

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

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

Applicants

**BOOK OF AUTHORITIES OF THE RESPONDENTS,
THE COMMUNICATIONS, ENERGY AND PAPERWORKERS
UNION OF CANADA**

January 11, 2012

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Tab 1

Case Name:
United Air Lines, Inc. (Re)

**IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C.36, as amended
AND IN THE MATTER OF United Air Lines, Inc. of the State of Delaware, in the United States of America and the other entities listed on Schedule "A"*
APPLICATION UNDER Section 18.6 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
[* Editor's note: Schedule "A" was not attached to the copy received from the Court and therefore is not included in the judgment.]**

[2005] O.J. No. 1044

[2005] O.T.C. 206

9 C.B.R. (5th) 159

45 C.C.P.B. 151

137 A.C.W.S. (3d) 1097

2005 CarswellOnt 1078

Court File No. 03-CL-5003

Ontario Superior Court of Justice - Commercial List

J.M. Farley J.

Heard: February 10, 2005.
Judgment: February 26, 2005.

(15 paras.)

Creditors and debtors law -- Legislation -- Debtors' relief -- Companies' Creditors Arrangement Act -- Pensions and benefits law -- Pensions -- Bankruptcy, effect of.

Application by the applicant, United Air Lines, for an order authorizing it to cease making contributions to its Canadian funded pension plans. United was in intense negotiations with its American workforce unions and was continuing to deal with its insolvency proceedings. Except for in the United States and Canada, United had kept up its pension funding commitments because under the pension and legal structures of the other countries, it had no choice but to do so. There was no evidence that United did not have sufficient funds to make the pension funding payments in Canada.

HELD: Application dismissed. Payment of the Canadian funding obligation would not in any way cause stress on the American restructuring given the relatively insignificant amounts in question. On the basis of fairness and equity, there was

no reason to excuse United from its obligation to fund its pension funding commitments in Canada.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.6.

Pension Benefits Standards Act, R.S.C. 1985, c. 32, s. 8(1), 8(2).

Counsel:

Scott A. Bomhof and Marc Lavigne, for United Air Lines, Inc.

Hugh M.B. O'Reilly, for the International Association of Machinists and Aerospace Workers ("IAMAW")

Barry Wadsworth, for the CAW-Canada

Ian Dick, for the Attorney General of Canada representing the Office of the Superintendent of Financial Institutions ("OSFI")

ENDORSEMENT

1 J.M. FARLEY J. (endorsement):-- United Air Lines, Inc. (UAL) moved for an order authorizing it to cease making contributions to its Canadian funded pension plans. It had originally brought on its motion on September 16, 2004 as to which there had been some advance preliminary discussion as to the "necessity" for it having to obtain some relief. The somewhat chaotic circumstances surrounding UAL and its insolvency proceedings in the U.S.A. and elsewhere in all probability contributed to its haste in bringing on the September motion and most certainly with respect to its method of giving notice to its two Canadian unions, the CAW and IAMAW, as well as OSFI. Given the exigencies of the circumstances, while unfortunate that there was not an appropriate length of and "proper" notice, one cannot be too critical of UAL as to providing something better. The CAW and OSFI attended at the September hearing; IAMAW did not in the relative confusion. There was then negotiated among UAL, CAW and OSFI a form of interim order granted by Pepall J. on September 16, 2004. This consent order, as is not uncommon with courtroom-drafted orders, is a little "awkward." It provided that pending the return of the motion, UAL could cease making pension plan funding payments notwithstanding the terms of any previous order or any direction of OSFI. I am of the view that, given that this motion was not brought back on until February 10, 2005, this shows that OSFI and the unions (IAMAW being cognizant of the September 16, 2004 order shortly thereafter) are quite understanding of the financial predicament in which UAL finds itself - and continues to find itself given a number of setbacks especially in its U.S. proceedings situation.

2 UAL as an airline has fallen on hard times. In this regard it is like a number of airlines worldwide both in recent times and at various stages in the past. The unions recognize that they have both long-term and short-term objectives in dealing with an employer - essentially they want a long term stable employer who is able to employ their workers at a fair wage and for this the company must remain in business and be competitive, but also in the short run, they do not wish to see a situation where commitments related to the employment arrangement are neglected. In the latter case, if matters take a turn for the worse, in this subject case, there would be relatively significant pension deficiencies (relative to the size of the Canadian workforce) which would be unsecured claims. In this regard "cash in the bank" is always better than an IOU. At the present time, UAL is no golden goose; indeed it is a rather bald bird (keeping in mind the taxation principle of plucking the squawking taxpayer) - but it is a bird which the unions have no interest in killing.

3 Allow me to observe a number of practical elements in this situation. UAL is in very intensive discussions/negotiations in the U.S.A. with its American workforce unions and it is continuing to deal with the morass its insolvency proceedings have become over the time since it commenced its Chapter 11 proceedings in December 2002. It has an international workforce, including that in Canada, of significantly less magnitude. It has in all countries except for the U.S.A. and Canada kept up its pension funding commitments because under the pension and legal structures of those other countries, it had no choice but to do so. UAL has it would seem devoted most of its time and energy to attempting to solve its U.S. based problems. It seems that it has taken the approach as to Canada, both in terms of the pension arrangements - but also with respect to discussions/negotiations as to concessions with its Canadian workforce (e.g. wage cuts or productivity improvement commitments), that this will and must await the outcome of the U.S. situation. On a functional basis, I do not criticize UAL for that approach. Indeed it may be the only practical one available to it. However, the unfortunate outcome of such an approach is that in essence Canada is ignored in the interim. This is contrary to the philosophy of our insolvency

proceedings approach which encompasses and balances the many elements including labour relations and balances the competing aspects of those elements - the key to which as to the labour relations element is that the company and the unions actively engage in a dialogue to see if the particular difficulty(ies) may be worked out and the aims of each side be accommodated with some give and take on a rational basis.

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).

5 In other situations where a company has been in dire circumstances, it is not uncommon for a union to consent to a deferral of pension funding in order to facilitate the bona fide restructuring efforts of an employer (eg. the USWA in Ivaco). However, this is achieved on a consensual basis after negotiation; it is not a "given right" of the company. In the present case, the CAW and IAMAW have attempted to engage UAL in such discussions, but while UAL attended a meeting, it said it could not make any commitment. As UAL put it in its factum when speaking generally of its situation in Canada vis-à-vis the U.S.A.:

6. United has also commenced discussions with representatives of its unionized workforce in Canada and OSFI with respect to United's Canadian labour issues and pension obligations. However, United has not been in a position to determine its course of action in Canada at this time given that its Chapter 11 emergence business plan, and any further cost cutting measures required thereunder, cannot be finalized until its substantial U.S. labour and pension issues are resolved.

As discussed above, fair enough, the tail cannot be expected to wag to dog. But the dog must appreciate that it has a tail.

6 Allow me to make a further observation as to the difference between Canada and the U.S.A. In the U.S.A., the parties are dealing under an umbrella which most significantly includes the Pension Benefits Guarantee Corp. which generally protects the workforce/pensioner side in an insolvency where there is a pension deficit. In Canada, in this federally regulated situation, there is no such backstop; the workforce/pensioners are naked. While I appreciate that as UAL points out, the pensioners in Canada continue to receive their pension cheques, that is as it should be. However, the result of that equation is that with all outflow from the fund and no inflow, it is not realistic to think that the investment income side will radically improve so that the pension deficit does not become larger with every pension cheque mailed, thereby weakening the pension fund to the detriment of future calls on it by existing pensioners and new pensioners upon retirement from the active workforce.

7 As discussed above, the relative size of the Canadian problems vis-à-vis the U.S.A. problems is rather insignificant. It would not seem on the evidence before me that payment of funding obligations would in any way cause any particular stress or strain on the U.S. restructuring - given their relatively insignificant amounts in question. UAL had no qualms about making such payments in the other countries internationally. Additionally there is the issue of the U.S. situation having the benefit of the Pension Benefits Guarantee Corp. (as to which UAL would have paid premiums) but there being no such safety net in Canada on the federal level (and thus no previous premium obligation on UAL).

8 In the end result on the basis of fairness and equity, I find no reason to excuse UAL from its obligation to fund its pension funding commitments in Canada and I therefore direct it to resume such funding.

9 I would also note that OSFI is at liberty to, if it feels it necessary, request a lift of stay so that it may issue a direction if it thinks that warranted (as opposed to the mere demand of September 3, 2004; the direction having a legal consequence).

10 I recognize that with the effluxion of time, the pension funding arrears have mounted up and therefore are greater than the interim payments at any one time which you would have in a pay as you go situation. It may therefore be desirable for UAL and its unions (with or without the assistance of OSFI) to have discussions about the mechanics of such payment regarding funding of arrears; including a schedule if necessary or desirable and the question of future obligation payments. However, recognizing the dog and its tail problem, it is conceivable that UAL would continue to conclude that it would not be practically feasible to do so. Thus if no such arrangement is put in place by March 31, 2005, all arrears are to be paid up by April 1, 2005. I would note the definite difference between "suspend" and "cease."

11 What then of the s. 8(2) Pension Benefits Standards Act, R.S.C. 1985, c. 32 (2nd Supp)? It provides as follows:

8(2) 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.

I agree with the submissions of UAL as set out in its factum at para. 85:

85. Also, United submits that there are a number of issues which raise doubts about the application of the deemed trust set out in subsection 8(2) of the PBSA to the current situation. In particular, subsection 8(2) states that a deemed trust arises where there is a "liquidation, assignment or bankruptcy" of an employer. None of the parties to this motion have provided any evidence that United (the employer) is in liquidation, has made an assignment or is in bankruptcy.

However, UAL should also keep in mind the provisions of s. 8(1):

8(1) An employer shall ensure, with respect to its pension plan, that

- (a) the moneys in the pension fund,
- (b) an amount equal to the aggregate of the prescribed payments that have accrued to date, and
- (c) all
 - (i) amounts deducted by the employer from members' remuneration, and
 - (ii) other amounts due to the pension fund from the employer that have not been remitted to the pension fund

are kept separate and apart from the employer's own moneys, and shall be 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 or refunds under the plan.

This of course may have fall out for officers and directors as to whom no stay protection is available.

12 In the end result, I dismiss the UAL motion to cease making contributions to its pension plans involving its Canadian workforce but rather to make good on its arrears unless otherwise agreed between its unions (who will have to keep in mind that UAL at some stage will come calling for concessions if it gets its U.S.A. house in order) and OSFI.

13 OSFI itself did not request a lift of stay vis-a-vis itself and so I do not find it appropriate to deal with the unions' request that I do so. OSFI is well able to speak for itself in this regard. It made no such motion; nor did it refer to same in its factum.

14 Orders accordingly (this endorsement also deals with the motions of the CAW and IAMAW).

15 All parties to this motion - UAL, the unions and OSFI - are labouring under the difficulties of fulfilling their valid legitimate mandates at a time where functionally there are pressing financial problems, compounded by UAL's being functionally distracted from Canada (and elsewhere) by the necessity of having to deal with its U.S.A. problems on a prioritized basis. I appreciate their difficulties. I would also wish to express my appreciation for the thorough and helpful submissions I received from counsel as they attempted to deal with their own clients' difficulties in dealing effectively with this situation on both a legal and functional basis.

J.M. FARLEY J.

cp/e/qljxh

Tab 2

CITATION: Indalex Limited (Re), 2011 ONCA 265
DATE: 20110407
DOCKET: C52187 & C52346

COURT OF APPEAL FOR ONTARIO

MacPherson, Gillese and Juriansz JJ.A.

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.

Applicants/Respondents

Andrew J. Hatnay and Demetrios Yiokaris for the Former Executives, appellants

Darrell L. Brown for the United Steelworkers, appellants

Mark Bailey for the Superintendent of Financial Services

Hugh O'Reilly and Adam Beatty for Morneau Sobeco Limited Partnership, Intervenor

Fred Myers and Brian Empey for Sun Indalex Finance, LLC

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

Harvey Chaiton and George Benchetrit for George L. Miller, the Chapter 7 Trustee of the
Bankruptcy Estates of the US Indalex Debtors

Heard: November 23 and 24, 2010

On appeal from the orders of Campbell J., of the Superior Court of Justice, dated

February 18, 2010.

Gillese J.A.:

[1] A Canadian company is insolvent. Its pension plans are underfunded and in the process of being wound up. The company is the administrator of the pension plans.

[2] The company obtains protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (*CCAA*). A court order enables it to borrow funds pursuant to a debtor-in-possession (DIP) credit agreement. The order creates a “super-priority” charge in favour of the DIP lenders. The obligation to repay the DIP lenders is guaranteed by the company’s U.S. parent company (the Guarantee).

[3] The company is sold through the *CCAA* proceedings but the sale proceeds are insufficient to repay the DIP lenders. The U.S. parent company covers the shortfall, in accordance with its obligations under the Guarantee.

[4] The *CCAA* monitor holds some of the sale proceeds in a reserve fund. The pension plan beneficiaries claim the money based on the deemed trust provisions in the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (*PBA*). The U.S. parent company claims the money based on its payment under the Guarantee.

[5] Must the money in the reserve fund be used to pay the deficiencies in the pension plans in preference to the secured creditor? What fiduciary obligations, if any, does the company have in respect of its underfunded pension plans during the *CCAA* proceeding? These appeals wrestle with these difficult questions.

OVERVIEW

[6] Indalex Limited was the sponsor and administrator of two registered pension plans: the Retirement Plan for Salaried Employees of Indalex Limited and Associated Companies (the Salaried Plan) and the Retirement Plan for Executive Employees of Indalex Limited and Associated Companies (the Executive Plan) (collectively, the Plans).

[7] On March 20, 2009, Indalex's parent company and its U.S. based affiliates (collectively, Indalex U.S.) sought Chapter 11 protection in the United States.

[8] On April 3, 2009, Indalex Limited, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc. (Indalex or the Applicants) obtained protection from their creditors under the *CCAA*. At that time, the Salaried Plan was in the process of being wound up. Both Plans were underfunded. FTI Consulting Canada ULC (the Monitor) was appointed as monitor.

[9] On April 8, 2009, the court authorized Indalex to borrow funds pursuant to a DIP credit agreement. The court order gave the DIP lenders a super-priority charge on Indalex's property. Indalex U.S. guaranteed Indalex's obligation to repay the DIP lenders.

[10] On July 20, 2009, Indalex moved for approval of the sale of its assets on a going-concern basis. It also moved for approval to distribute the sale proceeds to the DIP lenders, with the result that there would be nothing to fund the deficiencies in the Plans.

Without further payments, the underfunded status of the Plans will translate into significant cuts to the retirees' pension benefits.

[11] At the sale approval hearing, the United Steelworkers appeared on behalf of its members who had been employed by Indalex and are the beneficiaries of the Salaried Plan (the USW). In addition, a group of retired executives appeared on behalf of the beneficiaries of the Executive Plan (the Former Executives).

[12] Both the USW and the Former Executives objected to the planned distribution of the sale proceeds. They asked that an amount representing the total underfunding of the Plans (the Deficiencies) be retained by the Monitor as undistributed proceeds, pending further court order. Their position was based on, among other things, the deemed trust provisions in the *PBA* that apply to unpaid amounts owing to a pension plan by an employer.

[13] The court approved the sale. However, as a result of the USW and Former Executives' reservation of rights, the Monitor retained an additional \$6.75 million of the sale proceeds in reserve (the Reserve Fund), an amount approximating the Deficiencies.¹

[14] The sale closed on July 31, 2009. The sale proceeds were insufficient to repay the DIP lenders. Indalex U.S. paid the shortfall of approximately US\$10.75 million, pursuant to its obligations under the Guarantee.

¹ The Monitor retained the Reserve Fund as part of the Undistributed Proceeds. The Undistributed Proceeds also include amounts for the payment of cure costs, other costs associated with the completion of the SAPA transaction, legal and professional fees, and amounts owing under the DIP charge.

[15] In accordance with a process designed by the *CCAA* court, the USW and the Former Executives brought motions returnable on August 28, 2009, based on their deemed trust claims. They claimed the Reserve Fund was subject to deemed trusts in favour of the Plans' beneficiaries and should be paid into the Plans in priority to Indalex U.S. They also claimed that during the *CCAA* proceedings, Indalex breached its fiduciary obligations to the Plans' beneficiaries.

[16] Indalex then brought a motion in which it sought to lift the stay and assign itself into bankruptcy (the Indalex bankruptcy motion). This motion was directed to be heard on August 28, 2009, along with the USW and Former Executives' motions.

[17] By orders dated February 18, 2010, (the Orders under Appeal), the *CCAA* judge dismissed the USW and Former Executives' motions on the basis that, at the date of sale, no deemed trust under the *PBA* had arisen in respect of either plan. He found it unnecessary to decide the Indalex bankruptcy motion.

[18] The USW and the Former Executives (together, the appellants) appeal. They ask this court to order the Monitor to pay the Reserve Fund to the Plans.

[19] On November 5, 2009, the Superintendent of Financial Services (Superintendent) appointed the actuarial firm of Morneau Sobeco Limited Partnership (Morneau) as administrator of the Plans.

[20] Morneau was granted intervenor status. It supports the appellants.

[21] The Superintendent also appeared. He, too, supports the appellants.

[22] Sun Indalex, as the principal secured creditor of Indalex U.S., asks that the appeals be dismissed and the Reserve Fund be paid to it. As a result of its payment under the Guarantee, Indalex U.S. is subrogated to the rights of the DIP lenders. Its claim to the Reserve Fund is based on the super-priority charge.

[23] The Monitor appeared. It supports Sun Indalex and asks that the appeals be dismissed. The Monitor and Sun Indalex will be referred to collectively as the respondents.

[24] George L. Miller, the trustee of the bankruptcy estates of Indalex U.S., appointed under Chapter 7 of Title 11 of the United States Bankruptcy Code (the U.S. Trustee), was given leave to intervene. He joins with the Monitor and Sun Indalex in opposing these appeals.

[25] For the reasons that follow, I would allow the appeals and order the Monitor to pay, from the Reserve Fund, amounts sufficient to satisfy the deficiencies in the Plans. For ease of reference, the various statutory provisions to which I make reference can be found in the schedules at the end of these reasons.

BACKGROUND

[26] Indalex Limited is a Canadian corporation. It is the entity through which the Indalex group of companies operates in Canada. It is a direct wholly-owned subsidiary of its U.S. parent, Indalex Holding Corp., which in turn is a wholly-owned subsidiary of Indalex Finance.

[27] Together, the group of companies referred to as Indalex and Indalex U.S. were the second largest manufacturer of aluminum extrusions in the United States and Canada. Aluminum is a durable, light weight metal that can be strengthened through the extrusion process, which involves pushing aluminum through a die and forming it into strips, which can then be customized for a wide array of end-user markets.

[28] Indalex Limited produced a portion of the raw material used in the extrusion process, called aluminum extrusion billets, through its casting division located in Toronto. It also processed the raw extrusion billets into extruded product at its Canadian extrusion plants, for sale to end users. In 2008, Indalex Limited accounted for approximately 32% of the Indalex group of companies total sales to third parties.

[29] Indalex Limited provided separate pension plans for its executives and salaried employees. The Plans were designed to pay pension benefits for the lives of the retirees and those of their designated beneficiaries. Indalex Limited was the sponsor and administrator of both Plans. The Plans were registered with the Financial Services Commission of Ontario (FSCO) and the Canadian Revenue Agency.

The Salaried Plan

[30] The USW has several locals certified as bargaining agents on behalf of members employed with Indalex, including members who are beneficiaries of the Salaried Plan. It was certified to represent certain Indalex employees, seven of whom were members of the Salaried Plan and have deferred vested entitlements under that plan.

[31] The Salaried Plan contains a defined benefit and defined contribution component.

[32] Unlike the Executive Plan, the Salaried Plan was in the process of being wound up when Indalex began *CCAA* proceedings. The effective date of wind up is December 31, 2006. Special wind up payments were made in 2007 (\$709,013), 2008 (\$875,313) and 2009 (\$601,000). As of December 31, 2008, the wind up deficiency was \$1,795,600.

[33] All current service contributions have been made to the Salaried Plan.

[34] Article 4.02 of the Salaried Plan obligates Indalex to make sufficient contributions to the Salaried Plan. Article 14.03 of the Salaried Plan requires Indalex to remit “amounts due or that have accrued up to the effective date of the wind-up and which have not been paid into the Fund, as required by the Plan and Applicable Pension Legislation”.

The Executive Plan

[35] The Executive Plan is a defined benefit plan. Effective September 1, 2005, Indalex closed the Executive Plan to new members.

[36] As of January 1, 2008, there were eighteen members of the Executive Plan, none of whom were active employees.

[37] The Executive Plan is underfunded.

[38] As of January 1, 2008, the Executive Plan had an estimated funding deficiency, on an ongoing basis, of \$2,535,100. On a solvency basis, the funding deficiency was \$1,102,800 and on a windup basis, the deficiency was \$2,996,400. An actuarial review

indicated that as of July 15, 2009, the wind up deficiency had increased to an estimated \$3,200,000.

[39] In 2008, Indalex made total special payments of \$897,000 to the Executive Plan. No further special payments were due to be made to the Executive Plan until 2011. All current service contributions had been made.

[40] Due to its underfunded status, the Former Executives' monthly pension benefits have already been cut by 30-40%. Unless money is paid into the Executive Plan, these cuts will become permanent. The Former Executives have also lost their supplemental pension benefits which were unfunded and terminated by Indalex after it obtained *CCAA* protection. Between the two cuts, the Former Executives have lost between one half and two-thirds of their pension benefits.

[41] On June 26, 2009, counsel for the Former Executives sent a letter to counsel to Indalex and the Monitor, advising that the Former Executives reserved all rights to the deemed trust under s. 57(4) of the *PBA* in the *CCAA* proceedings. There was no response or objection to that letter from Indalex, the Monitor or any other party.

[42] At the time the Orders under Appeal were made, the Executive Plan had not been wound up. However, a letter from counsel for the Monitor dated July 13, 2009, indicated that it was expected that the Executive Plan would be wound up.

[43] On March 10, 2010, the Superintendent issued a Notice of Proposal to wind up the Executive Plan effective as of September 30, 2009. The wind up process is currently underway.

Pension and Corporate Governance During the CCAA Proceedings

[44] Keith Cooper, the Senior Managing Director of FTI Consulting Inc., was a key advisor to the Indalex group of companies prior to and during the CCAA proceedings. On March 19, 2009, he was appointed the Chief Restructuring Officer for all of the Indalex U.S. based companies. However, he was responsible not only for Indalex U.S. but for the entire Indalex group of companies and subsidiaries, including the Applicants. Mr. Cooper described his role as being to maximize recovery for Indalex as a whole.

[45] Mr. Cooper was the primary negotiator of the DIP credit agreement on behalf of Indalex. He does not recall discussing Indalex's pension obligations in respect of the Salaried and Executive Plans during the negotiation of the DIP credit agreement. He was aware that the Plans were underfunded and that pensions would be reduced if the shortfalls were not met.

[46] FTI Consulting Inc., the company for which Mr. Cooper works, and the Monitor are affiliated entities. The Monitor (FTI Consulting Canada ULC) is a wholly-owned subsidiary of FTI Consulting Inc.

[47] On July 31, 2009, all of the directors of Indalex resigned. On that same day, Indalex Holding Corp. (part of Indalex U.S.) became the management of Indalex. Thus, as of July 31, 2009, Indalex and Indalex U.S. formally had the same management.

[48] On August 12, 2009, a Unanimous Shareholder Declaration was executed in which Mr. Cooper was appointed to direct the affairs of all Indalex entities.

[49] On August 13, 2009, Indalex (which was now under the management of Indalex U.S.) announced its intention to bring a motion to bankrupt the Canadian company.

THE CCAA PROCEEDINGS

The Initial Order, as amended (April 3 and 8, 2009)

[50] On April 3, 2009, pursuant to the order of Morawetz J., Indalex obtained protection from its creditors under the CCAA (the Initial Order). A stay of proceedings against Indalex was ordered.

[51] On April 8, 2009, the Initial Order was amended to authorize Indalex to borrow funds pursuant to a DIP credit agreement among Indalex, Indalex U.S. and a syndicate of lenders (the DIP lenders). JP Morgan Chase Bank, N.A. was the administrative agent (the DIP Agent). The DIP credit agreement contemplated that the DIP loan would be repaid from the proceeds derived from a going-concern sale of Indalex's assets on or before August 1, 2009.

[52] Indalex's obligation to repay the DIP borrowings was guaranteed by Indalex U.S. The Guarantee was a condition to the extension of credit by the DIP lenders.

[53] Paragraph 45 of the Initial Order, as amended, is the super-priority charge. It provides that the DIP lenders' charge "shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise", other than the Administration Charge and the Directors' Charge, as those terms are defined in the Initial Order.

The Initial Order is Further Amended (June 12, 2009)

[54] On June 12, 2010, Morawetz J. heard and granted a motion by the Applicants for approval of an amendment to the DIP credit agreement to increase the borrowings by about \$5 million, from US\$24.36 million to US\$29.5 million. This resulted in an order dated June 12, 2009, further amending the Initial Order (the June 12, 2009 order).

[55] Counsel for the Former Executives was served with motion material on June 11, 2009, at 8:27 p.m. In response to an email from the Former Executives' counsel questioning the urgency of the motion, the Monitor's counsel responded that the motion was simply directed at obtaining more money under the DIP credit agreement.

[56] At the hearing of the motion on June 12, 2010, the Former Executives initially sought to reserve their rights to confirm that the motion was about an increase to the DIP and nothing more. When that was confirmed, the Former Executives withdrew their reservation and the motion proceeded later that afternoon.

The Sale Approval Order (July 20, 2009)

[57] Indalex brought two motions that were heard on July 20, 2009, by Campbell J. (the *CCAA* judge).

[58] First, Indalex sought approval of a sale of its assets, as a going concern, to SAPA Holdings AB (SAPA). Total consideration for the sale of Indalex and Indalex U.S. was approximately US\$151,183,000.00. The Canadian sale proceeds were to be paid to the Monitor.

[59] As a term of the sale, SAPA assumed no responsibility or liability for the Plans.

[60] Second, Indalex moved for approval of an interim distribution of the sale proceeds to the DIP lenders.

[61] Both the Former Executives and the USW objected to the planned distribution of the sale proceeds. They asserted statutory deemed trust claims in respect of the underfunded pension liabilities in the Plans, arguing that preference was to be given for amounts owing to the Plans pursuant to ss. 57 and 75 of the *PBA*. They also relied on s. 30(7) of the Ontario *Personal Property Security Act*, R.S.O. 1990, c. P.10 (*PPSA*), which expressly gives priority to the deemed trust in the *PBA* over secured creditors.

[62] The Former Executives and the USW further argued that Indalex had breached its fiduciary duty to the Plans' beneficiaries by failing to adequately meet its obligations under the Plans and by abdicating its responsibilities as administrator once *CCAA* proceedings had been undertaken.

[63] The court approved the sale in an order dated July 20, 2009 (the Sale Approval order). However, as a result of the USW and Former Executives' reservation of rights, the Monitor retained an additional \$6.75 million of the sale proceeds in reserve, an amount approximating the Deficiencies.

[64] It was agreed that an expedited hearing process would be undertaken in respect of the USW and Former Executives' deemed trust claims and that the Reserve Fund held by the Monitor would be sufficient, if required, to satisfy the deemed trust claims.

The Guarantee is Called on

[65] On July 31, 2009, the sale to SAPA closed. The sale proceeds available for distribution were insufficient to repay the DIP loan in full. The Monitor made a payment of US\$17,041,391.80 to the DIP Agent. This resulted in a shortfall of US\$10,751,247.22 in respect of the DIP borrowings. The DIP Agent called on the Guarantee for the amount of the shortfall, which Indalex U.S. paid.

The Orders under Appeal (August 28, 2009)

[66] The USW and Former Executives brought motions to determine their deemed trust claims. The motions were set for hearing on August 28, 2009. Indalex then filed its bankruptcy motion, in which it sought to file a voluntary assignment in bankruptcy.

[67] By orders dated February 18, 2010, the CCAA judge dismissed the USW and Former Executives' motions.

[68] The CCAA judge found it unnecessary to deal with Indalex's bankruptcy motion.

THE REASONS OF THE CCAA JUDGE

The Former Executives' Motion

[69] The CCAA judge dismissed the Former Executives' motion on the basis that since the wind up of the Executive Plan had not yet taken place, there were no deficiencies in payments to that plan as of July 20, 2009. As there were no deficiencies in payments, there was no basis for a deemed trust.

The USW Motion

[70] Because the Salaried Plan was in the process of being wound up, the CCAA judge dismissed the USW motion for different reasons.

[71] The CCAA judge saw the issue raised on the USW motion to be whether the *PBA* required Indalex to pay the windup deficiency in the Salaried Plan as at the date of closing of the sale and transfer of assets, namely, July 20, 2009. In resolving the issue, the CCAA judge considered ss. 57 and 75 of the *PBA*. He called attention to the words "accrued to the date of the wind up but not yet due" in s. 57(4).

[72] The CCAA judge also considered ss. 31(1) and (2) of R.R.O. 1990, Reg. 909 (the Regulations). He concluded that because s. 31 of the Regulations permitted Indalex to make up the deficiency in the Salaried Plan over a period of years, the amount of the yearly payments did not become due until it was required to be paid. Were it not for s. 31 of the Regulations, the CCAA judge stated that Indalex would have had an obligation under the *PBA* to pay in any deficiency as of the date of wind up.

[73] The CCAA judge concluded:

[49] ... I find that as of the date of closing and transfer of assets there were no amounts that were "due" or "accruing due" on July 20, 2010. On that date, Indalex was not required under the *PBA* or the Regulations thereunder to pay any amount into the [Salaried] Plan. There was an annual payment that would have become payable as at December 31, 2009 but for the stay provided for in the Initial Order under the CCAA.

[50] Since as of July 20, 2009, there was no amount due or payable, no deemed trust arose in respect of the remaining deficiency arising as at the date of wind-up.

[51] Since under the initial order priority was given to the DIP Lenders, they are entitled to be repaid the amounts currently held in escrow. Those entitled to windup deficiency remain as of that date unsecured creditors.

The Indalex Bankruptcy Motion

[74] Having found that the deemed trust claims failed, the CCAA judge considered that the question of Indalex's assignment into bankruptcy might be moot. He went on, in para. 55 of his reasons for decision, to state:

[55] ... In my view, **a voluntary assignment under the BIA should not be used to defeat a secured claim under valid Provincial legislation**, unless the Provincial legislation is in direct conflict with the provisions of Federal Insolvency Legislation such as the CCAA or the BIA. For that reason I did not entertain the bankruptcy assignment motion first. [Emphasis added.]

[75] He found no conflict between the federal and provincial legislative regimes and allowed the Applicants to renew their request for bankruptcy relief in a further motion.

