Canadian insolvency regime, deemed trusts exist only where there is a statutory provision creating the trust and a *CCAA* or *BIA* provision explicitly confirming its effective operation. The *Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act* all contain deemed trust provisions that are strikingly similar to that in s. 222 of the *ETA* but they are all also confirmed in s. 37 of the *CCAA* and in s. 67(3) of the *BIA* in clear and unmistakeable terms. The same is not true of the deemed trust created under the *ETA*. Although Parliament created a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it did not confirm the continued operation of the trust in either the *BIA* or the *CCAA*, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

L'ordonnance du juge siégeant en son cabinet n'a pas créé de fiducie expresse en l'espèce, car aucune certitude d'objet ne peut être inférée de cette ordonnance. La création d'une fiducie expresse exige la présence de certitudes quant à l'intention, à la matière et à l'objet. Lorsque le juge siégeant en son cabinet a accepté la proposition que les sommes soient détenues séparément dans le compte en fiducie du contrôleur, il n'existait aucune certitude que la Couronne serait le bénéficiaire ou l'objet de la fiducie, car il y avait un doute quant à la question de savoir qui au juste pourrait toucher l'argent en fin de compte. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dégagée précédemment, aucun différend ne saurait même exister quant à l'argent, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question.

Le juge Fish : Les sommes perçues par la débitrice au titre de la TPS ne font l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité, mais il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il s'agit d'un exercice délibéré du pouvoir discrétionnaire de légiférer. Par contre, en maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, les tribunaux ont protégé indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. Dans le contexte du régime canadien d'insolvabilité, il existe une fiducie réputée uniquement lorsqu'une disposition législative crée la fiducie et qu'une disposition de la *LACC* ou de la *LFI* confirme explicitement l'existence de la fiducie. La *Loi de l'impôt sur le revenu*, le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* renferment toutes des dispositions relatives aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la *LTA*, mais le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions est confirmé à l'art. 37 de la *LACC* et au par. 67(3) de la *LFI* en termes clairs et explicites. La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne confirme pas l'existence de la fiducie dans la *LFI* ou la *LACC*, ce qui témoigne de son intention de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

Per Abella J. (dissenting): Section 222(3) of the *ETA* gives priority during *CCAA* proceedings to the Crown's deemed trust in unremitted GST. This provision unequivocally defines its boundaries in the clearest possible terms and excludes only the *BIA* from its legislative grasp. The language used reflects a clear legislative intention that s. 222(3) would prevail if in conflict with any other law except the *BIA*. This is borne out by the fact that following the enactment of s. 222(3), amendments to the *CCAA* were introduced, and despite requests from various constituencies, s. 18.3(1) was not amended to make the priorities in the *CCAA* consistent with those in the *BIA*. This indicates a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails. Section 222(3) achieves this through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" other than the *BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3). By operation of s. 44(*f*) of the *Interpretation Act*, the transformation of s. 18.3(1) into s. 37(1) after the enactment of s. 222(3) of the *ETA* has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision. This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes other than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

La juge Abella (dissidente) : Le paragraphe 222(3) de la *LTA* donne préséance, dans le cadre d'une procédure relevant de la *LACC*, à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Cette disposition définit sans équivoque sa portée dans des termes on ne peut plus clairs et n'exclut que la *LFI* de son champ d'application. Les termes employés révèlent l'intention claire du législateur que le par. 222(3) l'emporte en cas de conflit avec toute autre loi sauf la *LFI*. Cette opinion est confortée par le fait que des modifications ont été apportées à la *LACC* après l'édiction du par. 222(3) et que, malgré les demandes répétées de divers groupes, le par. 18.3(1) n'a pas été modifié pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. Cela indique que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

Cette conclusion est renforcée par l'application d'autres principes d'interprétation. Une disposition spécifique antérieure peut être supplantée par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale. Le paragraphe 222(3) accomplit cela de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » sauf la *LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3). Selon l'alinéa 44*f*) de la *Loi d'interprétation*, le fait que le par. 18.3(1) soit devenu le par. 37(1) à la suite de l'édiction du par. 222(3) de la *LTA* n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure ». Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, ce pouvoir discrétionnaire demeure assujetti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi autre que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1), ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent, il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

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flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

ni des avantages qu'offrait, en présence de réorganisations de plus en plus complexes, un processus souple de réorganisation sous surveillance judiciaire par rapport au régime plus rigide de la *LFI*, fondé sur des règles préétablies. La « souplesse de la LACC [était considérée comme offrant] de grands avantages car elle permet de prendre des décisions créatives et efficaces » (Industrie Canada, Direction générale des politiques-cadres du marché, *Rapport sur la mise en application de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies* (2002), p. 50). Au cours des trois dernières décennies, la résurrection de la *LACC* a donc été le moteur d'un processus grâce auquel, selon un auteur, [TRADUCTION] « le régime juridique canadien de restructuration en cas d'insolvabilité — qui était au départ un instrument plutôt rudimentaire — a évolué pour devenir un des systèmes les plus sophistiqués du monde développé » (R. B. Jones, « The Evolution of Canadian Restructuring : Challenges for the Rule of Law », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2005* (2006), 481, p. 481).

[22] While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing,

[22] Si les instances en matière d'insolvabilité peuvent être régies par des régimes législatifs différents, elles n'en présentent pas moins certains points communs, dont le plus frappant réside dans le modèle de la procédure unique. Le professeur Wood a décrit ainsi la nature et l'objectif de ce modèle dans *Bankruptcy and Insolvency Law* :

> [TRADUCTION] Elles prévoient toutes une procédure collective qui remplace la procédure civile habituelle dont peuvent se prévaloir les créanciers pour faire valoir leurs droits. Les recours des créanciers sont collectivisés afin d'éviter l'anarchie qui régnerait si ceux-ci pouvaient exercer leurs recours individuellement. En l'absence d'un processus collectif, chaque créancier sait que faute d'agir de façon rapide et déterminée pour saisir les biens du débiteur, il sera devancé par les autres créanciers. [p. 2-3]

Le modèle de la procédure unique vise à faire échec à l'inefficacité et au chaos qui résulteraient de l'insolvabilité si chaque créancier engageait sa propre procédure dans le but de recouvrer sa créance. La réunion — en une seule instance relevant d'un même tribunal — de toutes les actions possibles contre le débiteur a pour effet de faciliter la négociation avec

rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

[23] 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. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, s. 25; see also *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*).

[24] With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4th) 192, at para. 19).

[25] Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

les créanciers en les mettant tous sur le même pied. Cela évite le risque de voir un créancier plus combatif obtenir le paiement de ses créances sur l'actif limité du débiteur pendant que les autres créanciers tentent d'arriver à une transaction. La *LACC* et la *LFI* autorisent toutes deux pour cette raison le tribunal à ordonner la suspension de toutes les actions intentées contre le débiteur pendant qu'on cherche à conclure une transaction.

[23] Un autre point de convergence entre la *LACC* et la *LFI* concerne les priorités. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence pour ce qui se produira dans une telle situation. De plus, l'une des caractéristiques importantes de la réforme dont ces deux lois ont fait l'objet depuis 1992 est la réduction des priorités de la Couronne (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73 et 125; L.C. 2000, ch. 30, art. 148; L.C. 2005, ch. 47, art. 69 et 131; L.C. 2009, ch. 33, art. 25; voir aussi *Québec (Revenu) c. Caisse populaire Desjardins de Montmagny*, 2009 CSC 49, [2009] 3 R.C.S. 286; *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35; *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité*).

[24] Comme les régimes de restructuration parallèles de la *LACC* et de la *LFI* constituent désormais une caractéristique reconnue dans le domaine du droit de l'insolvabilité, le travail de réforme législative contemporain a principalement visé à harmoniser, dans la mesure du possible, les aspects communs aux deux régimes et à privilégier la réorganisation plutôt que la liquidation (voir la *Loi édictant la Loi sur le Programme de protection des salariés et modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et d'autres lois en conséquence*, L.C. 2005, ch. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta L.R. (4th) 192, par. 19).

[25] Ayant à l'esprit le contexte historique de la *LACC* et de la *LFI*, je vais maintenant aborder la première question en litige.

DATE: 20061017
DOCKET: C44455

COURT OF APPEAL FOR ONTARIO

LASKIN, ROSENBERG AND SIMMONS JJ.A.

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.	Frederick L. Myers and Jason Wadden for the appellant, The Superintendent of Finance Services (Ontario)
AND IN THE MATTER OF A Plan or Plans of Compromise or Arrangement of Ivaco Inc. and the Applicants listed in Schedule "A"	Andrew Hatnay for the respondent, Quebec Pension Committee of Ivaco Inc. Jeffrey S. Leon and Richard B. Swan for the respondent, National Bank of Canada Dan V. MacDonald for the respondent, Bank of Nova Scotia Geoff R. Hall for the respondent, QIT-Fer et Titane Inc. Robert W. Staley and Evangelia Kriaris for the respondent, Informal Committee of Noteholders Peter F.C. Howard for the Monitor, Ernst & Young Inc. Heard: February 22, 2006

of the amount of the deemed trusts was not advanced before him. The Superintendent advanced this submission for the first time in this court. I do not agree with it.

[42] I will deal first with whether the motions judge should have required the Monitor, Ernst & Young, to segregate the amount of the deemed trusts. The Superintendent contends that the Companies, and in their place the Monitor, had a statutory and fiduciary obligation to segregate. As the Monitor was an officer of the court, the motions judge should have compelled it to fulfill these duties. This contention faces three obstacles: the language of the PBA; the terms of the pension stay order; and the status and role of the Monitor.

[43] The deemed trusts for unpaid past service and special contributions are found in ss. 57(3) and (4) of the PBA. Subsection (3) is the basic provision that creates a deemed trust for unpaid employer contributions. Subsection (4) stipulates that on the wind up of a pension plan, employer contributions accrued but not yet due because of the timing of the wind up are also deemed to be held in trust:

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

[44] At para. 11 of his decision, the motions judge said that both unpaid contributions and wind-up liabilities are deemed to be held in trust under s. 57(3). In his earlier decision in *Toronto-Dominion Bank v. Usarco* (1991), 42 E.T.R 235, Farley J. said, at para. 25, that the equivalent legislation then in force under the *Pension Benefits Act, 1987*, S.O. 1987, c.35 referred only to unpaid contributions, not to wind-up liabilities. I think that the statement in *Usarco* is correct, but I do not need to resolve the issue on this appeal.

[45] Under s. 57(5) of the PBA the plan administrator has a lien and charge on the assets of the employer for the amount of any deemed trust. The lien and charge permit the administrator to enforce the deemed trust.

> s. 57(5) The administrator of the pension plan has a lien and charge on the assets of the employer in an amount equal to the amounts deemed to be held in trust under subsections (1), (3) and (4).

