

Court of Appeal File No. C58636
Court of Appeal File No. M42978
Court File No.: CV-09-824700CL

COURT OF APPEAL FOR ONTARIO

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC.,
GRANT FOREST PRODUCTS SALES INC., and GRANT U.S. HOLDINGS G.P.**

Applicants

- and -

**THE TORONTO-DOMINION BANK, in its capacity as agent for the secured
lenders holding first lien security and THE BANK OF NEW YORK MELLON, in
its capacity as agent for secured lenders holding second lien security**

Respondents

RESPONDING FACTUM OF THE MONITOR

**STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9**

**David R. Byers LSUC#: 22992W
Tel: (416) 869-5697
Daniel S. Murdoch LSUC#: 53123L
Tel: (416) 869-5529
Fax: (416) 947-0866**

Lawyers for the Monitor

TO:

**CASSELS BROCK & BLACKWELL
LLP**

Suite 2100, Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Jane O. Dietrich

Telephone: 416-860-5223
Facsimile: 416-640-3144
E-mail: jdietrich@casselsbrock.com

Lawyers for the Applicants Grant
Forest Products Inc., Grant Alberta Inc.
and Grant Forest Products Sales Inc.

**MINISTRY OF THE ATTORNEY
GENERAL FOR THE PROVINCE OF
ONTARIO**

Financial Services Commission of
Ontario
Legal Services branch
5160 Yonge St., 17th floor
Toronto, ON M2N 6L9

BORDEN LADNER GERVAIS LLP

40 King Street West, Suite 4400
Toronto, ON M5H 3Y4

Craig J. Hill

Telephone: 416-367-6156
Facsimile: 416-361-7301

Roger Jaipargas

Telephone: 416-367-6266
Facsimile: 416-361-7067

Lawyers for West Face Capital Inc.

OSLER, HOSKIN & HARCOURT LLP

Box 50, 1 First Canadian Place
Toronto, ON M5X 1B8

Alexander Cobb

Telephone: 416-862-5964
Facsimile: 416-862-6666

Lawyers for Mercer (Canada) Limited

BENNETT JONES LLP

One First Canadian Place, Ste. 3400
P.O. Box 130
Toronto, ON M5X 1A4

Richard Swan

Telephone: 416-777-7479
Facsimile: 416-863-1716

Lawyers for Peter Grant Sr.

ERNST AND YOUNG INC.

P.O. Box 251
Ernst & Young Tower
Toronto-Dominion Centre
Toronto, ON M5K 1J7

Alex Morrison

Telephone: 416-941-7743
Facsimile: 416-864-1174
E-mail: alex.morrison@ca.ey.com

Simone Carvalho

Telephone: 416-943-2085
Facsimile: 416-864-1174
E-mail: simone.carvalho@ca.ey.com

Monitor

Court of Appeal File No. C58636
Court of Appeal File No. M42978
Court File No.: CV-09-824700CL

COURT OF APPEAL FOR ONTARIO

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC.,
GRANT FOREST PRODUCTS SALES INC., and GRANT U.S. HOLDINGS G.P.**

Applicants

- and -

**THE TORONTO-DOMINION BANK, in its capacity as agent for the secured
lenders holding first lien security and THE BANK OF NEW YORK MELLON, in
its capacity as agent for secured lenders holding second lien security**

Respondents

RESPONDING FACTUM OF THE MONITOR

PART I - OVERVIEW

1. This submission is delivered by Ernst & Young Inc. in its capacity as Monitor (the "**Monitor**") of the Remaining Applicants (defined below) in response to the appeal by the Superintendent of Financial Services (the "**Superintendent**") of the Order of the Honourable Mr. Justice Campbell dated September 20, 2013 (the

"Transition Order").¹ The Transition Order was granted pursuant to the written reasons of Justice Campbell of the same date (the **"Reasons"**).²

2. The Transition Order, among other things, lifted the stay of proceedings granted on behalf of Grant Forest Products Inc. (**"GFPI"**) pursuant to the Initial Order of the Honourable Mr. Justice Newbould dated June 25, 2009 (the **"Initial Order"**) for purposes of allowing West Face Capital Inc. (**"West Face"**), a secured creditor of GFPI, to obtain a bankruptcy order against GFPI. As the dispute on the motion below was primarily a priority dispute between two creditor groups, the Monitor took no position on West Face's motion to lift the stay (the **"Bankruptcy Motion"**), and takes no position on that issue in this appeal.