THE ISSUES

[76] The central issue raised on these appeals is whether the *CCAA* judge erred in his interpretation of s. 57(4) of the *PBA* and, specifically, in finding that no deemed trust existed with respect to the Deficiencies as at July 20, 2009.

[77] The USW and the Former Executives ask the court to decide a second issue: whether during the *CCAA* proceedings Indalex breached the fiduciary obligations that it owed to the Plans' beneficiaries by virtue of being the Plans' administrator.²

[78] The U.S. Trustee's submission raises two additional issues. Does the collateral attack rule bar the appellants' deemed trust motions? Do the principles of cross-border insolvencies apply to these appeals?

[79] The final issue that arises is that of remedy: how is the Reserve Fund to be distributed?

[80] Given the centrality of the wind up process to these appeals, I will briefly outline the salient aspects of the wind up process before turning to a consideration of each of these issues.

WINDING UP A PENSION PLAN

[81] To understand the wind up process, one must first understand how the pension plan operates while it is ongoing.

² The appellants had raised this issue below but it had not been dealt with by the *CCAA* judge.

[82] A pension plan to which the employees contribute is called a contributory plan. In the case of contributory plans, the employer is obliged to remit the employee contributions, including payroll deductions, within a specified time frame. This aspect of an employer's obligations does not arise in these appeals.

[83] In addition to remitting the employee contributions, if any, while a defined benefit pension plan is ongoing, the employer must make two types of contributions to ensure that the plan is adequately funded and capable of paying the promised pension benefits.

1. **Current service or "normal cost" contributions** – the employer contributions necessary to pay for current service costs in respect of benefits that are currently accruing to members as a result of their ongoing participation in the plan as active employees. These must be made in monthly instalments within 30 days after the month to which they relate.

2. **Special payments** – a plan administrator must file an actuarial report annually in which the pension plan is valued on two different bases: a "going-concern" basis, where it is assumed the plan will continue to operate indefinitely; and a "solvency" basis, where it is assumed that the employer will discontinue its business and wind up its plan. If the actuarial report discloses a going-concern liability, the employer is required to make monthly special payments over a 15 year period to fund the unfunded liability. If the actuarial report discloses a solvency deficiency, the

employer is required to make monthly special payments over a 5 year period to fund the deficiency.

[84] It is important to understand that the solvency valuation is not the same thing as a wind up report. To repeat, the solvency valuation is prepared while the pension plan is ongoing. A solvency valuation is required while the plan is ongoing because it is crucial that there be adequate funds with which to pay pensions if the company becomes insolvent and the plan is wound up.

[85] The wind up of a pension plan is defined in the *PBA* as “the termination of the pension plan and the distribution of the assets of the pension fund” (s. 1(1)). At the effective date of wind up, the plan members cease to accrue further entitlements under the plan. Naturally, no new members may join the plan after the wind up date. The pension fund of a plan that is wound up continues to be subject to the *PBA* and the Regulations until all of the assets of the fund have been disbursed (s. 76).

[86] Winding up a pension plan must be distinguished from closing the plan, which simply means that no new entrants are permitted to join the plan.

[87] Under the *PBA*, there are two ways that a pension plan can be wound up. First, s. 68(1) recognizes that an employer³ can voluntarily wind up the pension plan. Second, under s. 69(1), in certain circumstances, the Superintendent may order the wind up of the plan.

³ Or, in the case of a multi-employer plan, the administrator.

[88] The *PBA* contains a detailed statutory scheme that must be followed when a pension plan is to be wound up. This scheme imposes obligations on the employer and plan administrator, including the following:

- The administrator has to give written notice of proposal to wind up to various people, including the Superintendent, and the notice must contain specified information (s. 68(2) and (4));
- A wind up date must be chosen and the administrator must file a wind up report showing, among other things, the plan's assets and liabilities as at that date (s. 70(1));
- No payments can be made out of the pension fund until the Superintendent has approved the wind up report (s. 70(4));
- Plan members with a certain combination of age and years of service or membership in the plan are entitled to additional benefits on wind up (grow-ins) (s. 74).

[89] Importantly, s. 75 requires an employer to make two different categories of payment on plan wind up. Sections 75(1)(a) and (b) read as follows:

Liability of employer on wind up

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

- (a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and
- (b) an amount equal to the amount by which,
 - (i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,
 - (ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and
 - (iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

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

[90] Section 75(1)(a) requires the employer to make all payments that are due immediately or that have accrued and not been paid into the pension fund. Any unpaid current service costs and unpaid special payments are caught by this subsection. In other words, by virtue of this subsection, any payments that the employer had to make while the plan was ongoing must be paid. It will be recalled that while the plan was ongoing, some special payments could be made over time.

[91] Section 75(1)(b) requires the employer to pay additional amounts into the pension fund if there are insufficient assets to cover the value of the pension benefits in the three categories set out in s. 75(1)(b).

[92] It will be apparent that on wind up, an employer will often be faced with having to make significant additional contributions under s. 75(1)(b), in addition to being required to bring all contributions up to date because of s. 75(1)(a). Section 75(2) stipulates that “the employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times.” Section 31 of the Regulations prescribes the manner and timing for the s. 75 wind up payments. It provides that the amounts an employer is to contribute under section 75 shall be by annual special payments, commencing at the effective date of the wind up, over not more than five years.

THE *PBA* DEEMED TRUST

[93] The central issue in these appeals is whether the *CCAA* judge erred in his interpretation of s. 57(4) of the *PBA*. Section 57(4) reads as follows:

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.
[emphasis added]

[94] The modern approach to statutory construction dictates that in interpreting s. 57(4), the words must be read

in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.⁴

[95] Section 57(4) deems an employer to hold in trust an amount equal to the contributions “accrued to the date of wind up but not yet due under the plan or regulations”. The question is: what employer contributions are caught by s. 57(4) and, thus, are subject to the deemed trust?

[96] The introductory words of s. 57(4) refer to where a pension plan is “wound up”. Therefore, to answer this question, one must refer to the wind up regime created by the *PBA* and Regulations, a summary of which is set out above.

[97] It will be recalled that when a pension plan is wound up, an actuarial calculation is made of the assets and liabilities, as of the wind up date. Because the plan liabilities relate to service that was provided up to the wind up date and not beyond, it is clear that all plan liabilities are accrued as of the wind up date. Put another way, no additional liability can accrue following the wind up because all events crystallize on the windup date – all pension benefit accruals by members cease and all amounts that an employer is required to pay into a pension plan are calculated as of the wind up date. For the same reason, the amounts that s. 75 requires an employer to contribute to the pension fund, on wind up, are accrued to the date of wind up. The required contributions are the amounts that an employer must make to the pension fund so that the accrued pension benefits of the plan members can be paid.

⁴ *Bell ExpressVu Limited Partnership v. Rex.*, [2002] 2 S.C.R. 559, at para. 26.

[98] It will be further recalled that s. 31 of the Regulations gives the employer up to five years in which to make all of the required s. 75 contributions. However, the fact that an employer is given time in which to pay the requisite contributions into the pension fund does not change the fact that the liabilities accrued by the wind up date.

[99] This point is reinforced when one distinguishes amounts that are “accrued” from amounts that are “not yet due”. In *Hydro-Electric Power Commission (Ontario) v. Albright* (1922), 64 S.C.R. 306, at para. 23, the Supreme Court of Canada explains that money is “due” when there is a legal obligation to pay it, whereas payments are “accrued” when the rights or obligations are constituted and the liability to pay exists, even if the payment does not need to be made until a later date (*i.e.* is not “due” until a later date).

[100] Thus, just as s. 57(4) contemplates, while the amounts that the employer must contribute to the pension fund pursuant to s. 75 “accrued to the date of wind up”, because of s. 31 those contributions are “not yet due under the ... regulations”.

[101] There is nothing in the wording of s. 57(4) to suggest that its scope is confined to the amounts payable under only s. 75(1)(a), as the respondents contend. On the contrary, the words of s. 57(4), given their grammatical and ordinary meaning, contemplate that all amounts owing to the pension plan on wind up are subject to the deemed trust, even if those amounts are not yet due under the plan or regulations. Therefore, the deemed trust in s. 57(4) applies to all employer contributions that are required to be made pursuant to

s. 75. In short, the words “employer contributions accrued to the date of wind up but not yet due” in s. 57(4) include all amounts owed by the employer on the wind up of its pension plan.

[102] This interpretation accords with a contextual analysis of s. 57(4).

[103] As these appeals demonstrate, during the five-year “grace” period permitted by s. 31 of the Regulations, the rights of plan beneficiaries are at risk. Sections 57(4) and (5) provide some protection to the plan beneficiaries during that period. The employees’ interest is in receiving their full pension entitlements. For that to happen, all s. 75 employer contributions must be made into the pension fund. The employer, on the other hand, has an interest in having a reasonable period of time within which to make the requisite s. 75 contributions. Section 31 of the Regulations gives the employer up to five years to make the contributions, during which time the deemed trust in s. 57(4) and the lien and charge in s. 57(5) provide a measure of protection for the employees over the amount of the unpaid employer contributions, contributions that had *accrued* to the date of wind up *but [were] not yet due under the regulations*.

[104] Further, this interpretation is consistent with the overall purpose of the *PBA*, which is to establish minimum standards,⁵ safeguard the rights of pension plan beneficiaries,⁶

⁵ *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, at para. 13, relying on *Gencorp Canada Inc. v. Ontario (Superintendent of Pensions)* (1998), 158 D.L.R. (4th) 497 (Ont. C.A.), at p. 503.

⁶ *Ibid.*

and ensure the solvency of pension plans so that pension promises will be fulfilled.⁷ As the Supreme Court of Canada said in *Monsanto*, at para. 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 (citations omitted).

[105] Much reference has been made to the two cases in which s. 57(4) has been discussed: *Re Ivaco* (2005), 12 C.B.R. (5th) 213 (Ont. S.C.), aff'd (2006), 83 O.R. (3d) 108 (C.A.), and *Toronto-Dominion Bank v. Usarco* (1991), 42 E.T.R. 235 (Ont. Ct. (Gen. Div.)). In my view, these decisions are of little assistance in deciding this issue.

[106] Factually, *Ivaco* and *Usarco* differ from the present case. In *Ivaco* and *Usarco*, the prospect of bankruptcy was firmly before the court whereas in this case, at its highest, there is a motion to lift the stay and file for bankruptcy.

[107] Moreover, there are conflicting statements in *Ivaco* and *Usarco* regarding the applicability of the deemed trust to wind up deficiencies. In *Usarco*, a bankruptcy petition had been filed but no steps had been taken to proceed with the petition. The company was not under *CCAA* protection. In that context, Farley J., the motion judge, held that the deemed trust provision referred only to the regular contributions together

⁷ *Bourdon v. Stelco Inc.*, [2005] S.C.R. 279, at para. 24.

with special contributions that were to have been made but had not been.⁸ In *Ivaco*, the major financiers and creditors wished to have the *CCAA* proceeding, which was functioning as a liquidation, transformed into a bankruptcy proceeding. The case was focused primarily on whether there was a reason to defeat the bankruptcy petition. In *Ivaco*, Farley J. took a different view of the scope of the s. 57(4) deemed trust, stating that in a non-bankruptcy situation, the company's assets were subject to a deemed trust on account of unpaid contributions and wind up liabilities.⁹ On appeal, although this court indicated that it thought that Farley J.'s statement in *Usarco* was correct, it found it unnecessary to decide the matter. Accordingly, these decisions are not determinative of the scope of the deemed trust created by s. 57(4) of the *PBA*.

[108] The *CCAA* judge concluded that because Indalex had made the going-concern and special payments to the Salaried Plan at the date of closing, there were no amounts due to the Salaried Plan. Therefore, there could be no deemed trust. Respectfully, I disagree. As I have explained, the deemed trust in s. 57(4) is not limited to the payment of amounts contemplated by s. 75(1)(a). It applies to all payments required by s. 75(1), including payments mandated by s. 75(1)(b).

[109] Accordingly, the deficiency in the Salaried Plan had accrued as of the date of wind up (December 31, 2006) and, pursuant to s. 57(4) of the *PBA*, was subject to a deemed trust. The *CCAA* judge erred in holding that no deemed trust existed with respect to that

⁸ At para. 26.

⁹ At para. 11.

deficiency as at July 20, 2009. The consequences that flow from this conclusion are explored in the section below on how the Reserve Fund is to be distributed.

[110] Are the unpaid liability payments owing to the Executive Plan also subject to the s. 57(4) deemed trust? The Former Executives, Superintendent and Morneau all contend that they are. On the plain wording of s. 57(4), I find it difficult to accept this argument – the introductory words of the provision speak to “where a pension plan is wound up”. In other words, wind up of the pension plan appears to be a requirement for s. 57(4) to apply. If that is so, no deemed trust could arise unless and until a plan wind up occurred. As has been noted, the Executive Plan had not been wound up at the relevant time.

[111] Having said this, I am troubled by the notion that Indalex can rely on its own inaction to avoid the consequences that flow from wind up. In its letter of July 13, 2009, counsel for the Monitor confirmed that the Executive Plan would be wound up. Indeed, the *CCAA* judge acknowledged that the material filed with the court showed an intention on the part of the Applicants to wind up the plan. If the deemed trust does not extend to the Executive Plan, in the circumstances of this case, it appears that the result would be a triumph of form over substance.

[112] In the end, however, the question that drives these appeals is whether the Monitor should be directed to distribute the Reserve Fund to the Plans. As I explain below in the section on how the Reserve Fund should be distributed, in my view, such an order should be made. Consequently, it becomes unnecessary to decide whether the deemed trust

applies to the deficiency in the Executive Plan and I decline to do so. It is a question that is best decided in a case where the result depends on it and a fuller record would enable the court to appreciate the broader implications of such a determination.

DID INDALEX BREACH ITS FIDUCIARY OBLIGATION?

[113] The appellants say that Indalex, as administrator of the Plans, owed a fiduciary duty to the Plans' members and beneficiaries. Both appellants list a number of actions that Indalex took or failed to take during the *CCAA* proceedings that they say amounted to breaches of its fiduciary obligation. They contend that the appropriate remedy for those breaches is an order requiring the Reserve Fund to be paid into the Plans.

[114] The Monitor acknowledges that pension plan administrators have both a statutory and common law duty to act in the best interests of the plan beneficiaries and to avoid conflicts of interest, and that these duties are "fiduciary in nature". However, the Monitor contends that Indalex took all of the impugned actions in its role as employer and, therefore, could not have breached the fiduciary duties it owed to the Plans' beneficiaries as administrator. In any event, the Monitor adds, the issue is moot because any such breaches would merely give rise to an unsecured claim outside the ambit of the deemed trusts created by the *PBA*.

[115] Sun Indalex echoes the Monitor's latter argument and says that the allegations of breach of fiduciary duty are irrelevant in these appeals. Its submission on this issue is summarized in para. 79 of its factum:

[79] There is no provision in the PBA that creates a deemed trust in respect of any claim for damages based on an alleged breach of fiduciary duty by an employer and there is no basis in the PBA for conferring a priority with respect to such a claim. If a claim for breach of fiduciary duty on the part of Indalex exists, it is merely an unsecured claim outside the ambit of the deemed trusts created by the PBA that does not have priority over Sun's secured claim or the super-priority DIP Lenders Charge.

[116] For the reasons that follow, I accept the appellants' submission that Indalex breached its fiduciary obligations as administrator during the CCAA proceedings. I deal with the question of what flows from that finding when deciding the issue of remedy.

[117] It is clear that the administrator of a pension plan is subject to fiduciary obligations in respect of the plan members and beneficiaries.¹⁰ These obligations arise both at common law and by virtue of s. 22 of the PBA.

[118] The common law governing fiduciary relationships is well known. A fiduciary relationship will be held to exist where, given all the surrounding circumstances, one person could reasonably have expected that the other person in the relationship would act in the former's best interests.¹¹ The key factual characteristics of a fiduciary relationship are: the scope for the exercise of discretion or power; the ability to exercise that power unilaterally so as to affect the beneficiary's legal or practical interests; and, a peculiar vulnerability on the part of the beneficiary to the exercise of that discretion or power.¹²

¹⁰ *Burke v. Hudson's Bay Co.*, [2010] 2 S.C.R. 273, at paras. 39-41.

¹¹ *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at para. 32.

¹² *Ibid.*, at para. 30; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at p. 646.

[119] It is readily apparent that these characteristics exist in the relationship between the pension plan administrator and the plan members and beneficiaries. The administrator has the power to unilaterally make decisions that affect the interests of plan members and beneficiaries as a result of its responsibility for the administration of the plan and management of the fund. Those decisions affect the beneficiaries' interests. The plan members and beneficiaries reasonably rely on the administrator to ensure that the plan and fund are properly administered. And, as these appeals demonstrate, they are peculiarly vulnerable to the administrator's exercise of its powers. Thus, at common law, Indalex as the Plans' administrator owed a fiduciary duty to the Plans' members and beneficiaries to act in their best interests.

[120] Section 22 of the *PBA* also imposes a fiduciary duty on the administrator in the administration of the plan and fund. As well, it expressly prohibits the administrator from knowingly permitting its interest to conflict with its duties in respect of the pension fund. The relevant provisions in s. 22 read as follows:

Care, diligence and skill

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

Special knowledge and skill

(2) The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the

administrator's profession, business or calling, ought to possess.

...

Conflict of interest

(4) An administrator ... shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

[121] In Ontario, an employer is expressly permitted to act as the administrator of its pension plan: see ss. 1 and 8 of the *PBA*.¹³ It is self-evident that the two roles can conflict from time to time. In *Imperial Oil Ltd. v. Ontario (Superintendent of Pensions)* (1995), 18 C.C.P.B. 198 (*Imperial Oil*), the Pension Commission of Ontario (PCO) grappled with this statutorily sanctioned conflict in roles.

[122] In that case, the employer Imperial Oil was the administrator of two employee pension plans. Imperial Oil sought to file amendments to the pension plans with the PCO. Prior to the amendments, a plan member with 10 or more years of service with Imperial Oil whose employment was terminated for efficiency reasons was entitled to an enhanced early retirement annuity (the enhanced benefit). The effect of the amendments was to deny such an employee the enhanced benefit unless the employee would have been able to retire within five years of termination. Put another way, after the amendments, in addition to the other requirements, an employee had to be 50 years of age

¹³ In contrast, Quebec legislation requires that plan administration be entrusted to a pension committee of at least three persons, including a representative of each of the active and inactive members of the plan and an independent member. See *Supplemental Pension Plans Act*, R.S.Q. c. R-15.1, s. 147.

or older at the time his or her employment was terminated for efficiency reasons in order to receive the enhanced benefit.

[123] The Superintendent accepted the amendments for registration.

[124] Some six months after the amendments were passed, Imperial Oil terminated the employment of a large number of employees for efficiency reasons. A number of the affected employees had 10 or more years of service but, because they had not reached the age of 50, they were denied the enhanced benefit.

[125] A group of former employees (the Entitlement 55 Group) objected to the registration of the amendments. They brought an application to the PCO, seeking a declaration that the amendments were void and an order compelling Imperial Oil to administer the pension plans according to the terms of the plans in place before the amendments were passed.

[126] Among other things, the Entitlement 55 Group argued that when Imperial Oil amended the plans, it was acting in both its capacity as employer and its capacity as administrator of the plans. Thus, they contended, Imperial Oil placed itself in a conflict of interest situation prohibited by s. 22(4) of the *PBA* because in its role as employer it wished to reduce pension fund liabilities but in its role as administrator it had a duty to protect the interests of the beneficiaries who had reached the 10 year service qualification and thereby “qualified” for the enhanced benefit.

[127] The PCO dismissed the application. In so doing, it rejected the submission that Imperial Oil had contravened s. 22(4) by passing the amendments. It held that Imperial Oil had acted solely in its capacity as employer when it passed the amendments.

[128] The PCO acknowledged that the *PBA* allows an employer to wear “two hats” – one as employer and the other as administrator. However, at para. 33 of its reasons, the PCO explained that an employer plays a role in respect of the pension plan that is distinct from its role as administrator:

Its role as employer permits it to make the decision to create a pension plan, to amend it and to wind it up. Once the plan and fund are in place, it becomes an administrator for the purposes of management of the fund and administration of the plan. If we were to hold that an employer was an administrator for all purposes once a plan was established, of what use would a power of amendment be? An employer could never use the power to amend the plan in a way that was to its benefit, as opposed to the benefit of the employees. Section 14 presupposes this power is with an employer as it created parameters around the exercise of a power of amendment.

[129] The “two hats” analogy in *Imperial Oil* assists in understanding the parameters of the dual roles of an employer who is also the administrator of its pension plan. The employer, when managing its business, wears its corporate hat. Although the employer *qua* corporation must treat all stakeholders fairly when their interests conflict, the directors’ ultimate duty is to act in the best interests of the corporation: see *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560, at paras. 81-84. On the other hand, when

acting as the pension plan administrator, the employer wears its fiduciary hat and must act in the best interests of the plan's members and beneficiaries.

[130] The question raised by these appeals is whether, as the respondents contend, Indalex wore only its corporate hat during the *CCAA* proceedings. In my view, it did not. As I will explain, during the *CCAA* proceedings, in the unique circumstances of this case, Indalex wore both its corporate and its administrator's hats.

[131] I begin from the position that Indalex had the right to make the decision to commence *CCAA* proceedings wearing solely its corporate hat. That decision is not part of the administration of the pension plan or fund nor does it necessarily engage the rights of the beneficiaries of the pension plan. For example, an employer might sell its business under *CCAA* protection, with the purchaser agreeing to continue the pension plan. In that situation, there should be no effect on the payment of pension benefits. Similarly, if the pension plan were fully funded, *CCAA* proceedings should have no effect on pension entitlements.

[132] However, just because the initial decision to commence *CCAA* proceedings is solely a corporate one that does not mean that all subsequent decisions made during the proceedings are also solely corporate ones. In the circumstances of this case, Indalex could not simply ignore its obligations as the Plans' administrator once it decided to seek *CCAA* protection. Shortly after initiating *CCAA* proceedings, Indalex moved to obtain DIP financing, in which it agreed to give the DIP lenders a super-priority charge. At the

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

[133] In concluding that Indalex was subject to its fiduciary duties as administrator as well as its corporate obligations during the *CCAA* proceedings, two points need to be made.

[134] First, it is significant that Indalex is unclear as to what it thinks happened to its role as administrator during the *CCAA* proceedings. When cross-examined on this matter, Mr. Cooper gave various responses as to whom he believed filled that role: Indalex, a combination of him and the Monitor, and a combination of him and his staff. This confusion is understandable, given the number of roles that Mr. Cooper played in these proceedings. It will be recalled that prior to the commencement of the *CCAA* proceedings, he became the Chief Restructuring Officer for Indalex U.S., a position which included responsibility for the Canadian group of Indalex companies. In this position, he served as Indalex's primary negotiator of the DIP credit agreement. But, at the same time, he worked for FTI Consulting Inc. The Monitor is a wholly-owned

subsidiary of FTI Consulting Inc. This blending of roles no doubt contributed to the apparent disregard for the obligations owed by the Plans' administrator.

[135] In any event, it is not apparent to me that Indalex could ignore its role as administrator or divest itself of those obligations without taking formal steps through the Superintendent, plan amendment, the courts, or some combination thereof, to transfer that role to a suitable person. However, I will not consider this particular question further because it was not squarely raised and argued by the parties and, in any event, even if Mr. Cooper became the administrator, through his various roles, including as Chief Restructuring Officer for Indalex U.S., he is so clearly allied in interest with Indalex that the following analysis remains applicable.

[136] Second, the respondents' submission that Indalex wore only its corporate hat during the proceedings is implicitly premised on the notion that an employer will wear its corporate hat or its administrator's hat, but never both. I do not accept this premise. Nor do I accept that the reasoning in *Imperial Oil*, which the respondents rely on, supports this submission.

[137] In *Imperial Oil*, the PCO had to decide whether certain acts taken in respect of a pension plan were those of the employer or the administrator. Because the provision of pension plans is voluntary in Canada, the employer has the right to decide questions of plan design, including whether to offer a pension plan and, if it does, whether to end it. In part because of the wording of s. 14 of the *PBA* and in part because the amendments at

issue in *Imperial Oil* were a matter of plan design, the PCO concluded that the employer was found to be acting solely in its corporate role when it passed the amendments. There is nothing in *Imperial Oil* to suggest that an employer cannot find itself in a position where it is wearing both hats at the same time.

[138] I turn next to the question of breach.

[139] As previously noted, when Indalex commenced *CCAA* proceedings, it knew that the Plans were underfunded and that unless additional funds were put into the Plans, pensions would be reduced. Indalex did nothing in the *CCAA* proceedings to fund the deficit in the underfunded Plans. It took no steps to protect the vested rights of the Plans' beneficiaries to continue to receive their full pension entitlements. In fact, Indalex took active steps which undermined the possibility of additional funding to the Plans. It applied for *CCAA* protection without notice to the Plans' beneficiaries. It obtained a *CCAA* order that gave priority to the DIP lenders over "statutory trusts" without notice to the Plans' beneficiaries. It sold its assets without making any provision for the Plans. It knew the purchaser was not taking over the Plans.¹⁴ It moved to obtain orders approving the sale and distributing the sale proceeds to the DIP lenders, knowing that no payment would be made to the underfunded Plans. And, Indalex U.S. directed Indalex to bring its bankruptcy motion with the intention of defeating the deemed trust claims and ensuring that the Reserve Fund was transferred to it. In short, Indalex did nothing to protect the

¹⁴ On advice of counsel, Mr. Cooper refused to answer questions about what, if any, steps were taken to have the purchaser take over the Plans.

best interests of the Plans' beneficiaries and, accordingly, was in breach of its fiduciary obligations as administrator.

[140] Further, in my view, Indalex was in a conflict of interest position. As has been mentioned, Indalex's corporate duty was to treat all stakeholders fairly when their interests conflicted, but its ultimate duty was to act in the best interests of the corporation. Indalex's duty as administrator was to act in the Plans' beneficiaries best interests. It is apparent that in the circumstances of this case, these duties were in conflict.

[141] The common law prohibition against conflict of interest is not confined to situations where the fiduciary's personal interest conflicts with those of the beneficiaries. It also precludes the fiduciary from placing itself in a position where it acts for two parties who are adverse in interest: *Davey v. Woolley, Hames, Dale & Dingwall* (1982), 35 O.R. (2nd) 599 (C.A.), at para. 8. In *Davey*, a solicitor who acted for both sides of a business transaction was found to be in breach of his fiduciary obligations. Wilson J.A., writing for this court, explained that the conflict arose because the solicitor could not fulfill his duties in respect of both clients at the same time. At para. 18, she concluded that the solicitor was bound to refuse to act for the plaintiff in the circumstances.

[142] The prohibition against a fiduciary being in a position of conflicting duties governs the situation in which Indalex found itself in during the *CCAA* proceedings.

[143] Indalex was not at liberty to resolve the conflict in its duties by simply ignoring its role as administrator. A fiduciary relationship does not end simply because it becomes

impossible of performance. At the point where its duty to the corporation conflicted with its duties as administrator, it was incumbent on Indalex to take steps to address the conflict.

[144] Even if I am in error in concluding that Indalex was in breach of its common law fiduciary obligations, I would find that its actions amounted to a breach of s. 22(4) of the *PBA*. Section 22(4) prohibits an administrator from knowingly permitting its interest to conflict with its duties and powers in respect of the pension fund. Under s. 57(5) of the *PBA*, as administrator, Indalex had a lien and charge on its assets for the amount of the deemed trust. Any steps that it might have taken pursuant to s. 57(5), as administrator, would have been in respect of the pension fund. Thus, if nothing else, Indalex's actions during the *CCAA* proceedings demonstrate that it permitted its corporate interests to conflict with the administrator's duties and powers that flow from the lien and charge.

[145] Having found that Indalex breached its fiduciary obligations to the Plans' beneficiaries, the question becomes: what flows from such a finding? I address that question below when considering the issue of how to distribute the Reserve Fund. At that time I will return to the arguments of the Monitor and Sun Indalex to the effect that such a finding is largely irrelevant in these proceedings.

DOES THE COLLATERAL ATTACK RULE BAR THE DEEMED TRUST MOTIONS?

[146] The U.S. Trustee submits that even if the *PBA* creates a deemed trust for any wind up deficiencies in the Plans, the appeals should be dismissed because the underlying motions are an impermissible collateral attack on previous orders made in the *CCAA* proceedings. His argument runs as follows.

[147] The Initial Order, the June 12, 2009 order and the Sale Approval order (the “Court Orders”) are all valid, enforceable court orders. The Court Orders gave super-priority rights to the DIP lenders and Indalex U.S. is subrogated to those rights. None of the Court Orders were appealed and no party sought to have them set aside or varied. As the appellants’ motions seek to alter the priorities established by the Court Orders, they should be barred because they are an impermissible collateral attack on those orders.

[148] I do not accept this submission for three reasons, the first two of which can be shortly stated.

[149] First, this submission is an attack on the underlying motions. As such, it ought to have been raised below. The Former Executives say that the collateral attack doctrine was raised for the first time on appeal. Certainly, if it was raised below, the *CCAA* judge makes no reference to it. As a general rule, it is not appropriate to raise an issue for the first time on appeal. The exceptions to this general rule are very limited and do not apply in this case: see *Cusson v. Quan*, [2009] 3 S.C.R. 712, at paras. 36-37.

[150] Second, the USW and the Former Executives raised the matter of the deemed trusts in the *CCAA* proceedings. The *CCAA* judge designed a process by which their claims would be resolved. They followed that process. The USW and Former Executives can scarcely be faulted for complying with a court-designed process. Further, the Sale Approval order acknowledged the deemed trust issue in that it required the Monitor to hold funds in reserve that were sufficient to satisfy the deemed trust claims. That acknowledgment is inconsistent with a subsequent claim of impermissible collateral attack.

[151] Third, as I will now explain, an appreciation of the *CCAA* regime makes it apparent that the collateral attack rule does not apply in the circumstances of this case.

[152] The collateral attack rule rests on the need for court orders to be treated as binding and conclusive unless they are set aside on appeal or lawfully quashed. Court orders may not be attacked collaterally. That is, a court order may not be attacked in proceedings other than those whose specific object is the reversal, variation, or nullification of the order. See *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at para. 8.

[153] The fundamental policy behind the rule against collateral attacks is “to maintain the rule of law and to preserve the repute of the administration of justice”: see *R. v. Litchfield*, [1993] 4 S.C.R. 333, at para. 22. If a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from

circumventing the effect of a decision rendered against it: see *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, at para. 72.

[154] The *CCAA* regime is designed to deal with all matters during an insolvent company's attempt to reorganize. The court-ordered stay of proceedings ensures that there is only one forum where parties can put forth their arguments and claims. By preempting other legal proceedings, the stay gives a corporation breathing space, which promotes the opportunity for reorganization.

