CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

No: 500-11-042345-120

SUPERIOR COURT
Commercial Division

(sitting as the designated Court in accordance with the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36)

IN THE MATTER OF THE PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF:

AVEOS FLEET PERFORMANCE INC./
AVEOS PERFORMANCE AÉRONAUTIQUE INC.
and
AERO TECHNICAL US, INC.

Insolvent debtors

and

FTI CONSULTING CANADA INC.

Monitor

and

SUPERINTENDENT OF FINANCIAL INSTITUTIONS

Applicant

and

WELLS FARGO BANK NATIONAL ASSOCIATION, as holder of a power of attorney
and
CRÉDIT SUISSE AG, CAYMAN ISLAND BRANCH, as holder of a power of attorney
and
AVEOS HOLDING COMPANY, as holder of a power of attorney
and
BREOF/BELMONT BAN L.P.

Respondents

and

AON HEWITT, as administrator of the pension plans of Aveos Fleet Performance Inc. Aveos Performance Aéronautique Inc.
and
retired former employees of Aveos Fleet Performance Inc. / Aveos Performance Aéronautique Inc.

Impleaded party

APPLICANT'S FACTUM

INTRODUCTION

1. This dispute involves one of the pension plans for former employees of the Insolvent Debtor, Aveos Fleet Performance Inc.. Specifically, the Applicant, the Superintendent of Financial Institutions, is seeking a declaration from the Court that the special payments the Insolvent Debtor has not paid since placing itself under the protection of the *Companies' Creditors Arrangement Act*, i.e. the total amount of $2,804,450, be deposited into the plan in question since the Insolvent Debtors have liquidated almost all its assets without submitting a recovery plan to the creditors.

2. Disputes involving pension plans in the context of business restructuring are arising more frequently , particularly where the restructuring does not result in a plan, despite amendments enacted in 2007 to both the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, hereinafter BIA, and the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, hereinafter the CCAA.

3. In this case, the issue is essentially whether the beneficiaries of the plan are entitled, in priority to the respondent secured creditors, to the proceeds from the liquidation of assets to the extent of the unpaid special payments.

4. Accordingly, this dispute is between two of the most significant stakeholders in an insolvency file: the contributors to and beneficiaries of a pension plan and a secured creditor. The Insolvent Debtors will defer to the decision to be issued.

5. It is important to note that the Applicant in this proceeding is not acting as a creditor but as a regulator and that, therefore, this dispute is not subject to the principles that apply to debtor/creditor relations.

6. We will demonstrate below that the Applicant's position, which seeks to protect the pension plan beneficiaries, is the one that should be adopted considering, on the one hand, the unique nature of pension plans and, on the other hand, the appropriate balance of social and economic inconvenience that the parties are suffering as a result of the Insolvent Debtor's financial collapse.

I. OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS

A - Its mandate

7. The Office of the Superintendent of Financial Institutions, hereinafter OSFI, was established under section 4 of the *Office of the Superintendent of Financial Institutions Act,* R.S.C., 1985, c. 18 (3rd Supp.) ("OSFI Act").

> **"4.** (1) There is hereby established an office of the Government of Canada called the Office of the Superintendent of Financial Institutions over which the Minister shall preside and for which the Minister shall be responsible."

8. Its mandate with respect to pension plans specifically is defined at subsection 4(2.1) of the OSFI Act.

> **"4.** (2.1) The objects of the Office, in respect of pension plans, are
>
> (a) to supervise pension plans to determine whether they meet the minimum funding requirements and are complying with the other requirements of *the Pension Benefits Standards Act, 1985* and the *Pooled Registered Pension Plans Act* and their regulations and supervisory requirements under that legislation;
>
> (b) to promptly advise the administrator of a pension plan in the event that the plan is not meeting the minimum funding requirements or is not complying with other requirements of the Pension Benefits Standards Act, 1985 or the Pooled Registered Pension Plans Act or their regulations or supervisory requirements under that legislation and, in such a case, to take, or require the administrator to take, the necessary corrective measures or series of measures to deal with the situation in an expeditious manner; and
>
> (*c*) to promote the adoption by administrators of pension plans of policies and procedures designed to control and manage risk. "

9. In pursuing its legislated objects, OSFI must strive to protect the rights and interests of plan members and other beneficiaries.