3. However, in granting the Transition Order and lifting the stay against GFPI, Justice Campbell addressed issues relating to the existence and potential priority of a deemed trust for the benefit of pension beneficiaries in the amount of the wind-up pension liabilities of GFPI's two defined benefit pension plans (the **"Timmins Salaried Plan"** and the **"Executive Plan"**, referred to herein as the **"Pension Plans"**). Justice Campbell's conclusion that no such deemed trust existed in this case was one factor he considered in exercising his discretion to lift the stay of proceedings against GFPI to allow the bankruptcy order.

¹ Transition Order, Monitor's Compendium, Tab 1.

² Reasons, Monitor's Compendium, Tab 2.

4. Given the relevance of these issues to other insolvency proceedings, and to address certain factual and legal points raised by the Superintendent in his factum, the Monitor provides this responding submission.

PART II - THE FACTS

5. The Monitor agrees with the facts set out in paragraphs 4 through 22 and paragraph 24 of the Superintendent's factum.

6. However, the Monitor is of the view that a proper assessment of this appeal is assisted by a more comprehensive description of the background to this CCAA proceeding, and accepts and adopts the facts set out in paragraphs 12 through 49 of the responding factum of GFPI, Grant Forest Products Sales Inc. and Grant Alberta Inc. (the "**Remaining Applicants**").

PART III - ISSUES AND THE LAW

7. The Superintendent's factum sets out three issues for determination. The Superintendent does not include, as an issue to be decided on this appeal, the main question giving rise to the Transition Order: was it appropriate to lift the stay to permit the filing of a bankruptcy order against GFPI?

8. While the issues set out by the Superintendent at paragraph 31 of his factum informed Justice Campbell's overall decision, Justice Campbell's decision to lift the stay to permit the filing of a bankruptcy order against GFPI was a matter of

discretion for the supervising judge of the CCAA proceeding and entitled to deference.

9. With respect to the overall decision to lift the stay, the Monitor will not make submissions. However, the Monitor will make submissions below on the following questions as they relate to insolvencies generally:

- a. Under the *Pension Benefits Act* (the “PBA”), when does a deemed trust relating to a pension wind-up deficit come into existence?
- b. Were deemed trusts relating to the wind-up deficits of the Pension Plans created during the pendency of the CCAA proceeding?
- c. Were pension creditors obligated to take steps to assert the priority of their deemed trust claims?

A. When does a deemed trust for a wind-up deficit come into existence?

10. The first issue addressed in the Superintendent’s factum is the “timing of the deemed trust”, and in particular, the question: Is a deemed trust effective if it is created after an Initial Order in a CCAA proceeding is granted? Before addressing whether a deemed trust *can* be created during a CCAA proceeding, however, it is worthwhile to consider *when* a deemed trust is created under the PBA.

11. The Superintendent, in his factum, appears to assume without analysis that the deemed trust contemplated in subsection 57(4) of the PBA is created as of the

effective date of the wind-up, even when the effective date is retroactive to the wind-up order. For example, in this case the Timmins Salaried Plan and the Executive Plan were both wound up by order of the Superintendent on February 27, 2012, but with effective dates of March 31, 2011 and June 30, 2010, respectively.³ The assumption that super-priority could exist “in the air” on June 30, 2010 and March 31, 2011 for pension plans that had not in fact been wound up as of those dates is both unworkable and unsupported. The deemed trusts cannot be created retroactively.

12. Section 57(4) of the PBA states:

(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.⁴

13. The choice of the words “where a pension plan is wound up” is a clear indication that a deemed trust is only created when the pension plan is, in fact, wound up. Had the legislature intended that a deemed trust could be established, with super-priority effect, prior to the actual wind up of a pension plan, it would have chosen clear language to effect such a provision. It did not, and for good reason. A deemed trust that can spring up with retroactive effect where the

³ Reasons, para. 8, Monitor’s Compendium, Tab 2

⁴ *Pension Benefits Act*, R.S.O. 1990, c. P.8.

Superintendent winds up a pension plan with a retroactive effective date would be unmanageable and impractical, and impossible for even the most diligent employer to avoid.

14. Accordingly, while a deemed trust relating to a wind-up deficit does not arise until the effective date of the wind up when such date is *after* the wind-up order, if the Superintendent orders that the effective date of a wind up is *retroactive* the deemed trust can only be established when the wind-up order is made. In this case, the earliest that a deemed trust could be created in respect of both Pension Plans (without considering the impact of the CCAA proceeding) is February 27, 2012.