[155] The *CCAA* regime is a flexible, judicially supervised reorganization process that allows for creative and effective decisions: see *Century Services Ltd. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379, at para. 21. The *CCAA* judge is accorded broad discretion because the proceedings are a fact-based exercise that requires ongoing monitoring and because there is often a need for the court to act quickly. There is an underlying assumption, however, that the *CCAA* proceedings will provide an opportunity for affected persons to participate in the proceedings.

[156] This assumption finds voice in para. 56 of the Initial Order, as amended, which permits any interested party to apply to the *CCAA* court to vary or amend the Initial Order (the come-back clause). That is precisely what the appellants did. As interested parties, they went to the *CCAA* court to ask that the super-priority charge be varied or amended so that their claims could be properly recognised.

[157] Moreover, I do not accept that the appellants failed to act promptly in asserting their claims. It was only when Indalex brought a motion for approval of the sale of its assets to SAPA and for a distribution of the sale proceeds to the DIP lenders that it became clear that Indalex intended to abandon the Plans in their underfunded states. The appellants immediately took steps to assert their claims in the very forum in which all of the Court Orders had been made, namely, the *CCAA* court.

[158] The U.S. Trustee's argument that the Court Orders were never appealed is not persuasive. In *Algoma Steel Inc. Re* (2001), 147 O.A.C. 291, at paras. 7-9, this court stated that it is premature to grant leave to appeal from an initial order – brought on an urgent basis to deal with seemingly desperate circumstances – when the order specifically opens the proceeding to all interested parties and invites dissatisfied parties to bring their concerns to the court on a timely basis using a come-back provision.

[159] As the Former Executives point out, had the appellants sought to advance their deemed trust claims by bringing a motion challenging the paragraph of the Initial Order that established the DIP super-priority charge, it is likely that they would have been met by a response that their motions were premature. Depending on the amount paid for the company and/or the arrangements made in respect of the Plans, the interests of the Plans' beneficiaries might not have been affected by a sale. Indeed, on July 2, 2009, when Indalex brought a motion to have the bidding procedures approved for the asset sale and the Former Executives objected because of concerns that the Plans were underfunded, the

CCAA judge endorsed the record as follows: “The issues can be raised by the retirees on any application to approve a transaction – but that is for another day.”

[160] The appellants followed that direction. When Indalex moved to have the sale transaction approved and the jeopardy to the appellants’ interests became apparent, they went to the CCAA court and raised the deemed trust issue.¹⁵

[161] Thus, as I have said, I do not view the deemed trust motions as collateral attacks on the Court Orders. The motions were raised in a timely manner in the same court in which the orders were made. They can scarcely be termed attempts to circumvent decisions rendered against the USW and the Former Executives when no decision had ever been rendered in which their claims had been squarely raised and addressed. The process the USW and the Former Executives followed is exactly that which is contemplated in CCAA proceedings and, specifically, the come-back clause.

[162] Even if the collateral attack rule were applicable, however, this is not a case for its strict application.

[163] In *Litchfield*, the Supreme Court of Canada recognized that there will be situations in which the collateral attack rule should not be strictly applied. In that case, a physician had been charged with a number of counts of sexual assault on his patients. On motion, a judge (not the trial judge) ordered that the counts be severed and divided and three

¹⁵ To the extent that the U.S. Trustee suggests that the Former Executives raised the deemed trust issue at the motion heard on June 12, 2010, I reject this submission. As explained in the background portion of these reasons, the Former Executives’ reservation of rights on June 12, 2010, was to obtain time to confirm that the motion related solely to an increase in the DIP loan amount.

different trials be held. After one trial, the physician was acquitted. The Crown appealed. One of the grounds of appeal related to the pre-trial severance order. The question arose as to whether the Crown's challenge to the validity of the severance order violated the collateral attack rule.

[164] At paras. 16-19 of *Litchfield*, Iacobucci J., writing for the majority, explains that “some flexibility” is needed in the application of the rule against collateral attacks. Strictly applied, the rule would prevent the trial judge from reviewing the severance order because the trial was not a proceeding whose specific object was the reversal, variation or nullification of the severance order. However, Iacobucci J. noted, the rule is not intended to immunize court orders from review. He reiterated the powerful rationale behind the rule: to maintain the rule of law and preserve the repute of the administration of justice. This promotes certainty and finality, key aspects of the orderly and functional administration of justice. However, he concluded that flexibility was warranted because permitting a collateral attack on the severance order did not offend the underlying rationale for the rule.

[165] Similarly, in *R. v. Domm* (1996), 31 O.R. (3d) 540, at para. 31, Doherty J.A., writing for this court, states that if a collateral attack can be taken without harm to the interests of the rule of law and the repute of the administration of justice, the rule should be relaxed. At para. 36 of *Domm*, he says that the rule must yield where a person has “no other effective means” of challenging the order in question.

[166] I acknowledge that certainty and finality are necessary to the proper functioning of the legal system. And, I recognize that permitting the appellants' motions to proceed has generated some degree of uncertainty as to the priorities established by the Court Orders. However, in the circumstances of this case, there was no other effective means by which the appellants could assert their claims to a deemed trust. As has been mentioned, it was only when Indalex brought a motion for approval of the sale of its assets to SAPA and for a distribution of the sale proceeds to the DIP lenders that it became clear that Indalex intended to abandon the Plans in their underfunded states. The appellants immediately took steps to assert their claims in the very forum in which all of the Court Orders had been made, namely, the *CCAA* court. By permitting their motions to be heard, the *CCAA* judge did not damage the repute of the administration of justice. On the contrary, he strengthened it. He enabled the sale to proceed while ensuring that the competing claims to the Reserve Fund would be decided on the merits and expeditiously.

[167] Nor can it be said, for the reasons already given about the nature of *CCAA* proceedings, that the deemed trust motions jeopardize the rule of law. Given the nature of a *CCAA* proceeding, the court must often make orders on an urgent and expedited basis, with little or no notice to creditors and other interested parties. Its processes are sufficiently flexible that it can accommodate situations such as the one that arose here. A strict application of the rule would preclude the appellants from having the opportunity to meaningfully challenge the super-priority charge in the Initial Order, as amended. In my view, that result would be a fundamental flaw in the *CCAA* process, one in which

procedure triumphed over substance. As Iacobucci J. said in *Litchfield*, at para. 18, such a result cannot be accepted.

[168] Accordingly, in my view, while the collateral attack rule does not apply, even if it did, there are compelling reasons in this case to relax its strict application.

DO THE PRINCIPLES OF CROSS-BORDER INSOLVENCIES APPLY?

[169] The U.S. Trustee also submits that the principles of cross-border insolvencies should be applied when deciding these appeals. He contends that notwithstanding that separate proceedings were commenced in Canada and the U.S., those principles apply because the Applicants were direct and indirect subsidiaries of certain of the U.S. debtors, who commenced proceedings under Chapter 11 of Title 11 of the United States Bankruptcy Code in March 2009. Further, the U.S. Trustee contends that if the appellants' claims were to succeed, it would seriously undermine the basic principles underlying cross-border insolvencies and the confidence of foreign creditors and courts in the Canadian insolvency system.

[170] While this argument provides context for the U.S. Trustee's collateral attack submission, I do not see it as disclosing any legal grounds relevant to these appeals. By order dated May 12, 2009, Morawetz J. approved a cross-border protocol in these proceedings that stipulates that the U.S. and Canadian courts retain exclusive jurisdiction over the proceedings in their respective jurisdictions. Furthermore, there is no evidence to support the U.S. Trustee's claim that allowing these appeals would impair future

lending practices by U.S. companies. Finally, nothing has been raised which supports the notion that upholding valid provincial law in the circumstances of these appeals will undermine the principles of cross-border insolvencies.

HOW IS THE RESERVE FUND TO BE DISTRIBUTED?

The Salaried Plan

[171] Having concluded that a deemed trust exists with respect to the deficiency in the Salaried Plan as at July 20, 2009, the question becomes whether the Monitor should be ordered to pay the amount of that deficiency, from the Reserve Fund, into the Salaried Plan.

[172] The USW argues, on behalf of the beneficiaries of the Salaried Plan, that the deemed trust ranks in priority to all secured creditors and, therefore, the order should be made. Its argument rests on s. 30(7) of the *PPSA*, which reads as follows:

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*. [emphasis added]

[173] The USW contends that as s. 30(7) gives priority to the *PBA* deemed trust and no finding of paramountcy was made in these proceedings, it must be given effect.

[174] The respondents argue that the super-priority charge has priority over any deemed trusts and, therefore, the Reserve Fund should be paid to Sun Indalex, as the principal secured creditor of Indalex U.S. They point to well-established law that authorizes the

court to grant super-priority to DIP lenders in *CCAA* proceedings and argue that without such a charge, DIP lenders will no longer provide financing to companies under *CCAA* protection. Without DIP funding they say, many companies under *CCAA* protection will be unable to continue in business until a compromise or arrangement has been worked out. Consequently, companies will file for bankruptcy where deemed trusts have no priority. This, they say, will frustrate the very purpose of the *CCAA*, which is to facilitate the making of compromises or arrangements between insolvent debtor companies and their creditors.

[175] There is a great deal of force to the respondents' submissions. Indeed, in general, I agree with them. It is important that the courts not address the interests of pension plan beneficiaries in a manner that thwarts or even discourages DIP funding in future *CCAA* proceedings. Nonetheless, in the circumstances of this case, it is my view that the Monitor should be ordered to pay the amount of the deficiency, from the Reserve Fund, into the Salaried Plan.

[176] The *CCAA* court has the authority to grant a super-priority charge to DIP lenders in *CCAA* proceedings.¹⁶ I fully accept that the *CCAA* judge can make an order granting a super-priority charge that has the effect of overriding provincial legislation, including the *PBA*. I also accept that without such a charge, DIP lenders may be unwilling to provide financing to companies under *CCAA* protection. However, this does not mean that the

¹⁶ See, for example, *InterTAN Canada Ltd. (Re)*, (2009), 49 C.B.R. (5th) 232 (Ont. S.C.). And, the granting of super-priority charges is referred to with approval in *Century Services*, at para. 62.

super-priority charge in question has the effect of overriding the deemed trust. To decide whether it does, one must turn to the doctrine of paramountcy.

[177] Valid provincial laws continue to apply in federally regulated bankruptcy and insolvency proceedings absent an express finding of federal paramountcy. The onus is on the party relying on the doctrine of paramountcy to demonstrate that the federal and provincial laws are incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law: see *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, at para. 75 and *Nortel Networks Corp. (Re)* (2009), 99 O.R. (3d) 708 (C.A.), at para. 38, leave to appeal to S.C.C. refused, [2009] S.C.C.A. No. 531.

[178] In this case, there is nothing in the record to suggest that the issue of paramountcy was invoked on April 8, 2009, when Morawetz J. amended the Initial Order to include the super-priority charge. The documents before the court at that time did not alert the court to the issue or suggest that the *PBA* deemed trust would have to be overridden in order for Indalex to proceed with its DIP financing efforts while under *CCAA* protection. To the contrary, the affidavit of Timothy Stubbs, the then CEO of Indalex, sworn April 3, 2009, was the primary source of information before the court. In para. 74 of his affidavit, Mr. Stubbs deposes that Indalex intended to comply with all applicable laws including “regulatory deemed trust requirements”.

[179] While the super-priority charge provides that it ranks in priority over trusts, “statutory or otherwise”, I do not read it as taking priority over the deemed trust in this case because the deemed trust was not identified by the court at the time the charge was granted and the affidavit evidence suggested such a priority was unnecessary. As no finding of paramountcy was made, valid provincial laws continue to operate: the super-priority charge does not override the *PBA* deemed trust. The two operate sequentially, with the deemed trust being satisfied first from the Reserve Fund.

[180] Does this conclusion thwart the purpose of the *CCAA* regime, which is to facilitate the restructuring of failing businesses to avoid bankruptcy and liquidation? It does not appear that would have happened in the present case. The granting of a stay in a *CCAA* proceeding provides a company with breathing space so that it can restructure. In this case, the stay of proceedings gave Indalex the breathing space it needed to effect a sale of its business. Recall that this was a “liquidating *CCAA*” from the outset. There was no restructuring of the company. There was no plan of compromise or arrangement prepared and presented to creditors. Within days of obtaining *CCAA* protection, Indalex began a marketing process to sell itself. Very shortly thereafter, it sold its business as a going-concern. There is nothing in the record to suggest that giving the deemed trust priority would have frustrated Indalex’s efforts to sell itself as a going-concern business.

[181] What of the contention that recognition of the deemed trust will cause DIP lenders to be unwilling to advance funds in *CCAA* proceedings? It is important to recognize that the conclusion I have reached does not mean that a finding of paramountcy will never be

made. That determination must be made on a case by case basis. There may well be situations in which paramountcy is invoked and the record satisfies the *CCAA* judge that application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy. But, this depends on the applicant clearly raising the issue of paramountcy, which will alert affected parties to the risks to their interests and put them in a position where they can take steps to protect their rights. That, however, is not this case.

[182] Nor am I persuaded by the argument that if the deemed trust is given effect in the unique circumstances of this case, companies will file for bankruptcy instead of moving for *CCAA* protection. This argument suggests that companies will act based on the desire to avoid their pension obligations. That motivation does not conform with the obligations that directors owe to the corporation. The obligation to act in the best interests of the corporation suggests that companies will choose the route that maximizes recovery for creditors. As the respondents point out, Indalex sought a going-concern sale for exactly that reason. In addition, by selling its business as a going concern, Indalex preserved value for suppliers and customers who can continue to do business with the purchaser and preserved approximately 950 jobs for its former employees. Surely the desire to maximize recovery for their creditors – along with those other considerations – would have prevailed had Indalex known it would have to satisfy the deemed trust when considering whether to pursue bankruptcy or *CCAA* proceedings. In this regard, it is worth recalling that consideration for the sale exceeded \$151 million, all DIP lenders

were repaid in full, the Reserve Fund consists of undistributed proceeds, and the total deficiencies in the Plans appear to be approximately \$6.75 million.

[183] As for the suggestion that Indalex will pursue its bankruptcy motion in order to defeat the deemed trust, I would simply echo the comments of the *CCAA* judge that a voluntary assignment into bankruptcy should not be used to defeat a secured claim under valid provincial legislation. I would add this additional consideration: it is inappropriate for a *CCAA* applicant with a fiduciary duty to pension plan beneficiaries to seek to avoid those obligations to the benefit of a related party by invoking bankruptcy proceedings when no other creditor seeks to do so.

[184] There is also the matter of Indalex U.S.'s apparent reliance on the super-priority charge when it gave the Guarantee. As explained more fully above, Indalex U.S. was fully aware of Indalex's obligations to the Plans when it entered into the Guarantee. Again as explained more fully above, there were a number of different steps that Indalex could have taken to deal with these obligations. It chose not to. This is not a case in which the secured creditor is an arm's length third party taken by surprise by the claims of the Plans' beneficiaries.

[185] A final consideration that must be addressed at this stage arises from the recent decision of the Supreme Court of Canada in *Century Services*, which was released after the oral hearing of the appeals. The parties were invited to make written submissions on

the impact of *Century Services*, if any, on these appeals. I am grateful for the excellence of those submissions, which mirrors the quality of the original submissions.

[186] *Century Services* deals with conflicting provisions in two pieces of federal legislation: s. 222(3) of the *Excise Tax Act*, R.S.C. 1985, c. E-15, which gives the federal Crown a deemed trust for unpaid GST, and s. 18.3(1) (now s. 37) of the *CCAA*, which expressly excludes deemed trusts in favour of the Crown from applying in *CCAA* proceedings. Deschamps J., for the majority, conducted a comprehensive analysis of the two conflicting sections and held that s. 18.3(1) of the *CCAA* prevails. In sum, *Century Services* stands for the proposition that s. 18.3(1) of the *CCAA* excludes the deemed trust for unpaid GST created by s. 222 of the *Excise Tax Act* from applying in a *CCAA* proceeding.

[187] It will be readily apparent that *Century Services* is distinguishable from the present case in a number of ways. Three significant differences between it and the present appeals are worthy of note.

[188] First, in *Century Services*, reorganization efforts had failed and the company sought leave to make an assignment into bankruptcy. Liquidation on a piecemeal basis through bankruptcy was inevitable. The *CCAA* proceedings in the present case, on the other hand, were successful – they resulted in the sale of Indalex’s assets and the continuation of the business, albeit through another entity. It is not a situation in which

transition to the bankruptcy regime was inevitable because efforts under the *CCAA* had failed.

[189] Second, *Century Services* deals with competing provisions in two federal statutes. The conflict between the two provisions was patent: one or the other had to prevail. They could not be read together. Section 18.3(1) was found to prevail, in part because of its wording, which expressly excludes a deemed trust in favour of the Crown. The present appeals involve a consideration of the doctrine of federal paramountcy and whether a deemed trust under provincial legislation applies to a charge granted in a *CCAA* proceeding. Significantly, unlike the situation in *Century Services*, there is nothing in the *CCAA* that expressly excludes the provincial deemed trust for unpaid pension contributions from applying in *CCAA* proceedings. In these appeals, exclusion of the provincial deemed trust is dependent on the *CCAA* judge engaging in a factual examination and a determination that preservation of pension rights through the deemed trust would frustrate the purpose of the *CCAA* proceeding. Moreover, it is difficult to see how a finding of paramountcy would have been made on the record at the time the super-priority charge was made, given the evidence that Indalex intended to comply with all regulatory deemed trust requirements.¹⁷

[190] Third, no issue of fiduciary duty arose in *Century Services*. In the present case, as discussed previously and again below, the impact of fiduciary duties during the *CCAA* proceeding plays a significant role.

¹⁷ See para. 178 of these reasons.

[191] The respondents contend that *Century Services* is crucial in the disposition of these appeals because it stands for the proposition that federal priorities under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*) apply in *CCAA* proceedings. If *Century Services* stood for that proposition, I would agree. In a series of cases, the Supreme Court of Canada has repeatedly said that a province cannot, by legislating a deemed trust, alter the scheme of priorities under the *BIA*: see, for example, *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24.

[192] However, in my view, *Century Services* does not stand for that unqualified proposition. In *Century Services*, Deschamps J. explains that the *CCAA* and *BIA* are to be read in an integrated fashion but she is at pains to say that the *BIA* scheme of liquidation and distribution is the backdrop for what happens *if a CCAA reorganization is unsuccessful*.¹⁸ Here, as I have noted, the *CCAA* proceedings were successful.

[193] Moreover, Deschamps J. repeatedly distinguishes the two regimes on the basis that the *BIA* is “characterized by a rules-based approach”¹⁹ whereas the *CCAA* “offers a more flexible mechanism with greater judicial discretion”.²⁰ Permitting the *PBA* deemed trust to survive, absent an express finding of paramountcy, is consistent with both those key features of the *CCAA* proceedings – greater flexibility and greater judicial discretion on the part of the *CCAA* court. This flexibility and discretion on the part of the *CCAA* court

¹⁸ See, for example, para. 23.

¹⁹ At para. 13, for example.

²⁰ See, for example, para. 14.

enables it to meaningfully assess the baseline considerations of appropriateness, good faith and due diligence, referred to by Deschamps J. at para. 70 of *Century Services*.

[194] The respondents point to paras. 47, 48 and 76 of *Century Services*, in which Deschamps J. notes the “strange asymmetry” that would occur if the *ETA* Crown priority were interpreted differently in *CCAA* proceedings than in *BIA* proceedings. She says this would encourage forum shopping in cases where the debtor’s assets cannot satisfy both the secured creditors’ and the Crown’s claims. No “strange asymmetry” would occur in cases such as the present appeals. If the *CCAA* judge found that recognition of the *PBA* deemed trust would frustrate the purpose of the *CCAA* proceeding and paramountcy had been invoked, the *CCAA* judge would be free to make a super-priority charge that overrode the deemed trust. This approach leaves the *CCAA* court with greater flexibility and the ability to be “cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees”.²¹

[195] In para. 70 of her reasons, Deschamps J. exhorts the *CCAA* courts to be “mindful that chances for successful reorganizations are enhanced where participants achieve common ground and *all stakeholders are treated as advantageously and fairly as the circumstances permit*” [emphasis added]. The Plans’ beneficiaries are stakeholders. And, once the deemed trust claims are recognized, they are not to be treated as mere unsecured creditors. If, as the respondents contend based on *Century Services*, the deemed trusts are automatically overridden, there will be no incentive for companies that

²¹ *Century Services*, at para. 60.

are similarly situated to Indalex to attempt to deal with their underfunded pension plans. There will be no incentive to treat pension plan beneficiaries “as advantageously and fairly as the circumstances permit”. The incentive will be to do as Indalex did – go to court without notice to the affected pension plan beneficiaries and negotiate as if the pension obligations did not exist.

[196] Justice Deschamps also says that no “gap” should exist between the *BIA* and the *CCAA* and approves of Laskin J.A.’s reasoning to that effect at paras. 62-63 of *Ivaco*.²² She explains that the gap is a situation “which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy”. When the facts of the present case are considered carefully, it can be seen that a gap of this sort will not occur should the appeals be allowed. As I see it, the deemed trusts continued to exist during the *CCAA* proceedings although no steps could be taken to enforce them during the proceedings because of the stay. By the time of the Sale Approval Order, the *CCAA* court had become aware of the deemed trust claims. It dealt with the deemed trust claims as part of the *CCAA* proceedings, by deciding whether the undistributed sales proceeds held by the Monitor should go to Indalex U.S. or to the Plans’ beneficiaries. Thus, rather than being a situation in which property interests that would be lost in bankruptcy were enforced at the conclusion of the *CCAA* proceedings, the property interests were dealt with as part of the *CCAA* proceedings.

²² At para. 78.

[197] However, even if I am wrong in concluding that the deemed trust has priority over the secured creditor in this case, I would make the order on the basis that it is the appropriate remedy for the breaches of fiduciary obligation.

[198] It is important to keep in mind that the contest over the Reserve Fund is not a fight between the DIP lenders and the pensioners. The DIP lenders have been paid in full. The dispute is between the pensioners and Sun Indalex, the principal secured creditor of Indalex U.S. It is in that context that the court must consider the competing equities.

[199] The *CCAA* was not designed to allow a company to avoid its pension obligations. To give effect to Indalex U.S.'s claim would be to sanction Indalex's breaches of fiduciary obligation. In the circumstances of this case, such a result would work an injustice. The equities are not equal. The Plans' beneficiaries were vulnerable to the exercise of power by Indalex. They were not part of the negotiations for the DIP financing nor were they involved in the sale negotiations. They had no opportunity to protect their interests and, as a result of Indalex's actions, there was no one who fulfilled the administrator's role. Indalex, on the other hand, was fully aware of the Plans' underfunding and the result to the pensioners of a failure to inject additional funds. It was Indalex who advised the *CCAA* court that it intended to comply with "regulatory deemed trust requirements". To permit Sun Indalex to recover on behalf of Indalex U.S. would be to effectively permit the party who breached its fiduciary obligations to take the benefit of those breaches, to the detriment of those to whom the fiduciary obligations were owed.

[200] I do not accept the respondents' argument that a finding that Indalex breached its fiduciary obligation is irrelevant because it would merely give rise to an unsecured claim and there is no basis for conferring a priority for such a claim. This view fundamentally misunderstands the rights of the pension plan beneficiaries. Even if there is no deemed trust, the Plans' beneficiaries are not mere unsecured creditors. They are unsecured creditors to whom Indalex owed a fiduciary duty by virtue of its role as the Plans' administrator. There is a significant difference, in my view, between being a mere unsecured creditor and being an unsecured creditor to whom a fiduciary duty is owed.

[201] Further, the Supreme Court has repeatedly stated that equitable remedies are sufficiently flexible that they can be molded to meet the requirements of fairness and justice: see, for example, *Canson Enterprises v. Boughton & Co.*, [1991] 3 S.C.R. 534, at para. 86 and *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, at para. 34.

[202] In *Soulos*, at para. 36, McLachlin J. (as she then was) writing for the majority, held that constructive trusts may be imposed where "good conscience requires" it. She went on to identify two different types of cases in which constructive trusts may be ordered: 1) those in which property is obtained by a wrongful act of the defendant, notably breach of fiduciary duty or breach of the duty of loyalty; and, 2) those in which there may not have been a wrongful act, but where there has been unjust enrichment. While the second type of case – one in which there is unjust enrichment – is not relevant to these appeals, the first is.

[203] At para. 45 of *Soulos*, McLachin J. sets out four conditions that should “generally be satisfied” if a constructive trust based on wrongful conduct is to be ordered:

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

[204] As I have already explained, in the circumstances of this case, Indalex’s fiduciary obligations as administrator were engaged in relation to the *CCAA* proceedings and it is those proceedings that gave rise to the asset (*i.e.* the Reserve Fund) (condition 1). The assets that would flow to Indalex U.S., absent the constructive trust, are directly connected to the process in which Indalex committed its breaches of fiduciary obligation (condition 2). Without the proprietary remedy, the Plans’ beneficiaries have no meaningful remedy. Moreover, there must be some incentive to require employers who

are also the administrators of their pension plans to remain faithful to their duties (condition 3). And, because Indalex U.S. is not an arm's length innocent third party, imposing a constructive trust in favour of the Plans' beneficiaries is not unjust (condition 4).

The Executive Plan

[205] As I explained above, it is not clear to me that a deemed trust arose in respect of the underfunded amounts in the Executive Plan because it had not been wound up at the time of sale. However, based on the breaches of fiduciary duty, the court is entitled to consider the equities of the parties competing for the Reserve Fund. For the reasons given in respect of the Salaried Plan in respect of those equities, I would make the same order in respect of the Executive Plan, namely, that the Monitor pay the deficiency from the Reserve Fund to the Executive Plan in priority to those entitled under the super-priority charge.

[206] In light of this conclusion, I find it unnecessary to deal with the Former Executives' submission that the doctrine of equitable subordination applies to remedy Indalex's breaches of fiduciary duty. In any event, I would decline to decide that issue as it was not argued below. It offends the general rule that appellate courts are not to entertain new issues on appeal.

DISPOSITION

[207] Accordingly, I would allow the appeals and declare that the claims of the USW and the Former Executives take priority over the claim asserted by Indalex U.S./Sun Indalex. I would order the Monitor to pay from the Reserve Fund into each of the Salaried Plan and the Executive Plan an amount sufficient to satisfy the deficiencies in each plan. I understand that the Reserve Fund is sufficient to satisfy the Deficiencies but if this proves problematic, the parties may return to the court for direction on that matter.

[208] If the parties are unable to agree on costs, they may make brief written submissions on that matter. The appellants, Morneau and the Superintendent shall file their submissions within fifteen days of the date of release of these reasons. The respondents shall have a further seven days within which to file their submissions.

RELEASED: APR 07 2011 ("JCM")

"E. E. Gillese J.A."

"I agree. J. C. MacPherson J.A."

"I agree. R. G. Juriansz J.A."

Schedule "A"

Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 1(1), 8, 14(1), 22, 57(1) – (5), 70(1), 74(1), 75(1), (2), 76

Definitions

1. (1) In this Act, ...

“administrator” means the person or persons that administer the pension plan; ...

“wind up” means the termination of a pension plan and the distribution of the assets of the pension fund;

Administrator

Requirement

8. (0.1) A pension plan must be administered by a person or entity described in subsection (1).

Prohibition

(0.2) No person or entity other than a person or entity described in subsection (1) shall administer a pension plan.

Administrator

(1) A pension plan is not eligible for registration unless it is administered by an administrator who is,

(a) the employer or, if there is more than one employer, one or more of the employers;

(b) a pension committee composed of one or more representatives of,

(i) the employer or employers, or any person, other than the employer or employers, required to make contributions under the pension plan, and

(ii) members of the pension plan;

(c) a pension committee composed of representatives of members of the pension plan;

- (d) the insurance company that provides the pension benefits under the pension plan, if all the pension benefits under the pension plan are guaranteed by the insurance company;
- (e) if the pension plan is a multi-employer pension plan established pursuant to a collective agreement or a trust agreement, a board of trustees appointed pursuant to the pension plan or a trust agreement establishing the pension plan of whom at least one-half are representatives of members of the multi-employer pension plan, and a majority of such representatives of the members shall be Canadian citizens or landed immigrants;
- (f) a corporation, board, agency or commission made responsible by an Act of the Legislature for the administration of the pension plan;
- (g) a person appointed as administrator by the Superintendent under section 71; or
- (h) such other person or entity as may be prescribed.

Additional members

- (2) A pension committee, or a board of trustees, that is the administrator of a pension plan may include a representative or representatives of persons who are receiving pensions under the pension plan.

Interpretation

- (3) For the purposes of clause (1) (b), “employer” includes the following persons and entities:
 - 1. Affiliates within the meaning of the *Business Corporations Act* of the employer.
 - 2. Such other persons or entities, or classes of persons or entities, as may be prescribed.

Reduction of benefits

- 14. (1) An amendment to a pension plan is void if the amendment purports to reduce,
 - (a) the amount or the commuted value of a pension benefit accrued under the pension plan with respect to employment before the effective date of the amendment;
 - (b) the amount or the commuted value of a pension or a deferred pension accrued under the pension plan; or

(c) the amount or the commuted value of an ancillary benefit for which a member or former member has met all eligibility requirements under the pension plan necessary to exercise the right to receive payment of the benefit.

Care, diligence and skill

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

Special knowledge and skill

(2)The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.

Member of pension committee, etc.

(3)Subsection (2) applies with necessary modifications to a member of a pension committee or board of trustees that is the administrator of a pension plan and to a member of a board, agency or commission made responsible by an Act of the Legislature for the administration of a pension plan.

Conflict of interest

(4)An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

Employment of agent

(5)Where it is reasonable and prudent in the circumstances so to do, the administrator of a pension plan may employ one or more agents to carry out any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund.

Trustee of pension fund

(6) No person other than a prescribed person shall be a trustee of a pension fund.

Responsibility for agent

(7) An administrator of a pension plan who employs an agent shall personally select the agent and be satisfied of the agent's suitability to perform the act for which the agent is employed, and the administrator shall carry out such supervision of the agent as is prudent and reasonable.

Employee or agent

(8) An employee or agent of an administrator is also subject to the standards that apply to the administrator under subsections (1), (2) and (4).

Trust property

57. (1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.

Money withheld

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

Accrued contributions

(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.

Wind Up

(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.

Lien and charge

(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).

Wind up report

70. (1) The administrator of a pension plan that is to be wound up in whole or in part shall file a wind up report that sets out,

- (a) the assets and liabilities of the pension plan;
- (b) the benefits to be provided under the pension plan to members, former members and other persons;
- (c) the methods of allocating and distributing the assets of the pension plan and determining the priorities for payment of benefits; and
- (d) such other information as is prescribed.