> **"4.** (3) In pursuing its objects, the Office shall strive

> (a) in respect of financial institutions, to protect the rights and interests of depositors, policyholders and creditors of financial institutions, having due regard to the need to allow financial institutions to compete effectively and take reasonable risks; and
>
> (b) in respect of pension plans, to protect the rights and interests of members of pension plans, former members and any other persons who are entitled to pension benefits or refunds under pension plans."

B - Its interest in this proceeding

10. Under section 5.(1) of the *Pension Benefits Standards Act,1985*, R.S.C. 1985, c. 32 (2nd Supp.), hereinafter the PBSA, the Superintendent is responsible for the administration of the Act.

11. Section 5.(1) states:

> "The Superintendent, under the direction of the Minister, has the control and supervision of the administration of this Act and has the powers conferred by this Act."

12. Section 33.2(1) of the Act provides as follows:

> "In addition to any other action that the Superintendent may take in respect of a pension plan, the Superintendent may bring against the administrator, employer or any other person any cause of action that a member, former member or any other person entitled to a benefit from the plan could bring."

13. In *Rogers* v. *Buschau,* the Supreme Court of Canada stated at paragraph 20:

> "20 In essence, the Superintendent plays a crucial role in the protection of beneficiaries. Although most of his interventions relate to supervision of the solvency requirements, he also acts as a gatekeeper for the distribution of a pension fund. The Superintendent has unique duties and responsibilities *vis-à-vis* beneficiaries that may make it possible to avoid resorting to a common law rule that was designed for an environment totally different from that of pension law."

II. BACKGROUND

14. The facts hereinafter mentioned are taken from the record or have been admitted by the parties in the joint statement of facts.

15. Restructuring of the Debtor commenced on March 19, 2012, following the initial order of Justice Mark Schrager.

16. In that order, the Court authorized a stay of the special payments (paragraph [19] of the order).

17. These special payments, payable by the Insolvent Debtor, Aveos Fleet Performance, at the rate of $254,950 per month, were required prescribed payments under the PBSA.

18. Pursuant to subsection 9(1) of the PBSA, a pension plan must meet the prescribed tests and standards for solvency. Pursuant to section 8 of the Pension Benefits Standards Regulations, 1985 ("PBSR") a pension plan is considered to have met the standards for solvency if funding to the plan complies with section 9 of the PBSR. Subsection 9(4) of the PBSR required that the following annual payments be made to the non-unionized pension plan: normal cost (representing the amount of benefits to accrue in the plan year), going concern special payments (those required to fund a liability determined by a going concern valuation), solvency special payments (those required to fund a deficiency calculated on a solvency basis). These annual amounts must be paid at least on a monthly basis throughout the plan year.

19. Pursuant to subsection 9(1.1) of the PBSA, the employer (in this case the Debtor) was required to pay to the pension fund the amounts required under section 9 of the PBSR.

20. When the initial order was made, the Insolvent Debtor was administering three pension plans. Normal cost and defined contribution amounts were paid for all the plans, and only the pension plan for non-unionized employees required special payments.

21. Under subsections 29(2), (2.1) and (3) of the PBSA, and considering, on the one hand, the Insolvent Debtor's insolvency and, on the other hand, the fact that it had dismissed all its employees with the exception of a few, the

Applicant advised the debtor on May 25, 2012, that it was terminating all the plans, including the one for non-unionized employees (Exhibit R-5). The non-unionized plan was terminated effective May 19, 2013.

22. As will be demonstrated below, upon the termination of a pension plan all the amounts due and becoming due until the end of the calendar year are immediately payable by the employer.

23. As shown in the chart included in the joint statement, the Insolvent Debtor owes the amount of $2,804,450 representing the aggregate amount of special payments owed in respect of the year in which the plan was terminated.

24. Most, if not all, of the Insolvent Debtor's assets were sold with the authorization of the Court, which has issued some twelve orders to this effect. The liquidation of the Insolvent Debtor's assets carried out under the CCAA is completed, and there is no evidence to indicate that a plan of arrangement will be filed; rather, the CRO's last report suggested that this matter will end through bankruptcy or by placing the remaining assets of the Debtor in receivership.