15. As support for the assumption that a deemed trust can be imposed retroactively, the Superintendent submits that the effective date of a pension wind-up, retroactive or otherwise, is predictable. With respect, this is frequently not the case:

- *First*, under subsection 68(5) of the PBA, if the employer, in this case GFPI, wound up the Pension Plans, the effective date could not have been earlier than “the date notice is given to members” and accordingly could not have been retroactive;
- *Second*, while the Superintendent has the ability to wind up a pension plan with a retroactive effective date, under subsection 69(1) of the PBA the Superintendent only has the *discretion* to wind-up a pension plan and may or

may not exercise his discretion to do so. The Superintendent frequently does not;

- *Third*, subsection 69(1) also provides the Superintendent with up to 8 different grounds on which he can exercise his discretion to wind-up a pension plan. These grounds may or may not imply certain effective dates. As there is often more than one ground present, and the effective dates implied by those grounds may be different, the selection of an effective wind-up date is often subjective.

16. As a result, when an employer winds up a pension plan it will not have a retroactive effective date, and even when wound up by the Superintendent there is a high potential for competing grounds to impact the selection of an effective wind-up date. Accordingly, stakeholders, including creditors, cannot predict with any degree of confidence an effective wind-up date.

17. The Superintendent's factum spends considerable time on whether the various decisions in *Re Indalex* provide that, for a deemed trust to be effective in the course of a CCAA proceeding, it must be wound up (a) before the Initial Order, (b) before the sale of assets, or (c) before a distribution. This discussion does not impact this appeal for the following reasons:

- a. As discussed below, neither the wind-up nor deemed trust can occur or be created without lifting the stay, which was not done in this case;

- b. Even if Justice Deschamps' decision is read to suggest that a deemed trust could have been established between the Initial Order and the date of sale, which she does not in fact say, none of the three decisions support the Superintendent's claim that a deemed trust could be established *after* the sale but before the distribution;⁵ and
- c. Under the PBA the deemed trust could only come into existence (if at all, as discussed below) on the wind up of the Pension Plans on February 27, 2012, after all Approval and Vesting Orders in this case had been granted.

B. Was a deemed trust for the wind-up deficit of the Pension Plans created during the pendency of the CCAA proceeding?

18. In his Reasons, Justice Campbell determines that "a commitment to make wind-up deficiency payments is not in the ordinary course of business" and that anyone seeking the creation of a deemed trust for a wind-up deficit in order to obtain a super-priority over other secured creditors during a CCAA proceeding must first obtain an order lifting the stay of proceedings.⁶

19. In this respect, the Reasons are consistent with the decision in *G.E. Canada v. Northern Sawmills*, where Justice Newbould, in a receivership proceeding, found that

⁵ *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] S.C.J. No. 6, paras. 46, 118, 265, Monitor's Book of Authorities, Tab 1.

⁶ Reasons, para. 94, Monitor's Compendium, Tab 2.

a pension plan administrator's attempt to change the wind-up date of a pension plan was stayed by the receivership order. Justice Newbould refused to lift the stay in part because "the result . . . would be to alter existing priorities and negatively affect GE and other secured creditors. . ."⁷

20. The Monitor agrees that in the context of a CCAA proceeding it is important from the date of filing to have, with limited exceptions as set out in the Initial Order, certainty regarding the priority of different creditors. While this is especially important when a debtor company requires DIP financing, to give such DIP lenders the security they require to advance credit to a debtor, it is also important with respect to pre-existing secured creditors to encourage them to permit restructuring proceedings aimed at maximizing recovery for all creditors.

21. The willingness of senior secured lenders to allow CCAA proceedings to run their course (and possibly to lend to companies with defined benefit plans in the first place) could be significantly impacted if potentially large and indeterminable wind-up pension liabilities could gain priority over other secured lenders during the course of a CCAA proceeding in the face of the stay of proceedings.

22. The importance of maintaining the priorities in place as of the Initial Order, with limited exception to allow the debtor company to operate during the CCAA

⁷ *G.E. Canada v. Northern Sawmills*, 2012 ONSC 6664, at paras. 33-41, Monitor Book of Authorities, Tab 2.

proceeding, is reflected by paragraph 10(a) of the Initial Order, which prohibits the debtor companies from granting *any* security interest other than "liens arising solely by operation of law in the ordinary course of business of the Applicants and their subsidiaries".

