TAB 5

In the Matter of a Plan of Compromise or Arrangement of Indalex Limited et al.

[Indexed as: Indalex Ltd. (Re)]

104 O.R. (3d) 641

2011 ONCA 265

Court of Appeal for Ontario,
MacPherson, Gillese and Juriansz JJ.A.
April 7, 2011

Debtors and creditors -- Companies' Creditors Arrangement Act -- Company obtaining order in CCAA proceedings permitting it to borrow funds pursuant to debtor-in-possession credit agreement -- Order creating super-priority charge in favour of debtor-in-possession lenders -- Super-priority charge not having priority over statutory deemed trust under Pension Benefits Act as deemed trust was not identified by court when charge was granted and affidavit evidence suggested such priority was unnecessary -- No finding of paramountcy made -- Valid provincial law continuing to operate -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 -- Pension Benefits Act, R.S.O. 1990, c. P.8.

Fiduciaries -- Pensions -- Employer which acts as administrator of its pension plans having fiduciary duty to plan members -- Company initiating proceedings under Companies' Creditors Arrangement Act and obtaining court order permitting it to borrow funds pursuant to debtor-in-possession credit agreement -- Order creating super-priority charge in favour of debtor-in-possession lenders -- Company aware that its pension plans were underfunded -- Company subject to its fiduciary duties as administrator as well as its corporate obligations during CCAA proceedings -- Conflict of interest existing between company's duties as administrator and its corporate duties -- Company breaching its common law fiduciary duties and s. 22(4) of Pension Benefits Act -- Appropriate remedy being order for payment from proceeds of sale of company of amounts sufficient to satisfy deficiencies in plans in priority to claim of debtor-in-possession lenders -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 -- Pension Benefits Act, R.S.O. 1990, c. P.8, s. 22.

Pensions -- Winding up -- Deemed trust in s. 57(4) of Pension Benefits Act not limited to payment of amounts contemplated by s. 75(1)(a), but rather applying to all payments required by s. 75(1) -- Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 57(4), 75(1).

A Canadian company was the administrator of two registered pension plans, one for its salaried employees (the "Salaried Plan") and one for its executive employees (the "Executive Plan"). The Company's U.S. parent company sought Chapter 11 protection in the United States, and the Company initiated proceedings under the Companies' Creditors Arrangement Act ("CCAA"). At that time, the Salaried Plan was being wound up and both Plans were underfunded. The Company obtained a court order authorizing it to borrow funds pursuant to a debtor-in-possession ("DIP") credit agreement. The order created a super-priority charge in favour of the DIP lenders. The obligation to repay the DIP lenders was guaranteed by the U.S. parent. The Company moved for approval of the sale of its assets and for the distribution of the proceeds to the DIP lenders, which would result in there being nothing to fund the deficiencies in the Plans. Representatives of the Plans' members objected. The court approved the sale, but the Monitor retained in reserve an amount approximating the deficiencies. The sale [page642] proceeds were insufficient to pay the DIP lenders. The U.S. parent paid the shortfall. The representatives of the Plan members brought motions claiming that the reserve fund was subject to deemed trusts in favour of the Plans' beneficiaries and should be paid into the Plans in priority to the U.S. parent. They also claimed that during the

CCAA proceedings, the Company breached its fiduciary obligations to the Plans' beneficiaries. The CCAA judge dismissed the Executive Plan motion on the basis that since the wind up of the Executive Plan had not yet taken place, there were no deficiencies in payments on the date of closing of the sale and no basis for a deemed trust. He dismissed the Salaried Plan motion on the basis that, as s. 31 of R.R.O. 1990, Reg. 909 permitted the Company to make up the deficiency in the Plan over a period of years, the amount of the yearly payments did not become due until it was required to be paid. As there was no amount "due" under s. 57(4) of the Pension Benefits Act ("PBA") on the closing date of the sale, no deemed trust arose. The representatives of the Plans' members appealed.

Held, the appeal should be allowed.

The CCAA judge erred in his interpretation of s. 57(4) of the PBA. 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, and not just to amounts payable under s. 75(1)(a). The deficiency in the Salaried Plan had accrued as of the date of wind up and, pursuant to s. 57(4), was subject to a deemed trust on the closing date of the sale.

The Company breached its fiduciary obligations as administrator of the Plans during the CCAA proceedings. When managing its business, an employer wears its corporate hat. When acting as the administrator of its pension plans, it wears its fiduciary hat and must act in the best interests of the plan's members and beneficiaries. The Company could not ignore its obligations as administrator once it decided to seek CCAA protection. It breached its fiduciary obligations by doing nothing in the CCAA proceedings to fund the deficit in the underfunded Plans and taking 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 an order that gave priority to the DIP lenders over "statutory trusts" without notice to the beneficiaries. It sold assets without making any provision for the Plans. It knew the purchaser was not taking over the Plans. It moved to obtain orders approving the sale and distributing the proceeds to the DIP lenders, knowing that no payment would be made to the underfunded Plans. Further, there was a conflict of interest between the Company's corporate duty and its duty as administrator. Even if the Company was not in breach of its common law fiduciary obligations, its actions amounted to a breach of s. 22(4) of the PBA.

The deemed trust motions were not barred by the collateral attack rule. That rule was not applicable, and even if it were, this was not a case for its strict application.

The CCAA judge's order granting a super-priority charge did not mean that the super-priority charge had the effect of overriding the deemed trust. The deemed trust was not identified by the court at the time the charge was granted, and the affidavit evidence suggested that such a priority was unnecessary. As no finding of paramountcy was made, valid provincial laws continued to operate. The PBA deemed trust and the super-priority charge operated sequentially, with the deemed trust being satisfied first from the reserve fund. [page643]

Even if the conclusion that the deemed trust had priority over the secured credit was wrong, an order for payment from the reserve fund of amounts sufficient to satisfy deficiencies in the Plans was the appropriate remedy for the breaches of fiduciary obligation. That remedy was also appropriate for the Executive Plan, where it was not clear that a statutory deemed trust arose as the Plan had not been wound up at the time of sale.

Cases referred to

Century Services Inc. v. Canada (Attorney General), [2010] 3 S.C.R. 379, [2010] S.C.J. No. 60, 2010 SCC 60, 2011 D.T.C. 5006, 409 N.R. 201, 296 B.C.A.C. 1, 12 B.C.L.R. (5th) 1, 326 D.L.R. (4th) 577, EYB 2010-183759, 2011EXP-9, J.E. 2011-5, 2011 G.T.C. 2006, [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170; Imperial Oil Ltd. v. Ontario (Superintendent of Pensions)

(1995), 18 C.C.P.B. 198 (Ont. Pen. Comm.); Ivaco Inc. (Re) (2006), 83 O.R. (3d) 108, [2006] O.J. No. 4152, 275 D.L.R. (4th) 132, 26 B.L.R. (4th) 43, 25 C.B.R. (5th) 176, 56 C.C.P.B. 1, 151 A.C.W.S. (3d) 1004 (C.A.), affg [2005] O.J. No. 3337, 12 C.B.R. (5th) 213, 47 C.C.P.B. 62 (S.C.J.); R. v. Domm (1996), 31 O.R. (3d) 540, [1996] O.J. No. 4300, 95 O.A.C. 262, 111 C.C.C. (3d) 449, 4 C.R. (5th) 61, 40 C.R.R. (2d) 289, 33 W.C.B. (2d) 108 (C.A.); R. v. Litchfield, [1993] 4 S.C.R. 333, [1993] S.C.J. No. 127, 161 N.R. 161, J.E. 93-1895, 14 Alta. L.R. (3d) 1, 145 A.R. 321, 86 C.C.C. (3d) 97, 25 C.R. (4th) 137, 21 W.C.B. (2d) 369; Soulos v. Korkontzilas (1997), 32 O.R. (3d) 716, [1997] 2 S.C.R. 217, [1997] S.C.J. No. 52, 146 D.L.R. (4th) 214, 212 N.R. 1, J.E. 97-1111, 100 O.A.C. 241, 46 C.B.R. (3d) 1, 17 E.T.R. (2d) 89, 9 R.P.R. (3d) 1, REJB 1997-00862, 71 A.C.W.S. (3d) 194; Toronto-Dominion Bank v. Usarco, [1991] O.J. No. 1314, 42 E.T.R. 235, 28 A.C.W.S. (3d) 392 (Gen. Div.), consd