Combination of age and years of employment

74. (1) A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least fifty-five, at the effective date of the wind up of the pension plan in whole or in part, has the right to receive,

- (a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;
- (b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,

- (i) the normal retirement date under the pension plan, or
 - (ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date; or
- (c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date.

Liability of employer on wind up

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

- (a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and
- (b) an amount equal to the amount by which,
 - (i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,
 - (ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and
 - (iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

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

Payment

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

Pension fund continues subject to Act and regulations

76. The pension fund of a pension plan that is wound up continues to be subject to this Act and the regulations until all the assets of the pension fund have been disbursed.

Schedule “B”

Pension Benefits Act, Regulation 909, R.R.O. 1990, s. 31(1), (2) and (3)

31. (1) The liability to be funded under section 75 of the Act shall be funded by annual special payments commencing at the effective date of the wind up and made by the employer to the pension fund.

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

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

(b) the minimum special payments required for the year in which the plan is wound up, as determined in the reports filed or submitted under sections 3, 4, 5.3, 13 and 14, multiplied by the ratio of the basic Ontario liabilities of the plan to the total of the liabilities and increased liabilities of the plan as determined under clauses 30(2)(b) and (c).

(3) The special payments referred to in subsections (1) and (2) shall continue until the liability is funded.

Tab 3

Case Name:

Fraser Papers Inc. (Re)

**IN THE MATTER OF the Companies' Creditors Arrangement Act,
R.S.C. 1985, C-36. as Amended
AND IN THE MATTER OF a Proposed Plan of Compromise or
Arrangement with Respect to Fraser Papers Inc., FPS Canada
Inc., Fraser Papers Holdings Inc., Fraser Timber Ltd., Fraser
Papers Limited and Fraser N.H. LLC (collectively, the
"Applicants")**

[2009] O.J. No. 3188

55 C.B.R. (5th) 217

76 C.C.P.B. 254

2009 CarswellOnt 4469

179 A.C.W.S. (3d) 515

Court File No. CV-09-8241-OOCL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

July 16, 2009.

(24 paras.)

Bankruptcy and insolvency -- Proceedings -- Practice and procedure -- Courts -- Jurisdiction -- CCAA matters -- Stays -- Pending agreement or settlement -- Application to suspend special payments allowed -- Applicants were number of related companies under protection of Companies' Creditors Arrangement Act -- Due to market conditions, applicants were obligated to make substantial special payments for employee pension deficiencies -- Case law indicated court had jurisdiction to suspend payments and trend had developed to not require special payments during CCAA proceedings -- While jeopardizing employee pensions was not ideal, applicants had no capacity to make payments and forcing them to do so would cause the termination of business operations, which would be even less in the interest of employees.

Application to suspend special payments. The applicants were a number of related companies, all under the protection of the Creditors' Companies Arrangement Act. Due to the market conditions, the applicants had become obligated to make special payments for employee pension deficits. The applicants expected to be obligated to pay \$13.5 million in 2009 and \$34.7 million in 2010, over and above their regular contributions. The applicants lacked the financial capacity to make these special payments and argued the special payments were pre-filing, unsecured debts with no special status.

HELD: Application allowed. The CCAA was designed to avoid the termination of business operations and could be interpreted broadly to achieve its objectives. The recent trend had been not to require companies to make special payments during CCAA proceedings. The case law indicated that the court had the jurisdiction to suspend the payments. While

jeopardizing employee pensions was not ideal, not suspending the payments would result in the termination of the applicants' business operations, which would be even less in the interest of the employees. Furthermore, allowing the application would merely suspend the special payments, not extinguish the applicants' obligations.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.3

Industrial Relations Act, R.S.N.B. 1973, c. I-4, s. 56(2)

Labour Code, R.S.Q., c. C-27, s. 67, s. 68

Pension Benefits Act, S.N.B. 1987, c. P-5.1, s. 50(1), s. 50(2), s. 51(1), s. 51(2), s. 51(3), s. 51(4), s. 51(5), s. 51(6), s. 52, s. 53

Supplemental Pension Plans Act, R.S.Q., c. R-15.1, s. 6, s. 49

United States Bankruptcy Code, Chapter 11

Counsel:

M. Barrack and R. Thornton, for the Applicants.

R. Chadwick and C. Costa, for the Monitor.

P. Griffin, for the Directors.

D. Chernos, for Brookfield Asset Management Inc.

K. McEachern, for CIT Business Credit Canada Inc.

T. Wallis, for la Régie des rentes du Québec.

D. Wray and J. Kugler, for the Communications, Energy, and Paper Workers Union of Canada.

C. Sinclair, for the United Steelworkers.

J. Michaud, for the New Brunswick Regional Council of Carpenters, Millwrights and Allied Workers, Local 2540.

REASONS FOR DECISION

S.E. PEPALL J.:--

Relief Requested

1 The Fraser Group ("the Applicants") consists of a number of related companies that carry on an integrated specialty paper business with paper, pulp and lumber operations. For fiscal 2008, the Applicants had consolidated net sales of approximately \$688.6 million and suffered a net loss of \$71.9 million. For the four months ended May 2, 2009, the Applicants recorded a net loss of \$22.1 million on consolidated net sales of \$202.8 million. On June 18, 2009, Morawetz J. granted the Applicants protection from their creditors and a stay of proceedings pursuant to the *Companies' Creditors Arrangement Act* (the "Initial Order"). He adjourned the Applicants' request that the stay applied to special payments in respect of unfunded and going concern and solvency deficiencies with respect to certain pension plans. On June 18, 2009, the Applicants obtained recognition and provisional relief in an ancillary proceeding pursuant to Chapter 15 of the United States Bankruptcy Code in the U.S. Bankruptcy Court for the District of Delaware.

2 This motion addresses the need for the Applicants to make past service contributions or special payments to fund any

going concern unfunded liability or solvency deficiencies ("special payments") of certain pension plans during the stay period as that term is defined in the Initial Order. The Applicants seek to suspend those payments. Current service payments or normal cost contributions are not in issue. The Applicants are supported by the Monitor, PricewaterhouseCoopers Inc., the Directors and one of the DIP lenders, Brookfield Asset Management Inc. Brookfield also directly or indirectly owns 70.5% of the outstanding common shares of Fraser Papers Inc. The other DIP lender, CIT Business Credit Canada Inc., the Superintendent of Pensions for New Brunswick, the Minister of Business New Brunswick, and la Régie des rentes du Québec¹ are all unopposed to the relief requested. The Communications, Energy and Paper Workers Union of Canada and its local unions 4N, 6N, 29,189,894, and 2930 ("the CEP") who represent approximately 660 employees at facilities in New Brunswick and Quebec oppose the request. They are supported by the United Steelworkers and the New Brunswick Regional Council of Carpenters, Millwrights and Allied Workers, Local 2540.

3 On June 30, 2009, I granted the relief requested which was limited to special payments and ancillary relief with reasons to follow. These are the reasons in support of the order granted.

Facts

4 The Applicants sponsor five defined benefit pension plans in three jurisdictions: two in New Brunswick (an hourly and a salaried plan), two in Quebec (an hourly and a salaried plan) and one in the United States. 2297 retirees and 1412 active employees are members of the plans. The Applicants also sponsor one defined contribution plan in the U.S. with 2 active members and 7 retirees and three unfunded supplementary employee retirement plans ("SERPs"), one in Canada and two in the US. The Applicants' accrued pension benefit obligations in the five plans and the SERPs exceed the value of the plans assets by approximately \$171.5 million as at December 31, 2008. This figure is based on information received by Fraser Papers Inc. from its actuaries for the purpose of preparing annual audited financial statements. The Applicants are not required to fund the U.S. defined contribution plan for the balance of 2009 and 2010.

5 Changes in global capital markets and borrowing rates have affected the funded status, funding requirements, and pension expense for the plans. Based on market conditions, regulatory filing requirements and preliminary estimates, the Applicants expect that they will be required to make special payments in the amount of \$13.5 million in 2009 in respect of the pension deficits with respect to the plans. This is in addition to the \$3.3 million required to be paid in 2009 on account of normal cost contributions to the plans.

6 In 2010, the Applicants estimate that they will be required to pay approximately \$34.7 million to fund the pension deficits and \$5.1 million for normal cost contributions. The Applicants have no ability to pay the special payments or the combined 2010 funding obligations from cash flow generated by the business.

7 According to the Monitor, the Applicants are current with all their actuarial filings with the pension regulators. In 2008, actuarial valuations as at December 31, 2007 were filed with the New Brunswick regulator for the two plans in New Brunswick and an updated actuarial valuation as at December 31, 2006 for the Quebec salaried plan was filed in Quebec in April, 2008. Based on the latest filed actuarial valuations and the current 10 year extended amortization period with respect to the special payments, the monthly special payments in respect of pension deficits for the balance of 2009 amount to \$4,693,302 and for 2010, \$7,831,857. The next special payments were due on June 30, 2009 and amounted to \$380,397. Based on estimates prepared by the Applicants' director of pension administration, a Certified General Accountant with 25 years experience, the Applicants anticipate that they will be required to increase their 2009 special payments by an additional \$7.4 million in December, 2009 and in 2010 by an additional \$24.6 million.

8 The term sheets in support of the DIP financing were finalized the evening of June 17, 2009, and the financing requirements were not marketed externally to other potential lenders given the nature of the industry and the willingness of the existing lenders to fund ongoing operations. On June 18, 2009, Morawetz J. approved certain DIP term sheets and financing up to \$46 million, of which approximately \$20 million has been authorized by the lenders. He authorized the Applicants to enter DIP financing agreements with CIT Business Credit Canada Inc. and Brookfield Asset Management Inc. Under the latter's agreement, the Applicants are unable to pay the special payments without the lender's prior written consent and payment of same constitutes an event of default. Absent DIP financing, the Applicants are unable to continue in business. The cash flow forecast contemplates payment of salaries, wages, vacation pay, and current pension funding obligations but not special payments.

9 The CEP is party to five collective agreements in New Brunswick, one of which expires on June 30, 2009, two in Quebec, and one in the U.S. They provide for pension benefits although in argument counsel did not address any particular provisions of them. Schedule "A" to these reasons sets forth the applicable statutory provisions that were attached to the factum of CEP.

Positions of the Parties

10 The Applicants state that the special payments are pre-filing unsecured debts with no special status and relate to employment services provided prior to filing. As in other cases, the Court should stay the obligation to pay. Failure to do so would jeopardize the entire business of the Applicants and would be contrary to the purpose behind the *CCAA* order - namely, to give the Applicants the opportunity to restructure for the benefit of all stakeholders.

The CEP submits firstly that no special payments are currently required. Any such obligations will arise after the June 18, 2009 Initial Order and section 11.3 of the *CCAA* prohibits the suspension of claims resulting from obligations relating to services supplied after an Initial Order. Secondly, the special payments are grounded in the terms and conditions of CEP's collective agreements and they may not be unilaterally modified by the Applicants. Pursuant to section 11.3 of the *CCAA*, the members of CEP are entitled to the benefit of a plan provided for in the collective agreement. That is in accordance with applicable statutes. Thirdly, the relief requested by the Applicants is premature in that actuarial valuations have not been filed. Lastly, CEP submits that the DIP agreements are unreasonable.

Issues

11 The issues for me to address are whether I have jurisdiction to suspend the special payments and, if so, whether I should exercise that discretion and also grant ancillary relief.

Discussion

12 In recent years, a number of Canadian cases have addressed the interaction of employment and labour claims and the obligations of insolvent employers as they relate to pensions. In analyzing these cases and the issues before me, it is helpful to first examine general principles.

13 Employer pension contributions are described by M. Starnino, J-C Killey and C. P. Prophet in their article entitled "The Intersection of Labour and Restructuring Law in Ontario: A Survey of Current Law".

"In the case of a defined benefit plan, (i.e., a plan that promises to pay the beneficiaries of the plan a specific amount in retirement) the amount of the current service contribution is determined using actuarial estimations having regard to, among other things, the amount of the benefit to be provided, the demographics of the workforce and the anticipated returns generated by the investments in which the pension plan is invested.

Second, if the pension plan is a defined benefit plan then an employer may be required to make additional contributions to the pension plan called "special payments". The obligation to make special payments arises where the original plan experience or investment performance differed from that assumed by the actuaries in order to provide the benefit promised to employees and the plan develops either a going concern unfunded liability or a solvency deficiency.

A going concern unfunded liability arises when it appears, based on a periodic actuarial assessment of the plan, that the plan is insufficiently funded to pay the benefits that are or will become due, assuming that the pension plan continues indefinitely. Once a going concern unfunded liability is identified, the employer is required to make monthly special payments to fund the deficiency within fifteen years.

A solvency deficiency arises when it appears, based upon a periodic actuarial assessment of the plan, that the plan's current assets are insufficient to meet the obligations that would be due if the employer immediately discontinued its business and the plan were wound up. In the case of a solvency deficiency, the employer is required to make special payments to fix the deficiency within a five year time frame. Pending amendments will extend this period to 10 years."²

Directors may be liable in the event of a failure by a company to make a payment to a pension fund.

14 The *CCAA* has been and is to be broadly interpreted: *ATB Financial v. Metcalf & Mansfield Alternative Investments II Corp.*³. This is in keeping with the purpose of the *CCAA*, namely to facilitate restructuring. The *Act* is designed to avoid the

negative consequences of terminating business operations and to allow a company to carry on business. As noted by Professor Janis Sarra, "There is a public policy interest in allowing for a certain transition period to allow debtors to economically adjust in difficult markets in unsettled times."⁴

15 The *CCAA* does not directly address employment or labour claims. The power to stay claims against a debtor company is found in section 11 of the *CCAA*. Section 11.3 of the *Act* provides some limitation on the Court's discretion. It states:

- (3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,
 - (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
 - (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
 - (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

In addition, the *Act* of course provides for the compromise of claims against a debtor company.

16 As to the treatment of special payments in bankruptcy and insolvency proceedings, as noted by Messrs. Starnini, Killey and Prophet, a trend has developed not to make special payments in the course of *CCAA* proceedings and such payments do not enjoy any priority in bankruptcy.⁵

17 Courts in both Ontario and Quebec have addressed the issue of special payments in the context of a *CCAA* proceeding and a debtor company that was party to a collective agreement. In *Collins & Aikman Automotive Canada Inc.*⁶, Spence J. concluded that the Court had jurisdiction to permit the debtor to refrain from making special payments. Similarly, in *Re AbitibiBowater Inc.*⁷, Mayrand J. determined that the Court had jurisdiction to authorize the suspension of Abitibi's obligation to finance the pension plan by suspending its special payments. She followed the decisions of *Syndicat National de l'amiante d'Asbestos Inc. v. Mine Jeffrey Inc.*⁸, *Papiers Gaspesia Inc.*⁹, and *Collins & Aikman Automotive Canada Inc.* Like Spence J., she distinguished between rights that flow from a collective agreement and the performance of obligations to give effect to those rights. In that case, she determined that the past service contributions or special payments related to services provided prior to the Initial Order and therefore were not barred by section 11.3 of the *Act*.

18 In *Re Nortel Networks Corp.*¹⁰, Morawetz J.'s decision did not address the issue of special payments but certain other employee and union claims. He noted that employee claims, whether they were put forth by the union or by former employees, are unsecured claims and do not have statutory priority. He observed that section 11.3 is an exception to the general stay provision and should be construed narrowly. "The *CCAA* contemplates that during the reorganization process, pre-filing debts are not paid, absent exceptional circumstances and services provided after the date of the Initial Order will be paid for the purpose of ensuring the continued supply of services The triggering of the payment obligation may have arisen after the Initial Order but it does not follow that a service has been provided after the Initial Order. Section 11.3 contemplates, in my view some current activity by a service provider post-filing that gives rise to payment obligations post-filing The exact time of when the payment obligation crystallized is not, in my view, the determining factor under section 11.3. Rather, the key factor is whether the employee performed services after the date of the Initial Order."¹¹ Performance of services is the determining factor, not crystallization of the payment obligation.

19 Decisions of courts of co-ordinate jurisdiction are not binding but are highly persuasive and ought to be followed in the absence of strong reasons to the contrary: *R. v. Cameron*¹² and *Holmes v. Jarrett*¹³. This is in the interests of predictability, consistency, and stability in the administration of justice. This need is particularly evident in the current economic climate where companies and their stakeholders including employees and unions require time to restructure and stability in the law is an enabler in this regard. Until such time as an appellate court provides different guidance, it seems to me that this line of cases should be followed. I also note that neither la Regie des rentes du Quebec nor the Superintendent of Insurance for the Province of New Brunswick was opposed to the order requested by the Applicants.

20 Applying these cases, I conclude that I do have jurisdiction to make an order staying the requirement to make special payments. The evidence indicates that these payments relate to services provided in the period prior to the Initial Order and the collective agreements do not change this fact. In essence, the special payments are unsecured debts that relate to employment services provided prior to filing. Furthermore, I am not being asked to modify the terms of the pension plans or the collective agreements. The operative word is suspension, not extinction. In addition, the actuarial filings are current and

the relief requested is not premature.

21 I must then consider whether having concluded that I have jurisdiction, I should exercise it as requested by the Applicants. Frankly, I do not consider either of the alternatives to be particularly appealing. On the one hand, one does not wish to in any way jeopardize pensions. On the other hand, the Applicants have no ability to pay the special payments at this time. Their ability to operate is wholly dependent on the provision of DIP financing. Furthermore, payment of the special payments constitutes a DIP loan event of default. A bankruptcy would not produce a better result for the employees with respect to the special payments in that they do not receive priority in bankruptcy. Claims in this regard are unsecured. 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.¹⁴ 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.

22 As to the ancillary relief requested, it seems to me that it naturally flows from the aforesaid order. Given that I am ordering that the special payments need not be made during the stay period pending any further order of the Court, the Applicants and the officers and directors should not have any liability for failure to pay them in that same period. The latter should be encouraged to remain during the CCAA process so as to govern and assist with the restructuring effort and should be provided with protection without the need to have recourse to the Directors' Charge. I further understand that the provisions of the proposed order are similar to those granted by Farley J. in *Re Ivaco Inc.*, by Campbell J. in *St. Marys Papers Ltd.* and most recently, by Mayrand J. in *Re AbitibiBowater*.

23 The other argument raised by CEP is that the terms of the DIP financing are unreasonable. Morawetz J. did expressly approve the DIP financing and the term sheets. No motion was brought to amend his order in that regard. Even if one disregards this procedural problem, the Monitor reported to the Court that, based on a comparison of the principal financial terms of the two DIP financing arrangements with a number of other DIP packages in the forestry, pulp and paper sector with respect to pricing, loan availability and certain security considerations, the financial terms of the DIP term sheets appeared to be both commercially reasonable and consistent with current market transactions. The Monitor specifically referred to the treatment accorded to the special payment obligations. I also observe that no evidence of any alternative DIP financing was advanced or even suggested.

24 For these reasons, the relief requested by the Applicants was granted. CEP requested that the Applicants pay its costs of this motion and made submissions to this effect in its factum. If they are unable to agree, the Applicants are to make brief written submissions on costs in response to the request by CEP. CEP is at liberty to file a reply if it so desires.

S.E. PEPALL J.

* * * * *

Schedule "A"

Industrial Relations Act, R.S.N.B. 1973, c. I-4

56(2) A collective agreement is, subject to and for the purposes of this Act, binding upon the employer and upon the trade union that is a party to the agreement whether or not the trade union is certified and upon the employees in the bargaining unit defined in the agreement.

Pension Benefits Act, S.N.B. 1987, c. P-5.1

50(1) Subject to section 59, a pension fund is trust property for the benefit of the beneficiaries of the fund.

50(2) The beneficiaries of the pension fund are members, former members, and any other persons entitled to pensions, pension benefits, ancillary benefits or refunds under the plan.

51(1) If an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into

the pension fund.

51(2) For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from money payable to an employee shall be deemed to be money received by the employee from the employer.

51(3) An employer who is required by a pension plan 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 employer contributions due and not paid into the pension fund.

51(4) If 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 equal to employer contributions accrued to the date of the wind-up but not yet due under the plan or regulations.

51(5) The administrator of the pension plan has a lien and charge upon the assets of the employer in an amount equal to the amount that is deemed to be held in trust under subsections (1), (3) and (4).

51(6) Subsections (1), (3) and (4) apply whether or not the money mentioned in those subsections is kept separate and apart from other money or property of the employer.

52 If the administrator of the pension plan is the employer and the employer is bankrupt or insolvent, the Superintendent may act as administrator or appoint an administrator of the plan.

53 The administrator may commence proceedings in a court of competent jurisdiction to obtain payment of contributions due under the pension plan, this Act and the regulations.

Labour Code, R.S.O. c. C-27

67. A collective agreement shall be binding upon all the present or future employees contemplated by the certification.

The certified association and the employer shall make only one collective agreement with respect to the group of employees contemplated by the certification.

68. A collective agreement made by an employers' association shall be binding upon all employers who are members of such association and to whom it can apply, including those who subsequently become members thereof.

A collective agreement made by an association of school boards shall bind those only which have given it an exclusive mandate as provided in section 11.

Supplemental Pension Plans Act, R.S.O. c. R-15.1

6. A pension plan is a contract under which retirement benefits are provided to the member, under given conditions and at a given age, the funding of which is ensured by contributions payable either by the employer only, or by both the employer and the member.

Every pension plan, with the exception of insured plans, shall have a pension fund into which, in particular, contributions and the income derived therefrom are paid. The pension fund shall constitute a trust patrimony appropriated mainly to the payment of the refunds and pension benefits to which the members and beneficiaries are entitled.

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

cp/e/qllxr/qlmxb/qlbdp/qlmxl/qlaxw/qlced/qlcas/qlmIt

1 It reserves its rights to return to Court if necessary to address any issues relating to current service payments to be made.

2 2009, Ontario Bar Association, Continuing Legal Education

3 [2008] O.J. No. 3164, 2008 CarswellOnt 4811 (C.A.).

4 "Rescue! The Companies' Creditors Arrangement Act "Toronto: Thomson Carswell, 2007 at p. 9.

5 Supra, Note 2 at p. 18 and 31.

6 [2007] O.J. No. 4186, 2007 CarswellOnt 7014.

7 May 18, 2009 Decision of Quebec Superior Court, [2009] J.Q. no 4473.

8 [2003] R.J.Q. 420 (C.A.)

9 [2004] Q.J. No. 11022, [2004] CanLII 40296 (QC.S.C.)

10 [2009] O.J. No. 2558, June 18, 2009 Decision of Ontario Superior Court.

11 Ibid at para.

12 [1984] O.J. No. 683.

13 [1993] O.J. No. 679.

14 [1993] O.J. No. 679.

Tab 4

Case Name:

Collins & Aikman Automotive Canada Inc. (Re)

**IN THE MATTER OF the Companies Creditors Arrangement
Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a Plan of Compromise or
Arrangement of Collins & Aikman Automotive Canada Inc.
APPLICATION UNDER the Companies Creditors Arrangement
Act, R.S.C. 1985, c. C-36, as amended**

[2007] O.J. No. 4186

37 C.B.R. (5th) 282

63 C.C.P.B. 125

161 A.C.W.S. (3d) 675

2007 CanLII 45908

2007 CarswellOnt 7014

Court File No. 07-CL-7105

Ontario Superior Court of Justice

J.M. Spence J.

Heard: September 20 and 26, 2007.

Judgment: October 31, 2007.

(141 paras.)

Insolvency law -- Legislation -- Companies' Creditors Arrangement Act -- Motion by Superintendent of Financial Services, United Steelworkers, and CAW - Canada for relief relating to Initial Order made under Companies Creditors Arrangement Act dismissed -- Collins & Aikman Automotive filed for protection under CCAA -- Collins had obtained funding from lender subject to certain terms, which terms were approved in Initial Order -- Court declined to order changes to paragraphs in Initial Order, as moving parties provided insufficient basis for their objections -- Court could not compel Collins to make "special payments" ordinarily required under statutory pension law when terms of financing did not contemplate such payments.

Insolvency law -- Receivers, managers and monitors -- Liability -- Motion by Superintendent of Financial Services, United Steelworkers, and CAW - Canada for relief relating to Initial Order made under Companies Creditors Arrangement Act dismissed -- Collins & Aikman Automotive filed for protection under CCAA -- Court declined to alter paragraphs of Initial Order and Order approving engagement of Chief Restructuring Officer that provided limitation of liability for monitor and CRO because moving parties failed to show that Court lacked jurisdiction to make such provision -- Established practice indicated that Court did have authority to grant such protection.

Motion by Superintendent of Financial Services, United Steelworkers, and CAW - Canada for relief relating to Initial Order

made under Companies Creditors Arrangement Act -- Collins & Aikman Automotive filed for protection under CCAA -- Collins had obtained funding from a lender subject to certain terms, which terms were approved in Initial Order of July 19, 2007 -- Moving parties objected to wording of certain paragraphs of Initial Order, and also sought to compel Collins to make "special payments" contemplated under statutory pension law -- HELD: Motion dismissed -- Paragraph 4 of Initial Order allowing Collins to hire further individuals was not altered, since USW provided no basis for its concern that paragraph authorized unilateral contracting out of union positions -- Paragraph 6 of Initial Order stating that Collins was "not required" to make various employee compensation payments was not altered because terms of financing that Collins obtained specifically set out what disbursements were contemplated in cash flow, and "special payments" at issue were not included -- Collins was precluded by terms of financing agreement from making any material disbursements not contemplated in cash flow approved by lender -- Even if the "not required" provision resulted in abrogation of statutory pension plan law by permitting Collins to refrain from making "special payments" ordinarily required by Pension Benefits Act, Court had jurisdiction to approve an order under CCAA which conflicted with, and overrode provincial legislation -- Further, it was a proper exercise of Court's discretion to approve provision because moving parties had opportunity to object to Court's approval of financing terms, but did not do so -- Ordering Collins to make "special payments" would constitute a collateral attack on Initial Order that approved financing because Collins had no alternative funds available and such an order would require it to use funds for a purpose which was not permitted pursuant to Initial Order -- Paragraph 11 of Initial Order allowing Collins to terminate employment arrangements as it deemed appropriate was not altered, since USW did not establish that paragraph would allow Collins to repudiate its collective agreements -- Paragraph 26 of Initial Order providing that monitor was not to be deemed to have become an employer was not altered because if monitor started to act as de facto employer, motion could be brought at that time to consider matter in context of actual fact situation, rather than in current abstract circumstances -- Paragraph 29 of Initial Order providing for limitation of monitor's liability to gross negligence or willful misconduct was not altered because Court did not agree with USW's argument that such provision was beyond Court's jurisdiction to make under CCAA -- Similar limitation of liability that was provided for Chief Restructuring Officer in paragraph 4 of Order approving engagement of CRO was not altered for the same reason, and since established practice showed that Court did have authority to grant such protection to CRO.

Statutes, Regulations and Rules Cited:

Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11(3), s. 11(4), s. 11(6), s. 11.3, s. 11.8(1)

Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A, s. 69(1), s. 69(2), s. 69(12), s. 116

Pension Benefits Act, R.S.O. 1990, c. P.8, s. 55(2)

Pension Benefits Act, General Regulation, R.R.O. 1990, Reg.909, s. 4, s. 5

Counsel:

M.E. Bailey, for the Superintendent of Financial Services (Ontario).

K.T. Rosenberg and M.C. Starnino, for the United Steelworkers.

C.E. Sinclair, for the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW - Canada).

R.J. Chadwick, for Ernst & Young Inc., as Monitor of Collins & Aikman Automotive Canada Inc.

A.J. Taylor and K.L. Mah, for Collins & Aikman Automotive Canada Inc.

J.E. Dacks, for JP Morgan Chase Bank NA.

C.J. Hill, for Chrysler LLC.

REASONS FOR DECISION

1 J.M. SPENCE J.:-- Each of the three moving parties, the Superintendent of Financial Services, the USW and the CAW - Canada, seeks relief relating to the Initial Order made by this Court under the *Companies Creditors Arrangement Act*, R.S.C.

1985, c. C-36, as amended (the "CCAA") on July 19, 2007 (the "Initial Order") with respect to Collins & Aikman Automotive Canada Inc. ("Automotive" or the "Applicant").

2 On July 19, 2007, Collins & Aikman Automotive Canada Inc. ("Automotive") filed for protection from its creditors pursuant to the CCAA. The Applicant is insolvent. It was clear at the time of the CCAA filing that Automotive would not be able to reorganize and the Court was informed by counsel to Automotive and the Monitor that this proceeding is effectively a liquidation. The Court is advised that the CCAA is being utilized by the Applicant to attempt to maximize the potential recovery for the benefit of all creditors by creating the opportunity to attempt to sell some or all of its remaining operating facilities on a going concern basis.

3 Chrysler LLC (previously known as DaimlerChrysler Company LLC) ("Chrysler") is Automotive's largest remaining customer. In order to provide Automotive with the stability to pursue the sale of its facilities, Automotive, Chrysler, the U.S. Debtors and JPMorgan Chase Bank, N.A. as Agent for the U.S. Debtors' pre-petition secured creditors negotiated a comprehensive funding agreement whereby Chrysler (the "DIP Lender") will fund the costs of this CCAA filing.

4 The relief sought by the moving parties concerns, *inter alia*, the pension plans of Automotive. The Superintendent advises that Automotive maintains seven pension plans which are registered in Ontario,

The Impugned Provisions of the Initial Order

Paragraph 4

5 Paragraph 4 of the Initial Order provides as follows:

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 it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

The USW is concerned that, as presently worded, paragraph 4 of the Initial Order is open to an interpretation that permits the Applicant to employ individuals in a manner inconsistent with the terms of the Collective Agreement, contrary to applicable labour legislation. In particular, paragraph 4 could be taken to authorize the unilateral contracting out of union positions. Accordingly, the USW proposes that the following text should be appended at the end of paragraph 4: ", provided that such further retainers are not in breach of any of its collective agreements."

6 The CAW supports the Superintendent and the USW with respect to their submissions in respect of the above provisions of the Order.

Paragraph 6

7 Paragraph 6 of the Initial Order provides as follows:

THIS COURT ORDERS that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

- (a) all outstanding and future wages, salaries, employee benefits, contributions to pension plans, 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 ...

8 The Superintendent objects to any provision that would be inconsistent with the Applicant being required to make any and all required employee contributions to its pension plans.

9 The USW objects to the foregoing provision of the Initial Order on the basis that Automotive appears to be interpreting that provision so as to amend the terms of their employment by staying Automotive's obligation to pay compensation accruing due to employees post filing, including, wages, benefits and special payments to the pension plan. Accordingly, the USW proposes that the words "but not required" be struck from paragraph 6.

Paragraph 11

10 Paragraph 11 of the Initial Order provides as follows:

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

...