25. As also shown in the joint statement of facts, the Respondents are not DIP lenders, and the Insolvent Debtor has sufficient liquidity from the sale of its assets to pay the administration costs of the restructuring and the special payments claimed.

III. UNIQUE NATURE OF PENSION PLANS AND THE *PENSION BENEFITS STANDARDS ACT, 1985*

A - Public order statute

26. Unlike the protection afforded to Crown claims that has been limited over the course of court decisions and statutory amendments, the situation is different with respect to pension plans.

27. In *Buschau v. Rogers Communications Inc.*, [2006] SCR 973, dealing with the *Pension Benefits Standards Act, 1985*, the Supreme Court of Canada wrote:

> "19 The complex statutory and regulatory framework to which pension plans are subject cannot be overlooked. Recognizing the

economic and social importance of pension plans, Parliament and the vast majority of provincial and territorial legislatures have adopted legislation regulating them.

(...)

96 The underlying social policy objective of the legislation is to promote the establishment and maintenance of private pension plans in order to provide income security for employees and their families in retirement."

28. The minority in *Buschau* stated at paragraph 79:

"The *PBSA* is a comprehensive statutory scheme structured to further the public policy objective of enhanced financial security for workers upon their withdrawal from the active workforce. The *PBSA*, together with the *Pension Benefits Standards Regulations*, *1985*, SOR/87-19, facilitates pension contributions from workers and employers, and protects and preserves pension funds and maximizes pension benefits, all in the interest of providing income security for workers in retirement."

29. Moreover, in that decision, the Supreme Court referred to another decision it had issued in *Monsanto Canada Inc.* v. *Ontario (Superintendent of Financial Services)*, [2004] 3 SCR 152.

30. Although the latter case involved the *Pension Benefits Act*, R.S.O. 1990, c. P-8, we submit that the principles regarding the public order aspect of private pension plan statutes and the protection of beneficiaries are the same.

31. The Supreme Court stated:

"38 The Act is public policy legislation that recognizes the vital importance of long-term income security. As a legislative intervention in the administration of voluntary pension plans, its purpose is to establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans (see *GenCorp*, *supra*; *Firestone Canada Inc. v. Ontario (Pension Commission)* (1990), 1 O.R. (3d) 122 (C.A.), at p. 127). This is especially important when, as recognized by this Court in *Schmidt v.*

> *Air Products Canada Ltd.*, [1994] 2 S.C.R. 611, at p. 646, it is remembered that pensions are now generally given for consideration rather than being merely gratuitous rewards. At the same time, the voluntary nature of the private pension system requires the interventions in this area to be carefully calibrated. This is necessary to avoid discouraging employers from making plan decisions advantageous to their employees. The Act thus seeks, in some measure, to ensure a balance between employee and employer interests that will be beneficial for both groups and for the greater public interest in established pension standards."

32. This principle, moreover, has been applied by the Court of Appeal of Québec in relation to the *Supplemental Pension Plans Act*, R.S.Q., c. R-15.1 in *Association provinciale des retraités d'Hydro-Québec v. Hydro-Québec*, 2005 QCCA 304 (see, in particular, paragraph 32 of the decision).

B - Deemed trust and relevant provisions of the PBSA

33. To ensure that the rights of employees and beneficiaries are protected, the PBSA creates a deemed trust with respect to amounts paid, accrued to or owed to the fund.

34. Section 8.(1) states:

> "An employer shall ensure, with respect to its pension plan, that the following amounts are kept separate and apart from the employer's own moneys, and the employer is deemed to hold the amounts referred to in paragraphs (a) to (c) in trust for members of the pension plan, former members, and any other persons entitled to pension benefits under the plan:
>
> - (*a*) the moneys in the pension fund,
> - (*b*) an amount equal to the aggregate of the following payments that have accrued to date:
>
> (i) the prescribed payments, and
>
> (ii) the payments that are required to be made under a workout agreement; and

- (*c*) all of the following amounts that have not been remitted to the pension fund:

  (i) amounts deducted by the employer from members' remuneration, and

  (ii) other amounts due to the pension fund from the employer, including any amounts that are required to be paid under subsection 9.14(2) or 29(6).)"