Other cases referred to

Algoma Steel Inc. (Re), [2001] O.J. No. 1943, 147 O.A.C. 291, 25 C.B.R. (4th) 194, 105 A.C.W.S. (3d) 585 (C.A.); BCE Inc. v. 1976 Debentureholders, [2008] 3 S.C.R. 560, [2008] S.C.J. No. 37, 2008 SCC 69, 52 B.L.R. (4th) 1, EYB 2008-151755, J.E. 2009-43, 301 D.L.R. (4th) 80, 71 C.P.R. (4th) 303, 383 N.R. 119, 172 A.C.W.S. (3d) 915; Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, 2002 SCC 42, 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, J.E. 2002-775, 166 B.C.A.C. 1, 100 B.C.L.R. (3d) 1, 18 C.P.R. (4th) 289, 93 C.R.R. (2d) 189, REJB 2002-30904, 113 A.C.W.S. (3d) 52; Bourdon v. Stelco Inc., [2005] 3 S.C.R. 279, [2005] S.C.J. No. 35, 2005 SCC 64, 259 D.L.R. (4th) 34, 341 N.R. 207, J.E. 2005-2067, 48 C.C.P.B. 167, 143 A.C.W.S. (3d) 569, EYB 2005-97371; British Columbia v. Henfrey Samson Belair Ltd., [1989] 2 S.C.R. 24, [1989] S.C.J. No. 78, 59 D.L.R. (4th) 726, 97 N.R. 61, [1989] 5 W.W.R. 577, J.E. 89-1098, 38 B.C.L.R. (2d) 145, 75 C.B.R. (N.S.) 1, 34 E.T.R. 1, 2 T.C.T. 4263; Burke v. Hudson's Bay Co., [2010] 2 S.C.R. 273, [2010] S.C.J. No. 34, 2010 SCC 34, 268 O.A.C. 1, 406 N.R. 109, 324 D.L.R. (4th) 498, 60 E.T.R. (3d) 1, 84 C.C.P.B. 1, 193 A.C.W.S. (3d) 1332, EYB 2010-180092, 2010EXP-3280, 2010EXPT-2234, J.E. 2010-1818, D.T.E. 2010T-674; Canadian Western Bank v. Alberta, [2007] 2 S.C.R. 3, [2007] S.C.J. No.

22, 2007 SCC 22, 281 D.L.R. (4th) 125, 362 N.R. 111, [2007] 8 W.W.R. 1, J.E. 2007-1068, 75 Alta. L.R. (4th) 1, 409 A.R. 207, [2007] R.R.A. 241, 49 C.C.L.I. (4th) 1, [2007] I.L.R. I-4622, 157 A.C.W.S. (3d) 299, EYB 2007-120167; Canson Enterprises Ltd. v. Boughton & Co., [1991] 3 S.C.R. 534, [1991] S.C.J. No. 91, 85 D.L.R. (4th) 129, 131 N.R. 321, [1992] 1 W.W.R. 245, J.E. 92-271, 6 B.C.A.C. 1, 61 B.C.L.R. (2d) 1, 9 C.C.L.T. (2d) 1, 39 C.P.R. (3d) 449, 43 E.T.R. 201, 30 A.C.W.S. (3d) 199; Cusson v. Quan, [2009] 3 S.C.R. 712, [2009] S.C.J. No. 62, 2009 SCC 62, 258 O.A.C. 378, EYB 2009-167616, 2010EXP-89, J.E. 2010-36, 70 C.C.L.T. (3d) 1, 314 D.L.R. (4th) 55, 397 N.R. 94; Davey v. Woolley, Hames, Dale & Dingwall (1982), 35 O.R. (2d) 599, [1982] O.J. No. 3158, 133 D.L.R. (3d) 647, 13 A.C.W.S. (2d) 384 (C.A.); Garland v. Consumers' Gas Co., [2004] 1 S.C.R. 629, [2004] S.C.J. No. 21, 2004 SCC 25, 237 D.L.R. (4th) 385, 319 N.R. 38, J.E. 2004-931, 186 O.A.C. 128, 43 B.L.R. (3d) 163, 9 E.T.R. (3d) 163, 130 A.C.W.S. (3d) 32; [page644] Gencorp Canada Inc. v. Ontario (Superintendent of Pensions) (1998), 39 O.R. (3d) 38, [1998] O.J. No. 961, 158 D.L.R. (4th) 497, 114 O.A.C. 170, 37 C.C.E.L. (2d) 69, 78 A.C.W.S. (3d) 170 (C.A.); Hodgkinson v. Simms, [1994] 3 S.C.R. 377, [1994] S.C.J. No. 84, 117 D.L.R. (4th) 161, 171 N.R. 245, [1994] 9 W.W.R. 609, J.E. 94-1560, 49 B.C.A.C. 1, 97 B.C.L.R. (2d) 1, 16 B.L.R. (2d) 1, 6 C.C.L.S. 1, 22 C.C.L.T. (2d) 1, 57 C.P.R. (3d) 1, 95 D.T.C. 5135, 5 E.T.R. (2d) 1, 50 A.C.W.S. (3d) 469; InterTAN Canada Ltd. (Re), [2009] O.J. No. 293, 49 C.B.R. (5th) 232 (S.C.J.); Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574, [1989] S.C.J. No. 83, 61 D.L.R. (4th) 14, 101 N.R. 239, J.E. 89-1204, 36 O.A.C. 57, 44 B.L.R. 1, 26 C.P.R. (3d) 97, 35 E.T.R. 1, 6 R.P.R. (2d) 1, 16 A.C.W.S. (3d) 345; Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services), [2004] 3 S.C.R. 152, [2004] S.C.J. No. 51, 2004 SCC 54, 242 D.L.R. (4th) 193, 324 N.R. 259, J.E. 2004-1546, 189 O.A.C. 201, 17 Admin. L.R. (4th) 1, 45 B.L.R. (3d) 161, 41 C.C.P.B. 106, 132 A.C.W.S. (3d) 579; Nortel Networks Corp. (Re) (2009), 99 O.R. (3d) 708, [2009] O.J. No. 4967, 2009 ONCA 833, 59 C.B.R. (5th) 23, 77 C.C.P.B. 161, [2010] CLLC 210-005, 256 O.A.C. 131 [Leave to appeal to S.C.C. refused [2009] S.C.C.A. No. 531]; Ontario (Hydro-

Electric Power Commission) v. Albright (1922), 64 S.C.R. 306, [1922] S.C.J. No. 40, [1923] 2 D.L.R. 578; R. v. Wilson, [1983] 2 S.C.R. 594, [1983] S.C.J. No. 88, 4 D.L.R. (4th) 577, 51 N.R. 321, [1984] 1 W.W.R. 481, J.E. 84-70, 26 Man. R. (2d) 194, 9 C.C.C. (3d) 97, 37 C.R. (3d) 97, 11 W.C.B. 200

Statutes referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [as am.]

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 18.3(1) [rep. S.C. 2005, c. 47, s. 131], 37

Excise Tax Act, R.S.C. 1985, c. E-15, s. 222 [as am.], (3) [as am.]

Pension Benefits Act, R.S.O. 1990, c. P.8 [as am.], ss. 1 [as am.], (1) [as am.], 8 [as am.], 14, 22 [as am.], 22(4), 57, (4), (5), 68(1), (2), (4), 69(1) [as am.], 70(1), (4), 74 [as am.], 75 [as am.], (1) [as am.], (a), (b) [as am.], (2), 76

Personal Property Security Act, R.S.O. 1990, c. P.10, s. 30(7)

Supplemental Pension Plans Act, R.S.Q., c. R-15.1, s. 147 [as am.]

United States Bankruptcy Code, 11 U.S.C. tit. 11

Rules and regulations referred to

R.R.O. 1990, Reg. 909 (Pension Benefits Act), s. 31, (1), (2)

APPEAL from order of C. Campbell J., [2010] O.J. No. 974, 2010 ONSC 1114 (S.C.J.) dismissing motions for remedy for breach of deemed trust and breach of fiduciary duty.

Andrew J. Hatnay and Demetrios Yiokaris, for former executives, appellants.

Darrell L. Brown, for United Steelworkers, appellants.

Mark Bailey, for 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 monitor, FTI Consulting Canada ULC. [page645]

Harvey Chaiton and George Benchetrit, for George L. Miller, the Chapter 7 trustee of the bankruptcy estates of the US Indalex Debtors.

The judgment of the court was delivered by

[1] GILLESE J.A.: -- 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. [page646] 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. [See Note 1 below]

[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. [page647]

[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 [page648] 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 per cent 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) [page649] 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 18 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 wind up 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 per cent. 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 [page650] 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. [page651]

[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 e-mail 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 [page652] US$151,183,000. 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. [page653]

[67] By orders dated February 18, 2010, the CCAA judge dismissed the USW and Former Executives' motions [[2010] O.J. No. 974, 2010 ONSC 1114].

[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 wind up 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 s. 31(1) and (2) of R.R.O. 1990, Reg. 909 (Pension Benefits Act) (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 [at paras. 49-51]:

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.

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. [page654]

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:

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. [See Note 2 below]

[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.
[page655]

[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 five-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). [page656]

[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 employer [See Note 3 below] 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.

[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 [page657] 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 s. 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) [page658]

[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. [See Note 4 below]

[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 wind up 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.