- 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 Applicants and such employee, or failing such agreement, to deal with the consequences thereof in any plan of arrangement or compromise filed by the Applicants under the CCAA (the "Plan"); ...
- d. Repudiate such of its arrangements or agreement of any nature whatsoever, whether oral or written, as the Applicants deem appropriate on such terms as may be agreed upon between the Applicants and such counter-parties, or failing such agreement, to deal with the consequences thereof in the Plan; ...

The USW is concerned that these provisions are open to an interpretation that permits Automotive to repudiate its collective agreements with the USW's members. Accordingly, the USW proposes that the following text be added at paragraph 11, following the phrase "(as hereinafter defined)":

"and any and all applicable collective agreements (including, without limitation, all employee benefit, pension and related agreements, compensation policies, and arrangements), and labour laws"

11 The Superintendent seeks an order directing the Applicant to make all required employer contributions to its Pension Plans in accordance with the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the "PBA") and an order amending the Initial Order as is necessary to reflect this relief.

12 The CAW seeks an order compelling the Applicant to make the special payments due to the pension plans operated for the benefit of the CAW's members. The special payments that are referred to include the special payments that are provided for under s. 5(1)(b) and section 5(1)(e) of the Regulation under the PBA. These payments are required to be made to liquidate any unfunded liability in the plan by reason of a going concern deficiency and any insolvency deficiency based on actuarial valuation of the plan. The other special payments referred to are those dealt with in s. 31 of the Regulation. These payments are post wind-up special payments owing under s. 75 of the PBA to address a wind-up deficit. Section 31 states that annual special payments are to commence at the "effective date of wind up" and are equal to "the amount required in the year to fund the employer's liabilities under section 75 of the [PBA] in equal payments, payable annually in advance, over not more than five years".

13 As stated in *Toronto-Dominion Bank v. Usarco Ltd.*, (1991), 42 E.T.R. 235 at paragraph 25 (Ont. Gen. Div.), in the context of going concern special payments, special payments "may fluctuate depending upon the investment results of the pension fund and the employer's ongoing contributions, together with estimated demands on the fund by the beneficiaries" and other factors. The true position of the plan cannot, in fact, be known until the crystallization of all benefits when benefits are settled after a wind-up at which time "it will be known 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".

14 Accordingly, special payments are better understood as the payments which (in accordance with the PBA and Regulations and actuarial practice) have to be made to a pension plan now to meet the plan's benefit obligations which do not arise until some point in the future (either on retirement or termination for individual members or when benefits are settled in a plan wind up for the plan as a whole).

15 Likewise, post-wind-up special payments to address a wind up deficit are based on an actuarial estimate of the position of the plan as of the wind up date. Again, the actual liabilities of the pension plan are not determined until benefits are settled and the funds in the plan are used to actually purchase annuities from an insurance company (at then prevailing annuity rates) to provide the monthly pension benefit to the member.

16 The Applicant has indicated that monthly special payments for the Pension Plans are approximately \$345,000 as of

June 2007. The Superintendent is not in a position to confirm this amount precisely but advises that, owing to the funded position of the Plans it is clear that special payments are required for all the Pension Plans on the basis of the actuarial valuation reports last filed with the FSCO. The requirement to make special payments also applies to two of the Pension Plans which have been wound up, the Gananoque and Stratford Plans, although the special payment requirement arises on an annual rather than a monthly basis.

17 The factums of the USW and the CAW state that the most recently filed valuations for Automotive's various pension plans identify an aggregate wind-up deficiency of approximately \$18.2 million.

Paragraph 26

18 Paragraph 26 provides as follows:

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 - or be deemed to have been or become an employer of any of the Applicant's employees.

The USW is concerned that this provision usurps the exclusive jurisdiction of the Labour Relations Board (the "Board" or the "OLRB") to determine, on a full factual record, whether someone is a successor employer. Accordingly, the USW proposes that the following text be deleted from paragraph 26: "or be deemed to have been or become an employer of any of the Applicant's employees"; and that the following words be added: ", provided that the foregoing is without prejudice to any rights pursuant to the *Labour Relations Act, 1995*, (Ontario)."

19 The CAW seeks the same order.

Paragraph 29

20 Paragraph 29 provides as follows:

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 on this Order, save and except for any gross negligence or willful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

The USW is concerned that this provision provides the Monitor with a blanket immunity on a prospective basis, and that the court has no jurisdiction to provide this immunity and should not provide this immunity even if it did have such authority. Accordingly, the USW proposes that paragraph 29 be deleted and replaced with the following:

THIS COURT ORDERS that nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any other applicable legislation.

The CRO Order

21 On September 11, 2007, Automotive returned a motion for an order approving its engagement of Axis Consulting Group Inc. ("Axis") and Allan Rutman ("Rutman") as Chief Restructuring Officer of Automotive (the "CRO Approval Motion")

22 On September 11, 2007, this court made an order approving Automotive and Axis' engagement (the "CRO Order"), subject to a reservation of rights by the USW to challenge paragraph 4 of the CRO Order.

23 Paragraph 4 of the CRO Order is similar to paragraph 29 of the Automotive Initial Order and the USW objects to it for the same reason. That paragraph provides as follows:

THIS COURT ORDERS that the CRO shall not incur any liability or obligation as a result of the fulfillment of its duties, save and except for any liability or obligation arising from the gross negligence or willful misconduct of the CRO, and no action or other proceedings may be commenced

against the CRO relating to its appointment or its conduct as CRO except with the prior leave of this Court obtained on at least seven (7) days' notice to Automotive and the CRO and provided further that any liability of the CRO hereunder shall not in any event exceed the quantum of the fees and disbursements paid to or incurred by the CRO in connection herewith. This last limitation of liability will be effective up until + including Sept. 20/07 + thereafter as directed by the judge hearing the motion on Sept. 20/07.

24 The USW proposes that this paragraph be deleted and replaced with the following:

THIS COURT ORDERS that no action or other proceedings may be commenced against the CRO relating to its appointment or its conduct as CRO except with the prior leave of this Court obtained on at least seven (7) days' notice to Automotive and the CRO.

Relevant Statutory and Regulatory Provisions

The Companies Creditors Arrangement Act

25 Section 11(1) of the CCAA provides as follows:

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

26 Subsections 11(3) and (4) of the CCAA provide as follows:

- (3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,
- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
 - (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
 - (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Other than initial application court orders -

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

27 Section 11(6) of the CCAA provides as follows:

Burden of Proof on Application -

- (6) The court shall not make an order under subsection (3) or (4) unless
- (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

- (b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

28 Section 11.3 of the CCAA provides as follows:

11.3 No order made under section 11 shall have the effect of

- (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
- (b) requiring the further advance of money or credit.

The Pension Benefits Act

29 Section 55(2) of the PBA provides as follows:

An employer required to make contributions under a pension plan, or a person or entity required to make contributions under a pension plan on behalf of an employer, shall make the contributions in accordance with the prescribed requirements for funding and shall make the contributions in the prescribed manner and at the prescribed times, ...

30 The General Regulation to the Act, R.R.O. 1990, Reg. 909, provides in part as follows:

- 4. (2) Subject to subsection (2.1), an employer who is required to make contributions under a pension plan ... shall make payments to the pension fund or to an insurance company, as applicable, that are not less than the sum of,
 - (a) all contributions, including contributions in respect of any going concern unfunded liability and solvency deficiency and money withheld by payroll deduction or otherwise from an employee, that are received from employees as the employees' contributions to the pension plan;
 - (b) all contributions required to pay the normal cost;
 - (c) all special payments determined in accordance with section 5; and
 - (d) all special payments determined in accordance with sections 31, 32 and 35 and all payments determined in accordance with section 31.1.

...
- 5. (1) Except as otherwise provided in this section and in sections 4, 5.1 and 7, the special payments required to be made after the initial valuation date under clause 4(2)(c) shall be not less than the sum of,
 - (b) with respect to any going concern unfunded liability not covered by clause (a), the special payments required to liquidate the liability, with interest at the going concern valuation interest rate, by equal monthly instalments over a period of fifteen years beginning on the valuation date of the report in which the going concern unfunded liability was determined;

...

 - (e) with respect to any solvency deficiency arising on or after the Regulation date, the special payments required to liquidate the solvency deficiency, with interest at the rates described in subsection (2), by equal monthly instalments over the period beginning on the valuation date of the report in which the solvency deficiency was determined and ending on the 31st day of December, 2002, or five years, whichever is longer.

The Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A (the "LRA")

31 Section 69 of the LRA provides in part as follows:

69. (1) In this section,

"business" includes a part or parts thereof; ("enterprise")

"sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings. ("vend", "vendu", "vente")

Successor employer

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.

...

Power of Board to determine whether sale

(12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision is final and conclusive for the purposes of this Act.

32 Section 116 of the LRA provides as follows:

Board's orders not subject to review

116. No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, *quo warranto*, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.

Jurisdiction of the Court under the *Companies' Creditors Arrangement Act*

33 In *Canadian Red Cross Society (Re)*, [1998] O.J. No. 3306 (Gen. Div. [Commercial List]), Blair J. adopted, at paragraph 46, the following passage from the decision of Farley J. in *Lehndorff General Partner Ltd. (Re)* (1993), 17 C.B.R. (3d) 24, at p. 31 (Ont. Gen. Div.):

The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course *or otherwise deal with their assets* so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 7, 8 and 11 of the CCAA (a lengthy list of authorities cited here is omitted).

The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating *or to otherwise deal with its assets* but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether

the debtor company will succeed, relief should be granted under the CCAA (citations omitted)

[emphasis added]

34 In *Sulphur Corp. of Canada Ltd. (Re)*, [2002] 35 C.B.R. (4th) 304 (Alta. Q.B.), Lovecchio J. considered the jurisdiction of the Court to make an order under s. 11 of the CCAA with provisions that conflicted with provisions of the *Builders Lien Act* of British Columbia (the "BLA"), a conflict which arose because of the grant under a CCAA order of a priority to the financing charge of a debtor in possession ("DIP financing") over all other creditors of the applicant company. Lovecchio J. decided that the Court has jurisdiction to grant a change under the CCAA to secure DIP financing which ranks in priority to a statutory lien under the BLA of British Columbia (paragraph 16).

35 After noting that, apart from the circumstances of the case, the lien under the BLA would have priority, Lovecchio J. provided the following analysis under the headings set out below in the following excerpt which addresses the jurisdiction of the Court in helpful detail and is therefore set out fully here:

The Paramountcy Argument and the Jurisdiction of the Courts

para. 23 Sections 11(3) and 11(4) of the CCAA read as follows:

11(3) A Court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such a period as the Court deems necessary not exceeding 30 days, ... [staying proceedings, restraining proceedings and prohibiting proceedings against the debtor company].

11(4) A court may on application in respect of a company other than an initial application, make an order on such terms as it may impose, ... [staying proceedings, restraining proceedings and prohibiting proceedings against the debtor company].

para. 24 It is clear that the power of the Court to create a charge to support a DIP financing is not mentioned. Are the words "such terms as it may impose" sufficient to give inherent jurisdiction a statutory cloak?

para. 25 The facts at bar are similar to those that were before Associate Chief Justice Wachowich (as he then was) in *Re Hunters Trailer & Marine Ltd.*³ In that case, Wachowich C.J.Q.B. granted Hunters an *ex parte*, 30 day stay of proceedings under the CCAA and, further, granted a DIP financing and Administrative Charge with a super-priority ranking over the claims of the other creditors.

Note 3: (2002) 94 Alta. L.R.(3d) 389.

para. 26 In discussing the objective of the CCAA, Wachowich C.J.Q.B. stated the following at para. 15:

The aim of the CCAA is to maintain the status quo while an insolvent company attempts to bring its creditors on side in terms of a plan of arrangement which will allow the company to remain in business to the mutual benefit of the company and its creditors ...

At para 18:

I agree with the statement made by Mackenzie J.A. in *United Used Auto & Truck Parts Ltd., Re* (2000), 16 C.B.R. (4th) 141 (BCCA), at 146 that: "... the CCAA's effectiveness in achieving its objectives is dependent on a broad and flexible exercise of jurisdiction to facilitate a restructuring and continue the debtor as a going concern in the interim.

Later, at para.32:

Having reviewed the jurisprudence on this issue, I am satisfied that the Court has the inherent or equitable jurisdiction to grant a super-priority for DIP financing and administrative charges, including the fees and disbursements of the professional advisors who guide a debtor company through the CCAA process. Hunters brought its initial CCAA application *ex parte* because it was insolvent and there was a threat of seizure by some of its major floor planners. If super-priority cannot be granted without the consent of secured creditors, the protection of the CCAA effectively would be denied a debtor company in many cases.

...

para. 27 In addressing the Court's jurisdiction to grant an order, the Court of Appeal in *Luscar Ltd. v. Smoky River Coal Ltd.*⁴ confirmed the conclusion that s. 11(4) confers broad powers on the Court to exercise a wide discretion to make an order "on such terms as it may impose". At p. 11, para 53 of the decision, Hunt J.A. for the Court wrote:

These statements about the goals and operations of the CCAA support the view that the discretion under s. 11(4) should be interpreted widely.

 Note 4: [1999] A.J. No. 185 (C.A.), online: (AJ).

 para. 28 As indicated by Wachowich C.J.Q.B., numerous decisions in Canada have supported the proposition that s. 11 provides the courts with broad and liberal power to be used to help achieve the overall objective of the CCAA. It is within this context that my initial Order and the June 19 Order were based.

para. 29 Counsel for the Applicants referred to *Royal Oak Mines Inc., Re*⁵ as an authority supporting their submission that the Courts cannot use inherent jurisdiction to override a provincial statute. ...

 Note 5: (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div.).

 para. 30 In *Royal Oak*, Farley J. also relied on *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*⁶, where the Supreme Court of Canada remarked that there is a limit to the inherent jurisdiction of superior courts and, in the circumstances of that particular case, the Court's inherent

jurisdiction should not be applied to override an express statutory provision. At p. 480 the Court wrote the following:

Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or a Rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case.

 Note 6: (1975), [1976] 2 S.C.R. 475.

 para. 31 *Baxter* may be distinguished from the case at hand since, in that particular case, the contest came down to the Court's inherent jurisdiction pursuant to s. 59 of the *Court of Queen's Bench Act*⁷, a provincial statute which, the Supreme Court of Canada noted, was not intended to empower the Court to negate the unambiguous expression of the legislative will found in s. 11(1) of the *Mechanics' Liens Act*⁸, also a provincial statute.

 Note 7: R.S.M. 1970, c. C280.

Note 8: R.S.M. 1970, c. M80.

 para. 32 ... In *Smoky*, Hunt J.A. used the words the exercise of discretion - a discretion she found to have been broad and one provided for in the statute.

para. 33 It is clear that the Court's power to attach conditions was envisioned by Parliament. The intent of Parliament, through the enactment of the CCAA, was to help foster restructuring which, in turn, fosters the preservation and enhancement of the insolvent corporation's value.

para. 34 In *Re United Used Auto & Truck Parts Ltd.*⁹, Mackenzie J.A., of the Court of Appeal, wrote the following at p. 152, para. 29:

When, as here, the cash flow from operations is insufficient to assure payment and asset values exceeding secured charges are in doubt, granting a super-priority is the only practical means of securing payment. In such circumstances, if a super-priority cannot be granted without the consent of secured creditors, then those creditors would have an effective veto over CCAA relief. I do not think that Parliament intended that the objects of the Act could be indirectly frustrated by secured creditors.

Note 9: (2000), 16 C.B.R. (4th) 141 (BCCA).

para. 35 Parliament's way of ensuring that the CCAA would have the necessary force to meet this objective was to entitle the Courts, pursuant to s. 11, to exercise its discretion and no specific limitations were placed on the exercise of that discretion. There is a logic to the lack of specificity as what is required to be done is often dictated at least in part by the particular circumstances of the case. Whether the Court should exercise that discretion is obviously a different matter and that will be discussed below.

para. 36 For the foregoing reasons, I find that in the circumstances of this case, there is a federal statute versus a provincial statute conflict.

Paramountcy

para. 37 Having established that the Court has a statutory basis to use its inherent jurisdiction in the exercise of a discretion granted under the CCAA, the next question is whether this jurisdiction can be used to override an express provincial statutory provision, in this case s. 32 of the BLA.

para. 38 The case of *Pacific National Lease Holding Corp. v. Sun Life Trust Co.*¹⁰ was raised by Sulphur's Counsel to draw an analogy to the paramountcy issue at bar. While the facts are not identical, the case involved a conflict between the Court's power pursuant to the federal CCAA and the Legal Professions Act of British Columbia. In that decision, the Court found that it is within the Court's jurisdiction, pursuant to the CCAA, to exercise broad "power and flexibility", and proceeded to comment on p. 6 that the CCAA "will prevail should a conflict arise between this and another federal or provincial statute". I agree with that conclusion and would apply it in this case.

Note 10: [1995] B.C.J. No. 1535 (C.A.)

36 More recently, the Court of Appeal, in its decision in its decision in *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5, considered the jurisdiction of the Court under s. 11 of the CCAA in connection with an order given under that section removing directors from the board of the applicant company. Paragraphs 31ff of the decision dealt first with the jurisdiction of the Court and then with the exercise of its discretion. The following passages from that decision are relevant with respect to the jurisdiction of the Court:

Jurisdiction

[31] The motion judge concluded that he had the power to rescind the appointments of the two directors on the basis of his "inherent jurisdiction" and "the discretion given to the court pursuant to the CCAA". He was not asked to, nor did he attempt to rest his jurisdiction on other statutory powers imported into the CCAA.

[32] The CCAA is remedial legislation and is to be given a liberal interpretation to facilitate its objectives: *Babcock & Wilcox Canada Ltd. (Re)*, [2000] O.J. No. 786, 5 B.L.R. (3d) 75 (S.C.J.), at para. 11. See also, *Chef Ready Foods Ltd. v. Hong Kong Bank of Canada*, [1990] B.C.J. No. 2384, 4

C.B.R.(3d) 311 (C.A.), at p. 320 C.B.R.; *Re Lehndorff General Partners Ltd.*, [1993] O.J. No. 14, 17 C.B.R.(3d) 24 (Gen. Div.). [page17] Courts have adopted this approach in the past to rely on inherent jurisdiction, or alternatively on the broad jurisdiction under s. 11 of the CCAA, as the source of judicial power in a CCAA proceeding to "fill in the gaps" or to "put flesh on the bones" of that Act: see *Re Dylex Ltd.*, [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div. (Commercial List)), *Royal Oak Mines Inc. (Re)*, [1999] O.J. No. 864, 7 C.B.R. (4th) 293 (Gen. Div. (Commercial List)); and *Westar Mining Ltd. (Re)*, [1992] B.C.J. No. 1360, 70 B.C.L.R. (2d) 6 (S.C.).

[33] It is not necessary, for purposes of this appeal, to determine whether inherent jurisdiction is excluded for all supervisory purposes under the CCAA, by reason of the existence of the statutory discretionary regime provided in that Act. In my opinion, however, the better view is that in carrying out his or her supervisory functions under the legislation, the judge is not exercising inherent jurisdiction but rather the statutory discretion provided by s. 11 of the CCAA and supplemented by other statutory powers that may be imported into the exercise of the s. 11 discretion from other statutes through s. 20 of the CCAA.

...

[35] ... [I]nherent jurisdiction does not operate where Parliament or the legislature has acted. As Farley J. noted in *Royal Oak Mines*, supra, inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should [page18] not be brought into play" (para. 4). See also, *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*, [1976] 2 S.C.R. 475, 57 D.L.R. (3d) 1, at p. 480 S.C.R.; *Richtree Inc. (Re)* (2005), 74 O.R. (3d) 174, [2005] O.J. No. 251 (S.C.J.).

[36] In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. In that regard, I agree with the comment of Newbury J.A. in *Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.*, [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187 (C.A.), at para. 46, that:

... the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. ... This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above² at the end of the document], rather than the integrity of their own process.

[37] As Jacob observes, in his article "The Inherent Jurisdiction of the Court", supra, at p. 25:

The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital juridical distinction between jurisdiction and discretion, which must always be observed.

[38] I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to control its own process, should the need arise. There is a distinction, however -- difficult as it may be to draw -- between the court's process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the company's process, on the other hand. The court simply supervises the latter [page19] process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period "on such terms as it may impose"³ at the end of the document]. Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when

supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it is designed to supervise the company's process, not the court's process.

37 As to the exercise of the jurisdiction given by s. 11, the Court in *Stelco* said the following at paragraphs 43 and 44:

[43] Mr. Leon and Mr. Swan argue that matters relating to the removal of directors do not fall within the court's discretion under s. 11 because they fall outside of the parameters of the court's role in the restructuring process, in contrast to the company's role in the restructuring process. The court's role is defined by the "on such terms as may be imposed" jurisdiction under subparas. 11(3)(a) -- (c) and 11(4)(a) -- (c) of the CCAA to stay, or restrain, or prohibit proceedings against the company during the "breathing space" period for negotiations and a plan. ...

[44] What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in *Lehndorff*, *supra*, at para. 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructuring efforts.

38 The Court in *Stelco* went on to determine that it was not for the Court under s. 11 to usurp the role of the directors and management in conducting the restructuring efforts and found that there was no authority in s. 11 of the CCAA for the Court to interfere with the composition of a board of directors.

In the course of that analysis the Court stated as follows at paragraph 48:

[48] There is therefore a statutory scheme under the CBCA (and similar provincial corporate legislation) providing for the election, appointment and removal of directors. Where another applicable statute confers jurisdiction with respect to a matter, a broad and undefined discretion provided in one statute cannot be used to supplant or override the other applicable statute. There is no legislative "gap" to fill. See *Baxter Student Housing Ltd. v. College Housing Cooperative Ltd.*, *supra*, at p. 480 S.C.R.; *Royal Oak Mines Inc. (Re)*, *supra*; and *Richtree Inc. (Re)*, *supra*.

39 It appears to me that in making the analysis set out in the above paragraphs and coming to the conclusion that it reached, the Court was addressing the need to ensure that the "terms" imposed by the Court under its s. 11 powers to do so are terms that are properly related to the jurisdiction given under s. 11 to the Court to grant stays and the purpose of that jurisdiction under the CCAA. In that regard, the Court did not consider that intervening in the composition of the internal management of the company contrary to the applicable laws in that regard was proper. This conclusion is perhaps best understood in the context of the earlier discussion in the decision of the nature of the jurisdiction of the Court under s. 11. In particular, the Court emphasized the role of the Court as a supervisory one which is exercised through its ability "to stay, restrain or prohibit proceedings against the company during the plan negotiation period" on such terms as the Court may impose (paragraph 38). It is not apparent how an order removing directors would be inherently or functionally related to the Court's role to provide a protection against legal proceedings which are potentially adverse to the facilitation of "the continuation of the corporation as a viable entity" (paragraph 36, in the quoted passage from the *Skeena* decision).

40 On this basis, the limitation expressed by the Court in *Re Stelco* is not to be understood as restricting the jurisdiction of the Court to make orders which carry out that protective function.

41 Similarly, but in a quite different fact situation, Lax J. of this Court, in her decision in *Richtree Inc. (Re)* (2005), 74 O.R.(3d) 174 dismissed a motion to exempt the applicant company from certain filing requirements with regulatory authorities: see paragraphs 13 to 18 of the decision. In paragraph 18 of the decision, Lax J. said that the order that was sought had nothing to do with the restructuring process of the applicant company.

42 In view of the reasoning and the decisions in the above cases considered, the Court has a jurisdiction under the CCAA which, in the words of the decision in *Re Sulphur Corp. of Canada Ltd.*, *supra*, at paragraph 37, "can be used to override an

express provincial statutory provision" where that would contribute to carrying out the protective function of the CCAA as reflected particularly in the provisions of s. 11 of the CCAA.

43 This analysis is developed further with regard to the special payments in the part of the text below that deals with the issue relating to paragraph 6 of the Initial Order.

The Context of the Initial Order and the CRO Order

44 On July 19, 2007, the Court issued the Initial Order authorizing, *inter alia*, Automotive to obtain and borrow under a credit facility (the "DIP Facility") from Chrysler as DIP Lender in order to finance certain expenditures contemplated by the cash flows that are approved by the DIP Lender and filed with the Court.

45 The Initial Order provided that the DIP Facility was to be on the terms and subject to the conditions set forth in the DIP Term Sheet and Commitment Letter between Automotive and the DIP Lender dated as of July 18, 2007 (the "Commitment Letter"), filed with the Court.

46 The Commitment Letter provides:

The Borrower covenants as follows:

The Borrower shall not, without the Lender's prior written consent, make any material disbursement unless it is contemplated in the Initial cash flow, attached as Schedule "A" to this DIP Term Sheet and Commitment Letter (the "Initial Cash Flow") or any rolling cash flow approved by the Lender (collectively "Cash Flow Projections") and, for greater certainty, the Borrower shall not issue any cheques or make any disbursements until such point in time as the Lender has approved the same and confirmed sufficient funding of the same in accordance with the terms hereof[.]

47 The Initial Order also stated that rights of the DIP Lender under the Commitment Letter shall not be impaired in any way in Automotive's CCAA proceedings or by any provincial or federal statutes and that the DIP Lender shall not have any liability to any person whatsoever resulting from the breach by Automotive of any agreement caused by Automotive entering into the Commitment Letter.

48 The Initial Order provided that the DIP Lender was entitled to the benefit of the DIP Lender's Charge on all of the property of Automotive (except certain tax refunds).

49 The Affidavit of John Boken, dated July 19, 2007, sworn on behalf of Automotive and filed with the Court in connection with the application for the Initial Order (the "Boken Affidavit") stated the following at paragraph 46 with respect to the pension plans of Automotive:

[Automotive] intends to continue to pay current service costs with respect to benefits accruing from the date of filing. The DIP Loan (as defined below), does not provide for the funding of any special payments.

50 In addition, the initial cash flow approved by Chrysler and filed with the Court on the application for the Initial Order clearly stated that special payments would not be made and that such payments were not included in the cash flow projections.

51 Automotive brought a motion to the Court on July 30, 2007 for, *inter alia*, an Order confirming the terms of the DIP Facility (the "DIP Approval Motion"). The DIP Approval Motion was made on notice to, among others, the USW and the Superintendent. The Boken Affidavit was again served in connection with the DIP Approval Motion. As noted above, the Boken Affidavit unequivocally indicated that special payments would not be made and were not permitted by the DIP Facility.

52 In addition, the Monitor filed its First Report with the Court at the return of the DIP Approval Motion and specifically noted that Automotive could not make any payments that were not in the cash flow forecast and that special pension payments were not provided for in the forecast. That point was reiterated in the notes to the cash flow forecast.

53 On July 30, 2007, the Court issued an Order confirming the terms of the DIP Facility (the "DIP Approval Order"). The

DIP Approval Order provided:

3. THIS COURT ORDERS that the DIP Facility provided by DCC to the Applicant in the amount of Cdn.\$13.6 million on the terms and subject to the conditions contained in the DIP Term Sheet and Commitment Letter between the Applicant and DCC dated as of July 18, 2007, all as set forth in the Initial Order, is hereby confirmed and approved.

54 Based on the First Report of the Monitor and the submissions of all counsel Justice Stinson granted the requested relief and approved the DIP Loan "on the terms and subject to the conditions contained in the DIP Term Sheet and Commitment Letter between the Applicant and the DIP Lender dated as of July 18, 2007, all as set forth in the Initial Order". As noted in Justice Stinson's endorsement in respect of the DIP Approval Order, Mr. Bailey on behalf of FSCO and Mr. Starnino on behalf of the USW requested that the Court "record their respective clients' reservation of rights in relation to the pension fund payments and other matters referenced in paragraphs 6(a), 11(b) and (d) of paragraph 26 of the [Initial] Order". Although the CAW did not attend the hearing on July 30, it did receive notice of Automotive's CCAA proceedings on July 23, 2007.

55 No party objected to the approval of the DIP Loan, or the terms and conditions set forth therein. No party appealed Justice Stinson's July 30 order approving the DIP Loan. The appeal period expired on August 20, 2007.

56 The DIP Approval Order was not opposed by the USW or the Superintendent, although they did appear at the DIP Approval Motion.

57 Automotive brought a motion to the Court on August 23, 2007 for an Order, inter alia, extending the stay of proceedings and increasing the amount of an amended DIP Facility. The motion was made on notice to the Unions and the Superintendent. The revised Cash Flow approved by Chrysler and filed with the Court (as a Schedule to the Monitor's Second Report) clearly stated that special payments would not be made and that such payments were not included in the cash flow projections.

58 On August 23, 2007, the Court issued an Order (the "August 23 Order") approving the Amended DIP Term Sheet and Commitment letter dated August 21, 2007 (the "Amended Commitment Letter"). The Amended Commitment Letter provides that Automotive shall not, without the DIP Lender's prior written consent, make any material disbursement unless it is contemplated in the cash flows approved by the DIP Lender. The Unions and the Superintendent did not oppose the August 23 Order, and they did not seek leave to appeal it.

59 The Boken Affidavit filed in support of the Initial Application indicated that:

- (a) Automotive had no other realistic source of DIP funding to continue operations;
- (b) the DIP Loan was the only basis on which funding was available to keep the potential for the preservation of some of the plants as going concerns; and
- (c) the DIP Loan was being provided as a component of a complex multi-party agreement that represented a compromise of the rights of Chrysler, Automotive and the U.S. Debtors, which agreement was approved by the US Bankruptcy Court.

60 By Order of Justice Pepall dated September 11, 2007, Axis Consulting Group and Allan Rutman was appointed Chief Restructuring Officer ("CRO") of Automotive (the "CRO Order"). Paragraph 4 of that CRO Order states:

THIS COURT ORDERS that the CRO shall not incur any liability or obligation as a result of the fulfilment of its duties, save and except for any liability or obligation arising from the gross negligence or wilful misconduct of the CRO, and no action or other proceedings may be commenced against the CRO relating to its appointment or its conduct as CRO except with the prior leave of this Court obtained on at least seven (7) days' notice to Automotive and the CRO and provided further that any liability of the CRO hereunder shall not in any event exceed the quantum of the fees and disbursements paid to or incurred by the CRO in connection therewith. This last limitation on liability will be effective up until and including Sept. 20, 2007 and thereafter as ordered by the judge hearing the motion on Sept. 20, 2007.

61 The last sentence in paragraph 4 of the CRO Order was added by Justice Pepall in response to submissions by counsel that the issue of protections for the CRO were to be further addressed on this motion by the USW.

The Issues

Paragraph 4

62 The USW states its concern that the provision in paragraph 4 that allows the Applicant to retain further Assistants could be interpreted to allow hiring "in a manner inconsistent with the terms of the Collective Agreement, contrary to applicable labour legislation" (USW Factum, paragraph 43). How in particular that might come about is not explained. It is not suggested that the Applicant has acted or intends to act in such a manner.

63 Paragraph 4 does not provide that such hirings may be made in the manner that is the cause of concern. No basis was submitted for considering that such a result is implicit in paragraph 4.