[46] The Superintendent argues that these provisions required the Companies, and in their place the Monitor, to keep the unpaid contributions in a separate account. However, the language of s. 57 does not require the employer to hold the contributions separately. A "deemed trust" is, in a sense, a legal fiction. Outside of bankruptcy it does create a priority for pension contributions, a priority that would not exist but for the designation. Yet, as I have already said, this legislative designation by itself does not create a true trust. If the province wants to require an employer to keep its unpaid contributions to a pension plan in a separate account it must legislate that separation. It has not done so.

[47] The Superintendent argues that the pension stay order supports her position because para. 5 the order, *supra*, recognized that a deemed trust for unpaid contributions may arise during the stay period and that para. 6 of the stay order, *supra*, did not compromise the Companies' obligation to make these contributions. This argument fails to take account of para. 4 of the pension stay order. Paragraph 4 stipulates that during the stay the Companies will not incur any obligation – statutory, fiduciary or otherwise – for failing to make contributions to the plan. In my view, the Superintendent's argument amounts to an impermissible collateral attack on para. 4 of the pension stay order.

[48] The Superintendent also tries to buttress her position by arguing that the Monitor stands in the shoes of the Companies, and like the Companies, has a fiduciary duty to the pension beneficiaries. I disagree.

[49] The Monitor was appointed under s. 11.7(1) of the CCAA to "monitor the business and financial affairs" of the Companies, and was given the functions set out in s. 11.7(3) of that statute: to examine the Companies' property, report to the court on the Companies' business and financial affairs and keep the creditors informed. Although the motions judge gave the Monitor additional powers, they were limited. The Monitor was given authority to deal with day-to-day administrative matters, to finalize the sale to Heico and to receive and control the proceeds of sale. I do not think it can be fairly said that the Monitor "stands in the shoes of the Companies".

[50] Equally important, the Monitor does not owe a fiduciary duty to the pension beneficiaries. The Superintendent's attempt to impose an obligation on the Monitor to segregate the contributions to the non-union plans depends at least on establishing that the Monitor acts as a fiduciary of the employees in those plans. Both the role of the Monitor and the initial stay order preclude the Superintendent's assertion.

Indexed as:

Toronto-Dominion Bank v. Usarco Ltd.

IN THE MATTER OF Usarco Limited Pension Plan for its Hourly Employees
Between
The Toronto-Dominion Bank, Plaintiff, and
Usarco Limited and Frank Levy, Defendants

[1991] O.J. No. 1314

42 E.T.R. 235

28 A.C.W.S. (3d) 392

Action No. 52384/90

Ontario Court of Justice - General Division
Toronto, Ontario

Farley J.

Heard: June 4 and 17, 1991
Judgment: August 2, 1991

(21 pp.)

Receivers -- Property subject to receivership -- Future pension benefits -- Property not subject to receivership -- Deemed trust property -- Employer's pension contributions owing.

Motion by the administrator of an employee pension plan for an order directing the receiver to pay to the administrator monies payable but not yet paid into the pension plan. The defendant employer ceased operations in 1990. The plaintiff bank was the largest secured creditor and it applied for the appointment of a receiver to sell and dispose of the defendant's assets. A bankruptcy petition was filed but no further steps were taken in that proceeding. The defendant failed to remit contributions to the pension plan for some time. The administrator of the plan argued that the defendant's assets were subject to a lien in favour of the administrator and that the amounts collected by the receiver were held in trust for the beneficiaries of the plan. The bank sought to stay the administrator's motion until the bankruptcy proceedings were completed.

HELD: The administrator's motion was granted. The security interest of the bank was subordinate to the interest of the beneficiaries of the deemed trust. The deemed trust provisions of sections 58(3) and 58(4) of the Pension Benefits Act referred to the contributions which were to have been made but were not. The bank's security interest took priority over those special payments required to be made by the defendant to fully fund its pension obligations as of the wind-up date. The deemed trust extended to the amount that the defendant was obligated to pay into the pension fund and the interest on unpaid contributions, prorated to the date it ceased operations.

STATUTES, REGULATIONS AND RULES CITED:

Bankruptcy Act, R.S.C. 1985, c. B-3, ss. 43(13), 67(a), 70(1), 71(1).
Pension Benefits Act, 1987, S.O. 1987, c. 35, ss. 58(3), 58(4), 58(5), 58(6), 59(1), 59(2), 76(1), 76(2).
Pension Benefits Act Regulations, ss. 1, 4(1), 4(2), 4(3), 5(1)(b).
Personal Property Security Act, 1989, S.O. 1989, c. 16, ss. 30(7), 30(8), 33(1).

Harry Underwood, for Ernst & Yonge Inc., Administrator of the Usarco Limited Pension Plan for hourly employees.
M. MacNaughton, for the T-D Bank, a secured creditor of Usarco Limited.
N. Saxe, for Coopers & Lybrand Receivers, appointed for Usarco Limited.

FARLEY J.:-- Ernst & Yonge Inc. ("Administrator") is the administrator appointed by the Superintendent of Pensions pursuant to the Pensions Benefit Act, 1987 (Ont.), c. 35 ("PBA") as to the hourly employee pension plan ("Plan") at Usarco Limited ("Usarco").

The wind-up date for this Plan was July 13, 1990 being the date that Usarco ceased operations. A bankruptcy petition was filed by A. Gold & Sons Ltd. ("Gold"), dated January 5, 1990; nothing has proceeded in regard to this petition. The Toronto Dominion Bank ("Bank") is the largest creditor, being exposed for some $18 million; it is secured by a general security agreement which was registered under the Personal Property Security Act, 1989 (Ont.), c. 16 ("PPSA") or a predecessor thereof.

The Bank applied to the court on October 11, 1990 for the appointment of Coopers & Lybrand Limited ("Receiver") as receiver of Usarco for the purpose of selling or otherwise disposing of Usarco's assets. As of April 30, 1991 the Receiver had collected $503,571 from accounts receivable, $581,343 from inventory sales and $475,238 from realization of other assets. This was a total of $1,560,152 less disbursements of $486,532 leaving cash on hand in the amount of $1,073,620.

Usarco conducted its business in Hamilton as a scrap metal dealer and processor. Apparently there are concerns vis-a-vis environmental claims as to the Hamilton property. The Bank indicates that it will not move to join the Gold bankruptcy

petition and move it forward (the principal of Gold having died)
until the Hamilton property is sold. However, the property is now for sale and the Bank claims that it will proceed expeditiously, after the sale, as to the bankruptcy proceedings.

Usarco failed to remit regular and special contributions to
the Plan. The Plan did not require employee contributions. Regular contributions are required in respect of benefits accruing in the year contributions are to be made and special contributions are in respect of unfunded liabilities as determined by a triennial actuarial report, the last of which (May 1989) was made as of December 31, 1988. That report showed that Usarco was $206,920 short. Usarco anticipated it would have
been able to transfer a surplus in its salaried employees plan to remedy this; however, this was not permitted by the Pension Commission. Since December 31, 1988, Usarco failed to make regular contributions of $47,853.16 and special ones of $121,748.77 for a total of $169,601.93. Missed contributions then on that basis would be a total of $376,521.93.

The May 1989 report indicated that as of December 31, 1988 the Plan was unfunded to the extent of $711,071. This amount was
made up of $295,044 as at the end of 1985 (to be made up by special payments of $35,192 per year over twelve years) and a further $416,027 as at the end of 1988 (to be made up by special
payments of $41,702 over 15 years). Deducting the missed special
contributions, previously mentioned, to the wind-up date would result in a net of approximately $600,000. There was no solvency
deficiency.

On November 7, 1990 and December 20, 1990 the Administrator's counsel wrote to Usarco and the Receiver giving formal notice that all the assets of Usarco were subject to a lien and charge in favour of the Administrator and demanded payment of the amount of the deemed trust (see: s. 58(3)(4)(5)(6) PBA). The then counsel for the Receiver (now counsel for the Bank) wrote back on February 7, 1991 and referred to an enclosed copy of the order of Borins J. of October 11, 1990 appointing the Receiver. Paragraphs 9 and 10 of

that order provided that no proceedings be taken against Usarco or the Receiver without leave of the court but that any interested party be at liberty to apply for further orders on seven days' notice.

This matter came forward on April 16, 1991 and has been adjourned on consent of the Administrator, Bank and Receiver a number of times. A term of the adjournment was the undertaking by the Receiver to "hold $500,000 collected since November 7, 1991 (sic) from the proceeds of accounts receivable and inventories of Usarco until the return of the motion ...".

Leave is granted if it is necessary pursuant to the order of October 11, 1990 to the Administrator to bring its motion to have the Receiver pay to the Administrator, on behalf of the employee beneficiaries of the Plan, the amounts claimed. The Bank's motion to stay the Administrator's motion is dismissed. While it is possible for the Bank to be substituted or added as a petitioner in the Gold bankruptcy petition [s. 43(13) Bankruptcy Act, R.S.C. 1985, c. B-3 ("BA")], it has not moved to do so. It is now approximately a year and a half since the Gold petition. The Bank will not move in respect of a petition until the Hamilton property is sold. It is unclear when this might happen; no likely timetable was established. In my view it would be inappropriate for the Bank to put all proceedings involving Usarco (including this motion by the Administrator) into suspended animation while the Bank determined if, as and when it wished to take action. While the Bank might point to the fact that the Receiver has undertaken to hold $500,000 until the return of this motion to advance its assertion that the Administrator would not be prejudiced awaiting the disposition of the bankruptcy petition, I am mindful of the Bank's position that a bankruptcy petition would reverse priorities, that the amount claimed by the administrator is in excess of $500,000 and that the $500,000 being held does not have any interest attributed to it.

The relevant provisions of the legislation are as follows:

PBA	PPSA	BA	PBA Regs.
s.58(3)(4)(5)(6)	s.30(7)(8)	s.43(13)	s.1 (certain definitions)

s.59(1)(2)	s.33(1)	s.67(a)	s.4(1)(2)(3)
s.76(1)(2)		s.70(1) s.71((1)	s.5(1)(b)

I have set these out in an appendix.

It would appear that if the bankruptcy had come into effect as of a date prior to the Administrator's claim the subject matter of the deemed trust would not have come into existence: see: Re IBL Industries Ltd. (1991), 2 O.R. (3d) 140 (O.C.J.) relying on British Columbia v. Henfrey Samson Belair Ltd. (1989), 75 C.B.R. (N.S.) 1 (S.C.C.). The Henfrey Samson case at p.18 pointed out the principle that the provinces cannot create priorities that would be effective under the BA by their own legislation. One of the primary purposes of a bankruptcy proceeding is to secure an equitable distribution of the debtor's property amongst the creditors; although another purpose may be for creditors to avail themselves of provisions of the BA which may enhance their position by giving them certain priorities which they would not otherwise enjoy: see: Black Bros. (1978) Ltd. (1982), 41 C.B.R. (N.S.) 163 (B.C.S.C.).

Section 71(1) of the BA provides that a bankruptcy will have relation back to the date the bankruptcy petition was made: see also: In re W (1921), 2 C.B.R. 176 (Ont. S.C. Registrar) and Re Develox Industries Limited (No. 3) (1970), 15 C.B.R. (N.S.) 18 (Ont. S.C.).