35. Until the plan was terminated, the monthly instalment for the annual special payment accrued to the termination date would be "prescribed payments" that were required to meet the prescribed tests and standards for solvency (under paragraph 8(1)((b)) and the other amounts referred to in paragraph 29.(6)(b) would include the remaining annual special payment from the date of the plan termination to the plan year end (i.e., December 31st). Subsection 29(6) of the PBSA provides:

> "If the whole of a pension plan is terminated, the employer shall, without delay, pay into the pension fund all amounts that would otherwise have been required to be paid to meet the prescribed tests and standards for solvency referred to in subsection 9(1) and, without limiting the generality of the foregoing, the employer shall pay into the pension fund
>
> - (*a*) an amount equal to the normal cost that has accrued to the date of the termination;
> - (*b*) the amounts of any prescribed special payments that are due on termination or would otherwise have become due between the date of the termination and the end of the plan year in which the pension plan is terminated;
> - (*c*) the amounts of payments that are required to be made under a workout agreement that are due on termination or would otherwise have become due between the date of the termination and the end of the plan year in which the pension plan is terminated;
> - (*d*) all of the following amounts that have not been remitted to the pension fund at the date of the termination:
>
>   (i) the amounts deducted by the employer from members' remuneration, and

(ii) other amounts due to the pension fund from the employer; and

- (*e*) the amounts of all of the payments that are required to be made under subsection 9.14(2)."

36. Section 8(2) of the PBSA provides:

> "In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (1) is deemed to be held in trust shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate. (Emphasis added)"

37. Accordingly, Parliament intended to grant protection to the amounts deposited and the amounts that must be deposited into the fund, protection that applies both during the employer's normal operations and at its bankruptcy or the liquidation of its assets.

38. This legal protection is so essential for the security of the contributors' long-term income that section 36(2) of the PBSA states that any agreement to assign, charge, anticipate or give as security any benefit provided under a pension plan is null:

> "Any agreement or arrangement to assign, charge, anticipate or give as security
>
> - (*a*) any benefit provided under a pension plan, or
> - (*b*) any money withdrawn from a pension fund pursuant to section 26
>
> is void or, in Quebec, null."

39. Parliament only allows for the deferral or suspension of special payments without attracting a deemed trust where the employer has elected to seek funding relief under the Distressed Pension Plan Workout Scheme contained in sections 29.01 to 29.3 of the PBSA. Under subsection 29.07(3) of the PBSA the exclusion from the deemed trust does not apply where the employer has filed under CCAA.

40. Recognition of the deemed trust in these or bankruptcy proceedings would not impose an unfair burden on secured creditors. The PBSA deemed trust does not attach to the entire deficit of a pension plan (ss.29(6.2) and (6.5) of the PBSA).

41. The distribution of an employer's assets under CCAA or BIA should not make irrelevant the legislative scheme provided by the PBSA. As the minority in Buschau stated in paragraph 94:

> "In my view, the unique role of the employer in respect of the pension plan and pension Trust cannot be ignored; and the terms of the contract at the root of the Trust cannot be circumvented; as well, the legislative framework cannot be made irrelevant by applying the rule in *Saunders v. Vautier.*"

42. As indicated above, it is admitted that the Superintendent advised the debtor on May 25, 2012, that the plan was being terminated effective May 19, 2012(Exhibit R-5).

43. The monthly instalments of the special payment due for the 2012 plan year (i.e., due from the effective termination date of March 19, 2012 to December 31, 2012), were added to the total of the special payments already due and owing from January 2012, bringing the total amount to $2,804,450.

44. By virtue of section 8(1) of the PBSA, this amount is deemed to be held in trust for members, former members and any other persons entitled to pension benefits under the plan.

45. In addition, as admitted in the joint statement of facts, all or almost all the debtor's assets have already been liquidated. Thus, and pursuant to section 8(2) of the PBSA, part of the sale proceeds equal to the amount the debtor owes to the pension plan, in this case, an amount equal to the special payments payable up to December 31, 2012, is deemed to form no part of the estate and therefore must be paid into the aforesaid retirement fund.

IV. STAY OF SPECIAL CONTRIBUTION PAYMENTS ORDERED IN INITIAL ORDER

46. Under paragraph [19] of the initial order, the Insolvent Debtor was authorized to stay its monthly special payments to the pension fund for non-unionized employees.