[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 Ontario (Hydro-Electric Power Commission) v. Albright (1922), 64 S.C.R. 306, [1922] S.C.J. No. 40, at para. 23, the Supreme Court of Canada explains that money is "due" when there is a [page659] 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. Section 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, [See Note 5 below] [page660] safeguard the rights of pension plan beneficiaries [See Note 6 below] and ensure the solvency of pension plans so that pension promises will be fulfilled. [See Note 7 below] 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: Ivaco Inc. (Re), [2005] O.J. No. 3337, 12 C.B.R. (5th) 213 (S.C.J.), affd (2006), 83 O.R. (3d) 108, [2006] O.J. No. 4152 (C.A.) and Toronto-Dominion Bank v. Usarco, [1991] O.J. No. 1314, 42 E.T.R. 235 (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 with special contributions that were to have been made but had not been. [See Note 8 below] In Ivaco, the major financers 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. [See Note 9 below] On appeal, although this court indicated that it thought that Farley J.'s [page661] 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 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 [page662] 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:

> 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. [See Note 10 below] These obligations arise both at common law and by virtue of s. 22 of the PBA. [page663]

[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. [See Note 11 below] 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. [See Note 12 below]

[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. [page664]

. . . . .

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. [See Note 13 below] 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 (Ont. Pen. Comm.) ("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 ten 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 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 ten 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. [page665]

[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 ten-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, [2008] S.C.J. No. 37, 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. [page666]

[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. [page667] 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 [page668] 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. [See Note 14

below] 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 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. (2d) 599, [1982] O.J. No. 3158 (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. [page669]

[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 [page670] do not apply in this case: see Cusson v. Quan, [2009] 3 S.C.R. 712, [2009] S.C.J. No. 62, 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 R. v. Wilson, [1983] 2 S.C.R. 594, [1983] S.C.J. No. 88, 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, [1993] S.C.J. No. 127, at para. 17. 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, [2004] S.C.J. No. 21, 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 pre-empting 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 Inc. v. Canada (Attorney General), [2010] 3 S.C.R. 379, [2010] S.C.J. No. 60, at para. 21. The CCAA judge is accorded broad discretion because the proceedings are a fact-based exercise that requires ongoing monitoring [page671] 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 recognized.

[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] O.J. No. 1943, 147 O.A.C. 291 (C.A.), 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 [page672] the appellants' interests became apparent, they went to the CCAA court and raised the deemed trust issue. [See Note 15 below]

[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 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 [page673] 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, [1996] O.J. No. 4300 (C.A.), 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. [page674]

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) [page675]

[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. [See Note 16 below] 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 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 [page676] 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, [2007] S.C.J. No. 22, at para. 75, and Nortel Networks Corp. (Re) (2009), 99 O.R. (3d) 708, [2009] O.J. No. 4967 (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 [page677] 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 [page678] 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 [page679] 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. [See Note 17 below]

[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.

[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, [1989] S.C.J. No. 78.

[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. [See Note 18 below] 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 [page680] rules-based approach", [See Note 19 below] whereas the CCAA "offers a more flexible mechanism with greater judicial discretion". [See Note 20 below] 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 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". [See Note 21 below]

[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 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 [page681] 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. [See Note 22 below] 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.

[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 [page682] 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 Ltd. v. Boughton & Co., [1991] 3 S.C.R. 534, [1991] S.C.J. No. 91, at para. 86, and Soulos v. Korkontzilas, (1997), 32 O.R. (3d) 716, [1997] 2 S.C.R. 217, [1997] S.C.J. No. 52, 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, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his 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; [page683]

(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 [page684] 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 15 days of the date of release of these reasons. The respondents shall have a further seven days within which to file their submissions.

Appeal allowed.

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; [page685]

(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. [page686]

. . . . .

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 [page687] 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; [page688]

(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. [page689]

Schedule "B"

R.R.O. 1990, Reg. 909 (Pension Benefits Act), 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.

Notes

Note 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.

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

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

Note 4: Bell ExpressVu Limited Partnership v. Rex., [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, at para. 26.

Note 5: Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services), [2004] 3 S.C.R. 152, [2004] S.C.J. No. 51, at para. 13, relying on Gencorp Canada Inc. v. Ontario (Superintendent of Pensions) (1998), 39 O.R. (3d) 38, [1998] O.J. No. 961, 158 D.L.R. (4th) 497 (C.A.), at p. 503 D.L.R.

Note 6: Ibid.

Note 7: Bourdon v. Stelco Inc., [2005] 3 S.C.R. 279, [2005] S.C.J. No. 35, at para. 24.

Note 8: At para. 26.

Note 9: At para. 11.

Note 10: Burke v. Hudson's Bay Co., [2010] 2 S.C.R. 273, [2010] S.C.J. No. 34, at paras. 39-41.

Note 11: Hodgkinson v. Simms, [1994] 3 S.C.R. 377, [1994] S.C.J. No. 84, at para. 32.

Note 12: Ibid., at para. 30; Lac Minerals Ltd. v.

International Corona Resources Ltd., [1989] 2 S.C.R. 574, [1989] S.C.J. No. 83, at p. 646 S.C.R.

Note 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.

Note 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.

Note 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.

Note 16: See, for example, InterTAN Canada Ltd. (Re), [2009] O.J. No 293, 49 C.B.R. (5th) 232 (S.C.J.). And, the granting of super-priority charges is referred to with approval in Century Services, at para. 62.

Note 17: See para. 178 of these reasons.

Note 18: See, for example, para. 23.

Note 19: At para. 13, for example.

Note 20: See, for example, para. 14.

Note 21: Century Services, at para. 60.

Note 22: At para. 78.

TAB 6

Lexington on the Green Inc. v. Toronto Standard Condominium Corporation No. 1930

[Indexed as: Lexington on the Green Inc. v. Toronto Standard Condominium Corp. No. 1930]

102 O.R. (3d) 737

2010 ONCA 751

Court of Appeal for Ontario,
O'Connor A.C.J.O., Rouleau and Epstein JJ.A.
November 9, 2010

Real property -- Condominiums -- Declaration -- Section 112 of Condominium Act not giving new board of directors authority to terminate obligations arising from declaration of condominium corporation -- Corporation's obligation to purchase manager's unit properly included in declaration -- Obligation constituting responsibility of corporation for purposes of s. 7(4)(d) of Act -- Condominium Act, 1998, S.O. 1998, c. 19, ss. 7(4)(d), 112.

The respondent condominium corporation's declaration required that the respondent purchase a manager's unit from the appellant, the declarant of the condominium project. When a new board of directors was elected, the new board decided not to purchase the manager's unit and passed a resolution purporting to terminate the purchase agreement pursuant to s. 112 of the Condominium Act. The appellant brought an application for an order requiring the respondent to immediately purchase the ownership interest in the manager's unit. The application was dismissed. The appellant appealed.

Held, the appeal should be allowed.

The right of a new board of directors under s. 112 of the Act to "terminate an agreement . . . that the Corporation has entered into" does not include a right to terminate an obligation arising from the declaration of the condominium corporation. The obligation to purchase the manager's unit was properly included in the declaration, as it constituted a responsibility of the corporation for the purposes of s. 7(4)(d) of the Act.

Cases referred to

Carleton Condominium Corp. No. 441 v. Carleton Condominium Corp. No. 441 (1998), 42 O.R. (3d) 62, [1998] O.J. No. 4463, 114 O.A.C. 370, 20 R.P.R. (3d) 1, 83 A.C.W.S. (3d) 509 (C.A.); Chieu v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 84, [2002] S.C.J. No. 1, 2002 SCC 3, 208 D.L.R. (4th) 107, 280 N.R. 268, J.E. 2002-133, 37 Admin. L.R. (3d) 252, 18 Imm. L.R. (3d) 93, 110 A.C.W.S. (3d) 1106; Peel Condominium Corp. No. 417 v. Tedley Homes Ltd. (1997), 35 O.R. (3d) 257, [1997] O.J. No. 3541, 103 O.A.C. 143, 12 R.P.R. (3d) 278, 73 A.C.W.S. (3d) 691 (C.A.)

Statutes referred to

Condominium Act, R.S.O. 1990, c. C.26, s. 3(3)(d)

Condominium Act, 1998, S.O. 1998, c. 19, ss. 7(2), (4), (d), (5), 17, 42, 43 [as am.], (1), 72 [as am.], 107, 111, 112, 113 [as am.], 114, 119, 134 [as am.], (1) [as am.], 135 [as am.]

Rules and regulations referred to

O. Reg. 48/01 (Condominium Act, 1998), s. 17(1)(g) [page738]

Authorities referred to

Loeb, Audrey, The Condominium Act: A User's Manual, 3rd ed. (Toronto: Carswell, 2009)

APPEAL from the judgment of Thorburn J. of the Superior Court of Justice dated June 29, 2009 dismissing an application for an order requiring the respondent to purchase a manager's unit.

Carol Dirks, for appellant.