Therefore, since the bankruptcy petition has not been dealt with, we are presently dealing with a claim by the Administrator for certain trust funds held by the Receiver. The security interest of the Bank is subordinate to the interest of the beneficiaries of the deemed trust (represented by the Administrator): (see: s. 30(7) PPSA). The Bank suggested that it was entitled to a purchase money security interest in Usarco's inventory and its proceeds (see: s. 30(8) PPSA). It did not, however, advance any material to support the proposition that it did not need to send out a purchase money security interest notice in light of its assertion that it was

the only secured creditor or when the inventory came into Usarco's possession, vis-a-vis the Bank's financing. I must reject the Bank's contention because of this lack of evidence.

The Administrator's position is that if it enforces its rights and obtains payment, such payment would not be subject to being put back into the bankruptcy pot pursuant to s. 71(1) of the BA. In support of this proposition the Administrator cites s. 70(1) of the BA. Houlden and Morawetz, Bankruptcy Law of Canada, 3rd ed. (1989) Vol. 1, pp. 3-120 to 3-122 would appear to support that claim and specifically:

> Section 70(1) does not refer to "the date of bankruptcy" but to "every receiving order and every assignment". In A.C. Weeks Ltd. v. C.C.M.T.A. (1962), 4 C.B.R. (N.S.) 182, 40 W.W.R. 312 (B.C.C.A.), the British Columbia Court of Appeal held that the doctrine of relation back in s. 71(1) had no application to s. 70(1), and money paid to a judgment creditor after the filing of a petition but before the making of a receiving order could be retained by the creditor. (p. 3-120.1-3-121)

Aside from the Weeks case cited in Houlden and Morawetz the following cases would also appear to support the Administrator's proposition: Price Waterhouse Ltd. v. Marathon Realty Co. Ltd. (1979), 32 C.B.R. (N.S.) 71 (Man. Q.B.); Re Sara (1985), 56 C.B.R (N.S.) 282 (Ont. S.C.); Re Southern Fried Foods Limited. (1976), 21 C.B.R. (N.S.) 267 (Ont. S.C.); J.J.H. McLean Company, Limited v. Newton In re Kaplan Estate (1926), 8 C.B.R. 61 (Man. C.A.).

The Administrator is taking the steps that it feels are necessary to perfect its claim for the monies in advance of the determination of the bankruptcy petition, one that conceivably may never be proceeded with further. In this respect it is further ahead in the foot race than was the creditor attempting to perfect under the PPSA in Re Hillstead Limited (1979), 32 C.B.R. (N.S.) 55 (Ont. S.C.) or the union in the Re IBL case, supra. In those cases the claimants brought their action after the bankruptcy was determined so that there was no hope of having completely executed payment prior to the bankruptcy determination. The deemed trust provision would also imply a fiduciary obligation on the part of Usarco. A trustee in bankruptcy stepping into the shoes of Usarco must deal with that fiduciary obligation.

It seems to me that the Administrator's position would be stronger than the types of claims set out in the above cases since it comprises a trust claim. If so, then according to s. 67(a) of the BA such trust property would not be property of a

bankrupt divisible amongst its creditors. The Administrator asserts that the deemed trust under the PBA has been converted into a true trust either (a) by notice or (b) by virtue of an actual separation of the funds by the Receiver. A true trust would, if it exists, prevail against a competing claim of a trustee in bankruptcy. While it appears to me that the Administrator gave notice to the Receiver by the November and December letters (with an estimated amount of the deemed trust of $489,928) it does not seem that the Receiver had notice of any further claim until June 19, 1991 when the Administrator advanced a further claim for approximately $600,000 plus interest. As to the question of an actual separation of funds by the Receiver, the Administrator relies on the terms of the undertaking given on one of the multiple adjournments of this matter. Its text is as follows:

> On consent adjourned to May 13, 1991 on the undertaking of the Receiver to
>
> 1. hold $500,000 collected since November 7, 1991 from the proceeds of accounts receivable and inventories at Usarco until the return of the motion on May 13, 1991, and
> 2. notify the Applicant of any motion for an order directing the Receiver to pay any funds in its hand to any creditor of Usarco or Frank Levy.
>
> (Indicated signed by counsel for the Bank, Receiver and Administrator)

I would think that the claim of an actual separation of funds may not overreach what was said in this understanding. While there is no promise to hold the funds apart and separate per se, I do think that this can be inferred by the fact that paragraph 2 of the undertaking requires the Receiver to notify the Administrator of a motion to the effect of directing the Receiver to pay out any funds (which I assume would include the $500,000 to any creditor of Usarco). The undertaking therefore would seem to have the $500,000 as being the subject matter of this judicial determination as to the Administrator's trust claim. On this basis it may meet the test of separation enunciated in the Re IBL case, supra. Certainly, the Administrator has given Usarco and the Receiver notice to the extent of $489,928.

If the funds are true trust funds then they will not be property of Usarco in the event that Usarco is determined to be bankrupt (see s. 67(a) BA). It is clear that if the funds are merely deemed to be trust funds, then such deeming is not sufficient to segregate such for the purposes of the BA (see: Re IBL case, supra, at pp. 143-4).

Section 58(4) of the PBA provides that the amount deemed to be held in trust on a wind-up situation is:

> ...equal to employer contributions accrued to the date of the wind-up but not yet due under the plan or regulations.

This should be contrasted with the language of s. 58(3) which deals with a non wind-up situation:

> ...equal to the employer contributions due and not paid into the pension fund.

Section 76(1)(a) obliges the employer in a wind-up situation to pay into the pension fund 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". In this context what does "accrued", "due", "not yet due" and "not yet paid" mean? What is the extent of the trust? Does it apply to the non-current and unfunded liability; does it support a claim for interest?

The Administrator relies on the analysis of Duff J. in Hydro-Electric Power Commission of Ontario et al. v. Albright (1922), 64 S.C.R. 306 to support is claim for the additional monies which are referred to as the non-current unfunded liability. Duff J. indicated at pp. 312-3:

> ...The subjects of this provision are such interest and sums payable for the purpose of a sinking fund as shall have accrued but shall not be due at the time mentioned; and in order to apply the provision you must ascertain what interest and what sums of the character mentioned fall at the specified time within the described category - the category defined by the words
>
> interest and sinking fund payments
> ... accrued ... but not yet due.
>
> The word "due" in relation to moneys in respect of which there is a legal obligation to pay them may mean either that the facts making the obligation operative have come into existence with the exception that the day of payment has not yet arrived, or it may mean that the obligation has not only been completely constituted but is also presently exigible. That it is used in the latter sense in the present instance is perfectly clear - otherwise the contrast expressed between payments "accrued" and payments "due" would, especially in the case of interest, be patent nonsense. The most natural meaning of such a phrase as "accrued payments" would be, and standing alone it would prima facie receive that reading, moneys presently payable; but the word "accrued" according to well recognized usage has, as applied to rights or liabilities the meaning simply of completely constituted - and it may have this meaning although it appears from the context that the right completely constituted or the liability completely constituted is one which is only exercisable or enforceable in futuro -a debt for example which is debitum in praesenti solvendum in futuro. It is in this sense that it has been widely applied to express the fact that such a liability has been

> created in relation to a sum of money, part of a whole (made up of an accumulation of such parts) which is not to be payable until a later date, and it is in this sense that it seems to be used in the clause before us.

Quite clearly, in a wind-up situation, the wording of s. 58(4) is to oblige the employer (Usarco) with a trust arrangement concerning those contributions which are accrued even though such may not be due under the plan. This is distinct from an ongoing situation envisaged by s. 58(3) where such obligation is with respect to contributions which are then due but not yet paid over to the pension fund. Section 58(5) gives the Administrator a lien and a charge over the deemed trust amounts. By s. 58(6) the deemed trust applies whether or not the employer kept these monies separate and apart. It is clear from s. 76(1)(a) that "due" and "accrued" are not identical as they are referred to separately therein.

The regulations to the PBA are not particularly helpful in distinguishing on the basis of "contributions" versus "special payments". While it is true that s. 4(2)(c) of the regulation refers to "special payments" without, as in s. 4(2)(a) and (b), indicating these are contributions, it is also true that s. 4(3)4 refers to "employer contributions for a special payment". I also note that s. 4(1) refers to a contribution "both in respect of the normal cost [that is, a regular payment] and any going concern unfunded actuarial liabilities [i.e. special payments]". I conclude that as is the case with so much technical legislation, particularly if it has been patch worked, that the language of intent has simply not been fully coordinated. The PBA and regulations thereunder are legislation which are not designed for persons not actively working in the field to tread in with any comfort.

However, it should be noted that s. 76(1) of the PBA is segregated into two parts (a) and (b). Section 76(1)(b) appears to deal with special payment requirements envisaged by "going concern assets", "going concern liabilities", "going concern unfunded", "actuarial liability" and "going concern evaluation". This is so especially "when going concern liability" is said to mean "the present value of the accrued benefits of a pension plan determined on the basis of a going concern valuation". Such going concern valuation is one that is required in the triennial

report as set out in s.11 of the regulations. Section 76(1)(b)(ii) appears to pick up the concept of the unfunded liability that was to have been made good by the special payments. Section 76(1)(b) is then to be contrasted with s. 76(1)(a) which deals with payments which are "due or that may have accrued" but have not yet been paid into the pension fund. This contrast implies that the special payments are not either due or accrued as otherwise s. 76(1)(b)(ii) would be redundant. Section 5(1) of the regulation speaks of the special payments being required to "amortize" a "going concern unfunded actuarial liability". The Shorter Oxford Dictionary, 3rd ed. (1988), reprinted, defines "amortized" as "to extinguish a debt, etc. usually by means of a sinking fund". Thus it denotes a setting aside of the monies, not payment. It is also evident that such special payments in a going concern situation may fluctuate depending on the investment results of the pension fund and the employer's ongoing contributions together with the estimated demands on the fund by the beneficiaries. As of the date of crystallization being the wind-up date, the situation in the pension plan may be (significantly) different from that set forth in the last triennial report. At that time (or rather as of that time) it will be know what are the assets in the fund and the liabilities to be set against such funds by those beneficiaries who are then established as being legally entitled to claim.

It therefore appears to me that the deemed trust provisions of s. 58(3) and (4) only refer to the regular contributions together with those special contributions which were to have been made but were not. In this situation that would be the regular and special payments that should have been made but were not (as reflected in the report as of December 31, 1988) together with any regular or special payments that were scheduled to have been made by the wind-up date, July 13, 1990, but were not made. This is contrasted with the obligation of Usarco to fully fund its pension obligations as of the wind-up date pursuant to s. 76(1). It is recognized in these circumstances however, that the Bank will have a secured position which will prevail against these additional obligations as to the special payments which have not yet required to be paid into the fund. Sadly, it is extremely unlikely there will be a surplus after taking care of the Bank to allow the pension

fund to be fully funded for this (the likelihood being that the wind-up valuation of assets and liabilities of the pension fund will show a deficiency).