23. This objective is also reflected in paragraph 22 of the Initial Order, which sets out very specific exceptions to the stay of proceedings:

THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of any of the Applicants or the Monitor, or affecting the Business or the Property . . . , are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court, provided that nothing in this Order shall: (a) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on; (b) exempt the Applicants from compliance with statutory or regulatory provisions relating to health, safety or the environment; (c) prevent the filing of any registration to preserve or perfect a security interest; (d) prevent the registration of a claim for lien under the *Construction Lien Act* or the *Forestry Workers Lien for Wages Act* or any other applicable statute; or (e) prevent GE Canada Leasing Services Company from selling the 1992 Dassault Falcon 50 aircraft or the 1994 Dassault Falcon 900B aircraft and related engines and parts pursuant to its lease thereof to GFPI.⁸

⁸ Initial Order, paras. 10(a), 22, Monitor's Compendium, Tab 3

24. This issue was not expressly addressed by the Supreme Court of Canada in *Re Indalex* because that decision involved one pension plan that was wound up *prior* to the commencement of Indalex's CCAA proceeding and another pension plan that, at the time of the initial motion, had not been wound up at all.⁹ However, in the present case, the Pension Plans were both wound up pursuant to an order of the Superintendent subsequent to the granting of the Initial Order.

25. In the unique circumstances of this case, it is suggested by the Superintendent that the authority to wind-up the Pensions Plans was in fact granted by two orders of Justice Campbell dated August 26, 2011 and September 21, 2011 (the "**Pension Reserve Orders**").¹⁰ The Pension Reserve Orders established reserves to be held by the Monitor in the amount of the estimated wind-up deficits of the Pension Plans and authorized GFPI "to take steps required in accordance with the PBA to initiate a wind-up of the [Pension Plans]" and "to work with the Superintendent . . . to facilitate the appointment of a replacement plan administrator . . ."¹¹

⁹ *Re Indalex*, supra note 5, para. 5, Monitor's Book of Authorities, Tab 1.

¹⁰ Order of Justice Campbell dated August 26, 2011, paras. 2-3, Monitor's Compendium, Tab 4; Order of Justice Campbell dated September 21, 2011, paras. 2-3, Monitor's Compendium, Tab 5.

¹¹ *Ibid.*, para. 2.

26. At paragraphs 88 through 100 of his Reasons, Justice Campbell reviews this position, concluding that, in the Pension Reserve Orders, “[t]he Court did not authorize a deemed trust to prevail in insolvency by granting wind up orders.”¹²

27. As he granted the Pension Reserve Orders, Justice Campbell is in the best position to assess what they were intended to authorize. The Monitor agrees with Justice Campbell’s description of the purpose and object of the Pension Reserve Orders. The Monitor supported the Pension Reserve Orders, which were obtained with the consent of the Second Lien Lenders, who expressly required the following language: “For greater certainty, nothing in this order determines or affects the priority or security of the claims against these funds.”¹³

28. If the Pension Reserve Orders are found to authorize the establishment of deemed trusts in respect of the wind up deficiencies, with super-priority to the claims of the Second Lien Lenders, the without prejudice nature of those orders would be expressly overridden. It is reasonable to assume that if the Pension Reserve Orders had not been obtained on a without prejudice basis the Second Lien Lenders would not have consented to them.

29. However, even if the Pension Reserve Orders are treated as implicitly permitting the creation of deemed trusts for the benefit of pension beneficiaries in the

¹² Reasons, paras. 88-100, Monitor’s Compendium, Tab 2.

¹³ Pension Reserve Orders, para 3., Monitor’s Compendium, Tabs 4 and 5.

amount of the estimated wind up deficits of the Pension Plans, a conclusion with which the Monitor does not agree, the Monitor submits that for the sake of certainty in future proceedings it should be recognized that the reason a deemed trust could be created in this case is because of the unique fact that the Pension Reserve Orders were granted.

30. The winding up of a pension plan is not in the ordinary course of business. However, from a policy perspective, it is beneficial to allow the wind up of pension plans associated with debtor companies in CCAA proceedings without a resulting deemed trust for wind-up deficits. Pension plans should be wound up within a reasonable time after pension accruals have ceased.

31. However, if a pension plan cannot be wound up in a CCAA proceeding without a resulting deemed trust for wind-up deficits, the wind-up will likely be opposed by secured and other creditors. If secured creditors are faced with the risk that deemed trusts in the amount of pension plan wind-up deficits will be created during the pendency of the CCAA proceeding, it will be more likely that secured creditors will bring a cross-motion to put the debtor into bankruptcy before the CCAA proceeding has run its course in order to secure their priorities. This is contrary to the overall objective of the federal insolvency regime, which is to promote restructurings that may result in greater recovery for creditors overall as well as a better potential for the preservation of businesses and jobs.

C. Were pension creditors obligated to take steps to assert priority of their deemed trust claim

32. The Superintendent incorrectly asserts that Justice Campbell's decision that the pension creditors were required to obtain an order lifting the stay for a deemed trust to be created is based on the fact that the Initial Order, similar to the model order, provides that GFPI is "entitled but not required" to make payments in respect of its pension obligations "in the ordinary course of business".¹⁴ Justice Campbell did not make his decision on the basis that GFPI was "entitled but not required" to make these payments under paragraph 5(a) of the Initial Order, but on the grounds that the winding up of a pension plan is outside the ordinary course of business.