Patricia Conway, for respondent.

The judgment of the court was delivered by

[1] O'CONNOR A.C.J.O.: -- Pursuant to s. 112 of the Condominium Act, 1998, S.O. 1998, c. 19 (the "Act"), the first board of directors elected by the purchasers of units in a condominium project may terminate certain types of agreements entered into by the corporation before its election. This appeal raises the question of whether the right to terminate in s. 112 applies to a condominium corporation's obligation to buy a manager's residence unit arising from the condominium corporation's declaration. In my view, it does not.

Facts

[2] The appellant, Lexington on the Green Inc., is the declarant of a condominium project in Toronto. The appellant registered the declaration and description for the project on April 29, 2008, thereby creating the respondent, Toronto Standard Condominium Corporation No. 1930 (the "Corporation").

[3] The Corporation's declaration (the "Declaration") provided that the Corporation purchase from the appellant a "Residence Manager Unit" (the "manager's unit") for $240,000 within 120 days of registration of the declaration and description. Section 28 of the Declaration states in part:

> The Corporation shall purchase from the Declarant the ownership interest in the Residence Manager Unit, one Parking Unit and one Locker Unit for a purchase price of $240,000 all inclusive of any applicable goods and services tax. The Corporation shall arrange a mortgage in the amount of the purchase price and shall be responsible for all costs relating to obtaining the mortgage . . . All other expenses of ownership and duties of maintenance . . . relating to the Residence Manager Unit shall also be borne by the Corporation. The transfer of ownership of the interest of the

Residence Manager Unit to the Corporation shall occur within 120 days of the date of registration of the Declaration. [page739]

[4] After registration of the Declaration and description, [See Note 1 below] the appellant, which still owned the majority of the condominium units, appointed a board of directors of the Corporation. The board of directors enacted a by-law authorizing the Corporation to enter into a conveyance and purchase agreement (the "Purchase Agreement") for the purchase of the manager's unit from the appellant. The board of directors appointed by the appellant signed the Purchase Agreement on May 1, 2008 on behalf of the Corporation.

[5] As part of the marketing and sale of units in the condominium project, the appellant delivered to every prospective purchaser a disclosure statement as required by s. 72 of the Act, which included the Declaration.

[6] The disclosure statement included a description of the Corporation's obligation to purchase the manager's unit in language very similar to that set out in the Declaration. The disclosure statement also included a copy of the first year's operating budget for the Corporation, which showed a budget item of $25,380 for the first-year mortgage payments to purchase the manager's unit.

[7] The parties agree that the disclosure statement complied with s. 72 of the Act. There is no suggestion in the record that prospective purchasers were not aware of the provision in the Declaration requiring the Corporation to purchase the manager's unit for $240,000.

[8] By August 2008, the appellant had transferred ownership of a majority of the units in the project to purchasers. On August 14, 2008, a turnover meeting was held pursuant to s. 43 of the Act, at which a new board of directors was elected by the unit owners (the "New Board").

[9] The New Board decided not to purchase the manager's unit. On March 12, 2009, the New Board passed a resolution purporting

to terminate the Purchase Agreement pursuant to s. 112 of the Act. The New Board offered to lease the manager's unit from the appellant for $1,000 per month.

[10] On April 15, 2009, the appellant brought an application pursuant to s. 134 of the Act for an order requiring the Corporation to immediately purchase the ownership interest in the manager's unit for a price of $240,000, as provided in the Declaration. [page740]

[11] On June 9, 2009, the application judge dismissed the application. She held that s. 112 of the Act authorized the New Board to terminate the Purchase Agreement within the period of 12 months from the turnover meeting.

[12] In addition, the application judge ordered that the provision in the Declaration which obliged the Corporation to purchase the manager's unit be amended to state that such obligation is subject to s. 112 of the Act.

[13] Finally, the application judge ordered that if it was necessary to amend the Declaration further to take into account the Corporation's rights under s. 112, the Declaration be amended by deleting ss. 28 and 1(u) of the Declaration in their entirety (the sections creating the obligation to buy the manager's unit).

Issues

[14] The outcome of this appeal turns on the interpretation of s. 112 of the Act and, in particular, the extent of the authority conferred upon a board of directors elected at a meeting held pursuant to s. 43 of the Act to terminate pre-existing obligations of a condominium corporation.

[15] The relevant parts of s. 112 read as follows:

> 112(1) Subject to subsection (4), a corporation may, by resolution of the board within 12 months following the election of a new board at a meeting held in accordance with subsection 43(1), terminate an agreement mentioned in subsection (2) that the corporation has entered into with a

person other than another corporation before the election of the new board.

(2) Subsection (1) applies to the following agreements

. . . . .

2. An agreement for the provision of facilities to the corporation on other than a non-profit basis.

The Position of the Parties

[16] The appellant accepts that the New Board was properly elected under s. 43(1) of the Act. Further, it is common ground that the New Board purported to terminate the obligation to purchase the manager's unit within 12 months of its election.

[17] The appellant submits, however, that although s. 112 gave the New Board the authority to terminate the Purchase Agreement, it did not confer authority to terminate the Corporation's obligation to purchase the manager's unit, which obligation arose from the Declaration.

[18] Specifically, the appellant argues that the obligation to purchase that arose from the Declaration is not "an agreement . . . that the corporation [had] entered into" before the [page741] election of the New Board so as to be subject to the authority to terminate in s. 112.

[19] The appellant points out that the Corporation's obligation to purchase the manager's unit was fully and accurately disclosed to all unit owners before they agreed to purchase their units and argues that there would be no unfairness in requiring the Corporation to fulfill this obligation.

[20] In response, the Corporation argues that the Act is consumer protection legislation. As such, the power to terminate found in s. 112 must be interpreted broadly. One of the objectives of s. 112 is to allow a board of directors elected by unit owners to scrutinize all of the arrangements put into place by the corporation while it was controlled by the declarant and to terminate agreements which the board, elected by the unit owners, considers not fair or desirable for

the condominium corporation. In order to fulfill this objective, the power to terminate in s. 112 should be interpreted to include all pre-existing obligations of the condominium corporation, including those arising from a declaration.

[21] The Corporation submits there is no unfairness to a declarant in interpreting s. 112 in the manner suggested. When declarants, such as the appellant in this case, register a declaration creating obligations on a condominium corporation, they do so with the knowledge that the board, elected by the unit owners, may terminate the obligations within 12 months of its election.

[22] The Corporation also argues that the disclosure of the obligation to purchase the manager's unit to prospective purchasers does not eliminate the power of the board elected by unit owners to terminate under s. 112. If it were otherwise, a developer could exempt itself from the Act based on disclosure. That would be a convenient means of bypassing the intent of the legislature.

[23] Finally, the Corporation argues that the Act is paramount to a declaration. A right given under the Act, such as that in s. 112, cannot be taken away by a declaration.

[24] The application judge did not address directly the issue of the application of s. 112 to the Declaration. However, implicit in her decision is the conclusion that the New Board's authority to terminate an agreement extended to an obligation created by the Declaration. Indeed, she ordered that, if necessary, the Declaration be amended to delete the Corporation's obligation to purchase the manager's unit so that the Declaration would take into account the authority of the New Board under s. 112 to terminate that obligation. [page742]
Analysis

[25] In my view, s. 112 of the Act did not confer the authority on the New Board to terminate the obligation to purchase the manager's unit arising from the Declaration.

[26] The interpretation of s. 112 of the Act is central to the resolution of this appeal. What does the phrase "terminate an agreement . . . that the Corporation has entered into" mean? Did the legislature intend that it be broad enough to include a right to terminate an obligation arising from a declaration of a condominium corporation?

[27] The Supreme Court of Canada has stated on several occasions that when interpreting a statute, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statute, the object of the statute and the intention of Parliament: see Chieu v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 84, [2002] S.C.J. No. 1.

[28] I start with the ordinary meaning of the words in issue. The power to terminate in s. 112 applies to "agreement[s] . . . that the corporation has entered into with a person other than another [condominium] corporation". The ordinary meaning of the word "agreements" does not include "declarations". The word "agreements" when used in a legal context generally refers to legally binding contracts entered into by two or more parties. Declarations, on the other hand, are statutorily prescribed documents that are prepared and registered by developers. It is upon the registration of the declaration that a condominium corporation comes into existence and the developer becomes the declarant. Declarations have been referred to as the equivalent of the constitution of a condominium corporation. They provide the legal framework for condominium corporations upon which the purchasers of units, and declarants, can rely: A.M. Loeb, The Condominium Act: A User's Manual, 3rd ed. (Toronto: Carswell, 2009).

[29] Declarations become legally effective upon registration. Unlike agreements, they are not "entered into" with another person. The use of the phrase "that a corporation has entered into" in s. 112 suggests an action by a corporation after its creation. This language does not seem to relate to a declarant's actions in preparing and registering a declaration, thereby creating a condominium corporation.