On that basis, I believe that there is merit in the Bank's position that s. 58(4) takes into account those employee contributions (regular and special payments) which are developing but not yet, but for that subsection, required to be paid into the pension plan. See Canadian Institute of Chartered Accountants, Terminology for Accountants, 3rd ed. (1983), at p. 5, where "accrue" is defined as "in accounting, to record that which has accrued with the passage of time in connection with the rendering or receiving of service (e.g. interest, taxes, royalties, wages) but the payment of which is not enforceable at the time of recording." Section 59(1) states: "Money that an employer is required to pay into a pension fund accrues on a daily basis." Therefore, in my view the trust extends to the amount that Usarco was obligated to pay into the pension fund, prorated to July 13, 1990.

It also seems to me that s. 59(2) of the PBA deals with the question of interest. It states: "Interest on contributions shall be calculated and credited at a rate not less than the prescribed rates and in accordance with prescribed requirements." This in my view means that interest is to be paid on contributions that are unpaid. I base this on the fact that contributions which are paid will generate income based upon what investments are in fact made (and could be interest, dividend or other basket clause income) and secondly, that this obligation seems to relate to the obligations of the employer set out in the other part of the section (i.e. s. 59(1)).

There is then to be an order in the following terms:

(1) An order granting the Administrator leave to bring this motion as per the order of Borins J. dated October 11, 1990.

(2) An order directing the Receiver to pay the Administrator an amount of money equal to the regular and special payments required to have been made but not yet paid into the pension plan, prorated to July 13, 1990, together with interest at the prescribed rate as set out in s. 59(2) of the PBA on all unpaid amounts from the date such were due to and including the date of payment under this order.

Counsel should be able to work out these amounts with their respective pension consultants but if they are unable to do so, they may speak to me further.

(3) As to the question of costs, the Receiver took the position that it was merely a stakeholder and asked for its costs in the amount of $3,500. I award the Receiver costs in that amount payable out of the funds that it holds. As between the Administrator and the Bank, there were mixed results. It is also to be noted that apparently the question of the non-current unfunded liability was a novel one. Balancing these factors together with the additional factor that the Bank did not wish to proceed with the bankruptcy matter until a time convenient to it (if at all), I am of the view that the Administrator should have part of its costs payable by the Bank. I estimate those related to the current unfunded liabilities as being $3,500. In accordance with the usual procedures costs are to be payable forthwith.

FARLEY J.

APPENDIX

PBA

58.--(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.

(5) The administrator of the pension plan has lien and charge on the assets of the employer in an amount equal to the amounts deemed to be held in trust under subsections (1), (3) and (4).

(6) Subsections (1), (3) and (4) apply whether or not the moneys have been kept separate and apart from other money or property of the employer.

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.

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 regulations if the Commission declares that the Guarantee Fund applies to that 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.

(2) The employer shall pay the moneys due under subsection (1) in the prescribed manner and at the prescribed times.

1.--(1) In this Regulation,

"special payment" means a payment or one of a series of payments determined for the purpose of liquidating a going concern unfunded actuarial liability or solvency deficiency.

(2) In this Part,

"going concern assets" means the value of the assets of a pension plan including accrued and receivable income determined on the basis of a going concern valuation;

"going concern liabilities" means the present value of the accrued benefits of a pension plan determined on the basis of a going concern valuation;

"going concern unfunded actuarial liability" means the excess of going concern liabilities over going concern assets;

"going concern valuation" means a valuation of assets and liabilities of a pension plan using methods and actuarial assumptions considered by the actuary who valued the plan to be in accordance with generally acceptable actuarial principles and practices for the valuation of a continuing pension plan;

4.--(1) Every pension plan shall set out the obligation of the employer or any person required to make contributions on behalf of an employer, to contribute both in respect of the normal cost and any going concern unfunded actuarial liabilities and solvency deficiencies under the plan.

(2) An employer who is required to make contributions to a pension plan or any person who is required to make contributions on behalf of an employer to a pension fund shall make payments to the pension fund or to the insurance company, as applicable, or amounts that are not less than the sum of,

(a) any contributions received from employees, including money withheld from an employee, whether by payroll deduction or otherwise, as the employee's contribution to the pension plan;

(b) contributions required to pay the normal cost; and

(c) special payments determined in accordance with section 5.

(3) The payments referred to in subsection (2) shall be made by the employer or the person who is required to make contributions on behalf of the employer within the following time limits:

1. All sums received by the employer from an employee or deducted from an employee's pay as the employee's contribution to the pension plan, within thirty days following the month in which the sum was received or deducted.
2. Employer contributions in respect of the normal cost for the period prior to the 1st day of January, 1988, not later than 120 days after the end of the fiscal year of the plan.
3. Employer contributions in respect of the normal cost for any period on or after the 1st day of January, 1988, in monthly instalments within thirty days after the month for which contributions are payable, the amount of such instalments to be either a fixed dollar amount, a fixed dollar amount or each employee or member of the plan or a fixed percentage of either that portion of the payroll related to members of the pension plan or employee contributions, in accordance with such contributions as are certified under clauses 10(1)(a) or 11(2)(a).

4. Employer contributions for a special payment required to be made with respect to a fiscal year of the plan commencing prior to the 1st day of January, 1988, within thirty days after the end of the fiscal year.
5. All special payments determined in accordance with section 5, other than a payment made under paragraph 4, by equal monthly instalments throughout the fiscal year of the plan.

5.--(1) Subject to subsections (2) and (3) and section 7, the special payments to amortize a going concern unfunded actuarial liability or solvency deficiency shall not be less than the sum of,

(a) any remaining special payments determined in accordance with subsection (5) with respect to an initial unfunded liability or experience deficiency within the meaning of Regulation 746 of Revised Regulations of Ontario, 1980 (General as it existed on the 31st day of December, 1987;
(b) the amount required to liquidate by equal instalments, with interest at the going concern valuation rate, any other going concern unfunded actuarial liability within a period of fifteen years after the date on which the going concern unfunded actuarial liability arose;
(c) the amount required to liquidate by equal instalments, with interest at the solvency valuation interest rate, any solvency deficiency, other than that part of a solvency deficiency referred to in clause (d), within five years after the review date of the solvency in which the solvency deficiency is identified; and
(d) the amount required to liquidate by equal instalments that part of any solvency deficiency that exists on the 1st day of January, 1988 that is attributable to the application of subsection 75(7) of the Act, with interest at the solvency valuation interest rate, within fifteen years from that date.

PPSA

30.--(7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the Employment Standards Act or under the Pension Benefits Act, 1987.

(8) Subsection (7) does not apply to a perfected purchase-money security interest in inventory or its proceeds.

33.--(1) A purchase-money security interest in inventory or its proceeds has priority over any other security interest in the same collateral given by the same debtor, if

(a) the purchase-money security interest was perfected at the time,
(i) the debtor obtained possession of the inventory, or
(ii) a third party, at the request of the debtor, obtained or held possession of the inventory, whichever is earlier,

(b) before the debtor receives possession of the inventory, the purchase-money secured party gives notice in writing to every other secured party who has registered a financing statement in which the collateral is classified as inventory before the date of registration by the purchase-money secured party; and

(c) the notice referred to in clause (b) states that the person giving it has or expects to acquire a purchase-money security interest in inventory of the debtor, describing such inventory by item or type.

BA

43.(13) Where proceedings on a petition have been stayed or have not been prosecuted with due diligence and effect, the court may, if by reason of the delay or for any other cause it is deemed just, substitute or add as petitioner any other creditor to whom the debtor may be indebted in the amount required by this Act and make a receiving order on the petition of the other creditor, and shall thereupon dismiss on such terms as it may deem just the petition in the stayed or non-prosecuted proceedings.

67. The property of a bankrupt divisible among his creditors shall not comprise
(a) property held by the bankrupt in trust for any other person,

70. (1) Every receiving order and every assignment made in pursuance of this act takes precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, judgments operating as hypothecs, executions or other process against the property of a bankrupt, except those that have been completely executed by payment to the creditor or his agent, and except the rights of a secured creditor.

71.--(1) A bankrupt shall be deemed to have relation back to, and to commence at the time of the filing of, the petition on which a receiving order is made or of the filing of an assignment with the official receiver.

Legislative Summary LS-584E

BILL C-12: 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

Marcia Jones
Law and Government Division

14 December 2007

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LEGISLATIVE HISTORY OF BILL C-12

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	29 October 2007	First Reading:	30 October 2007
Second Reading:	29 October 2007	Second Reading:	15 November 2007
Committee Report:	29 October 2007	Committee Report:	13 December 2007
Report Stage:	29 October 2007	Report Stage:	13 December 2007
Third Reading:	29 October 2007	Third Reading:	13 December 2007

Royal Assent: 14 December 2007

Statutes of Canada: S.C. 2007, c.36

N.B. Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print.**

Legislative history by Michel Bédard

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BILL C-12: 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*

BACKGROUND

Bill C-12, 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, makes a series of important amendments to federal bankruptcy and insolvency legislation. Bill C-12 has been described as a "technical" bill that is intended to correct some of the formal deficiencies in existing legislation. However, many of the changes it makes are of a substantive nature.

Bill C-12 has a somewhat complicated history. On 3 June 2005, the Government introduced a package of major amendments to bankruptcy legislation in Bill C-55, An Act to Establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts. This bill was tabled following a comprehensive government-led review(1) of the

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* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force.

(1) Amendments made to the *Bankruptcy and Insolvency Act* in 1997 required the federal government to report to Parliament on the operation of the Act within five years. The Government organized regional meetings to obtain feedback from stakeholders about the operation of the *Bankruptcy and Insolvency Act* (BIA) and the *Companies' Creditors Arrangement Act*, and commissioned academics to prepare research reports on various features of the BIA. In 2000, the Superintendent of Bankruptcy established a Personal Insolvency Task Force (PITF) to report on the operation of consumer aspects of the federal bankruptcy legislation and to make recommendations for change. The PITF held meetings over a 15-month period and issued its report in August 2002. In a parallel process, Industry Canada also reported to Parliament in September 2002 on the operation of federal bankruptcy legislation. The role of reviewing these reports and holding hearings on the operation of Canada's insolvency system was assigned to the Senate Standing Committee on Bankruptcy, Trade and Commerce. The Committee issued its report in November 2003.

Bankruptcy and Insolvency Act[2] (BIA) and the *Companies' Creditors Arrangement Act*[3] (CCAA).

Bill C-55 made its way through the parliamentary process on an expedited basis, and received Royal Assent on 25 November 2005, shortly before the minority Liberal government fell. Since the bill was rushed through Parliament, the Senate Standing Committee on Banking, Trade and Commerce requested and received the Government's assurance that it would not be proclaimed in force prior to its referral to that Committee for further study, or before 30 June 2006.[4] To date, Bill C-55 (now Chapter 47 of the Statutes of Canada, 2005) has not been proclaimed into force.