33. Accordingly, the Superintendent's argument in respect of paramouncy in paragraphs 77 through 79 of his factum is misplaced. In any event, from the perspective of administering a CCAA, the Monitor submits that federal paramouncy is invoked when an Initial Order provides that a debtor is "not required" to pay pension obligations, because such a provision is clearly contrary to the obligations of the debtor under the PBA. To conclude that paramouncy is not invoked because the debtor is *permitted* to make pension obligations simply serves to read out of the Initial Order the "not required" language, and that reading out such language is inconsistent with federal paramouncy. The Superintendent improperly limits the

¹⁴ Initial Order, para. 5(a), Monitor's Compendium, Tab 3

role of paramountcy by stating, in his factum, that “[f]ederal paramountcy does not apply in these circumstances because there is no DIP loan and no DIP charge”.

34. Indeed the very reason that cases such as *Re Collins & Aikman Automotive Canada Inc.*, cited by the Appellant, were argued was because the “but not required” language in section 5(a) of the Initial Order was considered by pension beneficiaries to be contrary to the employer’s obligations under the PBA. The “but not required” language that the Superintendent now seeks to render superfluous was specifically upheld on the grounds of federal paramountcy.¹⁵

35. At no time does Justice Campbell suggest, in his Reasons, that the pension creditors were obligated to bring a motion challenging the Initial Order earlier in the proceeding, at a time when GFPI was making the nominal special payments. However, the pension creditors have not brought such a motion at any time, even after the wind-up orders were granted in February 2012 and GFPI did not make payments on the wind-up deficit. Instead, the Superintendent and the plan administrator left it to GFPI to obtain directions from the Court. There was no basis for pension creditors to assume that because GFPI had been making nominal monthly special payments throughout the CCAA proceeding that it would be permitted by its lenders to make wind-up payments in the millions of dollars,

¹⁵ *Re Collins & Aikman Automotive Canada Inc.*, [2007] O.J. No. 4186, at para. 87, Monitor’s Book of Authorities, Tab 3.

38. When the First Lien Distribution Order was obtained, GFPI and the Monitor were granted the authority to pay the First Lien Lenders in full, though at the time the Monitor and GFPI were not in a position to do so.¹⁷ It was not known at that time what the full proceeds would be from the Georgia Pacific transaction due to working capital and other escrows, and it was not known what proceeds would be obtained from further asset sales. While the Superintendent argues that pension creditors ranked ahead of GFPI's other secured creditors, including the First Lien Lenders, after the effective date of the Executive Plan (June 30, 2010), the First Lien Distribution Order provided for the payment in full of the First Lien Lenders at a time when there was no certainty that the First Lien Lenders would be paid in full. The idea that a first-ranking stakeholder could sit back in such a scenario does not accord with the orderly administration of a CCAA proceeding.

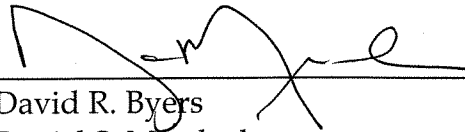
39. The Superintendent's contention that there were "explicit reserves" in respect of the pension claims is also incorrect. The Pension Reserve Orders were not obtained until over a year after the First Lien Distribution Order was granted, in August and September 2011.

40. The Monitor also notes that, from a policy perspective, the Superintendent's submissions on this point are problematic in that they appear to discourage creditors

¹⁷ Order of Justice Campbell dated June 4, 2010, Monitor's Compendium, Tab 6.

from allowing CCAA debtors to make ongoing special payments during a CCAA proceeding because it may be used against them if they seek to suspend such payments at a later date. The Pension Plans were not prejudiced by GFPI continuing special payments; to the contrary, the payments were to the benefit of the Pension Plans.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of July, 2014.

A handwritten signature in black ink, appearing to read 'David R. Byers', is written over a horizontal line.

David R. Byers
Daniel S. Murdoch
Stikeman Elliott LLP
Lawyer for the Monitor Ernst & Young Inc.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. C-36, AS
AMENDED;
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST
PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. AND GRANT
U.S. HOLDINGS G.P.