47. This authorization, usually granted in the course of a business restructuring under the CCAA, was intended to permit the Insolvent Debtor to restructure, by giving it more time to do so. Although the Insolvent Debtor was authorized under the terms of the initial order to stay the payment of its special payments, the fact remains that the Insolvent Debtor remains subject to the PBSA during the process.

48. Moreover and from the time when it became clear that there would be no restructuring plan presented to the creditors and that, the amounts due to the pension fund did not belong, by virtue of the wording of the Act, either to the Insolvent Debtor or to the estate, it became unfair to deprive their beneficiaries for an even longer time.

49. Moreover, an authorization to momentarily stay payments to a pension plan does not in any way imply that the obligation to make those payments are set aside or expunged.

50. As Justice Mayrand wrote in *AbitibiBowater Inc. (Arrangement retatif à)*, 2009 QCCS 2028:

> [TRANSLATION]
>
> "51 Moreover, *Abitibi*, in conjunction with all its creditors, employees, lenders and suppliers may successfully overcome the impasse by agreeing to an arrangement to put the business back on the right track in the short or medium term. Terms and conditions for the repayment of the stayed contributions can be agreed on with the approval of the appropriate authorities. This will be done at another stage."

51. Justice Mayrand authorized a stay of payments to the pension plan, taking care to state that the terms and conditions for the repayment of those amounts could ultimately be agreed on once the restructuring was completed and in a context where not staying these payments would jeopardize the chances of restructuring and, as a result, the closing of the business and the loss of jobs.

> [TRANSLATION]

> "49 The consequences of the measures sought and disputed by both groups are substantial. If Abitibi cannot restructure its affairs because it is making amortization payments and, in doing so, its survival is at risk, the first spectre arises, the closure of the business, loss of jobs and the termination and winding-up of pension plans."

52. *A fortiori,* in this case, where the debtor has already dismissed its employees, liquidated its assets and where it appears that no recovery plan will be presented to the creditors and that, on the other hand, the sale proceeds of the assets are more than enough to pay the amortization payments, the total amount due should be deposited in the pension plan.

53. Justice Pepall came to a similar conclusion in *Fraser Papers Inc. (Re)*, 2009 Can LII 39776:

> "[21] The relief requested by the Applicants, importantly in my view, does not extinguish or compromise or even permit the Applicants to compromise their obligations with respect to special payments. Indeed, the proposed order expressly provides that nothing in it shall be taken to extinguish or compromise the obligations of the Applicants, if any, regarding payments under the pension plans. Failure to stay the obligation to pay the special payments would jeopardize the business of the Applicants and their ability to restructure. The opportunity to restructure is for the benefit of all stakeholders including the employees. That opportunity should be maintained."

54. Justice Farley in *United Air Lines Inc. (Re,)* 9 CBR (5th) 159, had even dismissed the application for authorization to stay payments to the pension fund, stating, in particular, that the debtor had the necessary funds and that these payments were not up against the ceiling of the DIP financing:

> "**4** UAL has not run out of money nor of liquidity, albeit that it must husband its available funds and liquidity in a very prudent manner. However, there is no evidence before me that UAL either (i) does not have sufficient funds to make the pension funding payments or (ii) that its DIP arrangements are such that it cannot make such payments (in this latter (ii) situation, neither is there any evidence that even if it were up against the ceiling of its DIP requirements, that an application was made to the DIP lenders for consent to make such payments)."

V. OBJECTIVE OF CCAA

55. As pointed out by Justice Gascon, then of the Superior Court, in *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 2152:

> [TRANSLATION]
>
> "[4] Although the familiarity of the numerous stakeholders with the process varies greatly, the objective of this Act is nonetheless well known. The *CCAA* is intended to permit AbitibiBowater to restructure its affairs, operations and debt.
>
> [5] The method available to it under the Act is the development, negotiation and implementation of a fair and reasonable plan of arrangement with its creditors that they will vote on.
>
> [6] The process primarily involves the debtors and its creditors. The Court's role is supervisory. The ultimate goal is to arrive at a successful plan of arrangement with a view to the continuity of operations and the survival of the business. This is in the interest of all the stakeholders, even of society in general, according to some. To paraphrase the words of Justice Blair in *Metcalfe*,[4] we are talking here about a statute that involves a broader social economic purpose and a wider public interest."