Among other things, Chapter 47 would establish a Wage Earner Protection Program, financed out of the Consolidated Revenue Fund, to provide workers with quick payment of unpaid wages in the event of their employer's bankruptcy or receivership. Indeed, Chapter 47 is perhaps best known for its proposed wage-earner protection scheme. However, it would also make a number of significant amendments relating to commercial and consumer insolvency more generally. In May 2006, the Government indicated that it had not proclaimed Chapter 47 in force because of the numerous technical defects in the legislation resulting from its expedited passage through Parliament, and that an interdepartmental committee was working to address these problems.[5]

On 8 December 2006, in the 1st Session of the 39th Parliament, the Minister of Labour (the Honourable Jean-Pierre Blackburn) tabled a notice of ways and means motion to amend the *Bankruptcy and Insolvency Act*, the *Wage Earner Protection Program Act*

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(2) R.S.C. 1985, c. B-3.

(3) R.S.C. 1985, c. C-36.

(4) Office of the Superintendent of Bankruptcy, "Bill C-55 Receives Royal Assent: Next Steps," http://www.ic.gc.ca/epic/site/bsf-osb.nsf/print-en/br01561e.html (accessed 21 November 2007).

(5) Statements of the Honourable Jean-Pierre Blackburn, Minister of Labour, *House of Commons Debates*, Vol. 131, No. 30, 1st Session, 39th Parliament, 31 May 2006, p. 1500. With regards to the Government's position that Chapter 47 requires modifications, see also the Office of the Superintendent of Bankruptcy, note 4.

According to Mr. Colin Carrie, M.P., Parliamentary Secretary to the Minister of Industry, Bill C-12 was drafted following extensive consultations with a panel of leading insolvency law experts, including practitioners and academics. This panel helped the Department in identifying the technical flaws of Chapter 47 and crafting solutions to these problems. Departmental officials also received input from a wide variety of stakeholders, including the Canadian Bar Association, the Canadian Life and Health Insurance Association and family law advocates. *Speaking Notes for Mr. Colin Carrie, M.P., to the Standing Senate Committee on Banking, Trade and Commerce, on Bill C-12: 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 Statues of Canada, 2005*, 29 November 2007.

and Chapter 47 of the Statutes of Canada. The Government wanted to "fast track" the proposed bill through the House without amendments. However, before the bill was tabled, the Bloc Québécois requested amendments dealing with the seizure of Registered Retirement Savings Plans (RRSPs) and Registered Retirement Income Funds (RRIFs) in bankruptcy. These amendments were sought on the basis that the provisions of Chapter 47 encroached on Quebec's legislative jurisdiction to regulate RRSPs and RRIFs.(6) The federal government at first refused to make the amendments, and the bill was never tabled. Some six months later, after the Quebec National Assembly passed a resolution urging the federal government to make the amendments,(7) the Government agreed to include the amendments in the bill. On 12 June 2007, the Minister of Labour tabled a new notice of ways and means motion 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. Bill C-62, 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 was tabled on 13 June 2007, and on the following day it was deemed to have moved through all stages and to have been passed by the House.

Bill C-62 died on the *Order Paper* when Parliament was prorogued on 14 September 2007. However, it was reintroduced in the 2nd Session of the 39th Parliament as Bill C-12, 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. Pursuant to an order of the Speaker made 25 October 2007, Bill C-12 was deemed adopted at all stages and passed by the House on 29 October 2007. It was referred to the Standing Senate Committee on Banking, Trade and Commerce on 15 November 2007.

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(6) See, for example, the debates on this issue in the *House of Commons Debates*, Vol. 141, No. 166, 1st Session, 39th Parliament, 7 June 2007, pp. 1435-1440.

(7) On 7 June 2007, the National Assembly of Quebec passed the following resolution: "That the National Assembly require the Government of Canada to amend the its bill amending *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), so that it fully respects Québec legislation, namely the provisions of the *Civil Code of Québec* and of the *Code of Civil Procedure*, concerning the immunity from seizure of RRSPs and RRIFs, as well as Québec's jurisdiction in this matter." (*Votes and Proceedings of the Assembly*, 1st Session, 38th Legislature, No. 17, 7 June 2007, p. 138.)

The Committee, chaired by Senator David Angus, conducted hearings on Bill C-12 on 29 November and 5 December 2007. The Minster of Labour (the Hon. Jean-Pierre Blackburn) and the Parliamentary Secretary to the Minister of Industry (Colin Carrie, MP) appeared before the Committee. The Committee also heard from representatives of the Canadian Association of Insolvency and Restructuring Professionals. On 13 December 2007, the Committee conducted a clause-by-clause analysis of the bill and reported back to the Senate. Although the Committee did not recommend any amendments, it submitted formal observations on Bill C-12 along with its report (*Observations to the Fifth Report of the Standing Senate Committee on Banking, Trade and Commerce*). In this document, the Committee indicated that it was reporting back to the Senate without having conducted a comprehensive study and review of Bill C-12 in order to speed up the implementation of wage-earner protection legislation. It wrote:

> As the Committee noted in our Seventeenth Report in the 38th Parliament [on Bill C-55], we unanimously support and approve of wage earner protection for workers of bankrupt employers. In our November 2005 report, we indicated that enhanced protection for these vulnerable creditors was long overdue. More than two years later, we continue to believe that the need is urgent.

However, the Committee acknowledged that some stakeholders had certain reservations about Bill C-12, as well as other aspects of bankruptcy and insolvency legislation more generally. Referring to the Minister of Labour's statement before the Committee that further amendments to bankruptcy and insolvency legislation could be made in 2008, the Committee expressed its intention to continue studying the legislation, for the purpose of formulating recommendations to the Government. It also indicated that it would be hearing from stakeholders beginning in early 2008.

Bill C-12 received third reading in the Senate on 13 December 2007. On 14 December 2007, it received Royal Assent, and became Chapter 36 of the Statutes of Canada, 2007.

it is reasonable to conclude that, having regard to the circumstances, the parties would have entered into a substantially similar transaction had they been dealing with each other at arm's length. (Clause 38, sections 81.3(6)-(7) and 81.4(6)-(7) of the BIA).

Finally, Bill C-12 makes the super-priority security applicable on the appointment of an interim receiver as well as of a conventional receiver (clause 38, sections 81.3(9) and 81.4(9) of the BIA).

c. Employment-related Claims of Relatives (Clauses 47-48)

Section 137(2) of the BIA subordinates the claims of a bankrupt's current or former spouse or common-law partner for employment-related remuneration. Section 138 prohibits certain relatives of a bankrupt from claiming a preference under section 136 of the BIA for employment-related remuneration. Bill C-12 repeals these provisions.

2. Amendments to the BIA and CCAA

a. Income Trusts (Clauses 1(3) and 61(2)-(3))

Chapter 47 amends the BIA and the CCAA so that an income trust may undergo insolvency proceedings. It defines the term "income trust" as a trust that has assets in Canada, the units of which are traded in a prescribed stock exchange.

Bill C-12 expands the definition of "income trust" to cover any trust with assets in Canada, if it is structured in one of the following ways:

- its units are listed on a prescribed stock exchange on the date of the initial bankruptcy event; or
- the majority of its units are *held by a trust* whose units are listed on a prescribed stock exchange on the date of the initial bankruptcy event (commonly referred to as a "trust on trust" structure) (clause 1(3), section 2 BIA; and clause 61(2), section 2(1) CCAA).[12]

This amendment ensures that both levels of a "trust on trust" structure – a structure commonly used by many income trusts – may undergo proceedings under the BIA and CCAA.[13]

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(12) Also note that Chapter 47 amends the BIA to include an income trust within the definition of the term "person" (clause 2(3), section 2 BIA). However, under Bill C-12, an income trust is included in the definition of a "corporation," rather than of a "person." This change is not significant, as the term "person" is defined to include a corporation (clauses 1(1)-(2), section 2 BIA).

(13) Blake, Cassels and Graydon LLP, "Proposed Insolvency Law Amendments – Take Two," *Bulletin on Restructuring and Insolvency*, January 2007.

Bill C-12 further clarifies that the term "director," in the case of a trust, means a person occupying the position of trustee, regardless of what the position is called (clause 1(3), section 2 BIA; and clause 61(2), section 2(1) CCAA).

b. Effect of Stay of Proceedings on Regulatory Bodies (Clauses 34-35, 37 and 65)

The CCAA gives provincial and territorial superior courts the power to stay any action, suit or proceeding brought against a company when the company becomes subject to a CCAA order (section 11). This stay of proceedings has been held to apply to provincial market regulators, such as securities commissions or stock exchanges.(14) Such a stay prevents the regulator from being able to take action against a company that is conducting itself inappropriately.(15)

Chapter 47 inserts a new section into the CCAA (section 11.1) to clarify the impact of a stay on a regulatory body. The term "regulatory body" is defined as any person or body having powers, duties or functions relating to the enforcement or administration of a federal or provincial Act, including any prescribed regulatory body (section 11.1(5)). Section 11.1(1) provides that a stay order does not affect the right of a regulatory body with respect to any investigation, suit or proceeding it is taking against the company – except when the regulatory body is seeking to enforce any of its rights as a secured or unsecured creditor. In case of dispute, the company may apply to the court for a declaration as to whether a regulatory body is seeking to enforce its rights as a creditor. Furthermore, on the application of the company, the court may make an order that the regulatory body is not exempted from a stay of proceedings, provided certain conditions are met (sections 11.1(2)-(4)).

Bill C-12 makes some changes to the language of these provisions (at clause 65). For instance, it provides that the regulatory body may not seek "the enforcement of a payment ordered by the regulatory body or the court" (amending the language under Chapter 47, which provides that the regulatory body may not seek "the enforcement of any of its rights as a secured or unsecured creditor").

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(14) Senate, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*, Report of the Standing Senate Committee on Banking, Trade and Commerce, November 2003, p. 126.

(15) Industry Canada, Marketplace Framework Policy Branch, Policy Sector, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*, September 2002, p. 51.

More importantly, Bill C-12 adds parallel provisions into the BIA (section 69.6), in order to ensure that a stay of proceedings under the BIA[16] does not generally prevent regulatory bodies from performing their duties. See clauses 34, 35 and 37 of Bill C-12.

c. Interim Financing (Clauses 18 and 65)

Interim financing, also known as debtor-in-possession financing (DIP financing) is a tool that was first developed in the United States. In DIP financing, a new lender provides an infusion of cash to a business that is seeking reorganization, and in exchange for doing so jumps ahead of other secured creditors.[17] This facilitates the continuation of the debtor company as a going concern pending negotiations for reorganization. DIP financing compromises the claims of other creditors; however, they may benefit if there is a reasonable prospect of a viable restructuring plan.[18]

Neither the BIA nor the CCAA currently contains any provisions on DIP financing. Nonetheless, DIP financing has been authorized by Canadian courts using their "inherent and equitable" jurisdiction in CCAA proceedings.[19]

Chapter 47 introduces new provisions into the BIA and CCAA to specifically authorize court orders for interim financing in reorganization proceedings. New section 50.6 of the BIA and new section 11.2 of the CCAA permit a debtor undergoing reorganization to apply to the court for an order declaring that the debtor's property is subject to a security or charge in favour of any person specified in the order who agrees to lend to the debtor an amount that is approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement. An order for interim financing may be made on any conditions that the court considers appropriate. The interim financing may be provided for a period of 30 days after the commencement of reorganization proceedings,[20] or, if notice of the application has been given

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(16) Under the BIA, where a debtor files a proposal or a notice of intention, there is an automatic stay of proceedings against creditors. While the stay is in effect, no creditor, including secured creditors and the Crown, has any remedy against the insolvent person or his or her property, or may commence or continue any action, execution or other proceeding, for the recovery of a claim provable in bankruptcy – unless the court lifts the stay (sections 69 and 69.1 of the BIA). The stay continues until it is expired by the terms of the BIA or is terminated by court order. Kevin P. McElcheran, *Commercial Insolvency in Canada,* LexisNexis, Markham, p. 292.