[30] In my view, the ordinary meaning of the language in s. 112 does not include the authority to terminate legal obligations [page743] arising from a declaration, the registration of which creates the condominium corporation.

[31] Turning to the scheme of the statute, I am of the view that the interpretation that accords with the ordinary meaning of the language used in s. 112 is also consistent with the statutory scheme of the Act.

[32] As I pointed out above, a declaration is a type of foundational document for a condominium corporation. The Act contains specific provisions relating to declarations. It sets out the matters that must be included and the matters that may be included in a declaration: see ss. 7(2) and 7(4), respectively. Notably, s. 7(4)(d) provides:

> 7(4) . . . A declaration may contain,
>
> (d) a list of the responsibilities of the corporation consistent with its objects and duties.

[33] Section 72 of the Act requires a declarant to deliver to purchasers of condominium units a copy of a current disclosure statement that must contain a copy of the existing or proposed declaration. I also note, pursuant to s. 17(1)(g) of O. Reg. 48/01 under the Act, that the disclosure statement must include "an indication of the units and assets that the corporation is required to purchase".

[34] Section 107 of the Act sets out the process by which a condominium corporation may amend a declaration. The threshold is high. A super majority of unit holders (80 or 90 per cent, depending on the nature of the amendment) must approve a proposed amendment. In addition, the declarant must consent if it still owns units and fewer than three years have elapsed from the later of the date of registration or the date the declarant first entered into an agreement of purchase and sale with respect to a unit in the project. To be effective, an amendment must be registered.

[35] Declarations may create statutory obligations for a

condominium corporation. Section 119 of the Act provides inter alia that "a corporation . . . shall comply with . . . the declaration".

[36] Section 134(1) of the Act provides the means by which those with an interest in a condominium project, including a declarant, may enforce an obligation arising from a declaration. It reads as follows:

> 134(1) . . . an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, . . .

(Emphasis added) [page744]

[37] In summary, the Act has detailed provisions relating to declarations. If a matter is properly included in a declaration, then it is subject to those provisions.

[38] None of the provisions of the Act suggest that agreements entered into by a condominium corporation have the same legal status under the Act as declarations.

[39] The affairs of a condominium corporation are managed by a board of directors.

[40] The Act requires that immediately after registration of a declaration and description, the declarant will appoint the first board of directors. Sections 42 and 43 set out a gradual, multi-step process by which the control of a condominium corporation is transferred from the declarant to the owners who have purchased units. Upon the declarant transferring ownership of a majority of the units to purchasers, a "turnover meeting" of owners must be called for the purpose of electing a new board.

[41] Section 17 of the Act empowers condominium corporations to enter into agreements for the purposes of managing and operating the corporation's enterprise in accordance with the

corporation's objects and the Act.

[42] Sections 111 to 113 set out the means by which a board of directors elected by unit owners may terminate or apply to the court to terminate certain types of agreements entered into by the corporation before its election. The obvious purpose of these sections is to protect the purchasers of units against agreements entered into by a declarant-controlled board that a newly elected board does not consider to be in the best interests of the corporation. The concern is that the declarant-controlled board may have entered into "sweetheart agreements" for the management of the condominium corporation or the provision of services that potentially have long-term and undesirable obligations for the condominium corporation. There are no limits in the Act on the reasons why a newly elected board may terminate or seek to terminate agreements under these sections.

[43] In summary, the Act treats declarations and agreements entered into by a condominium corporation differently in a number of respects. They are created differently: a developer prepares and registers a declaration, whereas, once created, condominium corporations may enter into agreements with others to carry out their objects. The Act gives declarations legal effect on registration. The legal effect of agreements arises from contract law. Declarations and agreements are enforced differently: those with an interest in a condominium corporation have the statutory right to enforce compliance with a declaration, whereas parties to an agreement involving a condominium [page745] corporation do not have a statutory right to enforce, but are left to pursue remedies under the law of contract.

[44] Significantly, s. 107 of the Act creates a high threshold for the amendment of a declaration, including the need for approval by a super majority of unit owners and consent of the declarant in some circumstances. On the other hand, s. 112 authorizes a board of directors, elected by unit holders, to terminate, by simple resolution, certain agreements entered into by a declarant-controlled board. If s. 112 is interpreted to include the right to terminate obligations of a

condominium corporation arising from a declaration, the high threshold for amending declarations set out in s. 107 would be bypassed.

[45] It is worth noting that s. 114 of the Act, which gives a condominium corporation the power to terminate an insurance trust agreement, is explicitly available, "Despite anything contained . . . in the declaration." Had the legislature intended the power in s. 112 to operate in a similar fashion, that is despite what the declaration provided, it seems likely the legislature would have done so with similar language.

[46] The Corporation argues that s. 7(5) of the Act supports an interpretation of s. 112 that includes the authority to terminate obligations created by a declaration. Section 7(5) provides that if any provision in a declaration is inconsistent with the provisions of the Act, the provisions of the Act prevail and the declaration shall be deemed to be amended accordingly. The Corporation's argument is premised on the notion that if a declaration does not specifically include the power to terminate under s. 112, it is inconsistent with the Act and the authority in s. 112 must prevail. The flaw in this argument is that it presumes that s. 112 applies to a declaration. If s. 112 only applies to agreements, as the ordinary language and the scheme of the Act suggest, and not to declarations, there is no conflict and s. 7(5) has no application.

[47] In short, the Act makes a logical and reasonable distinction between declarations, on the one hand, and agreements entered into by a condominium corporation, on the other. The Act provides declarations with a different and, in several respects, a higher legal status than agreements.

[48] Finally, in my view, an interpretation of s. 112 that recognizes the difference between declarations and agreements entered into by a condominium corporation is consistent with the purposes of the Act.

[49] A significant purpose of the Act is consumer protection. The Act sets out a detailed and sophisticated scheme of

disclosure in an attempt to ensure that purchasers of condominium [page746] units are fully informed of the rights and obligations attendant on their purchases. A disclosure statement must include a copy of the declaration. Purchasers are given a ten-day "cooling off period" with rights of rescission after entering into agreements to purchase the units. Misleading or inadequate disclosure can lead to a variety of remedies for those affected.

[50] In addition, s. 135 of the Act entitles a condominium corporation or a unit owner to bring an application against a declarant for conduct that is oppressive or unfairly prejudicial or unfairly disregards the interest of the corporation.

[51] A second but also important purpose of the Act is to provide predictability and sufficient certainty to those involved in condominium projects, including developers and unit purchasers, to enable them to make informed decisions about their investments. The Act provides a regime for the creation of condominium projects, the sale of units and the management of condominium corporations. That regime must have sufficient certainty so as not to discourage development, or prospective purchasers, from acquiring units in a development.

[52] In my view, an interpretation of the Act that recognizes a distinction between declarations and agreements entered into by a condominium corporation, particularly as that distinction applies to s. 112, achieves a reasonable balance between the two objectives mentioned above.

[53] In summary, I am of the view that s. 112 of the Act should not be interpreted to include the right of a board of directors elected pursuant to a s. 43 meeting to terminate obligations of a condominium corporation arising from the corporation's declaration. Thus, I am satisfied in this case that the New Board did not have authority under s. 112 of the Act to terminate obligations arising from the Declaration.

[54] The remaining question is whether the Corporation's obligation to purchase the manager's unit in this case was

properly included in the Declaration. In my view, it was. The authority is found in s. 7(4)(d) of the Act, which, for ease of reference, I repeat here:

> 7(4) . . . a declaration may contain
> (d) a list of the responsibilities of the corporation consistent with its objects and duties.

[55] Using the ordinary meaning of the words of s. 7(4)(d), the obligation to purchase the manager's unit as set out in the Declaration is a "responsibility of the corporation". Moreover, purchasing the manager's unit is clearly consistent with the object of the Corporation to manage the condominium project. [page747]

[56] In Peel Condominium Corp. No. 417 v. Tedley Homes Ltd. (1997), 35 O.R. (3d) 257, [1997] O.J. No. 3541 (C.A.), this court concluded that it was permissible under the predecessor section to s. 7(4)(d) of the Act for developers (declarants) to provide in a declaration that a condominium corporation be required to purchase manager units. The predecessor section -- s. 3(3)(d) -- provided that a declaration may contain "a specification of duties of the corporation consistent with its objects".

[57] In Tedley, Robins J.A., for the court, said [at para. 17]:

> The question raised here is whether the corporation can be required by means of a provision in the declaration to purchase such units [manager units and guest suites] or whether, as the corporation argues, the declaration to this effect is ultra vires . . . Section 3(3) . . . is broad enough to permit the inclusion of a provision of this nature. The imposition of a duty on a condominium corporation by way of the declaration in relation to the common elements of the condominium, in my opinion, falls within the category of duties consistent with the objects of the corporation that may be specified in the declaration. Furthermore, in the circumstances of this case, where it can be taken that unit owners have relied on the representations contained in the

declaration, I think, for the reasons to which I shall come, it would be unreasonable if not unfair to void the declaration on this basis.