56. Justice Deschamps in *Century Services Inc.* v. *Canada (A.G.)* [2010] 3 S.C.R. 379, summarized the restructuring procedure under the CCAA as follows:

> "[14] Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization

> regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations."

57. The CCAA does not contain a provision regarding the liquidation of assets and, consequently, does not contain a priority plan.

58. The only provision in the CCAA that deals specifically with pension plans is found in section 6(6), which provides that the Court may not sanction an arrangement or compromise that does not provide for the payment of the amount set out in that section. This is a minimum in a situation where the debtor has submitted a plan to its creditors.

59. In such a scenario, it is the creditors themselves who will decide whether to accept or refuse the proposal presented to them. However, since special payments that have been stayed are subject to a deemed trust, they are still owed and not subject to compromise even if a plan is prepared.

VI. ABSENCE OF PRIORITY RANKING IN THE CCAA AND CONSEQUENCE OF THAT ABSENCE WHERE PLAN NOT PROVIDED

60. The Insolvent Debtor, with the respondents' consent, opted to liquidate its assets under the CCAA, when it was clear from the outset that it would not continue its operations since the employees were dismissed at the beginning of the process. Although a debtor can liquidate its assets under the CCAA instead of the BIA, this choice is not without consequence. The result for the respondent that authorized the Insolvent Debtor to proceed with the liquidation under the CCAA is that the deemed trust created by section 8(2) of the PBSA continues to apply in this case.

61. Justice Deschamps, in fact, held in *Indalex*:

> "[51] In order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements. Yet this does not mean that courts may read bankruptcy priorities into the *CCAA* at will. Provincial legislation defines the priorities to which creditors are entitled until that legislation is ousted by Parliament. Parliament did not expressly apply all bankruptcy priorities either to *CCAA* proceedings or to proposals under the *BIA*. Although the creditors of a corporation that is attempting to reorganize

> may bargain in the shadow of their bankruptcy entitlements, those entitlements remain only shadows until bankruptcy occurs. At the outset of the insolvency proceedings, Indalex opted for a process governed by the *CCAA*, leaving no doubt that although it wanted to protect its employees' jobs, it would not survive as their employer. This was not a case in which a failed arrangement forced a company into liquidation under the *BIA*. Indalex achieved the goal it was pursuing. It chose to sell its assets under the *CCAA*, not the *BIA*.
>
> [52] The provincial deemed trust under the *PBA* continues to apply in *CCAA* proceedings, subject to the doctrine of federal paramountcy (*Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, [2004] 1 S.C.R. 60, at para. 43). The Court of Appeal therefore did not err in finding that at the end of a *CCAA* liquidation proceeding, priorities may be determined by the *PPSA*'s scheme rather than the federal scheme set out in the *BIA*."
>
> *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6

62. Applying that principle to this case, it follows that, by operation of the PBSA, a federal statute that continues to apply during the procedures, the proceeds of the liquidation of assets to the extent of the amounts owed to the plan under section 8(1) of the PBSA, which includes special payments, is deemed to not form a part of the estate, and consequently the amount of $2,804,450 must be deposited into the pension plan for non-unionized employees.

63. The powers granted to the Court under the CCAA are broad enough to allow it to make an order now that the amounts due be deposited into the pension plan.

64. Neither the Insolvent Debtor, nor the creditors, nor the regulators can remain in limbo about an arrangement under the CCAA that is not an arrangement.

65. Although it is acknowledged that a debtor may, with the Court's approval, liquidate its assets under the CCAA, this process must result in a restructuring plan. A stay of the creditors' proceedings and the debtor's obligations is not separate from filing such a plan.

66. The debtor cannot in effect request, with the respondent's assistance and approval, the protection of the Court in order to restructure while asking that payment of the special payments due to the pension plan be stayed and then request, indirectly, that it be exempted from making those payments by remitting the proceeds of sale of its assets to the respondent, which is not entitled to them, at least to the extent of the amounts due to the plan, under the very wording of section 8(2) of the PBSA.