Court of Appeal File No: C58636
Court of Appeal File No. M42978
Court File No.: CV-09-8247-00CL

Applicants

COURT OF APPEAL FOR ONTARIO
Proceeding commenced at Toronto

**RESPONDING FACTUM OF THE
MONITOR**

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

David R. Byers LSUC#: 22992W
Tel: (416) 869-5697
Daniel S. Murdoch LSUC#: 53123L
Tel: (416) 869-5529
Fax: (416) 947-0866

Lawyers for the Monitor
Ernst & Young Inc.

Court of Appeal File No. C58636
Court of Appeal File No. M42978
Court File No.: CV-09-824700CL

COURT OF APPEAL FOR ONTARIO

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC.,
GRANT FOREST PRODUCTS SALES INC., and GRANT U.S. HOLDINGS G.P.**

Applicants

- and -

**THE TORONTO-DOMINION BANK, in its capacity as agent for the secured
lenders holding first lien security and THE BANK OF NEW YORK MELLON, in
its capacity as agent for secured lenders holding second lien security**

Respondents

**RESPONDING BOOK OF AUTHORITIES
OF THE MONITOR**

**STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9**

**David R. Byers LSUC#: 22992W
Tel: (416) 869-5697
Daniel S. Murdoch LSUC#: 53123L
Tel: (416) 869-5529
Fax: (416) 947-0866**

Lawyers for the Monitor

TO: CASSELS BROCK & BLACKWELL LLP

Suite 2100, Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Jane O. Dietrich

Telephone: 416-860-5223
Facsimile: 416-640-3144
E-mail: jdietrich@casselsbrock.com

Lawyers for the Applicants Grant Forest Products Inc.,
Grant Alberta Inc. and Grant Forest Products Sales Inc.

**MINISTRY OF THE ATTORNEY GENERAL FOR THE PROVINCE OF
ONTARIO**

Financial Services Commission of Ontario
Legal Services branch
5160 Yonge St., 17th floor
Toronto, ON M2N 6L9

BORDEN LADNER GERVAIS LLP

40 King Street West, Suite 4400
Toronto, ON M5H 3Y4

Craig J. Hill

Telephone: 416-367-6156
Facsimile: 416-361-7301

Roger Jaipargas

Telephone: 416-367-6266
Facsimile: 416-361-7067

Lawyers for West Face Capital Inc.

OSLER, HOSKIN & HARCOURT LLP

Box 50, 1 First Canadian Place
Toronto, ON M5X 1B8

Alexander Cobb

Telephone: 416-862-5964
Facsimile: 416-862-6666

Lawyers for Mercer (Canada) Limited

BENNETT JONES LLP

One First Canadian Place, Ste. 3400

P.O. Box 130

Toronto, ON M5X 1A4

Richard Swan

Telephone: 416-777-7479

Facsimile: 416-863-1716

Lawyers for Peter Grant Sr.

ERNST AND YOUNG INC.

P.O. Box 251

Ernst & Young Tower

Toronto-Dominion Centre

Toronto, ON M5K 1J7

Alex Morrison

Telephone: 416-941-7743

Facsimile: 416-864-1174

E-mail: alex.morrison@ca.ey.com

Simone Carvalho

Telephone: 416-943-2085

Facsimile: 416-864-1174

E-mail: simone.carvalho@ca.ey.com

Monitor

Court of Appeal File No. C58636
Court of Appeal File No. M42978
Court File No.: CV-09-824700CL

COURT OF APPEAL FOR ONTARIO

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC.,
GRANT FOREST PRODUCTS SALES INC., and GRANT U.S. HOLDINGS G.P.**

Applicants

- and -

**THE TORONTO-DOMINION BANK, in its capacity as agent for the secured
lenders holding first lien security and THE BANK OF NEW YORK MELLON, in
its capacity as agent for secured lenders holding second lien security**

RESPONDING BOOK OF AUTHORITIES OF THE MONITOR

INDEX

TAB DOCUMENT

1. *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] S.C.J. No. 6
2. *G.E. Canada Equipment Financing G.P., V. Northern Sawmills*, 2012 ONSC
6664
3. *Collins & Aikman Automotive Canada Inc. (Re)*, [2007] O.J. No. 4186

**** Preliminary Version ****

Case Name:

Sun Indalex Finance, LLC v. United Steelworkers

Sun Indalex Finance, LLC, Appellant;

v.

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

And between

George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors, Appellant;

v.

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

And between

FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited, Appellant;

v.

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

And between

United Steelworkers, Appellant;

v.

Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership) and Superintendent of Financial Services, Respondents, and

Superintendent of Financial Services, Insolvency Institute of Canada, Canadian Labour Congress, Canadian Federation of Pensioners, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers Association, Interveners.