See, also, Carleton Condominium Corp. No. 441 v. Carleton Condominium Corp. No. 441 (1998), 42 O.R. (3d) 62, [1998] O.J. No. 4463 (C.A.).

[58] Although s. 7(4)(d) has somewhat different wording from its predecessor section, I am of the view that the revision did not change the meaning. Section 3(3)(d) referred to "a specification of duties consistent with its [the corporation's] objects". Section 7(4)(d) of the present Act refers to "a list of responsibilities of the corporation consistent with its objects and duties". I see no difference in substance.

[59] Thus, I am satisfied that the provision in the Declaration obliging the Corporation to purchase the manager's unit was properly included in the Declaration pursuant to s. 7(4)(d).

[60] Finally, I note that, in this case, the board of directors controlled by the appellant enacted a by-law and caused the corporation to enter into the Purchase Agreement with the appellant for the manager's unit. I accept that the New Board had authority to terminate that Purchase Agreement pursuant to s. 112. However, in my view, the exercise of that authority did not extend to the obligation created by the Declaration. The Corporation was obliged to purchase the manager's unit pursuant to the Declaration. To the extent that the Purchase Agreement gave effect to this obligation and did not add to or change it, it was superfluous. Terminating the Purchase Agreement did not terminate the pre-existing obligation. [page748]

Disposition

[61] In the result, I would allow the appeal, set aside the judgment below and grant the relief sought in para. 1 of the Supplementary Notice of Appeal, being an order that the Corporation purchase the manager's unit forthwith. The other relief requested by the appellant in the application below was not addressed by the parties at the hearing of this appeal.

Thus, to the extent that the parties cannot agree upon terms that would put the appellant in the position it would have been had the purchase taken place as contemplated in the Declaration, I would remit those matters to the court below.

[62] I would also set aside the costs order below and award costs of the hearing below to the appellant. If the parties cannot agree on the amount of those costs, I would remit that issue to the court below.

[63] The parties agreed that the costs of this appeal be fixed in the amount of $10,000, inclusive of disbursements and applicable taxes. I would award costs to the appellant in that amount.

Appeal allowed.

Notes

Note 1: The Act requires registration of a description. However, this appeal does not raise any issues regarding the description of the Corporation, and thus, I am concerned only with the legal status of the Declaration.

TAB 7

COURT OF APPEAL OF NEW BRUNSWICK

COUR D'APPEL DU NOUVEAU-BRUNSWICK

17-15-CA

B E T W E E N:	E N T R E :
CYRENUS DUGAS	CYRENUS DUGAS
APPELLANT	APPELANT
-and-	-et-
PETER GAUDET, ADAM GAUDET, 508571 N.B. LTD. and 100167 P.E.I. INC.	PETER GAUDET, ADAM GAUDET, 508571 N.B. LTD. et 100167 P.E.I. INC.
RESPONDENTS	INTIMÉS
Motion heard by: The Honourable Justice Richard	Motion entendue par : l'honorable juge Richard
Date of hearing: March 19, 2015	Date de l'audience : le 19 mars 2015
Date of decision: April 7, 2015	Date de la décision : le 7 avril 2015
Counsel at hearing:	Avocats à l'audience :
For the appellant: Charles A. LeBlond, Q.C.	Pour l'appelant: Charles A. LeBlond, c.r.
For the respondents: Eugene J. Mockler, Q.C. and Christian E. Michaud	Pour les intimés : Eugene J. Mockler, c.r. et Christian E. Michaud

DECISION

[1] In January 1999, Cyrenus Dugas sold his fishing business to the Respondents. As part of the sales agreement, Mr. Dugas was to hold certain fishing licences in trust until the Department of Fisheries and Oceans (DFO) effected their transfer to Adam Gaudet. The purchase price of $1.4 million was paid to Mr. Dugas, but the licences – the business' largest assets – were never transferred because the Minister of Fisheries and

Oceans withheld consent for various reasons. For three years, Mr. Dugas cooperated with the Respondents as they operated the business, but then, for fear DFO might revoke the licences, Mr. Dugas unilaterally terminated the trust agreement. The Respondents sued him for breach of contract. On August 22, 2002, a settlement agreement was reached whereby Mr. Dugas was to pay the Respondents $2.1 million within thirty days. This agreement is reflected in a consent judgment signed the following day. However, other than $50,000 paid at the time of signing, Mr. Dugas did not honour the settlement agreement. Sixty-three days after having signed it, he declared bankruptcy.

[2] The Respondents filed an application to have the consent judgment set aside. This proceeding was eventually converted into an action and, following a lengthy trial in the Court of Queen's Bench, resulted in a decision, issued on February 27, 2015, in favour of the Respondents. The trial judge set aside the consent judgment and ruled the 1999 sale and trust agreements were valid transactions that had to be given effect. He therefore ordered Mr. Dugas to cooperate and take all necessary means to transfer the fishing licences in question to Adam Gaudet, as provided in the initial agreement. He also awarded the Respondents significant damages and costs.

[3] In the intervening period, Mr. Dugas had been discharged from bankruptcy. During those proceedings, the law was understood to be such that fishing licences were not realizable property for the purposes of a bankruptcy. As a result, when he was discharged, Mr. Dugas remained the holder of these lucrative assets. However, in October 2008, the Supreme Court of Canada issued a decision holding that fishing licences issued by DFO constitute "property" for the purposes of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3: *Saulnier v. Royal Bank of Canada*, 2008 SCC 58, [2008] 3 S.C.R. 166. Following this decision, the trustee in bankruptcy applied to be reappointed for the purpose of permitting the trustee to realize upon and sell the fishing licences. In *Pricewaterhousecoopers Inc. v. Dugas*, 2012 NBQB 48, 384 N.B.R. (2d) 98, a judge of the Court of Queen's Bench allowed the trustee's motion. However, the judge's decision was reversed on appeal: 2012 NBCA 85, 395 N.B.R. (2d) 265, leave to the Supreme Court of Canada refused [2012] S.C.C.A. No. 521 (QL).

[4] Mr. Dugas has appealed the February 27, 2015, trial decision on numerous grounds. In the Motion that is the subject matter of this decision, Mr. Dugas seeks a stay of execution of the trial judgment until his appeal is determined. He argues he meets the three-stage test adopted in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, [1987] S.C.J. No. 6 (QL), summarized in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, [1994] S.C.J. No. 17 (QL), and applied in numerous decisions of this Court, including *Leby Fixtures & Interiors Ltd. v. The Bank of Nova Scotia*, 2006 NBCA 93, 305 N.B.R. (2d) 199.

[5] The applicable test for the determination of Mr. Dugas' motion is not in dispute. It requires me to determine the following three questions:

(1) Does Mr. Dugas' appeal raise one or more serious questions?

(2) Has Mr. Dugas demonstrated he would suffer irreparable harm if execution of the trial judgment were not stayed until the determination of this appeal?

(3) Which party would suffer the greater harm from the granting or refusal of the stay pending a determination of the appeal?

[6] In determining the first of these questions, I am not called upon to determine whether Mr. Dugas would likely be successful on appeal. The threshold is low: *Leby Fixtures*, at para. 32. In my view, considering this low threshold, the first question must be answered in the affirmative.

[7] It is the second question that has caused me to deliberate at length in reaching a decision on Mr. Dugas' motion. As stated in *RJR-MacDonald*, the term "irreparable" is said to refer to "the nature of the harm suffered rather than its magnitude". The Supreme Court explains that "[i]t is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other" (para. 59). In *Leby Fixtures*, the Court acknowledged that "[b]eing put out of business is a type of harm that is recognized as irreparable so as to meet the second stage of the three-stage *Metropolitan Stores/RJR-MacDonald* test" (para. 40).

[8] The only evidence in support of Mr. Dugas' contention he would suffer irreparable harm if execution of the trial judgment is not stayed pending the determination of his appeal is the following paragraph in the affidavit he filed in support of his motion:

> Si je perds mes permis de pêche, je perds ma seule source de revenus. J'ai une scolarité de 4e année, je ne peux presque pas lire et je ne peux pas écrire. J'ai 69 ans et tout ce que j'ai fais (*sic*) comme travail dans ma vie est relié à la pêche. J'ai continué de faire la pêche depuis 2002 en conformité avec les positions juridiques dans lesquelles je me suis retrouvé au fil de l'évolution de ce dossier. Si je ne peux plus pêcher, je vais encourir des dommages irréparables et je serai à toute fin pratique ruiné.

[9] In essence, the evidence Mr. Dugas has adduced is but a bald claim of irreparable harm without much, if any, support. However, in determining the question, I must consider all the evidence filed on the motion, including the affidavit of Adam Gaudet filed by the Respondents.