67. The debtor has the funds to pay the amounts due to the pension plan, and that payment could not jeopardize the filing of a plan because the net value of the sale of the debtor's assets is insufficient to cover the debt owed to the secured creditors (12th report of the CRO).

68. Although everyone recognizes the general principle, often pointed out by the courts, that in a restructuring under the CCAA everyone must make sacrifices, we submit that this principle must be weighed where there is a liquidation under the CCAA that does not result in any restructuring plan and where almost all the employees were dismissed on Day 1 of the process. In addition to the loss of their jobs, these employees have lost the benefit of the continuation of their pension plan. The amount at stake is, in short, minimal for the respondents but represents a significant difference for these workers. See, *inter alia*, the intervener's report.

69. In a context where the debtor does not submit a plan to its creditors, the respondent cannot take advantage of what would be more favourable to it in the BIA and the Civil Code and must bear the consequences of having chosen liquidation under the CCAA. It is not for the plan's contributors to pay for this choice especially since under the PBSA the respondent cannot claim to have any right to the special payments due to their plan, which are protected by the Act that excludes them from the debtor's assets and the estate.

70. In his written contestation, the respondent Crédit Suisse AG argues that to be effective the deemed trust must, first, be created by a statutory provision and, second, be confirmed by an explicit provision in the CCAA.

71. This statement appears to be taken from paragraph [96] of the Supreme Court of Canada decision in *Century Services Inc.* (op. cit.) where Justice Fish wrote:

> "In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* — or explicitly preserving — its effective operation."

72. This passage was repeated by Justice Mongeon in paragraph [156] of his decision in *White Birch Paper Holding Company (Arrangement relatif à)*, 2012 QCCS 1679.

73. This "confirmation" by an explicit provision in the CCAA was denied by the majority in the same case, *Century Services Inc.*, where Justice Deschamps wrote:

> "[40] With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize conflicts, apparent or real, and resolve them when possible."

74. The Respondent also seems to submit that since its guarantees were published prior to the debtor's insolvency, they take precedence over the deemed trust created by section 8 of the PBSA.

75. In our opinion, this argument appears to be an overly simplistic application of the principles established by the Supreme Court of Canada, over 16 years ago, in *Royal Bank of Canada* v. *Sparrow Electric Corp.* [1997] 1 S.C.R. 411.

76. This decision was made in the context of disputes about the Crown's deemed trusts, which, in recent years, have been the subject of a number of statutory amendments and are now limited.

77. That decision can also be distinguished. Unlike the Income Tax Act at that time, section 8 of the PBSA deems the amounts calculated under the PBSR and not just withheld amounts to be held in trust and to have to have been kept separate and apart even if the employer fails to do so.

78. Since that decision and further to various amendments that have been enacted, it is now clear that a deemed trust takes precedence over a

guarantee regardless of the date it was published. To argue the contrary amounts to nullifying the very existence of the deemed trust.

79. In addition, in this case, and we must emphasize this point, there is no deemed trust in favour of the Crown, and the legislation creating it is very clear.

80. The deemed trust referred to here is in favour of the plan's contributors and retirees. It is created by a federal statute, which gives it priority in the liquidation of assets. No other formality is required to give it its full effect and to entrench its priority.

CONCLUSIONS

FOR THESE REASONS, THE APPLICANT, THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS, ASKS THE COURT TO

GRANT this motion;

DECLARE that the total amount of special payments accumulated or payable in the pension plans for non-unionized employees of the debtors' Plan is subject to the deemed trust established by law under subsection 8(2) of the *Pension Benefits Standards Act, 1985*;

DECLARE, as a result, that the total of the monies held by the debtors, the amount of $2,804,450, does not form part of the estate or part of the debtors' assets or the secured creditors' assets, and that it must be paid to the Plan, which is registered with the Superintendent of Financial Institutions under the number 57573;

ORDER the debtors to deposit the aforesaid sum of $2,804,450, with interest, into the said Plan;

THE WHOLE, WITH COSTS.

MONTRÉAL, October 10, 2013

Attorney General of Canada

ATTORNEY GENERAL OF CANADA
(Pierre Lecavalier & Antoine Lippé)
Counsel for the Applicant