[2013] S.C.J. No. 6

[2013] A.C.S. no 6

2013 SCC 6

[2013] 1 S.C.R. 271

[2013] 1 R.C.S. 271

301 O.A.C. 1

96 C.B.R. (5th) 171

8 B.L.R. (5th) 1

354 D.L.R. (4th) 581

2013EXP-356

2013EXPT-246

J.E. 2013-185

D.T.E. 2013T-97

EYB 2013-217414

439 N.R. 235

2013 CarswellOnt 733

223 A.C.W.S. (3d) 1049

20 P.P.S.A.C. (3d) 1

2 C.C.P.B. (2d) 1

File No.: 34308.

Supreme Court of Canada

Heard: June 5, 2012;

Judgment: February 1, 2013.

**Present: McLachlin C.J. and LeBel, Deschamps, Abella,
Rothstein, Cromwell and Moldaver JJ.**

(280 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters --

Compromises and arrangements -- Claims -- Priority -- Appeals from judgment setting aside decision concluding that deemed trust did not apply to wind-up deficiencies allowed -- Statutory deemed trust extended to contributions employer had to make to ensure that pension fund was sufficient to cover liabilities upon wind-up -- However, deemed trust was superseded by security granted to creditor that loaned money to employer during insolvency proceedings -- Although employer, as plan administrator, might have put itself in position of conflict of interest by failing to give plan's members proper notice of motion requesting financing of its operations during restructuring process, there was no realistic possibility that, had members received notice and had CCAA court found they were secured creditors, it would have ordered priorities differently -- Consequently, it was not appropriate to order equitable remedy such as constructive trust ordered by Court of Appeal.

Pensions and benefits law -- Private pension plans -- Bankruptcy, effect of -- Appeals from judgment setting aside decision concluding that deemed trust did not apply to wind-up deficiencies allowed -- Statutory deemed trust extended to contributions employer had to make to ensure that pension fund was sufficient to cover liabilities upon wind-up -- However, deemed trust was superseded by security granted to creditor that loaned money to employer during insolvency proceedings -- Although employer, as plan administrator, might have put itself in position of conflict of interest by failing to give plan's members proper notice of motion requesting financing of its operations during restructuring process, there was no realistic possibility that, had members received notice and had CCAA court found they were secured creditors, it would have ordered priorities differently -- Consequently, it was not appropriate to order equitable remedy such as constructive trust ordered by Court of Appeal.

Appeals from a judgment of the Ontario Court of Appeal setting aside a decision concluding that a deemed trust did not apply to wind-up deficiencies. Indalex became insolvent in 2009. At that time, Indalex was the administrator of two registered pension plans. Indalex obtained protection under the Companies' Creditors Arrangement Act ("CCAA"). Both plans faced funding deficiencies when Indalex filed for the CCAA stay. Indalex's financial distress threatened the interests of all the plan members. Indalex was authorized to borrow US\$24.4 million from the DIP lenders and grant them priority over all other creditors. Indalex subsequently received a bid for approximately US\$30 million, and the buyer did not assume responsibility for the pension plans' wind-up deficiencies. The plan members contended that Indalex had breached its fiduciary obligations by failing to meet its obligations as a plan administrator throughout the insolvency proceedings. The plan members brought motions for a declaration that a deemed trust equal in amount to the unfunded pension liability was enforceable against the proceeds of the sale. They contended that they had priority over the secured creditors. The court concluded that the deemed trust did not apply to the wind-up deficiencies because the associated payments were not "due" or "accruing due" as of the date of the wind up. The Ontario Court of Appeal allowed the plan members' appeals. It found that the deemed trust created by section 57(4) of the Pension Benefits Act applied to all amounts due with respect to plan wind-up deficiencies. The Court of Appeal also concluded that a constructive trust was an appropriate remedy for Indalex's breach of its fiduciary obligations.

HELD: Appeals allowed. A contribution had "accrued" when the liabilities were completely constituted, even if the payment itself would not fall due until a later date. The fact that the precise amount of the contribution was not determined as of the time of the wind-up did not make it a contingent contribution that could not have accrued for accounting purposes. The relevant provisions, the legislative history and the purpose were all consistent with inclusion of the wind-up deficiency in the protection afforded to members with respect to employer contributions upon the wind up of their pension plan. Therefore, Court of Appeal correctly held that Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency with respect to salaried plan. It was difficult to accept the Court of Appeal's sweeping intimation that the debtor in possession ("DIP") lenders would have accepted that their claim ranked below claims resulting from the deemed trust. As a result of the application of the doctrine of federal paramountcy, the DIP charge superseded the deemed trust. Although the employer, as plan

administrator, might have put itself in a position of conflict of interest by failing to give the plan members proper notice of a motion requesting financing of its operations during a restructuring process, there was no realistic possibility that, had the members received notice and had the CCAA court found that they were secured creditors, it would have ordered the priorities differently. Consequently, it was not appropriate to order an equitable remedy such as the constructive trust ordered by the Court of Appeal.