[10] Mr. Gaudet deposes that the Minister of Fisheries and Oceans has given indications she will comply with the trial judgment and effect the transfer of the licenses in question. This marks the first time in this lengthy saga when the conditions appear to be favourable for a transfer of the licences the Respondents purchased in 1999.

[11] Mr. Gaudet takes issue with Mr. Dugas' assertion that if the stay of execution is not granted he will be "ruined", and gives the following reasons in support:

> (a) Mr. Dugas sold his Licences in 1998 and 1999 having decided to retire;
>
> (b) Notwithstanding that he was paid all but a small portion of the purchase price [$1.4 m] and that he had voluntarily retired, he has never transferred the Licences and has continued to fish them;
>
> (c) Between 2002 and 2005, he received in the order of $1M of gross revenue and was able to keep something in the order of $600,000;
>
> (d) Between 2005 and 2015, he continued to fish the Licences and received gross revenue in the order of $4.4M and had been paying his

son a salary of some $80-90,000 per year. The son does not fish but, according to Mr. Dugas, he helps in the maintenance of the boat and gear. The season is approximately 10 weeks each year. His wife also receives benefits from the company, L'Atelier Serge Ltée, the exact amount of which is unknown to me;

(e) At trial, Mr. Dugas indicated he had spent part of the monies from the sale in 1999 on the construction of a new house and property. He led the Court to believe he still owned those properties, but a recent search of the property records indicates the property was transferred to his son in July 2002, just a short time before his agreement to settle the litigation and pay us $2.1M. And this was only a few weeks before his voluntary second bankruptcy and after he had financed the purchase of a new boat and gear for some $400,000-600,000. Attached as "C" is a copy of his Declaration of Assets which he was required to file for the bankruptcy and which indicates he had no assets nor had he made any transfers prior to his assignment in bankruptcy.

[12] Mr. Gaudet's assertions were not challenged.

[13] The evidence filed in support of the motion leads me to conclude that if execution of the trial judgment is not stayed pending determination of the appeal, the Minister may well transfer the licences in question to Adam Gaudet in accordance with the original purchase agreement and the trial judge's decision. The practical effect of this would be that the Respondents would gain the benefit of the licences until the time the appeal is determined, i.e. for the 2015 fishing season, as the parties have advised the appeal will likely be ready to be heard in the fall of this year.

[14] Nothing in the evidence suggests that if Mr. Dugas is successful in his appeal, such that he is found to be lawfully entitled to the licences, that the Minister of the day will not effect a re-transfer of the licences. Thus, the net effect of the decision to stay or not to stay execution of the trial judgment is akin to the stay of a monetary judgment in an amount equivalent to the proceeds of this year's fishing season.

[15] Mr. Dugas has not put forth any facts in support of his bold assertion he would be ruined and put out of business if he cannot fish the 2015 season. In these circumstances, I do not accept his unsupported assertions to that effect. I have not been

convinced that if, in the end, Mr. Dugas is successful on appeal, he cannot recover the licences, if appropriate. Nor have I been convinced the Respondents will not be able to compensate Mr. Dugas for any consequent losses. Mr. Dugas had the onus of establishing any irreparable harm to himself that might result from execution of the trial judgment, and, in my view, the evidence falls considerably short of the mark.

[16] I am satisfied, however, that if execution of the trial judgment is stayed pending resolution of the appeal, and if Mr. Dugas is not successful on appeal, the Respondents will never recover their loss of the proceeds of this year's fishing season. I have considered the alternative argument that, instead of denying the stay, I might issue a stay with conditions, including one that the profits of the fishing season be paid into court or somehow held in trust pending the resolution of the appeal. The evidentiary record is simply insufficient to enable me to give effect to this argument. No evidence at all has been adduced as to how these profits would be calculated, and I fear that a vague order giving effect to this alternative argument would do nothing but engender more litigation.

[17] In sum, although Mr. Dugas has met the first criterion of the three-step test that governs the determination of his motion, he has not convinced me he would suffer irreparable harm if execution of the trial judgment is not stayed pending the determination of the appeal, and I am not convinced that the balance of convenience favours him. For these reasons, his motion is dismissed with costs of $1,000. Considering the upcoming fishing season, I order this decision be released initially in the English language with the French version to follow in due course.

J. C. MARC RICHARD, J.A. / j.c.a.
Court of Appeal of New Brunswick / Cour d'appel du Nouveau-Brunswick

[VERSION FRANÇAISE]

DÉCISION

[1] En janvier 1999, Cyrenus Dugas a vendu son entreprise de pêche aux intimés. Conformément à la convention de vente, M. Dugas devait détenir certains permis de pêche en fiducie jusqu'à ce que le ministère des Pêches et des Océans (MPO) effectue leur transfert en faveur d'Adam Gaudet. Le prix d'achat de 1,4 million de dollars a été versé à M. Dugas, mais les permis – savoir les principaux éléments d'actif de l'entreprise – n'ont jamais été transférés parce que le ministre des Pêches et des Océans a refusé d'y consentir pour différentes raisons. Pendant trois ans, M. Dugas a coopéré avec les intimés pendant qu'ils exploitaient l'entreprise, mais ensuite, de crainte que le MPO ne révoque les permis, M. Dugas a unilatéralement résilié la convention de fiducie. Les intimés l'ont poursuivi pour rupture de contrat. Le 22 août 2002, les parties ont passé une convention de règlement conformément à laquelle M. Dugas devait payer 2,1 millions de dollars aux intimés dans un délai de trente jours. Cette convention a été constatée dans un jugement par consentement qui a été signé le lendemain. Toutefois, si l'on excepte les 50 000 $ versés au moment de la signature, M. Dugas n'a pas honoré cette convention de règlement. Soixante-trois jours après l'avoir signée, il a fait une cession en faillite.

[2] Les intimés ont déposé une requête en annulation du jugement par consentement. Cette requête a finalement été convertie en action et, à l'issue d'un long procès devant la Cour du Banc de la Reine, une décision a été rendue, le 27 février 2015, en faveur des intimés. Le juge du procès a annulé le jugement par consentement et a conclu que les conventions de vente et de fiducie intervenues en 1999 étaient des opérations valides et qu'on devait leur donner effet. Il a donc ordonné à M. Dugas de coopérer et de prendre tous les moyens nécessaires pour transférer les permis de pêche en question à Adam Gaudet, comme le prévoyait la convention initiale. Il a également accordé aux intimés des dommages-intérêts et des dépens considérables.

[3] Dans l'intervalle, M. Dugas avait été libéré de sa faillite. Selon l'interprétation de la loi qui a été retenue dans le cadre de cette instance, les permis de pêche n'étaient pas des biens dont la valeur pouvait être réalisée pour une faillite. Il s'en est suivi qu'au moment de sa libération, M. Dugas est resté le titulaire de ces lucratifs éléments d'actif.

En octobre 2008, toutefois, la Cour suprême du Canada a rendu une décision dans laquelle elle a conclu qu'un permis de pêche délivré par le MPO constitue un « bien » pour l'application de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 : *Saulnier c. Banque Royale du Canada*, 2008 CSC 58, [2008] 3 R.C.S. 166. Une fois cette décision rendue, la syndique de faillite a demandé le renouvellement de sa nomination afin de lui permettre de réaliser et de vendre les permis de pêche. Dans la décision *Pricewaterhousecoopers Inc. c. Dugas*, 2012 NBBR 48, 384 R.N.-B. (2^e) 98, un juge de la Cour du Banc de la Reine a fait droit à la motion de la syndique. Toutefois, la décision du juge a été infirmée en appel : 2012 NBCA 85, 395 R.N.-B. (2^e) 265, autorisation de pourvoi devant la Cour suprême refusée, [2012] C.S.C.R. n^o 521 (QL).

[4] M. Dugas a interjeté appel de la décision rendue en première instance le 27 février 2015 et il a invoqué à cette fin plusieurs moyens. Dans la motion qui fait l'objet de la présente décision, M. Dugas sollicite la suspension de l'exécution du jugement rendu en première instance jusqu'à ce que son appel soit tranché. Il prétend qu'il répond aux conditions de l'analyse en trois étapes adoptée dans l'arrêt *Manitoba (Procureur général) c. Metropolitan Stores Ltd.*, [1987] 1 R.C.S. 110, [1987] A.C.S. n^o 6 (QL), résumée dans l'arrêt *RJR – MacDonald Inc. c. Canada (Procureur général)*, [1994] 1 R.C.S. 311, [1994] A.C.S. n^o 17 (QL), et appliquée dans de nombreuses décisions de notre Cour, y compris l'arrêt *Leby Fixtures & Interiors Ltd. c. La Banque de Nouvelle-Écosse*, 2006 NBCA 93, 305 R.N.-B. (2^e) 199.

[5] L'analyse applicable aux fins de trancher la motion de M. Dugas n'est pas en litige. Cette analyse m'impose de répondre aux trois questions suivantes :

(1) L'appel de M. Dugas soulève-t-il une ou plusieurs questions sérieuses?