(17) Industry Canada, note 15, p. 30.

(18) Ibid.

(19) Ibid. See also the Standing Senate Committee on Banking, Trade and Commerce, *supra* note 14, p. 100; and the Joint Task Force on Business Insolvency Law Reform, *Report*, 15 March 2002, pp. 27-28.

(20) In this paper, the "commencement of reorganization proceedings" refers to the filing of a notice of intention or a proposal under the BIA or the initial filing of an application under the CCAA.

to the secured creditors likely to be affected by the security or charge, for any period specified in the order. However, in the case of interim financing under the CCAA, the court may only make an order for any period after the first 30 days following the initial application if the monitor reports to the court that the company's cash-flow statement is reasonable. The court may specify that the security or charge ranks in priority over any security or charge of any other secured creditor. The court may also specify that the security or charge ranks in priority over any security or charge arising from a previous order for interim financing, but only with the consent of the person in whose favour the previous order was made.

Bill C-12 makes the following amendments to the above provisions:

- It specifies that an order may only be made on notice to the secured creditors who are likely to be affected by the security or charge.

- It clarifies that the security or charge may apply to "all or part" of the debtor's property.

- It provides that the security or charge may not secure an obligation that exists before the order is made. Therefore, the special status accorded to interim financing loans will only apply to money lent to the company during the period of distress.

- It provides that the court may approve the amount of financing that it considers "appropriate," having regard to the cash-flow statement[21] of the debtor. Bill C-12 thus removes the restrictions in the BIA and CCAA as to the duration of financing that may be provided (e.g., with regards to financing after the first 30 days following the commencement of reorganization proceedings).

- The court's authority under Chapter 47 to make an order "on any conditions it considers appropriate" is removed.

  (See clause 18, section 50.6(1) BIA; and clause 65, section 11.2(1) CCAA.)

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(21) When filing a proposal with the official receiver, the trustee must include a statement indicating the projected cash-flow of the insolvent person ("cash-flow statement"). The cash-flow statement must be prepared by whoever is making the proposal, and be reviewed for its reasonableness and signed by both the trustee and the person making the proposal. In the same vein, an insolvent person filing a notice of intention with the official receiver must also prepare and file a cash-flow statement, reviewed for its reasonableness by the trustee under the notice of intention, and signed by both the insolvent person and the trustee. Creditors may obtain a copy of the cash-flow statement on request, unless the court orders otherwise (sections 50(6)(a),50(7)-(8), 50.4(2)(a) and 50.4(3)-(4) of the BIA).

Chapter 47 specifies that the cash-flow statement must indicate, on a *weekly* basis, the projected cash-flow of the insolvent person. Bill C-12 changes this to a *monthly* basis (clause 16(1), section 50(6)(a) and clause 17(1), section 50.4(2)(a)).

Bill C-12 also amends the BIA to allow orders for interim financing for individual debtors who are carrying on a business. (Under Chapter 47, individual debtors are excluded from the provisions on interim financing). However, only property acquired for or used in relation to the individual's business may be subject to the security or charge granted by the order for interim financing (clause 18, section 50.6(2)).

In addition, Bill C-12 makes changes to the factors that the court must consider in deciding whether to grant an order for interim financing. Chapter 47 provides that in deciding whether to make an order for interim financing under the BIA, the court must consider the following factors:

a. the period the debtor is expected to be subject to proceedings under the Act;

b. how the debtor's business and financial affairs are to be governed during the proceedings;

c. whether the debtor's management has the confidence of its major creditors;

d. whether the loan agreement will enhance the debtor's prospects as a going concern if the proposal is approved;

e. the nature and value of the debtor's property;

f. whether any creditor will be materially prejudiced as a result of the debtor's continued operations; and

g. where notice of the application is given to the secured creditors, whether the debtor has provided a cash-flow statement for the period ending 120 days after the making of the order.

Under Bill C-12, factor (d) is changed from whether the loan would "enhance the debtor's prospects as a going concern" to whether it would "enhance the prospects of a viable proposal being made in respect of the debtor." This change mirrors the language of the corresponding provision in the CCAA, which provides that the court must consider "whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company" (clause 18, section 50.6(5)(d)).

Under factor (g), the court must consider a report of the trustee as to the reasonableness of the debtor's cash-flow statement (clause 18, section 50.6(5)(g)). Note that the trustee's report must be filed with the official receiver whenever a proposal or notice of intention is filed (see sections 50(6)(b) and 50.4(2)(b) of the BIA).

Bill C-12 makes minor amendments to the language of the corresponding provision in the CCAA. It also directs the court to consider the report of the monitor as to the reasonableness of the company's cash-flow statement, which must be filed under section 23(1)(b)[22] of the CCAA (clause 65, CCAA, section 11.2(4)(a)-(g)).

d. Assignment of Agreements (Clauses 28, 65 and 112(10))

Chapter 47 adds provisions to the BIA and the CCAA that allow a debtor to apply to the court for an order assigning rights and obligations under an agreement to another person. Bill C-12 makes a number of important changes to these provisions.

1) BIA

a) Chapter 47

Chapter 47 adds a new section 84.1 to the BIA to allow the court, on the application of a trustee or insolvent person, to make an order assigning the rights and obligations of the insolvent person under any agreement to any other person specified by the court who has agreed to the assignment. In deciding whether to make an assignment, the court must consider the following factors: whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and whether it would be appropriate to assign the rights and obligations to that person. The court may not make an assignment if it is satisfied that the insolvent person is in default under the agreement. Moreover, rights and obligations under the following types of agreements cannot be assigned:

- a commercial lease;
- an eligible financial contract (e.g., a derivative);
- a collective agreement;
- rights and obligations that are "not assignable by reason of their nature" (e.g., a personal service contract).

(22) Section 23(1)(b) of the CCAA is enacted by section 131 of Chapter 47. It requires the monitor to review the company's cash-flow statement as to its reasonableness and file a report with the court on his or her findings.

E. Coming Into Force (Clause 113)

The provisions of Bill C-12 come into force on the date of Royal Assent, with the exceptions of clauses 1(1), 1(5)-(7), 3, 6, 9(3), 12, 13, 14(2), 14(3), 15(2), 15(3), 16(2), 16(3), 17(2), 19-22, 25, 31, 34, 35, 37, 42, 44, 46-48, 50, 51(1), 55-57, 58(2) and 67, which come into force on proclamation.

COMMENTARY

Bill C-12 is a long-awaited bill that is intended to correct some of the problems in Chapter 47 of 2005. Although Bill C-12 has been described as a technical amending bill, it is clear that it makes numerous substantive amendments to Canadian bankruptcy and insolvency legislation. These amendments deal with commercial and consumer insolvency issues, as well as administrative and procedural matters under the BIA and CCAA. In combination with Chapter 47, Bill C-12 will introduce wide-ranging reforms to Canadian insolvency legislation. Bill C-12 has not received much public attention, perhaps because of the perception that it has been tabled in order to deal with technical issues.

CANADA

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OFFICIAL REPORT
(HANSARD)

Thursday, September 29, 2005

Speaker: The Honourable Peter Milliken

HOUSE OF COMMONS

Thursday, September 29, 2005

The House met at 10 a.m.

Prayers

● (1000)

[*English*]

BUSINESS OF THE HOUSE

The Speaker: It has been brought to my attention that a clerical error has been found in the report to the House on Bill C-11, the public servants disclosure protection act.

In the Standing Committee on Government Operations and Estimates, a subamendment to clause 24(1)(b) was not recorded correctly in the English version of the report. Regrettably, the report to the House and the reprint of the bill have included this error.

Clause 24(1)(b) should read as follows:

> (b) the subject-matter of the disclosure is not sufficiently important or the disclosure is not made in good faith;

Therefore, I am directing that a corrigendum to the report be prepared to insert the correct words in the English version of clause 24(1)(b). In addition, the working copy of the bill will be corrected in its next edition after third reading.

* * *

[*Translation*]

ENVIRONMENT AND SUSTAINABLE DEVELOPMENT

The Speaker: I have the honour to lay upon the table, pursuant to subsection 23(3) of the Auditor General Act, the report of the Commissioner of the Environment and Sustainable Development to the House of Commons for the year 2005.

This report is deemed permanently referred to the Standing Committee on the Environment and Sustainable Development.

* * *

[*English*]

CHIEF ELECTORAL OFFICER

The Speaker: I also have the honour to lay upon the table the report of the Chief Electoral Officer, entitled "Completing the Cycle of Electoral Reforms". This report is deemed permanently referred to the Standing Committee on Procedure and House Affairs.

[*Translation*]

INDIVIDUAL MEMBERS' EXPENDITURES

The Speaker: I have the honour to table the document entitled "Individual Members' Expenditures for the Fiscal Year 2004-05".

ROUTINE PROCEEDINGS

[*English*]

ORDER IN COUNCIL APPOINTMENTS

Hon. Dominic LeBlanc (Parliamentary Secretary to the Leader of the Government in the House of Commons, Lib.): Mr. Speaker, the government has been very busy over the last number of months, and that is why I have the honour to table, in both official languages, a considerable number of orders in council recently made by the government. These will be deemed referred to the appropriate standing committees.

* * *

● (1005)

[*Translation*]

COMMITTEES OF THE HOUSE

PROCEDURE AND HOUSE AFFAIRS

Hon. Don Boudria (Glengarry—Prescott—Russell, Lib.): Mr. Speaker, I have the honour to present the 46th report of the Standing Committee on Procedure and House Affairs received from the Subcommittee on Private Members' Business.

[*English*]

Therefore, pursuant to Standing Order 91.1(2), this report contains items added to the order of precedence under private members' business that should not be designated non-votable.

* * *

PETITIONS

AUTISM

Mr. Bill Siksay (Burnaby—Douglas, NDP): Mr. Speaker, I am honoured to table a petition this morning from a number of residents of Vancouver Island, in Parksville, Chemainus, Nanaimo and Qualicum. The petitioners are calling on Parliament to amend the Canada Health Act and corresponding regulations to include intensive behaviour intervention therapy treatment and applied behaviour analysis for children who live with autism.

Quite frankly, the labour movement and workers have been chasing their tails and have been sent around in a spin. That is why we are creating a beachhead on this issue and saying that once and for all, in the case of a bankruptcy, let us make sure that pensions are the top priority. It is that straight up.