64 Paragraph 4 is, as it is stated, consistent with the protective function of s. 11 because it effectively restrains proceedings that might otherwise be brought against the Applicant for making further hirings. It is conceivable in principle that hirings might be made in a way that would raise issues of the kind raised in *Re Richtree Inc., supra*. In such circumstances, having regard to the approach taken by the Court in *Richtree*, the aggrieved parties would apparently be able to seek appropriate relief from the Court as part of administrative or supervisory jurisdiction in respect of orders made by the Court under the CCAA. That would be an appropriate context in which to address the question of whether there is a conflict between the Collective Agreement and/or the LRA on the one hand and the CCAA and/or the Initial Order on the other. In the present circumstances, it is unnecessary to address the matter and there is no fact situation before the Court to allow it to be addressed properly.

Paragraph 6

65 The objection taken to the phrase "but not required" in paragraph 6 is that Automotive regards the phrase as staying its obligations to pay various kinds of post-filing employee compensation, including in particular special payments to the pension plan.

66 Under the DIP Approval Order, the Court approved the DIP Facility on the terms and subject to the conditions contained in the DIP Term Sheet and Commitment Letter dated July 18, 2007. As noted, the Commitment Letter precludes Automotive from making distributions not contemplated in approved cash flows and the cash flow filed with the Court stated that special payments under the pension plans would not be made. These features link the DIP Approval Order to the paragraph 6 provision in the Initial Order that the specified kinds of payments are not required to be made. That is to say, the Initial Order and the DIP Approval Order are an integrated arrangement. The rationale given for this arrangement in the records is that Automotive will not be in a position to carry on business and will not have available funds without the DIP Facility and the terms on which the DIP Lender is prepared to commit to the DIP Facility are as stated.

67 Automotive states in its factum that it has continued to pay all wages and vacation pay during the course of this CCAA proceeding and intends to continue such payments and that the DIP Loan will, subject to certain conditions, provide advances to facilitate payment of statutory severance obligations.

68 The Initial Cash Flow provides for certain operating disbursements in respect of "Payroll, Payroll Taxes, Benefits, Severance, Other". The associated note states:

The Forecast [Initial Cash Flow] assumes that payments are made for medical and health benefits and current service pension payments will be made while a plant is operating and then cease on the end of production date. The Forecast does not provide for the payment of any special pension payments as it is assumed these will be stayed in a CCAA filing.

69 The Court has approved the DIP Facility and, subject to this motion, the Initial Order. It is obvious that the DIP Facility and the Initial Order are integrally related. In consequence, if Automotive were to fail to use the funds available under the DIP Facility for the purposes that have been indicated for those funds in these CCAA proceedings, that would be a matter that might properly found a motion to the Court for relief. So the phrase "but not required" in paragraph 6 does not give Automotive a carte blanche to withhold contemplated payments, contrary to a suggestion that was made against the paragraph in the course of the hearing.

70 On the other hand, it is clear that the effect of the terms of the DIP Approval and paragraph 6 of the Initial Order is that Automotive, under the Order, is "not required" to make the special payments under its Pension Plans that would otherwise be required.

71 The requirement for the making of such special payments is a statutory requirement. The special payments are provided for in the pension benefits regime under the PBA and the related regulations, as set out in the relevant provisions excerpted above.

Jurisdiction under the CCAA re the Special Payments

72 The USW and the CAW submitted that the obligation under the pension benefits statutory regime to make special payments is an obligation under their respective collective agreements with Automotive. Those agreements require Automotive to maintain pension plans for members having certain specific features, principally relating to the amount of the pension to be earned and paid for the period of employment served by the employee. It was not shown that any provisions in the collective agreements do expressly require Automotive to comply with the statutory regime as to special payments. Rather, the submission seemed to be that because Automotive has an obligation under the Collective Agreement to maintain the pension plan and also has a statutory obligation in respect of pension plans it maintains to make certain special payments, that the contractual obligation impliedly includes the statutory obligations and therefore, any relief from the statutory obligation also constitutes relief from the contractual obligation under the Collective Agreement. Whenever it is argued, as here, that a term should be implied in a contract, the necessary question is why that is so and in this case, no answer is evident from the submissions. The implication was perhaps that it is self-evident but that may be debatable. The pension plan provisions in the collective agreements are addressed to the pension benefits that the plan is required to make available to the members and not to how that is to be done. On this basis, it would seem to be a stretch to say that just because a pension plan is required to conform to the statutory regime, the company sponsoring the plan has impliedly agreed with the bargaining agent to do so. This would suggest that all that the company has agreed to do in the Collective Agreement is to maintain a plan that provides for the benefits contracted for in the collective bargain.

73 However, that analysis may be unduly technical for purposes of the issues on this motion. The commitment of Automotive in its collective agreement to maintain pension plans would give rise to a reasonable expectation that it would keep those plans in good standing in accordance with applicable regulatory requirements designed to ensure that the plans will be able to meet their payment obligations. Moreover, at least one of the pension plans contains a provision which requires the making of all payments required by the applicable statutes. So the better approach is probably to regard the maintenance of the special payments as effectively contemplated by the collective agreements.

74 Even so, this consideration would be relevant to the issue of the jurisdiction of the Court to make the impugned order only if this relationship to the collective agreements gives rise to jurisdictional considerations that are different from those that arise by reason of the payments being required pursuant to the PBA.

75 As observed by the Supreme Court of Canada in its decision in *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, [2007] S.C.J. No. 27, 2007 SCC 27 at paragraph 86, collective bargaining is a fundamental aspect of Canadian society, which has emerged as the most significant collective activity through which the freedom of association protected by s. 2(d) of the Charter is expressed in the labour context. Recognizing that workers have the right to bargain collectively reaffirms the values of dignity, personal autonomy, equality and democracy.

76 This fundamental process of collective bargaining is entrenched in the laws of Ontario by the LRA, which provides a comprehensive scheme for employment relations. Among other things, that statute directs that:

- (a) there shall only be one collective agreement in force between a trade union and an employer;
- (b) the trade union that is a party to the collective agreement is recognized as the exclusive bargaining agent of the employees in the bargaining unit defined therein;
- (c) the collective agreement is binding upon the employer and the employees;
- (d) the collective agreement shall not be terminated by the parties before it ceases to operate in accordance with its provisions or the statute without the consent of the Labour Board on the joint application of the parties;
- (e) a provision of a collective agreement may only be revised on the mutual consent of the parties;
- (f) no employer and no person acting on behalf of an employer shall interfere with the representation of employees by a trade union; and,
- (g) no employer shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with any person on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

77 Based on these elements of the LRA, it appears that the employees cannot legally terminate their employment under

their collective agreement before "it ceases to operate in accordance with its provisions or the LRA without consent of the O.L.R.B. on the joint application of the parties". The USW submits that therefore, the employees cannot legally terminate their services. However, whether this is so would depend first on whether the making of the Initial Order or its terms would allow the Collective Agreement to be terminated. No submissions were made that assist on this point.

78 Secondly, since the LRA provides that the Collective Agreement could be terminated with the consent of the Board, there is a question whether that consent could be obtained - a matter that was not canvassed in the submissions.

79 The above considerations relating to the LRA do not suggest that the relationship of the PBA requirements for special payments to the collective agreements should be considered to give those requirements any jurisdictional status for the issues in this case that would go beyond the implications that arise from the fact of those requirements being imposed pursuant to statute.

80 This result is not altered by the Court's recognition that collective bargaining is a fundamental aspect of Canadian society involving the exercise of the freedom of association protected by s. 2(d) of the *Charter*. It was not suggested that the Initial Order constitutes a breach of the *Charter* rights of the employees.

81 The Moving Parties rely upon the decision of Farley J. in *United Air Lines, Inc. (Re)* (2005), 45 C.C.P.B. 151 (Ont. S.C.J. [Commercial List]) as authority for the proposition that a CCAA debtor must in all circumstances continue to make special payments post-filing. *United Air Lines* involved a motion brought by UAL for an order authorizing it to cease making contributions to its Canadian pension plans. UAL applied for protection from its creditors pursuant to section 18.6 of the CCAA, whereby it sought recognition of a Chapter 11 proceeding in the United States. UAL had filed for bankruptcy protection in the United States in December 2002 and filed under section 18.6 of the CCAA in 2003. The motion was not brought until February 2005.

82 UAL was a large U.S. corporation that was attempting to restructure. It had an international workforce, including a small Canadian workforce. In its motion, it was seeking authority to cease making all contributions to its Canadian pension plans even though it continued to meet its pension funding commitments in all countries other than the United States and Canada. UAL's U.S. employees and retirees had the benefit of the protections provided by the Pension Benefits Guarantee Corporation, while the Canadian employees, as the beneficiaries of a federally regulated scheme, did not. UAL had not presented any evidence of its inability to make the pension payments.

83 After reviewing all of the facts, Farley J. summarized as follows at paragraph 7:

As discussed above, the relative size of the Canadian problems *vis-a-vis* the U.S.A. problems is rather insignificant. It would not seem on the evidence before me that payment of funding obligations would in any way cause any particular stress or strain on the U.S. restructuring - given their relatively insignificant amounts in question. UAL had no qualms about making such payments in the other countries internationally. Additionally there is the issue of the U.S. situation having the benefit of the Pension Benefits Guarantee Corp. (as to which UAL would have paid premiums) but there being no such safety net in Canada on the federal level (and thus no previous premium obligation on UAL).

84 *United Air Lines* does not appear to stand for the proposition that all pension contributions, including special payments, must in all cases be paid by a CCAA debtor absent an agreement with its unions and FSCO. On the contrary, Farley J.'s decision states in paragraph 8 that it was made "on the basis of fairness and equity" after a consideration of the facts and circumstances existing in that case.

85 Based on the decision of the Court of appeal for Quebec in *Syndicat national de l'amiante d'Asbestos inc. et al. v. Jeffrey Mine Inc.*, [2003] Q.J. No. 264, there is a reason to consider that the "not required" clause does not purport to abrogate the pension plan obligations. It authorizes the company not to make payments on account of its obligations during the currency of the Initial Order. Unpaid obligations would constitute debts of the company to be dealt with at the termination of its protection under the CCAA: see *Jeffrey Mine* paragraphs 60 to 62.

86 It was submitted that the text of the *Jeffrey Mine* decision at paragraph 57 shows that in that case there was no suspension of the special payments obligation in respect of the employees who continued to work in the post-filing period. The phrase in paragraph 57 that is relied on in this regard is that the monitor was authorized to suspend pension contributions "except for employees whose services are retained by the monitor". This phrase is stated in the text to be a translation. The text of the original version of the initial order in *Jeffrey Mine* is set out at paragraph 9 of the decision. Paragraph [22] of the order authorizes the monitor to suspend "contributions to pension plans made by employees other than those kept by the monitor". At paragraphs 10 and 11 of the decision, the text makes clear that, in respect of the pension plan, the monitor

advised that the payments that would continue to be paid were the current service payments, which are described as monthly remuneration to the employees to be paid to them by being paid to the plan. Nothing is said there about making any other payments to the plan. Paragraphs 68 and 70 express the Court's rejection of paragraph 16 of the Court's Order of November 29, 2006 which exempted the monitor from the collective agreements. However, paragraphs 54 and 55 of the decision deal with the suspension by the Court of payments to offset actuarial liability, which would seem to be payments in the nature of the special payments that are in issue in the present case. At paragraph 55 the Court gave its opinion that it was within the power of the Superior Court to suspend those payments. The Court of Appeal may have been making a distinction between the powers of the monitor and the Court.

87 Based on the analysis set out earlier in these reasons, even if it is correct to view the "not required" provision as abrogating provisions of pension plan statutory law, the Court has the jurisdiction under the CCAA to make an order under the CCAA which conflicts with, and overrides, provincial legislation. There is no apparent reason why this principle would not apply to an order made under the CCAA which conflicts with the PBA.

88 Reference was made to s. 11.3(a) of the CCAA, which provides that no order made under s. 11 is to have the effect of prohibiting a person from requiring payment for services provided after the order is made. The Applicant is paying the wages and the current service obligations under the pension plans of the employees who continue to be employed. The special payments do not relate exclusively to the continuing employees. It is not shown (and does not seem to be submitted) that the amounts that might be required under the special payments arise from or are in connection with the current service obligations to the plan (assuming those obligations are paid in due course). The most that can be said on the basis of the material now before the Court is that the fact that Automotive continues to operate with employment services being provided by Plan members may occasion some change in the amounts that were due and the payments that were required to be made as at the time of the CCAA filing, but what that amount might be and how, if at all, it could be attributed materially to the continuing service as opposed to other factors such as plan asset valuation is impossible to determine.

89 Accordingly, this point does not alter the conclusion that the Court has the jurisdiction to approve the "not required" clause, notwithstanding its effect in respect of the special payments.

Exercise of the Statutory Discretion under the CCAA

90 There is a separate question raised whether it is a proper exercise of the discretion of the court for it to approve the provision in question. That question must be addressed in the context discussed above.

91 The evidence before this Court is that Automotive is incapable of making the special payments. Automotive does not have the funds necessary to make the special payments. As at July 19, 2007, Automotive had no cash of its own. In the five-week period from July 19, 2007 to August 25, 2007, Automotive had negative cash flow from operations of approximately \$5 million. It is forecast that in the four-week period from August 26, 2007 until September 22, 2007 Automotive will have negative cash flow of approximately an additional \$12 million. Since filing, Automotive has been wholly dependent on the DIP Loan to fund all disbursements.

92 Two other important considerations are evident in the present case. First, for the reasons given above, the effective suspension of special payments is a feature of the integrated arrangement which was made available by Chrysler as the DIP Lender and which was the arrangement which enabled the company to continue in operation. So there was and is a very good reason for the Court to approve that arrangement.

93 Secondly, the moving parties each had a full opportunity to object to the approval of the DIP Facility and none of them did so, even though it was clear from the terms of the DIP Facility and the terms of the Initial Order that they are an integrated arrangement. Instead of objecting to the DIP Facility, they have allowed it to be approved and have objected only to the related provisions of the Initial Order. In proceeding this way, it appears they have avoided facing the question whether if they opposed the DIP Approval Order for the reasons they now advance in respect of the special payments, the DIP Lender might have resisted their demands at the first moment, to the detriment of the continuing employment of members, and they now seek to raise the issue now that the DIP lender is in place and has been advancing funds, in circumstances where the only practical consequence could be to raise the question which would have appropriately been raised at the earlier stage.

94 Chrysler submitted that this conduct is a collateral attack on the DIP Approval Order and should not be countenanced by the Court.

95 The Initial Order was approved on July 19, 2007 with a provision in paragraph 3 providing for a further hearing on July 30, 2007 (the "Comeback Date") at which time the Initial Order could be supplemented or otherwise varied. On July 30, 2007 the Court ordered the approval of the DIP Facility. It ordered an extension of the Stay Period to August 24, 2007.

96 The Court did not make any order to supplement or vary the Initial Order in any other respects. Neither did it make any order to the contrary. Nor does it appear from the recitals in the DIP Approval Order that the Court was asked on that motion to deal with the Initial Order in other respects. Stinson J., in his endorsement of July 30, 2007 approving the issuance of the DIP Approval Order, recorded the requests on behalf of the Superintendent and the USW that he record their respective clients' reservation of rights in relation to the pension fund payment and other matters referenced in paragraphs 6(a), 11(b) and (d) and paragraph 26 of the Initial Order. Since this reservation was recorded at the same time as the DIP Approval Order was granted and without any order being granted at that time to deal with any variations to the Initial Order, this raises a question of whether it is fair to regard the motion now before the Court as a collateral attack on the DIP Approval Order.

97 It is important that, in the Initial Order at paragraph 34, the DIP Facility was ordered to be on the terms and conditions in the DIP Term Sheet and Commitment Letter dated as of July 18, 2007 which was approved in that paragraph subject to a further hearing on the Comeback Date. Covenant No. 1 in the DIP Term Sheet and Commitment Letter provides that the Borrower shall not without the Lender's prior written consent make any material disbursement unless it is contemplated in the initial cash flow or any subsequent cash flow approved by the Lender.

98 As noted earlier, on the motion to approve the Initial Order the Court had affidavit information from Automotive that the DIP Loan does not provide for the funding of any special payments, along with a copy of the cash flow which states that no provision is made for the payment of any special pension payments.

99 So, based on the above analysis, the Court, in the Initial Order, by reason of paragraph 34 (as to which no reservation of a right to object has been made or is now asserted), has ordered that the DIP Loan is not to be applied to special payments except with the consent of the DIP Lender.

100 The Superintendent seeks an order requiring the Applicant to pay the Special Payments. For the reasons given above, such an order would constitute a collateral attack on DIP Approval because the evidence is that the Applicant has no funds available to it other than the DIP Loan. Consequently, the order the Superintendent requests would effectively order the Applicant to use the DIP Loan for a purpose which, pursuant to paragraph 34 of the Initial Order, is not permitted.

101 Chrysler's agreement to act as DIP lender is based on the fact that the Applicant's supply is required to maintain Chrysler's own just-in-time vehicle manufacturing operations. The Superintendent submits that if Chrysler has concluded that it requires the output derived from the labour of the employees, then it is only fair and equitable that Chrysler bears the cost, in terms of remuneration to the employees including special payments to the Pension Plans, of that labour.

102 In the decision in *Ivaco Inc. (Re)* (2005), 47 C.C.P.B. 62 at paragraph 4 (Ont. S.C.J. [Commercial List]) (affirmed (2006) 275 D.L.R. (4th) 132 (Ont. C.A.), leave to appeal granted [2006] S.C.C.A. No. 490) at the first instance, Farley J. characterized the nature of special payments, stating that "notwithstanding that past service contributions could be characterized as functionally a pre-filing obligation, legally the obligation pursuant to the applicable pension legislation is a fresh' obligation".

103 The amount of the outstanding special payments in the present case appears to have been determined prior to the Initial Order based on information relating to the pre-filing period. It is not apparent that the continuation of the operations of the Applicant in the post-filing period has given rise to an increase in the amount of the special payments from the amount that would otherwise have been applicable by reason of the pre-filing experience. Consequently, it seems tendentious to characterize the outstanding special payments as the costs of operating in the post-filing period.

104 The Superintendent objects that the approach that has been taken by the Applicant in the present case has been done without the requisite negotiation with the Superintendent and the pension plan stakeholders. In the decision in *United Airlines, Inc., supra*, Farley J. cited the example of a case where the company obtained specific relief from the requirement to make special payments although current service costs were made. The Court, however, concluded that such an arrangement "is not a given right' of the company" and is to be achieved "on a consensual basis after negotiation" with the pension plan stakeholders.

105 If there had been an objection to paragraph 34 of the Initial Order, that might well have occasioned negotiations of this kind, but there was no such objection. As noted, if there had been, each side could have assessed its own interests *vis-à-vis* the position of the other and the extent to which it would take the risk of insisting on its position or instead seek a compromise. Instead, what has happened is that the DIP Facility has proceeded without objection and the DIP Lender has changed its position on the basis of the Court orders given to date and now, after it has done so, an effort is made to put it in a position where it has no choice but to increase its funding or risk the loss of the continuing operations. This might yield a negotiation but it would be a lopsided one by reason of the DIP Lender already having provided funding in accordance with

the Court orders.

106 The USW contends that its submissions in respect of paragraph 6 of the Initial Order are not in conflict with paragraph 34 because they do not seek an order that the DIP Lender provide the funds that Automotive would require to make the special payments or that Automotive make the payments, but only that it not be ordered that Automotive is not required to make those payments.

107 Since the material before the Court is to the effect that Automotive had and has no funds and has no expectation of having funds available which could be used to make the special payments, other than the monies available under the DIP Facility, if the Court were now to countenance and make the amendment to paragraph 6 which the moving party seeks, the necessary practical consequence of that amendment would be to allow pressure to be put on the DIP Lender to increase its funding commitment to Automotive and consent to Automotive making the special payments, because Automotive would otherwise be potentially vulnerable to proceedings to force it to meet its payment obligations and there would inevitably be concerns about the consequences that could flow from default on its part. That situation would be contrary to the expectations which both Automotive and the DIP Lender would reasonably have been entitled to hold in respect of the Initial Order. It might well be different if the moving party had instead sought an order that the "not required" clause in paragraph 6 should be subject to a proviso that it would not apply to the extent that payment of such amounts could be funded out of monies other than from the DIP Facility. There is no alternative request for such a proviso, perhaps because no one expects it would be of any use.

108 So what remains is a request that the Court, in the exercise of its discretion under s. 11, should make an order that would be contrary to the reasonable expectations of the Applicant and the DIP Lender based on the steps already taken and the orders already granted under the CCAA in this proceeding. That would be unfair and it would not contribute to the fair application of the CCAA in this case or as a precedent for others.

109 Moreover, the failure of the moving parties to reserve in respect of and then dispute paragraph 34 of the Initial Order has the following unsatisfactory effect. If the moving parties had duly disputed paragraph 34 there would have been an opportunity for the Court to consider what would have been the two opposing positions on whether the DIP terms proposed by the DIP Lender should be accepted. If that question had properly been put in issue, then there would also have been an opportunity for each side to consider whether it would seek to press its position or would compromise for the sake of the respective potential benefits to each side. No such opportunity would exist with the request that is now before the Court. So the request should not be granted.

110 For the reasons given above, there is no fair way at the present time to put the parties on a level playing field for negotiation about the special payments. For the reasons mentioned at other points above, it is desirable to ensure that there is an opportunity for such negotiation in CCAA circumstances, as an important means of achieving the most satisfactory arrangements for all concerned to the extent possible. With these considerations in mind, it is appropriate to take into account that the period of the application of the Initial Order was extended by Court order and will expire on the date set by the last such Order unless further extended. If a motion is made for a further extension of the Initial Order beyond its present expiry date, there would seem to be no basis in the above reasons to object to the legitimacy of interested parties raising an objection to paragraph 6 at that time, provided they are also prepared to object to paragraph 34.

Paragraph 11

111 The objection taken by the USW is that the provisions of s. 11 are open to an interpretation that would permit Automotive to repudiate its collective agreements with the USW's members.

112 Paragraph 11 is stated to be subject to covenants in the Definitive Documents as defined in the Initial Order. (They appear to be certain security documents.) The provision does not state that the right to terminate is subject only to such covenants. No mention is made in paragraph 11 of other obligations to which the Applicant may or may not be subject.

113 The USW seeks to have the rights provided for in clauses (b) and (d) of paragraph 11 made subject to all applicable collective agreements and labour laws. Those rights can only be exercised by agreement with the affected employees or other counterparty or under a plan filed under the CCAA, failing which the matters are to be left to be dealt with in any plan of arrangement filed by the Applicant under the CCAA. Nothing in the provision purports to abrogate any applicable collective agreement or labour laws. No reason was advanced why the authorized bargaining agent could not withhold agreement to any proposed exercise of clause (b) or (d) and if Automotive then sought to deal further with the matter pursuant to the CCAA there is no apparent reason why the matter could not be pursued against Automotive in court under the CCAA.

114 Reference is made to the discussion set out earlier with respect to the provision in paragraph 4 relating to further

hirings. The comments made there are, with appropriate changes, applicable with respect to the issue relating to paragraph 11.

Paragraph 26

115 The USW and the CAW object to the part of paragraph 26 which provides that the monitor, by fulfilling its obligations under the Initial Order, shall not be deemed to have taken control of the business or be deemed to have "been or become an employer of any of the Applicant's employees." [The word "employees" does not appear in the text of the Order in certain of the materials, but it is obviously intended.]

116 The USW objects to the provision on the basis that the determination of whether the monitor is an employer is within the exclusive jurisdiction of the O.L.R.B. by reason of s. 69, s. 111 and s. 116 of the LRA. Section 69(2) of that Act provides that a person to whom an employer sells its business becomes the employer (the "successor employer") for the purposes specified in that section until the Board declares otherwise.

117 The Initial Order does not expressly purport to determine the application of s. 69(2) of the LRA, since it does not refer to that Act. The application of paragraph 26 is stated to be limited to the monitor in its limited role under the Initial Order, which leaves the Applicant in possession and control of the business and, therefore, as the employer. This consideration has been regarded as determinative in finding such a provision to be acceptable: see the *Jeffrey Mine* decision at paragraph [76].

118 The discussion in *Re Jeffrey Mine* about a provision of this kind did not address statutory provisions such as s. 69(2) of the LRA.

119 As worded, it is not apparent that paragraph 26 warrants the concern expressed by the USW. It seems reasonable to assume that if the monitor were to take action of a kind that would suggest that the monitor has started to act *de facto* as the employer, in breach of paragraph 26, a motion might be brought before the Court under the CCAA and/or to the Ontario Labour Relations Board and the matter would then be considered in the context of an actual fact situation rather than in the present abstract and ill-defined circumstances. No order to give effect to the objection of the USW and the CAW in respect of this feature of paragraph 26 is appropriate at the present time.

Paragraph 29

120 The USW objects that the immunity, or limitation of liability, provided to the monitor in the first sentence of paragraph 29 is not within the jurisdiction of the Court under the CCAA, or if it is, the granting of this immunity is not a proper exercise of the discretion of the Court. The impugned provision limits liability to gross negligence and willful misconduct.

121 There was no reservation of rights in the endorsement of Stinson J. of July 30, 2007 with respect to this paragraph.

122 The USW cites no authority that has been decided with respect to the CCAA in support of its contention that the limitation of liability is beyond the jurisdiction of the Court under the CCAA. In view of the stay jurisdiction of s. 11 of the CCAA and taking into account the "on such terms" jurisdiction under that section, it might seem that the better view is that the Court does have the jurisdiction to make such an order and that the only issue is whether the grant of limited liability of the kind specified is a proper exercise of the discretion of the Court.

123 The USW submits that other court decisions show that the Court does not have the jurisdiction to grant a limitation of liability to the monitor of the kind set out in paragraph 29.

124 In *GMAC Commercial Credit Corp. - Canada v. T.C.T. Logistics Inc.*, [2006] 2 S.C.R. 123 ("*T.C.T. Logistics*"), the Supreme Court of Canada held that the "boiler plate" immunization of the receiver, though not uncommon in receivership orders, was invalid in the absence of "explicit statutory language" to authorize such an extreme measure:

Flexibility is required to cure the problems in any particular bankruptcy. But guarding that flexibility with boiler plate immunizations that inoculate against the assertion of rights is beyond the therapeutic reach of the Bankruptcy and Insolvency Act.

...

As Major J. stated in *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3 (CanLII), [2004] 1

S.C.R. 60, 2004 SCC 3:

... explicit statutory language is required to divest persons of rights they otherwise enjoy at law ... [S]o long as the doctrine of paramountcy is not triggered, federally regulated bankruptcy and insolvency proceedings cannot be used to subvert provincially regulated property and civil rights. [para. 43]

125 The USW also relies on s. 11.8(1) of the CCAA. Indeed, subsection 11.8(1) explicitly exempts a monitor from liability in respect of claims against the company which arise "before or upon the monitor's appointment":

Notwithstanding anything in any federal or provincial law, where a monitor carries on in that position the business of a debtor company or continues the employment of the company's employees, the monitor is not by reason of that fact personally liable in respect of any claim against the company or related to a requirement imposed on the company to pay an amount where the claim arose before or upon the monitor's appointment.

126 The decision in *T.C.T. Logistics* did not deal with the CCAA. The monitor in that case had been appointed by the Court with a mandate to hire employees and carry on the business, but in the present case the monitor is restricted from hiring any employees and Automotive remains the employer of all of the unionized employees. The statements quoted from the *T.C.T. Logistics* decision are made in the context of a consideration of the issue whether a bankruptcy court judge can determine successor rights issues relating to the LRA. The immunity given in that case was that no action could be taken against the interim receiver without the leave of the Court.

127 Section 11.8(1) deals with the situation where a monitor carries on in that position the business of a debtor company or continues the employment of the company's employees and it provides a blanket immunity against claims which arose before or upon the monitor's appointment. It is understandable that in the situation addressed in the section that the immunity would be limited to such claims and that it would be a blanket immunity in respect of such claims. The existence of s. 11.8(1) does not give rise to any implication as to what kind of limitation of liability would be reasonable in respect of a monitor with the limited powers given in the present case.

128 The specific wording in paragraph 29 of the Initial Order is consistent with the standard limitation of liability protections granted to monitors under the standard-form model CCAA Initial Order, which was authorized and approved by the Commercial List Users' Committee on September 12, 2006.

129 That is, of course, not determinative but it suggests that the clause has received serious favourable consideration from members of the bar in a context unrelated to particular party interests.

130 The monitor submitted in its factum a list of twelve recent CCAA proceedings in which orders have been granted with similar provisions to the limitation of liability in this case. This would seem to suggest that in those cases the clause limiting liability was not disputed or, if it was, the Court found the clause to be acceptable.

131 For these reasons, paragraph 29 is acceptable.

Paragraph 4 of the CRO Order

132 The USW advances the submissions made with respect to jurisdiction as regards the monitor based on *T.C.T. Logistics* against the clause limiting the liability of the CRO.

133 Automotive does not have D&O insurance in place. The protection set out in paragraph 4 of the CRO Order can reasonably be regarded as a fundamental condition of Axis Consulting Group Inc. and Mr. Rutman's agreement to accept and continue as CRO. Automotive would probably be severely restricted in its ability to appoint a capable and experienced Chief Restructuring Officer without the ability to offer a limitation on potential liability.

134 The USW's claim that the Court does not have authority to grant this protection to the CRO is contrary to established practice. These protections are consistent with limitations of liability granted to Chief Restructuring Officers in other CCAA proceedings, and are consistent with the protections granted to Monitors under the standard-form CCAA Initial Order. The same or similar language was used in paragraph 19 of the Order of July 29, 2004 in the *Stelco Inc.* CCAA proceedings and in paragraph 3 of the Order of November 28, 2003 in the *Ivaco Inc.* CCAA proceeding, both granted by Farley J.

135 In *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, [2007] S.J. No. 154 the Saskatchewan Court of Queen's Bench upheld a similar limitation of liability for the Chief Restructuring Officer of Bricore. In dismissing a motion to lift the stay against the Chief Restructuring Officer, Koch J. stated:

The [CCAA] is intended to facilitate restructuring to serve the public interest. In many cases such as the present it is necessary for the Court to appoint officers whose expertise is required to fulfill its mandate. It is clearly in the public interest that capable people be willing to accept such assignments. It is to be expected that such acceptance be contingent on protective provisions such as are included in the order of May 23, 2006, appointing Mr. Duval. It is important that the Court exercise caution in removing such restrictions; otherwise, the ability of the Court to obtain the assistance of needed experts will necessarily be impaired. Qualified professionals will be less willing to accept assignments absent the protection provisions in the appointing order.

136 The Saskatchewan Court of Appeal upheld the decision, [2007] S.J. No. 313.

137 The terms of the limitation of liability given to the CRO are similar to the limitation in the indemnity ordered in paragraph 21 of the Initial Order to be given by the Applicant to the directors and officers of the Applicant. The moving parties have not requested any amendment of that paragraph.