(2) M. Dugas a-t-il établi qu'il subirait un préjudice irréparable si l'exécution du jugement rendu en première instance n'était pas suspendue jusqu'à ce que le présent appel soit tranché?

(3) Laquelle des parties subirait le plus grand préjudice selon que l'on accorde ou refuse la suspension en attendant une décision en appel?

[6] Pour trancher la première de ces questions, il n'est pas nécessaire que je décide s'il est probable que M. Dugas aura gain de cause en appel. Les exigences minimales ne sont pas élevées : *Leby Fixtures*, au par. 32. J'estime, compte tenu de ces exigences minimales peu élevées, qu'il faut répondre à la première question par l'affirmative.

[7] C'est la deuxième question qui m'a amené à longuement délibérer pour en arriver à une décision sur la motion de M. Dugas. Comme la Cour le dit dans l'arrêt *RJR – MacDonald*, le terme « irréparable » a trait à « la nature du préjudice subi plutôt qu'à son étendue ». La Cour suprême explique que « [c]'est un préjudice qui ne peut être quantifié du point de vue monétaire ou un préjudice auquel il ne peut être remédié, en général parce qu'une partie ne peut être dédommagée par l'autre » (par. 59). Dans l'arrêt *Leby Fixtures*, la Cour a reconnu que « [l]a perte d'une entreprise est un préjudice reconnu comme irréparable, qui répond aux conditions de la deuxième étape de l'analyse formulée dans *Metropolitan Stores/RJR – MacDonald* » (par. 40).

[8] La seule preuve présentée à l'appui de la prétention de M. Dugas selon laquelle il subirait un préjudice irréparable si l'exécution du jugement n'était pas suspendue jusqu'à ce que son appel soit tranché est le paragraphe suivant de l'affidavit qu'il a déposé à l'appui de sa motion :

> Si je perds mes permis de pêche, je perds ma seule source de revenus. J'ai une scolarité de 4^{e} année, je ne peux presque pas lire et je ne peux pas écrire. J'ai 69 ans et tout ce que j'ai fais (*sic*) comme travail dans ma vie est relié à la pêche. J'ai continué de faire la pêche depuis 2002 en conformité avec les positions juridiques dans lesquelles je me suis retrouvé au fil de l'évolution de ce dossier. Si je ne peux plus pêcher, je vais encourir des dommages irréparables et je serai à toute fin pratique ruiné.

[9] Essentiellement, la preuve que M. Dugas a produite n'est qu'une simple prétention de préjudice irréparable que rien, ou presque, n'appuie. Pour trancher la question, toutefois, je dois examiner l'ensemble de la preuve produite dans le contexte de la motion, y compris l'affidavit d'Adam Gaudet déposé par les intimés.

[10] M. Gaudet témoigne dans son affidavit que la ministre des Pêches et des Océans a laissé entendre qu'elle se conformera au jugement rendu en première instance et effectuera le transfert des permis en question. C'est la première fois, dans cette longue saga, que les conditions semblent favorables au transfert des permis que les intimés ont achetés en 1999.

[11] M. Gaudet conteste l'assertion de M. Dugas selon laquelle il sera « ruiné » si la suspension de l'exécution n'est pas accordée, et il invoque, à cet égard, les motifs suivants :

> [TRADUCTION]
> a) M. Dugas a vendu ses permis en 1998 et 1999 parce qu'il avait décidé de prendre sa retraite;
>
> b) Malgré le fait qu'il a touché la totalité, sauf une petite partie, du prix d'achat [1,4 million de dollars] et qu'il avait volontairement pris sa retraite, il n'a jamais transféré les permis et il a continué à les exploiter et à pêcher;
>
> c) Entre 2002 et 2005, il a touché des revenus bruts de l'ordre de 1 million de dollars et a pu conserver quelque 600 000 $;
>
> d) Entre 2005 et 2015, il a continué à exploiter les permis et à pêcher et il a touché des revenus brut de l'ordre de 4,4 millions de dollars et il paie à son fils un salaire de quelque 80 000 $ ou 90 000 $ par année. Le fils ne pêche pas mais, selon M. Dugas, il aide à l'entretien du bateau et des engins de pêche. La saison dure environ dix semaines chaque année. Son épouse tire aussi des avantages de la compagnie, L'Atelier Serge Ltée, mais je n'en connais pas le montant exact;
>
> e) Au procès, M. Dugas a indiqué qu'il avait consacré une partie des sommes obtenues par suite de la vente, en 1999, à la construction d'une nouvelle maison et d'un nouveau bien-fonds. Il a amené la Cour à croire qu'il était toujours propriétaire de ces biens, mais une recherche récente dans le registre des biens indique que le bien-fonds a été transféré à son fils en juillet 2002, soit un peu avant qu'il s'engage, par convention, à régler le litige à l'amiable et à nous verser 2,1 millions de dollars. De plus, cela s'est passé quelques semaines à peine avant sa deuxième faillite volontaire et après qu'il eut financé l'achat d'un nouveau bateau et de nouveaux engins de pêche au prix d'environ 400 000 $ à 600 000 $. Est jointe comme annexe « C » une copie de la déclaration des biens qu'il a dû déposer pour les besoins de

la faillite et qui indique qu'il n'avait aucun élément d'actif et qu'il n'avait non plus effectué aucun transfert avant sa cession de faillite.

[12] Les assertions de M. Gaudet n'ont pas été contestées.

[13] La preuve déposée à l'appui de la motion m'amène à conclure que si l'exécution du jugement rendu en première instance n'est pas suspendue en attendant que l'appel soit tranché, la Ministre pourrait fort bien transférer les permis en question à Adam Gaudet conformément à la convention d'achat initiale et à la décision du juge du procès. Il en résulterait, sur le plan pratique, que les intimés pourraient tirer avantage des permis jusqu'à ce que l'appel soit tranché, c'est-à-dire pendant la saison de pêche 2015, les parties ayant fait savoir que l'appel sera probablement en état d'être entendu à l'automne de la présente année.

[14] Il n'y a rien dans la preuve qui donne à penser que si M. Dugas a gain de cause dans son appel, c'est-à-dire si la Cour conclut qu'il a légalement droit aux permis, le ou la Ministre alors en poste ne lui transférera pas de nouveau les permis. Donc, l'effet net de la décision de suspendre ou de ne pas suspendre l'exécution du jugement rendu en première instance s'apparente à celui qu'aurait la suspension d'un jugement pécuniaire dont le montant serait équivalent au produit de la saison de pêche de cette année.

[15] M. Dugas n'a invoqué aucun fait à l'appui de son assertion impudente selon laquelle il sera ruiné et perdra son entreprise s'il ne peut pas pêcher pendant la saison 2015. Dans ces circonstances, je n'accepte pas les assertions non étayées qu'il fait à cet égard. On ne m'a pas convaincu que si, au bout du compte, M. Dugas a gain de cause en appel, il ne pourra pas recouvrer les permis, si cela est indiqué. On ne m'a pas non plus convaincu que les intimés ne seront pas en mesure d'indemniser M. Dugas des éventuelles pertes. C'est à M. Dugas qu'il incombait d'établir quel préjudice irréparable il pourrait subir par suite de l'exécution du jugement rendu en première instance. Or, à mon avis, la preuve n'a établi aucun préjudice, tant s'en faut.

[16] Je suis convaincu, toutefois, que si l'exécution du jugement rendu en première instance est suspendue en attendant la décision en appel, et si M. Dugas n'a pas gain de cause en appel, les intimés ne seront jamais indemnisés de la perte du produit de la saison de pêche de l'année en cours. J'ai examiné l'argument subsidiaire selon lequel au lieu de refuser la suspension, je pourrais l'accorder en l'assortissant de conditions, notamment une condition portant que les profits de la saison de pêche soient consignés à la Cour ou détenus d'une façon ou d'une autre en fiducie en attendant que l'appel soit tranché. La preuve au dossier est tout simplement insuffisante pour me permettre de donner effet à cet argument. Absolument aucun élément de preuve n'a été produit en ce qui concerne la façon dont ces profits seraient calculés, et je crains qu'une ordonnance vague donnant effet à cet argument subsidiaire ne fasse qu'engendrer davantage de litiges.

[17] En somme, bien que M. Dugas ait satisfait à la première condition de l'analyse en trois étapes qui régit la résolution de sa motion, il ne m'a pas convaincu qu'il subirait un préjudice irréparable si l'exécution du jugement rendu en première instance n'était pas suspendue en attendant la décision en appel, et je ne suis pas convaincu que la prépondérance des inconvénients le favorise. Pour ces motifs, l'appel est rejeté avec dépens de 1 000 $. Étant donné que la saison de pêche approche, j'ordonne que la présente décision soit d'abord publiée en anglais et que la version française suive en temps utile.