Relating to that, and this is important because I know it is easy to mislead folks on this one, in Ontario the Bob Rae government brought in a bill that was known as too big to fail, meaning that the super large corporations like General Motors and Algoma are not going to fail, and upon application would be allowed to defer some pension payments.

I am glad I have a chance to clarify this between federal and provincial. Under that legislation a corporation had to make an actual written proposal. Within that proposal it had to show how much money it was going to defer, how long it was going to take to catch up and by what date will it not only have kept current accounts going in the latter years of the plan but by what date will it give an absolute 100% catch-up on that. It was meant to be an interim measure.

When we were in government a couple of proposals were put in front of us under our structural legislation and we approved them. To the best of my knowledge every one of those proposals did exactly what they purported to do, which was to provide a little cash flow in the short term but over the medium term the money was entirely paid back and those funds are now where they should be.

What happened in the case of Stelco, which unfortunately is the poster child for people getting screwed out of their pensions, was that a proposal was made by Stelco after the Rae government had been defeated and Mike Harris had taken over. Mike Harris approved the Stelco plan and there was nothing in it about when the money would be paid back. There was no time period for catch-up. There was nothing. It was merely Stelco asking if it could avoid paying its pension payments for a while under a certain clause and the Mike Harris government very nicely rubber stamped it and said yes. A few years later, bingo, we are into this jackpot.

The Conservatives to this day still blame Bob Rae for bringing in the structural legislation. That legislation did what it was supposed to do. It was the government of the day that did not do its job to protect those pensions and workers. That is why we are here today, to fix at the federal level what cannot be fixed at the provincial level.

● (1145)

Hon. Jerry Pickard (Parliamentary Secretary to the Minister of Industry, Lib.): Madam Speaker, it is my honour and privilege to speak to the second reading of Bill C-55, an act to establish the wage earner protection program act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other acts.

The passage of the bill will have real effects on the economy and on individual Canadians. It will affect entrepreneurs, large and small creditors, lending institutions, consumers, workers and students. Approximately 100,000 personal bankruptcies and 10,000 business bankruptcies occur each year, affecting more than $11 billion of debts and redeployment of $4.5 billion of assets.

Bill C-55 will ensure the Canadian insolvency system meets the needs of the Canadian marketplace as well as contributes to the socio-economic objectives of helping Canadians in financial distress.

Canada's insolvency system centres around two main statutes, the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act.

Allow me to explain briefly what each statute does and how they interconnect. The Bankruptcy and Insolvency Act, or BIA, provides the legislative basis for dealing with both personal and commercial insolvency issues. Under the BIA there are two options available. When an individual or company declares bankruptcy, the act provides for the liquidation of bankrupt assets by the trustee and the distribution of proceeds in a fair and orderly way to the creditors.

Alternatively, the act provides a means for persons or companies to avoid bankruptcy by negotiating a settlement with their creditors. It is called the proposal. Under the act the use of proposals has grown considerably in recent years and they now account for 15% of all filings by individuals and 25% of corporate filings under the BIA.

The Companies' Creditors Arrangement Act, or CCAA, applies only to corporate insolvencies involving debts over $5 million. Its purpose is to establish a framework to govern the restructuring of companies. The CCAA provides for a court driven process whereby a company obtains a court order to prevent its creditors from taking action against negotiating an arrangement with its creditors. The use of the CCAA has greatly expanded over the past decade, and most restructuring of large insolvent companies is now handled under the CCAA.

There is a broad consensus among stakeholders that reforms to the insolvency legislation are needed. Bill C-55 has four primary objectives.

First, as the Minister of Labour and Housing has outlined, Bill C-55 greatly enhances the protection of workers where their employer goes bankrupt or undergoes a restructuring process.

Second, it seeks to further encourage restructuring as an alternative to bankruptcy. Restructuring produces better results for creditors, saves jobs and enhances competitiveness.

Third, the bill is intended to make the bankruptcy system fairer and to reduce the scope for abuse. Bankruptcy law is about sharing the burden. Hence it is essential that we consider fair and equitable agreements by all parties.

Fourth, the administration of the system will be improved as many provisions in both the BIA and CCAA need to be clarified and modernized in order to ensure a more effective and predictable insolvency system.

Let me offer specific examples on how Bill C-55 is going to improve our insolvency system. To foster the use of reorganization as an alternative to bankruptcy, the CCAA will be substantially rewritten providing guidance and certainty where none previously existed and codifying existing practice while still preserving the flexibility that has made the CCAA such a successful restructuring vehicle.

● (1150)

Several new rules will ensure greater transparency in the process and a better ability for the active parties to defend their interests. This includes rules on interim financing; the termination of assets of contracts; governance arrangements of the debtor company, including the role of the monitor who will need to be the trustee; the sales of assets outside the ordinary course of business; and the application of regulatory measures.

Finally, this bill will greatly improve the administration of Canada's insolvency system through a number of changes affecting the role and power of trustees, including when they act as monitors in CCAA cases and as receivers on behalf of secured creditors. The supervisory role of the Office of the Superintendent of Bankruptcy is clarified and also includes the establishment of a central registry for the CCAA cases.

It is widely accepted that insolvency rules that govern personal insolvency play an important socio-economic role. They permit honest but unfortunate individuals who experience significant financial difficulty to discharge their debts, obtain a fresh start and thereby have the best possible chance to restore their financial situation.

At the same time, a well functioning insolvency system strikes the appropriate balance among competing interests in circumstances in which by definition there is not enough money to go around. Accordingly, it is important that the system be designed in such a way that it functions effectively and efficiently and provides the right incentives so that it deters potential abuses.

Bill C-55 accomplishes these objectives. It does so through tailored improvements to the Bankruptcy and Insolvency Act. By way of background, the proposed changes to the Bankruptcy and Insolvency Act which impact on individuals were extensively examined by the personal insolvency task force, the PITF, during the period of 2000 to 2002. The PITF was an independent panel established by the Office of the Superintendent of Bankruptcy with membership from all principal stakeholder groups, including creditors, trustees, consumer credit counsellors, lawyers, judiciary and academics.

The PITF released its report in August 2002. The report served as the main point of reference for representations that were made before the Senate Standing Committee on Banking, Trade and Commerce, which conducted its own review of Canada's insolvency legislation in 2003. That is to say that the consumer insolvency issues addressed in Bill C-55 have been the subject matter of extensive debate and consideration by both the PITF and the Senate committee.

In the area of consumer bankruptcy, one of the key challenges is the growing number of cases. Consumer bankruptcies have significantly increased over the past decades, from 1,500 in 1967 to some 84,500 cases last year. The number of insolvencies is tied to many factors, including challenges in consumer lending practices, higher levels of personal indebtedness, and a more tolerant attitude toward bankruptcy.

Since 1998, however, the annual average growth in consumer bankruptcies has decreased to approximately 2% per year, compared to 12% for the preceding three decades.

During the same period, the number of consumer proposals has more than doubled and now represent approximately 16% of all filings. This reform will continue to encourage the use of consumer proposals which offer the debtor an alternative to bankruptcy and typically result in higher recovery by creditors. For instance, the threshold for a consumer proposal has been increased from $75,000 to $250,000, thereby allowing more individuals to choose to make a proposal rather than file for bankruptcy.

Among the significant changes introduced to the consumer insolvency system by Bill C-55 is a provision to curb the potential for strategic behaviour by individuals seeking to extinguish large income tax debts. The bill eliminates the eligibility for automatic discharge for those debtors with personal income tax debts exceeding $200,000, where it represents 75% or more of unsecured debts. Instead, these individuals have to seek a court order for discharge and the court would be able to fix conditions relating to the discharge.

● (1155)

In keeping with the principle that those individuals filing for bankruptcy who have the financial means to repay a portion of their debts ought to do so, Bill C-55 provides for amendments to existing surplus income provisions. Under the proposed regime, first time bankrupts with surplus incomes will be required to pay a portion of their surplus income to their creditors for a period of 21 months, an increase of approximately 12 months to the present situation.

Reform of consumer insolvency provisions is also aimed at making the current system fairer for individuals. This includes the elimination of inequitable treatment of retirement savings plans and improved treatment of student loans and bankruptcies.

Under the existing laws, some retirement savings plans, namely, those associated with life insurance policies and registered pension plans, are generally exempt from seizure in the bankruptcy. Other types of registered retirement savings plans, on the other hand, such as those held by banks, brokerages or in self-directed funds, are generally not exempt from seizure in bankruptcy. The difference in treatment of various retirement savings plans seems to conflict with the public policy goal of encouraging Canadians generally to save for retirement.

Under Bill C-55, the registered retirement savings plans, regardless of whether the savings are a part of the employer sponsored pension plan or whether they are held in a life insurance savings plan, will enjoy the same protection from seizure and bankruptcy.

The bill contemplates that certain requirements must be met in order to ensure the public policy goal is fulfilled and to avoid the incentive for strategic behaviour. Specifically, contributions made within 12 months of bankruptcy and the amounts in excess of the cap would be available to creditors. Furthermore, there is a requirement that the savings be locked in until retirement.

In respect to student loans, the bill proposes that the waiting period before which a student loan debt may be discharged in bankruptcy will be reduced from 10 years to seven years. Furthermore, the bill would reduce the period before which the application may be made to the court to have a student loan debt discharged on the basis of undue financial hardship. That would be reduced from 10 years to five years.

One of the functions of bankruptcy law is to define which parts of the bankrupt property are available to be divided among creditors and which parts will remain under their control. In recent years a series of court decisions has cast doubt on traditional interpretations of which parts of the bankrupt property are available to creditors. The decisions reveal ambiguities in the wording and legislation. These are clarified through changes by the proposed bill.

In addition, proposed changes to provisions which address the way in which the Canadian insolvency system is administered are designated to improve the integrity of the system as a whole. A number of the procedural changes to the consumer insolvency provisions will enable the process to be streamlined along the lines recommended by the PITF. It is anticipated that these changes will result in a system which is better able to respond to the needs of individual debtors and their creditors.

In the Speech from the Throne, as well as the budget, the government clearly staked out its commitment to encourage entrepreneurship and risk taking. It has committed itself to creating a society and a business climate where educated and skilled people want to live and work, as well as a country that is the best place to do business while providing effective safety nets for individuals in financial difficulty.

Bill C-55 is a significant step to ensure that we respect Canada's insolvency laws, that the framework is right, that the rules are fair and equitable and that the regulatory structure is smart and responds to the needs of the marketplace. I am confident that the measures proposed in this bill will have broad support among Canadians. I urge all members of the House to support this important legislation.

● (1200)

Mr. Nathan Cullen (Skeena—Bulkley Valley, NDP): Madam Speaker, I have a quick question for the member. He talked at great length about alleviating the pressure upon students, particularly those who find themselves in the unfortunate circumstance of having to declare bankruptcy.

We have this extraordinary situation in Canada whereby students enter a rarefied class not accessed by anybody else in the country who declares bankruptcy, that of being unable to move beyond that situation for a period of 10 years, which I find deplorable. It is not a class that anyone would want to be in.