138 It is hard to imagine how a prospective CRO would be prepared to take on the responsibilities of that position in the context of a situation like the present one, fraught as it is with obvious conflicting interests on the part of the different parties involved and a background of action in the work place and litigation in court, without significant protection against liability.

139 Paragraph 4 of the CRO Order appears satisfactory for the above reasons.

Conclusion

140 For the reasons given above, the motions are dismissed.

141 Counsel may make written submissions as to costs if necessary.

J.M. SPENCE J.

cp/e/qlaxs/qlmxt/qlhcs/qlisl

Tab 5

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No : 500-11-036133-094

DATE : **MAY 8, 2009**

PRESENT : THE HONOURABLE Mme JUSTICE DANIELE MAYRAND, J.S.C.

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

ABITIBIBOWATER INC.

And

ABITIBI-CONSOLIDATED INC.

And

BOWATER CANADIAN HOLDINGS INC.

And

The other petitioners listed in Schedules "A", "B", "C" and "D"
Petitioners

And

Ernst & Young Inc.

Intervenor

**REASONS FOR JUDGEMENT PRONOUNCED ON THE BENCH
ON A MOTION FOR AUTHORIZATION TO SUSPEND CERTAIN PAYMENTS TO PENSION
PLANS MAINTAINED BY PETITIONERS (#37)**

THE CONTEXT

[1] AbitibiBowater Inc. and its affiliated companies are asking the Court to suspend the payment of certain contributions to the pension plans of its subsidiaries Abitibi (20) and Bowater (13).

[2] At the time of the motion for issuance of an initial order, the judge responsible for supervision of the present file postponed this specific motion, contained in paragraphs 22 and subsequent of the initial application, before the undersigned and after interested parties were advised of the matter.

[3] In support of its motion, presented pursuant to s. 11(3) and (4) of the *Companies' Creditors Arrangement Act* (CCAA)¹, *Abitibi* argues that should it continue to make payments for past services and special payments (special payments for the purposes of this judgment) to the pension funds, it will be incapable of proceeding with its restructuring because it will have insufficient cash, even when taking into account the DIP financing that it has been granted.

INTERVENORS

[4] Both the Monitor and the *ad hoc* committee, which represents unsecured creditors with claims of up to \$3 billion, and the DIP lender *Fairfax Financial Holdings Ltd.*, which lent \$40 million to *Bowater*, support this motion submitted by *Abitibi*.

[5] The *Communications, Energy and Paperworkers Union of Canada* (CEP), the *Syndicat des employés professionnels et de bureau* (SEPB), as well as the *Fédération des travailleurs et travailleuses du papier et de la forêt* are contesting it.

[6] The regulators in charge of enforcing the laws applicable to the pension plans affected by the present motion, namely the *Régie des rentes du Québec*, the *Financial Services Commission of Ontario*, the *Superintendent of Pensions of British Columbia* and the *Superintendent of Pensions of Canada* are also intervening.

[7] They are not supporting or contesting the motion. They are considering, however, that in the event that the special payments are suspended, these cannot become an object of compromise during the restructuring. At their request, *Abitibi* agreed to the addition of the following conclusion:

Nothing in this order shall be taken to extinguish or compromise the obligations of the Petitioners or Partnerships, if any, regarding payments under the Pension Plans.

[8] Counsel for these organizations has, furthermore, informed the Court that they are preparing to file a motion to establish the current service contributions in a manner different than that of *Abitibi*.

PROLOGUE

[9] At this time, further details must be provided in order to better understand the issues argued by the parties. Indeed, there is a distinction between the financing of a pension plan and the rights and benefits that it provides.

¹ *Companies' Creditors Arrangement Act* (R.S.C., 1985, c. C-36)

[10] The motion for suspension involves a portion of the legal and contractual obligations of *Abitibi* with respect to the funding of the pension plans that it implemented for the benefit of its employees and for which it has the obligation to make up any actuarial difference.

[11] In other words, *Abitibi* is not asking to modify the terms of the pension plans or the collective agreements, but instead to suspend the execution of a part of its financing obligations, namely the payment of the special contributions. There is no question of suspending the current contributions, meaning for current service, that *Abitibi* will continue to make during the restructuring.

THE SPECIAL PAYMENTS

[12] The size of the amounts in question is considerable.

[13] Actuarial valuations conducted for each pension plan identify the actuarial deficits and the payments to be made. These valuations are necessary in order to take into account the performance and the fluctuations of the pension fund and the events that arise over the course of the plan.

[14] According to these actuarial valuations, at the time of the initial application, the solvency deficit (assuming the pension plans terminated today) is of the order of \$1.383 billion for the aggregate of all the pension plans of *Abitibi* and *Bowater*.

[15] The special payments aim to make up the solvency deficit of the pension fund and are amortized over a period of five years.

[16] The solvency deficit of the *Abitibi* plan is \$962 million. For the *Bowater* plan, it reaches \$419 million. One must add to this the actuarial deficit of approximately \$70 million pursuant to improvements made to the pension plans which came into effect on May 1, 2009, that Justice Gascon refused to modify in his judgment of May 4.

[17] According to the report of the monitor and the testimony of the actuary overseeing the plans, the special payments, required to amortize the solvency deficit over a period of five years, are \$102.4 million per year for *Abitibi* (\$8.5 million per month) and \$56.9 million per year for *Bowater* (\$4.7 million per month), for a total monthly payment of \$13.2 million.

CURRENT SERVICE CONTRIBUTIONS

[18] These consist of payments required by *Abitibi* for the purposes of financing the current service of its active employees. They are \$43.7 million per year, \$28.6 million for the *Abitibi* plan and \$15.1 million for the *Bowater* plan.

[19] To this must be added the payment of \$400 000 for all plans in effect since May 1, 2009.

[20] *Abitibi* will continue to make these payments to the pension plan during the restructuring.

THE ISSUES

[21] Three issues are in dispute in the present case, namely:

- 1) Does the Superior Court have jurisdiction?

- 2) Are the special payments aimed at rectifying a deficit for services rendered prior to the application for an initial order?
- 3) If yes, is it thus appropriate, in the circumstances, to suspend the special payment for the period of restructuring?

ANALYSIS

1. Does the Superior Court have jurisdiction?

[22] The objectives of the CCAA were expressed by Justice Gascon² in the judgment he rendered on May 4 in the present case. The court fully agrees with this meaning and endorses what he set out in paragraphs 3 to 14 of his judgment.

[23] The Court adds that the CCAA was introduced in 1933, during the Great Depression, to deal with the global economic crisis. Used frequently at the outset, it thereafter entered a quiet period. Nevertheless, in the last twenty years it has enjoyed a remarkable resurgence. Many doubted the relevance of returning to this unique law in the context of a more flourishing economy. In the face of international economic and financial chaos, it can be said today without a doubt that this legislation has regained its stature.

[24] Addressing now the issue of the jurisdiction of the Court pursuant to the CCAA, the nature and the scope of the desired conclusions must be understood.

[25] The Court reiterates that the benefits and advantages that flow from the pension plans and that form part of the collective agreements cannot be unilaterally modified. This issue was already resolved by the Court of Appeal of Quebec in three different cases: *Mine Jeffrey*³, *Uniforet*⁴ and *TQS*⁵. Justice Gascon confirmed it once again on May 4, in the present case.

[26] The application concerns the financing of the pension plans. Effectively, *Abitibi* is asking to suspend its obligation to finance in part the pension plans, by suspending its special payments.

[27] The Superior Court has jurisdiction to decide if there is reason to order the suspension of the special payments to the fund of a supplemental pension plan. This is not a new issue and has been ruled upon by courts in both Quebec and Canada.

[28] In *Mine Jeffrey*⁶, the debtor had obtained protection under the CCAA in order to restructure. The Court of Appeal of Quebec decided that the employer could not unilaterally modify the collective agreement, but granted the request to suspend special payments during the restructuring period.

[29] The suspension of special payments was also ordered in *Papiers Gaspésia*⁷ by Justice Chaput of this Court.

² May 4, 2009 judgment of Justice Clément Gascon on the motion for declaratory judgment, in the present case.

³ *Syndicat national de l'amiante d'Asbestos inc. c. Mine Jeffrey inc.* [2003] R.J.Q. 420 (C.A.).

⁴ *Uniforet inc. c. 9027-1875 Québec inc.* [2003] R.J.Q. 2073 (C.A.).

⁵ *Syndicat des employées et employés de CFAP-TV (TQS-Québec), section locale 3946 du Syndicat canadien de la fonction publique c. TQS inc.*, J.E. 2008-1578 (C.A.) [2008] QCCA 1429.

⁶ *Ibid* note 3.

⁷ *Papiers Gaspésia inc.* [2004] Cam: 00 40296 (QC S.C.).

[30] More recently, in *Collins v. Eickman Automotive Canada Inc.*⁸, Justice Spence of the Superior Court of Ontario conducted an exhaustive review of the Canadian jurisprudence on the issue (including the judgment of the Court of Appeal in *Mine Jeffrey*)⁹.

[31] Justice Spence highlights the important distinction between the rights that flow from a collective agreement, particularly those set out in the pension plan, and the performance of obligations to give them effect. From a jurisdictional point of view, he adds that, despite the provincial statutory framework that obliges the employer to make special payments on an as-needed basis, such payments still remain claims that can be suspended and that will be addressed once the protection offered by the CCAA has ended.

[32] The Court shares this opinion and henceforth considers that it has jurisdiction to settle the issue that is before it.

[33] Before approaching the second issue at hand, it is necessary to respond to one of the submissions of the unions. They claim that pension plan participants have a distinct status and that they should thus be treated differently from other creditors.

[34] With all due respect, whether by virtue of the CCAA or s. 49 of the *Supplemental Pension Plans Act* (SPPA)¹⁰, the creditors involved are ordinary creditors, that the legislator did not choose to protect in the context of the present restructuring. The wording of s. 49 of the SPPA is not sufficient in itself to imply that a genuine trust having priority over other creditors is created. Furthermore, the Court of Appeal of Ontario, in *Ivaco*¹¹, while deciding on the scope of s. 57(3) of the *Pension Benefit Act*¹² (the terms of which are to the same effect as those of s. 49 of the SPPA), states the following with respect to deemed trusts:

[...] 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.

[35] While it is true that s. 81.5 of the *Bankruptcy and Insolvency Act* (BIA) sets out a super priority for employee contributions that are deducted at source by the employer and the current contributions that the employer must make to the pension plan for current service, the BIA is nevertheless not applicable in this instance.

[36] For one thing, the restructuring is conducted pursuant to another statute that does not set out such a priority and, for another, this priority does not contemplate special payments, since it is limited to deductions at source and current service contributions.

2. Are the special contributions aimed at reversing a deficit incurred for services rendered prior to the motion for an initial order?

[37] Under s. 11(3) of the CCAA, the initial order cannot suspend the rights or claims that result from obligations related to goods and services supplied after the initial order.

[38] The unions allege that the special contributions are aimed at satisfying obligations that flow from services rendered by employees after the motion for initial order.

⁸ *Collins & Aikman Automotive Canada Inc. (Re)* [2007] O.J. N° 4186 (Ont. S.C.).

⁹ *Ibid* note 3.

¹⁰ R.S.Q., c. R.-15.1.

¹¹ *Ivaco Inc. (Re)*, 2006-275 D.L.R. (4th) 132 (Ont. C.A.) paragr. 46.

¹² R.S.O. 1990 c. P.8.

[39] With all due respect, this argument has no basis.

[40] The unions base themselves on a comment by Justice Farley of the Superior Court of Ontario who, in *Ivaco*¹³ in the first instance, said as follows:

Notwithstanding that past service contributions could be characterized as functionally a pre-filed obligation, legally, the obligation pursuant to the applicable pension legislation is a "fresh obligation".

[41] With respect, this assertion is not determinative and furthermore was removed by Justice Spence in *Collins*¹⁴, who wrote as follows:

The amount of the outstanding special payments in the present case appears to have been determined prior to the initial order based on information relating to the pre-filing period.

[42] Further along, he adds:

It is not apparent that the continuation of the operation of the applicant in the post-filing period has given rise to the increase in the amount of the special payments from the amount that would otherwise have been applicable by reason of the pre-filing experience.

Consequently, it seems tendentious to characterize the outstanding special payments as the cost of operating in the post-filing period.

[43] In the case at hand, the actuarial valuations, that determined the amount of the special payments and for which suspension is being requested, all originate prior to the motion for the initial order. Furthermore, the actuarial valuation of the *Régime de retraite applicable aux employés syndiqués de la compagnie Abitibi-Consolidated Company of Canada*, by far the largest, is dated December 2, 2006.

[44] As in *Papiers Gaspésia*¹⁵ and *Mine Jeffrey*¹⁶, the suspended special payments were identified prior to the filing of the motion for initial order and are not outstanding for services rendered after the filing of the motion.

3. If yes, is it appropriate, in the circumstances, to suspend payment for the restructuring period?

[45] Although the Court, which supervises and is called upon to adjudicate issues in the context of a restructuring of this scope, enjoys vast judicial discretion, this discretion still has its limits.

[46] Judicial discretion must be exercised in compliance with existing laws that the Court cannot modify.

[47] The core objective of the CCAA is to allow the company to emerge from its slump and to come to a possible agreement with its creditors. To accomplish this goal, the support, and even the sacrifice of all the stakeholders is essential.

¹³ *Ivaco Inc. (Re)* [2005] O.J., No 3337 (Ont. S.C.) paragr. 4.

¹⁴ *Ibid* note 8, paragr. 103.

¹⁵ *Ibid* note 7.

¹⁶ *Ibid* note 3.

[48] The conflict arises here between *Abitibi*, insolvent and confronted with a global economic crisis, its ordinary creditors who support it and its employees.

[49] The consequences of the measures sought and contested by the two groups are significant. If *Abitibi* cannot restructure because the special payments it is making are jeopardizing its survival, then this raises the danger of a closing of the business, the loss of jobs, the termination and the liquidation of the pension plans.

[50] The actuary testifies that as of the date of the motion for initial order, the solvency of the plans was at about 75%. This means that in the case of termination, the benefits payable would be discharged to a maximum of this percentage.

[51] Furthermore, *Abitibi*, together with all of its creditors, employees, lenders and suppliers, can meet this challenge and emerge from the deadlock by agreeing to an arrangement to put the business back on its feet, in the short or long term. Conditions for the reimbursement of the suspended payments could be agreed upon with the backing of the proper authorities. This will take place at a different stage.

[52] In the interim and in the absence of an agreement between the parties, the Court must rule on the third issue: whether the financial situation of *Abitibi* warrants suspension of the special payments.

[53] According to the monitor's representative, the restructuring is doomed to fail if the \$13 million monthly payments are made. He filed, with his report, the cash flow projections between now and July 19, 2009, for both *Abitibi* and *Bowater*.

Bowater

[54] At the time the initial order was made, *Bowater* obtained bridge financing of \$40 million from *Fairfax*, in order to permit the company to continue its current activities, as well as pay suppliers of goods and services, from the date of the motion for the initial order.

[55] *Fairfax* indicated to the Court that this financing was extended in order to finance current activities of *Bowater* and could not be used towards the payment of special contributions to the pension plans. The financing is also subject to the respect of certain solvency ratios.

[56] Although the filed forecasts include the \$40 million financing from *Fairfax* and omit the monthly special payments of \$4.7 million, they demonstrate the precarious financial position of *Bowater* in the short term.

[57] In July 2009, only \$17.773 million will be left to maintain the *status quo*, continue the operation of the business and fuel its restructuring. If it had to make the special payments due since March 31, 2009, the result is evident: there would be no cash left.

Abitibi

[58] *Abitibi's* situation is not any better. It was only yesterday that the company received "in extremis" temporary financing of \$100 million. In fact, the amounts available to *Abitibi* from this financing represent at the most \$87 million. The lender stipulated that the funds be utilized for

the sole purpose of maintaining current activities, and imposed solvency ratios that will not be satisfied if *Abitibi* must make the payments at issue.

[59] In the end, the name says it, the financing is temporary. It must be reimbursed in November 2009, pursuant to the sale of assets by the company.

[60] Apart from the DIP financing and the monthly contribution payments of \$8.5 million, the forecasts filed for the period up to July 19, 2009 leave cash of \$70 million. This does not include the additional payments for current service required for the current service contributions following the modifications that came into force May 1, 2009.

[61] As the monitor clearly explained in his report and testimony, *Abitibi* does not have enough leeway. The business needs oxygen in order to face the upcoming crucial months of restructuring. The Court refers particularly to paragraphs 42 to 51 and 57 to 60 and 63 of the third report of the monitor.

[62] It is thus necessary to suspend payment of the special contributions.

[63] Furthermore, after analysis, the Court will grant the conclusion identified as being paragraph 23, as well as that of paragraph 24, upon which the parties have agreed.

[64] Since the present judgment modifies the initial order drafted in English, the order is set forth in English.

FOR THESE REASONS, THE COURT :

1. **GRANTS** the Motion for Authorization to Suspend Certain Payments to Pension Plans Maintained by the Petitioners (N° 37).
2. **AMENDS** as follows the Initial Order issued by this Court in this matter on April 17, 2009, as amended on April 22 and May 6, 2009 by adding these paragraphs after Paragraph 21 of the Initial Order :

[22] **ORDERS** that notwithstanding any other provision of this Order, the Petitioners and the Partnerships shall not make any past service contributions or special payments to funded pension plans maintained by the Petitioners or the Partnerships (the "Pension Plans") during the Stay Period, pending further order of this Court.

[23] **ORDERS** that none of the Petitioners or the Partnerships, or their respective officers or directors shall incur any obligation, whether by way of debt, damages for breach of any duty, whether statutory, fiduciary, common law or otherwise, or for breach of trust, nor shall any trust be recognized, whether express, implied, constructive, resulting, deemed or otherwise, as a result of the failure of any Person to make any contribution or payments other than current cost contribution obligations ("Current Contributions") during the Stay Period that they might otherwise have become required to make to any Pension Plans maintained by a Petitioner or by a Partnership.

[24] **ORDERS** that if any claim, lien, charge or trust arises as a result of the failure of any Person to make any contribution or payment (other than Current Contributions in accordance with Sections 81.5 and 81.6 of the Bankruptcy and Insolvency Act) during the Stay Period that such Person might otherwise have become required to make to any Pension Plans but for the stay provided for herein, no such claim lien, charge or trust shall be recognized in these proceedings or in any subsequent receivership, interim receivership or bankruptcy of any of the Petitioners or the Partnerships as having priority over the claims of the CCAA Charges as set out in this Order.

[24.1] **ORDERS AND DECLARES** that nothing in this Order shall be taken to extinguish or compromise the obligations of the Applicants and Partnerships, if any, regarding payments under the Pension Plans.

3. **ORDERS** the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.
4. **THE WHOLE WITHOUT COSTS.**

Danièle Mayrand, j.c.s. (signed)

Mes Guy P. Martel, Joseph Reynaud et Mélanie Béland
STIKEMAN ELLIOTT (Montreal)
Attorneys for the Petitioners

Me Gilles Paquin
FLANZ FISHMAN MELAND PAQUIN LLP
Attorney for the Monitor

Me Frederick L. Myers
GOODMANS LLP (Toronto)
Attorney for the Ad Hoc Committee of Bondholders

Me Nicolas Plourde
HEENAN BLAIKIE
Attorney for Fairfax Financial Holdings Ltd.

Me Yves Saint-André
TRUDEL NADEAU
Attorney for SCEP and SEPB

Me Jean-François Cliche
MARTEL CANTIN
Attorney for the Fédération des travailleurs et travailleuses du papier et de la forêt

Me Pierre Lecavalier
JOYAL LEBLANC
Attorney for the Attorney General of Canada

Me Louis Robillard

ARAV ROBILLARD & LANIEL
Attorney for the Régie des rentes du Québec,
for the Financial Services Commission of Ontario,
for the Superintendent of Pensions of British Columbia

Date of Hearing : MAY 4, 2009

UNOFFICIAL ENGLISH TRANSLATION

SCHEDULE "A"
ABITIBI PETITIONERS

1. Abitibi-Consolidated Inc.
2. Abitibi-Consolidated Company of Canada
3. 3224112 Nova Scotia Limited
4. Marketing Donohue Inc.
5. Abitibi-Consolidated Canadian Office Products Holdings Inc.
6. 3834328 Canada Inc.
7. 6169678 Canada Inc.
8. 4042140 Canada Inc.
9. Donohue Recycling Inc.
10. 1508756 Ontario Inc.
11. 3217925 Nova Scotia Company
12. La Tuque Forest Products Inc.
13. Abitibi-Consolidated Nova Scotia Incorporated
14. Saguenay Forest Products Inc.
15. Terra Nova Explorations Ltd.
16. The Jonquière Pulp Company
17. The International Bridge and Terminal Company
18. Scramble Mining Ltd.
19. 9150-3383 Québec Inc.

UNOFFICIAL ENGLISH TRANSLATION

SCHEDULE "B"
BOWATER PETITIONERS

1. Bowater Canadian Holdings Inc.
2. Bowater Canada Finance Corporation
3. Bowater Canadian Limited
4. 3231378 Nova Scotia Company
5. AbitibiBowater Canada Inc.
6. Bowater Canada Treasury Corporation
7. Bowater Canadian Forest Products Inc.
8. Bowater Shelburne Corporation
9. Bowater LaHave Corporation
10. St-Maurice River Drive Company Limited
11. Bowater Treated Wood Inc.
12. Canoxel Hardboard Inc.
13. 9068-9050 Québec Inc.
14. Alliance Forest Products (2001) Inc.
15. Bowater Belledune Sawmill Inc.
16. Bowater Maritimes Inc.
17. Bowater Mitis Inc.
18. Bowater Guérette Inc.
19. Bowater Couturier Inc.

UNOFFICIAL ENGLISH TRANSLATION

SCHEDULE "C"
18.6 CCAA PETITIONERS

1. AbitibiBowater Inc.
2. AbitibiBowater US Holding 1 Corp.
3. Bowater Ventures Inc.
4. Bowater Incorporated
5. Bowater Nuway Inc.
6. Bowater Nuway Mid-States Inc.
7. Catawba Property Holdings LLC
8. Bowater Finance Company Inc.
9. Bowater South American Holdings Incorporated
10. Bowater America Inc.
11. Lake Superior Forest Products Inc.
12. Bowater Newsprint South LLC
13. Bowater Newsprint South Operations LLC
14. Bowater Finance II, LLC
15. Bowater Alabama LLC
16. Coosa Pines Golf Club Holdings LLC

UNOFFICIAL ENGLISH TRANSLATION

SCHEDULE "D"
PARTNERSHIPS

1. Bowater Canada Finance Limited Partnership
2. Bowater Pulp and Paper Canada Holdings Limited Partnership
3. Abitibi-Consolidated Finance LP

UNOFFICIAL ENGLISH TRANSLATION

Tab 6

Case Name:

White Birch Paper Holding Company (Arrangement relatif à)

**IN THE MATTER OF THE PLAN OF ARRANGEMENT AND COMPROMISE OF:
WHITE BIRCH PAPER HOLDING COMPANY, WHITE BIRCH PAPER COMPANY,
STADACONA GENERAL PARTNER INC., BLACK SPRUCE PAPER INC., F.F.
SOUCY GENERAL PARTNER INC., 3120772 NOVA SCOTIA COMPANY,
ARRIMAGE DE GROS CACOUNA INC. and PAPIER MASSON LTÉE,**

Petitioners

and

ERNST & YOUNG INC., Monitor

and

**STADACONA LIMITED PARTNERSHIP, F.F. SOUCY LIMITED PARTNERSHIP
and F.F. SOUCY, INC. & PARTNERS, LIMITED PARTNERSHIP, Mis en**

Cause

[2010] Q.J. No. 1723

2010 QCCS 764

2010EXP-1302

J.E. 2010-711

No.: 500-11-038474-108

Quebec Superior Court
District of Montreal

The Honourable Robert Mongeon, J.S.C.

Heard: 24 February 2010.

Judgment: March 4, 2010.

(103 paras.)

Bankruptcy and insolvency law -- Companies Creditors' Arrangement Act (CCAA) matters -- Application of Act -- Debtor company -- The interim financing proposed was intended to permit the debtor to restructure over a period of approximately nine to twelve months and was crucial to the survival of the Petitioners and Partnerships over the said restructuring period -- The Court granted a stay of proceedings against the Partnerships, given that the structure of the debtor was such that it would be impossible to proceed otherwise -- Motion granted.

Petitioner by White Birch Paper Company (WB) and the other Petitioners sought to have the stay of proceedings sought under the Companies Creditors' Arrangement Act extended to all Petitioners as well as to Partnerships, as they formed an integral and intimately interconnected part of the business of the Petitioners -- WB was the parent company of the other Petitioners -- WB was a major owner and operator of newsprint mills, principally in the province of Québec -- Almost all of WB's employees were in Quebec -- The Petitioners and the Partnerships were confronted with an unprecedented combination of negative circumstances leading to a significant liquidity shortfall -- Petitioners and the Partnerships were now insolvent --

WB contributed to various pension plans for its unionized and non-unionized employees -- WB was able to secure a DIP loan -- HELD : Motion granted -- The interim financing proposed was intended to permit WB to restructure over a period of approximately nine to twelve months and was crucial to the survival of the Petitioners and Partnerships over the said restructuring period -- The sizing of the interim financing, cost of borrowing and fees were reasonable and had been minimized in order to reduce the impact on all other secured creditors -- There was insufficient evidence to justify the confidentiality order sought -- The Court granted a stay of proceedings against the Partnerships, given that the structure of WB was such that it would be impossible to proceed otherwise.

Statutes, Regulations and Rules Cited:

Companies Creditors' Arrangement Act, s. 10(3), s. 11 and seq., s. 11.7

Counsel:

Me Jean Fontaine, Me Mathew Liben, Stikeman Elliott, Attorneys for the Petitioners.

Me Louis Gouin, Ogilvy Renault, Attorney for the Monitor.

Me Sylvain Vaclair, McCarthy Tétrault, Attorney for GE Capital Corporation.

Me Sandra Abitan, Osler, Hoskin & Harcourt, Attorney for the Interim Lender (DIP).

REASONS FOR JUDGMENT
ON PETITIONERS' MOTION FOR THE ISSUANCE OF AN INITIAL ORDER
Sections 11 and following Companies Creditors' Arrangement
Act ("CCAA")

1 On February 24, 2010, I granted the Petitioners' Motion for the Issuance of an Initial Order pursuant to Sections 11 and following of the CCAA, with reasons to follow.

2 Here are my reasons.

I. INTRODUCTION

(A) PETITIONERS

3 Petitioner White Birch Paper Company ("**WB**") is a Nova Scotia company with holdings principally situated in the Province of Québec;

4 WB is owned by a partnership, White Birch Partners L.P., which in turn is fully owned (both directly and through further intermediaries) by Petitioner White Birch Paper Holding Company ("**WB Holding**");

5 WB is the parent company of Petitioners Stadacona General Partner Inc. ("**Stadacona GP**"), F.F. Soucy General Partner Inc. ("**FF Soucy GP**"), Black Spruce Paper Inc. ("**Black Spruce**") and 3120772 Nova Scotia Company ("**3120772**");

6 Bear Island Paper Company LLC ("**Bear Island**"), a Virginia company, is also a subsidiary of WB, but is not a Petitioner hereunder as its assets and operations are located in the United States;

7 WB is also the ultimate parent company of Petitioners Papier Masson Ltée ("**Papier Masson**") and Arrimage de Gros Cacouna Inc. ("**Arrimage**");

8 The Mises en Cause, Stadacona Limited Partnership ("**Stadacona LP**"), F.F. Soucy Limited Partnership ("**FF Soucy LP**") and F.F. Soucy, Inc. & Partners, Limited Partnership ("**FF Soucy & Partners LP**") (referred to collectively herein as the "**Partnerships**") are not petitioners in these proceedings;

9 WB and the other Petitioners seek to have the stay of proceedings sought hereunder extended to the Partnerships as they form an integral and intimately interconnected part of the business of the Petitioners. They represent that the operations of the Partnerships are so integral to and intertwined with those of the Petitioners that failure to extend the stay to them would have a negative impact on the value of the Petitioners and would make it impossible to the Petitioners to successfully restructure;

10 WB, Stadacona GP, FF Soucy GP, Black Spruce, Papier Masson, 3120772, Arrimage, Bear Island and the Partnerships will be referred to collectively herein as the "**WB Group**";

11 WB Holding is privately owned and has its executive office in Greenwich, Connecticut, U.S.A.;

12 The WB Group operates three pulp and paper mills in the province of Québec, which, together with a fourth mill situated in Virginia and operated by Bear Island, collectively have a yearly production capacity of 1.3 million metric tons of newsprint and directory paper with up to 50% recycled content;

13 Each of the Petitioners and Partnerships has its chief place of business in the Province of Québec;

(B) ORDER SOUGHT

14 The Petitioners seek, *inter alia*, the following conclusions:

- a) a declaration that Petitioners are companies to which the CCAA applies;
- b) a declaration that the protection of the CCAA extends to the Partnerships;
- c) a declaration authorizing each of the Petitioners or the WB Group as a whole to file a plan of arrangement under the CCAA;
- d) a declaration ordering that all proceedings against the Petitioners, the Partnerships and their assets be stayed and suspended;
- e) a declaration authorizing the borrowers set out in the Interim Financing Credit Agreement to borrow a maximum amount of USD\$140 million under an interim financing facility secured by a priming charge;
- f) the appointment of Ernst & Young Inc. ("Ernst") as monitor (the "Monitor") pursuant to Section 11.7 of the CCAA;
- g) such further order and/or relief as this Court may deem just.