There is a point that causes me some confusion. I was at a University of Ottawa gathering last night. Fifty or so students got together to talk about politics and it was a very interesting exchange. There is one thing they find frustrating when they hear the government talk about its commitment to students and its appreciation of the great energy, effort and contribution that students make to our society and our economy as a whole. Why has that same government witnessed over the past 10 years an average increase of $1,000 every year in the average debt that students are leaving university and college with?

On the one hand the students hear the words, the rhetoric and the ideas about supporting our students, yet on the other hand they are watching their fellow students and themselves accumulate more and more debt, thereby in effect hamstringing their ability to enter successfully into the marketplace and to take further risks and challenges such as opening new businesses.

If they have not already completely lost faith, they have started to lose faith with the words on the one hand and the reality they are facing on the other. That reality is one of increased tuition costs and what I would suggest is a dramatic rise in the amount of debt burden students are leaving post-secondary education with, a burden that is encumbering their ability to take out further loans to buy a car or purchase a house and those types of considerations.

Having gone through school and having acquired student loans, I can speak from personal experience. As for the idea of paying back those banks in the future in good faith because the loans were taken out, it is difficult to hear the suggestion that I should be taking on further debt in acquiring a house and cars, thereby stimulating the economy, or in opening my own business. I eventually was able to open my own business, but only after a lag period, which was unfortunate.

From what the hon. member said today, how can I take the message back to those students and say that we must believe beyond the rhetoric and that this government is actually interested in lowering the debt burden? Let us talk about prior to the students actually having to declare bankruptcy. How can I take back that message about lowering the debt burden that students in Canada are leaving with while under the auspices of his government in the last 10 years we have watched a dramatic rise in the debt our students are having to carry?

Hon. Jerry Pickard: Madam Speaker, the hon. member's question is very significant. When we stop and think about student debt increasing, that is a reality, and certainly I do not think anybody here believes that government should control the costs of education outright totally, but I do believe that the costs of education have substantially gone up over the last 20 years.

When I went to school, certainly we had student debt and we had to pay for bills that we accumulated as students. Some of us were fortunate enough to have summer jobs and earn enough money to pay off the debts and some families were able to help students go through school, but it has always been the case that a student is at the lower end of income in our society.

I think the fact is that each year of school in the main adds a tremendous amount to students' incomes. As they become better educated and better able to enter the workforce, their potential for making dollars is extremely high compared to that of a lot of other Canadians who do not have the opportunity to go to school.

I think it is critical to understand what we as a government have control over. What we are talking about in this bill today is the aspect of the Insolvency Act and how it affects students who find it difficult after they have graduated, for whatever reason. Possibly they could not get a job in the field for which they had been trained or possibly other things intervened. Possibly circumstances in their lives made it impossible for them to make the money to pay back the loans. As a result, there are a lot of filings by students through the Bankruptcy Act.

What we as a government are looking at very carefully is where that maximum is: the number of years that a student has tried to pay back the loan and the ability of that student to pay back the loan. All the information comes together to give the direction that the student cannot afford to pay the loan back. There is a seven year time period in which we are going to allow the student to file bankruptcy at an earlier stage in order to dispense that debt, but in fact that is not the major portion of people who go to school. People graduate and are able to pay off those debts.

I remember one person who spoke with me when I was quite young; it was suggested that sometimes our society may be a little upside down. Young students should get paid high wages and as we get older the wages would be reduced somewhat. Then their houses would be paid for, their new family would be covered and their kids' education paid for and all of that. It was suggested that maybe when we start out our incomes should be higher and then go down. That goes counter to what our society does and the value placed upon it.

We have to remember, though, that those students who graduate do have the potential of earning a great number of dollars in our society. The better educated have the benefits and ability to make higher payments and are able to pay back those student loans. Where it becomes a crisis situation for students is what we are trying to ease this by this legislation. Quite frankly, I think that will be helpful to the students.

● (1205)

Mr. Jeff Watson (Essex, CPC): Madam Speaker, I appreciate the opportunity to speak to Bill C-55. It has taken two years from the time of the report to get wage earner protection legislation before this House, but Bill C-55 is not sufficient in scope. It leaves out an important component that I wish were being discussed here today. I am going to get to a question very shortly. What is left out is unfunded pension liability in situations of bankruptcy protection.

General Chemical Canada is in my riding. We can argue about whether that was a planned bankruptcy or not. I have some suspicions about that. There was a serious unfunded liability for pensions left over in this situation. Bill C-55 addresses only the wage protection that employees would get in a situation like that, but there is this other important component that is not being dealt with.

We found out in the situation with General Chemical Canada that there was no real proper monitoring of the pension fund and there is really no mechanism available to help workers who are not going to get full pension at the end of their careers. I understand that this legislation will not help the employees of General Chemical Canada because there is no retroactivity here, but we want to avoid situations like these in the future.

I have a simple question for the parliamentary secretary. Why is the unfunded pension liability protection for workers not included? Why did the government not bring it forward at this time as part of dealing not only with wage earner protection but with the other component that is important to workers in cases of bankruptcy protection? Why is the government continuing to leave workers twisting in the wind on this one?

Hon. Jerry Pickard: Madam Speaker, in the case of insolvency or bankruptcy, a number of assets need to be distributed among those who have priorities and have put out money. In a bankruptcy situation, everyone must realize that those people who put up the money for that business, the financial authorities and everyone else who was willing to risk their money and support that business, we have to strike a balance between that and the debt side. If we do not strike that balance, I know, and I think every person in the country knows, that some of the pension plans could be multi-million dollar assets. If we were to put that as a super priority, would the normal financial institutions that lend the money to get the businesses in operation retract money in Canada?

Would those investors, who have to invest to make sure corporate interests go forward, be investing in Canada, which would have some very specific laws about bankruptcy, or would they invest in Michigan? Would they invest in the United States? Would they invest in Europe? Would they invest in other areas where they know they have an opportunity of getting some of that money back if a bankruptcy were called?

The difficulty we have is striking that balance. Although I would love to see a policy where every person who has a claim on a pension that may not be fully paid would get every penny of it, in a bankruptcy situation we know that cannot be possible, as well as all the creditors get all their money and the investors get their money. As a result there has to be a reasonable compromise struck.

It is important to realize that under the bill we will be pressing very hard for the corporations to pay the unfunded, unpaid pension liabilities. They will have to be put into the fund. Corporations will not be able to slide by not putting the collected money into the pension plan. However, at the same time, if we put the pensioners above the lenders who are putting in money, no moneys will be invested in Canada. That would be tragic for all jobs in Canada and everyone has to realize that.

● (1210)

Mr. Ed Komarnicki (Souris—Moose Mountain, CPC): Madam Speaker, it is easy for the government to say that it is sympathetic with the employees who have lost vast sums of money in their pensions, in fact everything they may have saved for the future is wiped out in a bankruptcy. I have to wonder why the government would not address that situation by sister or companion legislation to the worker protection. The worker protection is one segment of it and that segment was added, along with others, into the bankruptcy legislation and the legislation relating to pension protection could just as well have been added to it and dealt with so that this problem does not arise.

BRIEFING BOOK

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts.

Bill Clause No.	Section No.	Topic
128	CCAA s.11.2	Interim Financing

Proposed Wording

11.2 (1) A court may, on application by a debtor company, make an order, on any conditions that the court considers appropriate, declaring that the property of the company is subject to a security or charge in favour of any person specified in the order who agrees to lend to the company an amount that is approved by the court as being required by the company, having regard to its cash-flow statement,

(*a*) for the period of 30 days following the initial application in respect of the company if the order is made on the initial application in respect of the company; or

(*b*) for any period specified in the order if the order is made on any application in respect of a company other than the initial application and notice has been given to the secured creditors likely to be affected by the security or charge.

(2) An order may be made under subsection (1) in respect of any period after the period of 30 days following the initial application in respect of the company only if the monitor has reported to the court under paragraph 23(1)(*b*) that the company's cash-flow statement is reasonable.

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

(4) The court may specify in the order that the security or charge ranks 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.

(5) In deciding whether to make an order referred to in subsection (1), the court must 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 is to be governed during the proceedings;

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

(*d*) whether the loan will 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 assets; and

(*f*) whether any creditor will be materially prejudiced as a result of the company's continued operations.

Rationale

Interim financing provides funds to a business in financial distress to enable the business to continue to operate while it attempts to restructure its debts. The most important element is the obtaining of a priority charge by the interim lender in respect of the amount lent, thereby decreasing the lender's risk and increasing the likelihood that a willing lender can be found. The court, in determining whether to grant a priority charge, relies on factors developed through jurisprudence. The reform is generally a codification of the current practice, with additional safeguards to defend against possible abuse.

Subsection (1) provides a court with the authority to grant a charge against the property of a debtor in respect of interim financing, subject to certain limits. In the situation described in paragraph (a), the court may only approve interim financing to meet the cash flow needs of a business for a period of 30 days. In the situation described in paragraph (b), the court may approve interim financing to meet the needs of a business for a period determined by the court to be appropriate in the circumstances.

The provision in paragraph (a), which is not within the current practice, is a safeguard intended to prevent potential abuse. Creditors have complained that some debtors attend court on the first day armed with an agreement with its chosen financier that provides for interim financing far in excess of the company's short-term cash flow needs and with terms that may be overly generous to the lender. Because the debtor is usually the initiator of proposal proceedings, creditors may not have notice, or insufficient notice, of the hearing to properly prepare to defend their interests at that hearing. On the other hand, a business in severe financial distress may require immediate funding to continue operating. The allowance of limited interim financing at the first hearing is intended to balance the needs of the business with the rights of creditors.

Paragraph (b) is substantially a codification of the current practice. It requires that secured creditors be given notice of the application, allowing them to defend their interests as they determine appropriate. The court should be in the best position, after hearing from the debtor and any interested creditors, to determine the appropriate period for interim financing.

Subsection (2) is intended to ensure that the court has the information necessary to make a proper determination under this provision. The requirement for the monitor to bless the statement is intended to provide assurance to the court that the information is reliable.

Subsection (3) is the heart of the section. It provides the court with legislative authority to grant the interim lender a priority security charge above the secured interests of other creditors. It is necessary because lenders would be very reluctant to provide financing to a business in financial difficulty. The priority charge reduces the risk that the lender will suffer a loss. While the priority charge negatively affects existing creditors, it is widely accepted that interim financing enhances the ability of the business to restructure successfully, which generally results in better recovery for the creditors than a bankruptcy would.

Subsection (4) is intended to ensure that an interim lender that has taken the risk of providing financing early in the restructuring process does not have its security interest effectively shunted

aside by a later lender without their consent. A later lender will have better information regarding the likelihood of a successful restructuring and can make the determination at that time whether it chooses to lend to the business. The ability of the first lender to consent to the granting of a higher priority is intended to provide greater flexibility in the process.

Subsection (5) provides the court with guidance regarding factors that should be considered prior to the granting of a priority charge under subsection (3). The described factors are largely a codification of the current jurisprudence. The intention is to provision is to ensure greater consistency, fairness and predictability in the process.

Present Law

None.

Senate Recommendation

The proposed reform follows Senate recommendation #22.