II OPERATIONS

(A) OVERVIEW

15 The WB Group is a major owner and operator of newsprint mills, principally in the province of Québec;

16 As of December 31, 2009, it has the second-greatest newsprint production capacity in North America, with a market share of approximately 12%;

17 It has annual net sales of approximately US\$667 million as of December 31, 2009;

18 As of January 2010, the WB Group has approximately 1,278 employees;

19 The WB Group's Canadian newsprint mills are situated at Québec City (the "**Stadacona Mill**"), Rivière-du-Loup (the "**Soucy Mill**") and Masson-Angers, Québec (the "**Papier Masson Mill**"), and its United States mill is situated in Ashland, Virginia (the "**Bear Island Mill**");

20 Stadacona LP also owns and operates a sawmill, under the name of Scierie Leduc ("**Leduc Sawmill**");

(B) THE STADACONA MILL

21 The Stadacona Mill was purchased by the WB Group in 2004, and is owned and operated by Stadacona LP;

22 It features five (5) paper machines capable of producing 410,000 metric tons of newsprint per year, 95,000 tons per year of directory paper and 45,000 tons per year of paperboard;

23 The workforce at the Stadacona Mill has recently been significantly reduced, from a total of 1,014 in 2004 to a current total of 585 employees;

(C) LEDUC SAWMILL

24 The Leduc Sawmill is located in St-Émile, Québec and employs approximately 20 people;

(D) THE SOUCY MILL

25 The Soucy Mill was acquired by the WB Group in 1973, and is jointly owned and operated by FF Soucy LP and FF Soucy & Partners LP;

26 The Soucy Mill features two (2) newsprint machines, which together have an annual newsprint production capacity of 265,000 metric tons;

27 The Soucy Mill also produces uncoated ground wood specialty paper;

28 The Soucy Mill currently employs 231 people;

(E) ARRIMAGE GROS CACOUNA

29 Arrimage provides stevedoring services, specializing in paper products, at the Gros-Cacouna Seaport, near Rivière-du-Loup, Québec;

30 Its primary purpose is to load WB Group paper products on ships, for marine shipment to foreign clients;

(F) THE PAPIER MASSON MILL

31 The Papier Masson Mill was purchased by the WB Group in 2006, and is owned and operated by Papier Masson;

32 The Papier Masson Mill has one newsprint machine capable of producing 245,000 metric tons of newsprint per year;

33 Following WB Group's acquisition of the Papier Masson Mill, the workforce was significantly reduced from 287, and currently stands at 186 employees;

(G) THE BEAR ISLAND MILL

34 The Bear Island Mill was built by the WB Group in 1979;

35 It is owned by Bear Island, which is not a Petitioner in the present proceedings;

36 It operates a single newsprint paper machine, which has a capacity of 235,000 metric tons per year;

37 The Bear Island Mill currently employs 199 people;

(H) EMPLOYEES

38 As stated above, the WB Group presently employs 1,278 people.

39 With the exception of the Bear Island staff, all such employees are situated in the Province of Québec, such that the Petitioners and Partnerships employ approximately 1,100 people in Québec. These employees are, for the most part, unionized.

40 Unionized employees of the Stadacona Mill, the Soucy Mill and the Papier Masson Mill are members of the Communications, Energy and Paperworkers Union:

- a) For the Stadacona Mill: Locals 137, 200, 250 and 299;
- b) For the Soucy Mill: Locals 625, 627 and 905;

- c) For the Papier Masson Mill: Locals 11 and 1104;

41 The unionized employees of Stadacona LP's Leduc Sawmill are members of a distinct union, the Syndicat Démocratique des Salariés de la Scierie Leduc;

42 At Arrimage, the unionized employees are members of the Syndicat des Employés d'Arrimage Gros-Cacouna;

III FINANCIAL SITUATION

A) OVERVIEW AND CAUSES OF FINANCIAL DIFFICULTIES

43 The Petitioners and the Partnerships are currently confronted with an unprecedented combination of negative circumstances;

44 In addition to the worldwide economic downturn, the newsprint industry is experiencing a particular harsh decline in demand as electronic alternatives replace printed media;

45 Newsprint prices dropped nearly \$330 per metric ton from the fourth quarter of 2008 until August 2009, a negative impact of approximately \$380 million for the WB Group, on the basis of full capacity operation;

46 Moreover, the increased strength of the Canadian dollar and the weakness of the United States dollar has exacerbated the negative impact of the decline, as most of the WB Group's clients are in the United States and remit payment in United States currency, while most expenses are payable in Canadian currency;

47 In sum, the Petitioners' and Partnerships' financial and operational challenges are principally attributable to the following factors :

- a) the overall decline in the world economy and its impact on demand for and price and inventories of newsprint;
- b) fundamental decline in demand for newsprint as consumers move away from print media;
- c) increased strength of the Canadian dollar and corresponding weakness of the American dollar;
- d) significant debt service obligations;
- e) the detrimental effect of low floating interest rates on the WB Group's position in certain major interest rate swap transactions;

48 These factors have led to a significant liquidity shortfall, such that the Petitioners and Partnerships are unable to respect their debt service obligations;

49 EBITDA (earnings before interest, taxes, depreciation and amortization) will not be sufficient to service the Petitioners' and Partnerships' debt and to fund required expenditures within the upcoming months;

50 This liquidity crisis demands an urgent solution, in light of the following payments that became due on September 30, 2009 and which remain unpaid:

- a) interest payment on the First Term Loan Facility: US\$3,666,672.19;
- b) interest payment on the Second Term Loan Facility: US\$1,380,000.00;
- c) accelerated payments under the Swap Agreements (as defined below): approximately US\$58,000,000;

51 In addition, between February 24 and March 31, 2010, the Petitioners and the Partnerships would have to make a total of approximately Cdn\$4,391,000¹ in pension fund contributions;

52 Of this amount, a significant amount relates to "past service cost contributions" (also known as "special payments" or "amortization payments"), in light of the existence of solvency deficits, as set out in a report detailing such deficits prepared

by Mercer (Canada) Ltd. ("**Mercer**"), and filed as **Exhibit P-2**;

53 Indeed, in 2009, a total of Cdn\$1,413,110 per month is attributable to such amortization payments, as appears from an actuarial report also prepared by Mercer, and also forming part of Exhibit P-2;

54 In light of their significant liquidity shortfall, and the size of the amounts currently due as set out above (as well as all other current operational obligations, notably payroll and payment of utilities and raw materials expenses), the Petitioners and Partnerships are not in a position to make such payments;

55 In view of the above, the Petitioners and the Partnerships are now insolvent;

B) INDEBTEDNESS

56 The WB Group's principal debt obligations consist of three major credit facilities:

- a) A First Lien Term Loan facility under which a total of approximately US\$438 million in principal and interest are owing;
- b) A Second Lien Term Loan facility under which a total of approximately US\$104 million in principal and interest are owing;
- c) A Revolving Asset-Based Facility under which US\$50 million in principal and interest are outstanding;

57 In addition, the WB Group is party to various interest rate swaps, which are out of the money to the extent of approximately US\$58 million in total as of the present date, which swaps rank *pari passu* to the lenders under the First Term Loan Facility;

C) PENSION PLANS AND RETIREMENT BENEFITS

58 The WB Group has created and contributes to various pension plans for its unionized and non-unionized employees;

59 It has also established Supplement Executive Retirement Plans ("**SERP's**") for certain management employees;

60 In addition, the Petitioners fund certain Other Post-Employment Benefits ("**OPEB's**");

61 Many of the plans are currently in a position of significant solvency deficit;

62 As stated, the Petitioners and Partnerships are in a major and urgent liquidity crisis and are therefore not in a position to make all payments due under the pension and retirement plans, in particular, those which are in respect of pre-filing obligations;

63 In view of this fact, the Petitioners and Partnerships seek an order suspending payment of amounts relating to "past service cost contributions" (i.e. amortization payments), which account for approximately Cdn\$1,413,110 per month, including any amounts accrued prior to the present CCAA filing²;

64 The Petitioners submit that such an order is justified during the stay period, as all available liquidity must be utilized to sustain the operations of the Petitioners and Partnerships, and to meet their ongoing post-filing obligations;

65 Consequently, the Petitioners In view of this fact, the Petitioners and Partnerships seek an order and Partnerships propose to continue making all current contributions to pension plans, SERP's and OPEB's;

D) UTILITIES AND TRADE CREDITORS

66 The Petitioners and Partnerships, in addition to employee expenses and debt-service obligations, have monthly expenses of approximately Cdn\$40 million, including approximately Cdn\$10.5 million in utilities expenses (principally electricity, natural gas and steam);

V) INTERIM FINANCING ("DIP")

67 In order to continue to operate, the WB Group, therefore, needs significant additional liquidity. To this end, the WB Group retained the services of Lazard Frères & Co LLC as financial advisors, who were able to convince a group of First Term Loan lenders to advance and cover said liquidity requirements in the form of a "DIP" loan secured by a priming charge. A copy of the Interim Financing Credit Agreement was filed as Exhibit P-3 (the "DIP Loan").

68 Essentially, the DIP Loan is for an aggregate amount of US\$140 million, from which an amount of approximately US\$50 million will be deducted and applied to the full payment and discharge of the Asset Based Revolving Credit Facility.

69 After earmarking a further amount of approximately US\$16 million³ to cover the Administrative and D&O priming charge (as explained below), the DIP Loan will provide some US\$74 million in additional liquidity which, according to the Monitor, should permit a orderly and appropriate restructuring. The DIP Loan will bear interest at the rate of approximately 17.5% to 19% per annum and is entirely supported by the Monitor (see Monitor's Initial Report Exhibit P-4).

70 After reviewing the allegations of paragraphs 128 to 159 of the Petition as well as the evidence of the representative of the Petitioners and the Monitor, the undersigned is satisfied that:

- d) the priming charge will not secure any obligations that were owing prior to the filing;
- e) the interim financing proposed is intended to permit the WB Group to restructure over a period of approximately nine to twelve months;
- f) the interim financing is crucial to the survival of the Petitioners and Partnerships over the said restructuring period;
- g) the sizing of the interim financing, cost of borrowing and fees are reasonable and have been minimized in order to reduce the impact on all other secured creditors;
- h) the interim financing will enhance the prospects of a viable restructuring;

71 Furthermore, I am advised that management has the confidence of its major creditors and shall remain in place over the restructuring period;

72 As a result, I am prepared to approve same.

VI DIRECTORS' INDEMNIFICATION AND CHARGE

73 A successful restructuring of the Petitioners and Partnerships will only be possible with the continued participation of the Petitioners' directors and officers. These executives are essential to the ongoing viability of the Petitioners' and Partnerships' businesses, and the successful restructuring thereof;

74 Even though the Petitioners intend to comply with all applicable laws and regulations, the Petitioners' directors and officers may nevertheless be concerned about the potential for their personal liability in the context of the present restructuring;

75 Given the allegations of paragraphs 162 to 167 of the Petition, I am also satisfied that the D&O Charge sought is reasonable and in the best interests of the Petitioners. Accordingly, I am prepared to approve same.

VII QUESTIONS OF PARTICULAR INTEREST

76 Three questions raised by the present proceedings require more particular comment.

A) Confidentiality of certain documents

77 The first issue has to do with the WB Group's request to put all sensitive financial information filed in support of its Petition to be put under seal. More particularly, the WB Group seeks the protection of its financial statements and cash flow statements from general access by the public in general and by the Group's competitors in particular.

78 Paragraphs 170 to 175 of the Petition outline the factual basis for such order.

79 I note two specific allegations which are pertinent:

- a) the fact that the WB Group is privately owned and that it does not wish to share this information with its competitors;
- b) the fact that the public disclosure of such sensitive information would be very prejudicial to the Group because of its potential use by its competitors in a manner which may jeopardize the restructuring.

80 These allegations are not supported with additional detailed facts. Consequently, I raised the question of sufficiency of these arguments to grant the requested confidentiality order.

81 I quote from the *2010 Annotated Bankruptcy and Insolvency Act* of Houlden, Morawetz and Sarra at pages 1125 and 1126:

..."There had been some issue over what information should or should not be sealed during a CCAA proceeding.

The Supreme Court of Canada⁴ considered the confidentiality of commercial information in context of judicial proceedings, finding that a confidentiality order should only be granted when such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk... The Court held that the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question. In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order... "Reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

In another judgment⁵, the Supreme Court of Canada held that the "administration of justice thrives on exposure to light, and withers under a cloud of secrecy"...

(underlining added)

82 The burden of establishing that the order is necessary bears upon the applicant.

83 However, section 10(3) CCAA now reads as follows (in force since September 18, 2009):

- 3) **Publication ban** - The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

(underlining added)

84 In the present instance, I was not convinced that the allegations of the Petition were elaborate and complete enough to meet the tests enunciated in "Sierra Club" and "Toronto Star Newspapers". It seems that a Petitioner seeking such order would have to explain in more detail the necessity of derogating from the general rule imposing publicity and public access to all evidentiary material in CCAA proceedings. In short, the exception of confidentiality (now codified in section 10(3) CCAA) will always have to be restrictively interpreted and applied only when the underlying facts are strong enough to warrant such an order.

85 But for the comments stated below, and if I were to base my decision only upon the contents of the Petition, I would have denied this request on the basis of incomplete and insufficient evidence to support it.

86 However, the Petitioners have suggested in paragraph 175 of the Petition, that the said financial information could be

made available to "certain creditors upon signature of a confidentiality agreement".

87 At my suggestion, the WB Group agreed to furnish unfettered access to the said documentation to all creditors without further distinction or limitation, upon signing of a confidentiality agreement.

88 Such a position is in line with the wording and intent of section 10(3) CCAA. Consequently, I was prepared to grant the WB Group's request and keep confidential and under seal the financial data filed by the Petitioners except for those creditors (regardless of their importance) who would be agreeable to signing a confidentiality agreement in exchange for the said information. Such a "*modus operandi*" ensures that the confidentiality order and will not "unduly prejudice the company's creditors".

B) Past service pension contributions

89 The second issue has to do with the Group's obligation to effect certain pension contributions.

90 The WB Group takes the position that "past service pension contributions" are the result of a pre-filing obligation and requests a confirmation of this position.

91 This issue is specifically covered in sections 103 to 110 of the Petition, which I have summarized in paragraphs 58 to 65 of the present Reasons. In addition, I have heard the testimony of Mr. Jay Epstein, Vice-President finance, of the WB Group.

92 Mr. Epstein's testimony has clearly identified the nature and specificity of the payments which cannot be met at the present time and in respect of which the Group requests a stay of its obligations.

93 The Group's monthly payments to the various pension funds and plans are approximately US\$2.2 million per month. They consist mainly of "past service pension contributions" of approximately US\$1.4 million per month and "current service pension contributions" of approximately US\$800 000,00 per month.

94 Past service contributions are due by the Group as a result of its obligation to make up for the actuarial deficit of the funds and/or plans. They are not the result of the Group's failure or negligence to pay its current service contributions or past service contributions, the said contributions having been paid by the Group up to December 31st, 2009. Past service contributions are calculated every year-end by Mercer, the Group's Advisor and Pension Plan Manager and Exhibit P-2 (A) and (B) establishes with greater accuracy the exact nature and amounts currently due.

95 On the whole of the evidence presented before me, I am satisfied that the relief sought by the WB Group falls squarely within the definition of "past service contributions" or "cotisations d'équilibre", as those words were defined by my colleagues Madam Justice Danièle Mayrand in Re: *AbitibiBowater Inc.*⁶ and Justice Paul Chapat in Re: *Papiers Gaspésia*⁷. Madam Justice Mayrand wrote:

[37] Aux termes de l'article 11(3) de la LACC, l'ordonnance initiale ne peut suspendre les droits ou créances qui résultent d'obligations relatives à la fourniture de services ou de biens après l'ordonnance initiale.

[38] Les syndicats prétendent que les cotisations d'équilibre visent à combler des obligations qui découlent de services rendus par les employés après le dépôt de la demande initiale.

[38] Avec respect, cet argument n'est pas fondé.

[40] Les syndicats prennent appui sur un commentaire du juge Farley de la Cour supérieure de l'Ontario qui, dans la cause de *Ivaco*⁸ en première instance, dit ce qui suit :

Notwithstanding that past service contributions could be characterized as functionally a pre-filed obligation, legally, the obligation pursuant to the applicable pension legislation is a "fresh obligation".

[41] Avec égards, cette assertion n'est pas déterminante et a d'ailleurs été écartée par le juge

Spence dans la cause de *Collins*⁹, alors qu'il s'exprime ainsi :

The amount of the outstanding special payments in the present case appears to have been determined prior to the initial order based on information relating to the pre-filing period.

[42] Plus loin, il ajoute :

It is not apparent that the continuation of the operation of the applicant in the post-filing period has given rise to the increase in the amount of the special payments from the amount that would otherwise have been applicable by reason of the pre-filing experience.

Consequently, it seems tendentious to characterize the outstanding special payments as the cost of operating in the post-filing period.

[43] Dans le présent dossier, les évaluations actuarielles, qui ont déterminé les montants des cotisations d'équilibre et dont on demande la suspension, sont toutes antérieures au dépôt de la demande initiale. D'ailleurs, l'évaluation actuarielle du "Régime de retraite applicable aux employés syndiqués de la compagnie *Abitibi-Consolidated du Canada*", de loin le plus important, date du 2 décembre 2006.

[44] Tout comme dans les dossiers de *Papiers Gaspésia* et *Mine Jeffrey*, [2003] J.Q. no 264, les cotisations d'équilibre suspendues ont été identifiées avant le dépôt de la demande initiale et ne sont pas dues pour des services rendus après le dépôt de celle-ci.

96 See also Houlden Morawetz and Sarra. The *2010 Annotated BIA*, paragraph Ns.54, pages 1121 and 1122 on the same issue.

97 The mere fact that those past service contributions are considered to be pre-filing obligations is, however, not the only issue to consider. I must also analyse if, in the absence of a consent of all affected stakeholders, I should authorize the suspension of past service contributions. In *AbitibiBowater*, the situation was relatively simple and clear: the past service contributions due, as at the date of the Initial Order, was close to \$1.4 billion and monthly contributions to correct the situation were estimated at approximately \$13 million per month. The Monitor was therefore able to convince the Court that it would be illusory to expect that *AbitibiBowater* would be able to complete a successful restructuring if it would remain obligated to continue to fund past service contributions during the period of restructuration. Accordingly, Madam Justice Mayrand exercised her discretion in favor of the suspension.

98 In the present instance, there has been no debate before me on this specific question. Unlike *AbitibiBowater*, we are not talking about \$13 million per month but approximately \$1.4 million, or approximately \$16.8 million per year. The total actuarial deficit is not nearly as high as \$1.4 billion but closer to US\$129 000 000,00.

99 No evidence challenging the Group's position (that it would be unable to complete a successful restructuring and continue to pay past service contributions during the restructuring period) was submitted, despite the fact that the Petition was duly served upon all the Unions representing the unionized employees in Quebec¹⁰. Furthermore, I insisted that Petitioners' counsel attempt, during the lunch break of the hearing on February 24, 2010, to communicate with the said Unions and/or Union Representatives, to inquire as to their position. At the resumption of the hearing, no one appeared or manifested oneself¹¹.

100 Faced with only a one-sided argument, albeit convincing and well supported by the jurisprudence (to which the decision of madam Justice Peppall of the Ontario Superior Court of Justice in *Re: Fraser Papers Inc. et al* (Court file CT-09-8241-OOCL dated 2009-06-30) must be added), I also chose to exercise my discretion in favor of the Petitioners' and Partnerships' requests. I also wish to point out that we are now more than a full week later and the stakeholders affected by this issue, namely the employees, have not indicated any willingness of intention to challenge the same.

C) Extension of the initial order and protection of the CCAA to the partnerships

101 One last point: I am asked to extend the Initial Order not only to the Petitioner companies but also to the Partnerships.

Although the CCAA does not deal with this issue specifically, I am prepared to exercise my discretion and to rely on the Court's inherent jurisdiction to grant a stay of proceedings against the partnerships, given that the structure of the WB Group is such that it would be impossible to proceed otherwise.

102 See Re: *Calpine Canada Energy Ltd* (2006), [2006] Carswell-Alta 446; 19 C.B.R. (5th) 187. See also *Houlden Morawetz and Sarra*, *op.cit.* paragraph Ns. 63, page 1135.

CONCLUSION

103 As for the rest of the conclusions sought, there seemed to be no major difficulties needing particular comment. In any event, any dissatisfied stakeholder may at any time avail itself of the "come back" clause if need be. The Order was therefore granted accordingly, without costs.

ROBERT MONGEON, J.S.C.

cp/e/qlcys/qlisl/qlcla/qlcal

1 Representing payments for January 2010, due at the end of February and for February 2010, due at the end of March

2 I am informed that all pension contributions, for either past service or current service have been made up to December 31st, 2009

3 The D&O charge is for an amount of US\$10 million and a further amount of US\$3 million may have to be reserved to cover the liability of employers pursuant to sections 81.3 and 136(1)(d) BIA. Finally, a US\$3 million Administrative Charge is also required.

4 *Sierra Club of Canada v. Canada (Minister of Finance)* [2002], 2002 CarswellNat 822, 2002 CarswellNat 823, [2002] 2 S.C.R. 522. See also *Marcotte c. Banque de Montréal* (2008), [2008] J.Q. no 8216, 2008 CarswellQue 8627 (Que. S.C.).

5 *Toronto Star Newspapers Ltd. v. Ontario* (2005), 2005 CarswellOnt 2613, 2005 CarswellOnt 2614, [2005] 2 S.C.R. 188 (S.C.C.).

6 2009 QCCS 2028 (CanLII)

7 2004 CanLII 40296 (QCCS)

8 Re: *Ivaco Inc.* [2005] 47 C.C.P.B. 62 Canada Inc. (ON. S.C.); (2006) 275 D.L.R. (4th) 132 (ON. C.A.)

9 Re: *Collins & Aikman Automotive Canada Inc.* 2007 CanLII 45908 (ON. S.C.)

10 Syndicat canadien des communications, de l'énergie et du papier, Locals 200, 250, 137, 625, 905, 627, 1104 and 11; Fraternité nationale des forestiers et travailleurs d'usine, Local 299; Syndicat des employés d'Arrimage de Gros Cacouna Inc., Syndicat démocratique des salariés de la scierie Leduc.

11 These Reasons are delivered more than one week after the hearing. To this date, no one has asked to be heard on this point.

Tab 7

Case Name:
Arclin Canada Ltd. (Re)

**IN THE MATTER OF the Companies' Creditors Arrangement Act,
R.S.C. 1985, c. C-36, as amended, and
IN THE MATTER OF a Plan of Compromise or Arrangement of Arclin
Canada Ltd./Arclin Canada Ltee., Arclin Management Holdings
Inc., Arclin Holdings GP I Inc., Arclin Holdings GP II Inc.,
Arclin Holdings III Inc. and Arclin Holdings IV Inc.,
Applicants**

[2009] O.J. No. 4260

59 C.B.R. (5th) 165

2009 CarswellOnt 6161

Court File No. CV-09-8290-00CL

Ontario Superior Court of Justice

A. Hoy J.

Heard: October 13, 2009.
Judgment: October 14, 2009.

(18 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Application by Arclin Canada for approval of key employee retention program agreements with its Chief Executive Officer and its Chief Financial Officer and for sealing order with respect to agreements allowed -- Monitor recommended approval of agreement -- Key employees were essential to successful restructuring of the Arclin group and could not be readily replaced -- Court placed substantial weight on Monitor's strong recommendation to approve agreement -- Sealing order only made for seven days -- Arclin and Monitor to clarify the significant prejudice to Arclin if the sealing did not continue.

Application by Arclin Canada for approval of key employee retention program agreements with its Chief Executive Officer and its Chief Financial Officer and for a sealing order with respect to such agreements. The applicant had obtained protection from its creditors under the Companies' Creditors Arrangement Act. Its US affiliates had commenced reorganization under the US bankruptcy laws. Both key employees had been approached about other opportunities for long-term and stable employment and both had indicated that they would take advantage of those opportunities if the agreement was not approved. The Monitor and Arclin confirmed that the costs of the agreement would be borne by Arclin. The board of directors of Arclin had approved the agreement. The Monitor recommended approval of the agreement and the First Lien Lenders supported the agreement.

HELD: Application allowed. The court placed substantial weight on the strong recommendation of the Monitor that the agreement be approved. All parties agreed that the employees in question were essential to the successful restructuring of the Arclin group and could not be readily replaced, given their intimate knowledge of Arclin's affairs, and that it would be a lengthy and costly process to do so. Key employee retention programs were controversial. The CCAA process should be open and transparent to the greatest extent possible. An order was granted sealing the agreement only for seven days to

permit Arclin and the Monitor to clarify the significant prejudice to Arclin and the Canadian participants in the CCAA process that they submitted might result if the sealing did not continue.

Statutes, Regulations and Rules Cited:

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

Counsel:

Steven J. Weisz and Jackie Moher, for the Applicants.

David Bish, for the Monitor, Ernst & Young Inc.

Marc Wasserman, for UBS, agent for the First Lien Lenders and the DIP Lenders.

Kevin P. McElcheran, for the Official Committee of Unsecured Creditors.

ENDORSEMENT

1 A. HOY J.:-- Arclin Canada Ltd./Arclin Canada Ltee. ("Arclin") and related companies obtained protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S., 1985, c. C-36 (the "CCAA") on July 27, 2009. Arclin's U.S. affiliates have commenced reorganization proceedings under Chapter 11 of Title 11 of the United States Code (the "U.S. Code") before the United States Bankruptcy Court for the District of Delaware (the "U.S. Court").

2 Arclin now seeks approval of key employee retention program agreements with its Chief Executive Officer, Claudio D'Ambrosio, and its Chief Financial Officer, Scott Maynard (collectively, the "KERP") and seeks a sealing order with respect to such agreements. Mr. D'Ambrosio and Mr. Maynard also fill those roles in respect of Arclin's U.S. affiliates. They are paid by Arclin, and their services are provided to the U.S. affiliates under a management agreement. The Monitor and Arclin confirmed that the costs of the KERP will be borne by Arclin and that the KERP cannot result in increased charges under the management agreement without the approval of the U.S. Court.

3 The board of directors of Arclin has approved the KERP. The Monitor recommends approval of the KERP, and the First Lien Lenders (which I understand are owed in excess of \$200 million) and the DIP Lender support the KERP. Counsel for the First Lien Lenders and the DIP Lender was involved in the negotiation of the KERP. The KERP has been contemplated since the time of the initial order, and is referenced in the Monitor's report filed at that time and reflected in cash flows filed with the Court.

4 Canadian counsel for the Official Committee of Unsecured Creditors (the "UCC"), which represents unsecured creditors of Arclin's U.S. based affiliates in the Chapter 11 proceeding, appeared at the hearing, initially to oppose the KERP. In the course of the hearing, counsel for the UCC advised that the UCC, like Arclin, the Monitor and the First Lien Lenders, was in fact of the view that a retention arrangement with Mr. D'Ambrosio and Mr. Maynard was critical. The UCC's real objection is one of process: it was not provided with the amounts payable under the KERP in advance of the hearing, and was therefore not in a position to evaluate the reasonableness of the terms. Arrangements were made during the hearing for the UCC to be provided with the KERP, through the U.S. estate, in order to ensure confidentiality. Given the payments provided for in the KERP, the level of payments that counsel for the UCC advised that the UCC was concerned about, and the fact that unless the U.S. bankruptcy court approves an increase in the management fee Arclin will bear the cost of the KERP, I am of the view that the UCC will be, as I am, satisfied as to the reasonableness of the KERP.

5 Arclin, the Monitor, the First Lien Lenders and the DIP Lender all argued that the UCC did not have standing to make objections on this motion. Counsel for the UCC sought an adjournment in relation to the standing issue. All, however, wished the motion to proceed, given the importance of implementing the KERP promptly. It was specifically agreed that the fact that counsel for the UCC was permitted to make submissions today was without prejudice to the parties' ability to argue on any subsequent motion in this matter that the UCC does not have standing. In support of this argument, the Monitor advised the court that at present Arclin is owed approximately \$87 million by its U.S. affiliates; Arclin is a creditor of the U.S. affiliates, not the other way around. Also, as noted above, the KERP is without cost to the U.S. affiliates unless approved by the U.S. Court.

6 Arclin and the Monitor also submit, and I note, that the UCC was served with notice of this motion a week ago, and that counsel for the UCC only asked today to see a copy of the KERP.

7 The evidence before me is that: both Mr. D'Ambrosio and Mr. Maynard have been approached about other opportunities for long-term and stable employment and both have indicated that they will take advantage of those opportunities if the KERP is not approved; Mr. D'Ambrosio and Mr. Maynard cannot be readily or easily replaced, given their intimate knowledge of Arclin's affairs, and it would be a lengthy and costly process to do so; and Mr. D'Ambrosio and Mr. Maynard have taken on a significant volume of additional responsibilities in connection with the CCAA proceedings.

8 The amounts payable under the KERP are insignificant in relation to the total debt outstanding. They appear to me reasonable in relation to what I was advised were Mr. D'Ambrosio's and Mr. Maynard's current compensation arrangements.

9 The Monitor confirmed in court that the alternative employment opportunities available to Mr. D'Ambrosio and Mr. Maynard, referred to in the evidence, are comparable opportunities.

10 I have specifically considered that the KERP will be funded by Arclin, yet its U.S. affiliates will also derive a benefit from it. Counsel for the UCC pointed out that the U.S. Code contains rigorous conditions that must be met before a key employee retention agreement can be approved for an insolvent company, and submits that, on the evidence before this Court, it appears that those conditions would not be met in this case. As Leitch, R.S.J. pointed out in *Textron Financial Canada Ltd. v. Beta Ltee/Brands Ltd.* (2007), 36 C.B.R. (5th) 296 (S.C.J.), Canada has not adopted equivalent legislative principles.

11 I place substantial weight on the strong recommendation of the Monitor that the KERP be approved.

12 I am advised that the "goal" of the restructuring is to swap debt for equity. I understand that the First Lien Lenders are the primary economic stakeholders. They, as noted above, support this motion. They have confidence in Mr. D'Ambrosio and Mr. Maynard.

13 All parties agree that Mr. D'Ambrosio and Mr. Maynard are essential to the successful restructuring of the Arclin group.

14 I am satisfied that, in these circumstances, the KERP should be approved.

15 I understood counsel for Arclin to submit that a sealing order is important to ensure: (1) that other employees are not able to point to the terms offered to Mr. D'Ambrosio and Mr. Maynard to attempt to secure retention arrangements, and thereby jeopardize the restructuring; and (2) that third parties desirous of engaging the services of Mr. D'Ambrosio and Mr. Maynard not know what terms they have to "better" in order to woo them away from Arclin. I further understood counsel to submit that Arclin is a private company, and that sealing orders in respect of key employment retention arrangements are customary. The Monitor simply submits in its report that disclosure may cause significant prejudice to Arclin and the other Canadian participants in the CCAA proceeding.

16 Neither Arclin nor the Monitor has indicated that there are other employees that it considers essential to the current operations and the successful restructuring of the Arclin group. I assume that all truly key employees would have been identified at this time. It appears to me that the KERP does not provide that its terms are confidential and restrict Mr. D'Ambrosio and Mr. Maynard from disclosing its terms.

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

18 I am prepared to provide for sealing of the KERP for a short period of time only - seven days, subject to such short extension as may be necessary in light of counsels' schedules - to permit Arclin and the Monitor to clarify the significant prejudice to Arclin and the Canadian participants in the CCAA process that they submit may result if the sealing does not continue.

A. HOY J.

cp/e/qlrpv/qljxr/qlaxw/qlced

**IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BECANCOUR
SILICON INC.**

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

**BOOK OF AUTHORITIES OF THE
COMMUNICATIONS, ENERGY AND
PAPERWORKERS UNION OF CANADA**

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