Statutes, Regulations and Rules Cited:

Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005, S.C. 2007, c. 36,

Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts, S.C. 2005, c. 47, s. 128

Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 122(1)(a)

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 2, s. 11

Pension Benefits Act, R.S.O. 1980, c. 373, s. 21(2), s. 23, s. 32

Pension Benefits Act, R.S.O. 1990, c. P.8, s. 1(1), s. 8(1)(a), s. 9, s. 10(1)12, s. 12, s. 19, s. 20, s. 22, s. 25, s. 26, s. 42, s. 56, s. 57, s. 57(3), s. 57(4), s. 58, s. 59, s. 68, s. 69, s. 70, s. 73, s. 74, s. 75, s. 75(1)(a), s. 75(1)(b)

Pension Benefits Act, 1965, S.O. 1965, c. 96, s. 22(2)

Pension Benefits Act, 1987, S.O. 1987, c. 35, s. 58, s. 59, s. 75(1), s. 76(1)

Pension Benefits Amendment Act, 1973, S.O. 1973, c. 113, s. 23(a)

Pension Benefits Amendment Act, 1980, S.O. 1980, c. 80,

Pension Benefits Amendment Act, 1983, S.O. 1983, c. 2, s. 21, s. 22, s. 32

Pension Benefits Amendment Act, 2010, S.O. 2010, c. 9, s. 52(5)

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

R.R.O. 1990, Reg. 909, s. 4(4)3, s. 5(1)(b), s. 5(1)(e), s. 14, s. 29, s. 31

Securing Pension Benefits Now and for the Future Act, 2010, S.O. 2010, c. 24, s. 21(2)

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Pensions -- Bankruptcy and Insolvency -- Priorities -- Company who was both employer and administrator of pension plans seeking protection from creditors under Companies' Creditors

Arrangement Act ("CCAA") -- Pension funds not having sufficient assets to fulfill pension promises made to plan members -- Company entering into debtor in possession ("DIP") financing allowing it to continue to operate -- CCAA court granting priority to DIP lenders -- Proceeds of sale of business insufficient to pay back DIP lenders -- Whether pension wind-up deficiencies subject to deemed trust -- If so, whether deemed trust superseded by CCAA priority by virtue of doctrine of federal paramountcy -- Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 57(3), 57(4), 75(1)(a), 75(1)(b) -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Pensions -- Trusts -- Company who was both employer and administrator of pension plans seeking protection from creditors under CCAA -- Pension funds not having sufficient assets to fulfill pension promises made to plan members -- Whether pension wind-up deficiencies subject to deemed trust -- Whether company as plan administrator breached fiduciary duties -- Whether pension plan members are entitled to constructive trust.

Civil Procedure -- Costs -- Appeals -- Standard of review -- Whether Court of Appeal erred in costs endorsement concerning one party.

Court Summary:

Indalex Limited ("Indalex"), the sponsor and administrator of two employee pension plans, one for salaried employees and the other for executive employees, became insolvent. Indalex sought protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). The salaried plan was being wound up when the CCAA proceedings began. The executive plan had been closed but not wound up. Both plans had wind-up deficiencies.

In a series of court-sanctioned steps, the company was authorized to enter into debtor in possession ("DIP") financing in order to allow it to continue to operate. The CCAA court granted the DIP lenders, a syndicate of pre-filing senior secured creditors, priority over the claims of all other creditors. Repayment of these amounts was guaranteed by Indalex U.S.

Ultimately, with the approval of the CCAA court, Indalex sold its business but the purchaser did not assume pension liabilities. The proceeds of the sale were not sufficient to pay back the DIP lenders and so Indalex U.S., as guarantor, paid the shortfall and stepped into the shoes of the DIP lenders in terms of priority. The CCAA court authorized a payment in accordance with the priority but ordered an amount be held in reserve, leaving the plan members' arguments on their rights to the proceeds of the sale open for determination later.

The plan members challenged the priority granted in the CCAA proceedings. They claimed that they had priority in the amount of the wind-up deficiency by virtue of a statutory deemed trust under s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("PBA") and a constructive trust arising from Indalex's alleged breaches of fiduciary duty as administrator of the pension funds. The judge at first instance dismissed the plan members' motions concluding that the deemed trust did not apply to wind up deficiencies. He held that, with respect to the wind-up deficiency, the plan members were unsecured creditors. The Court of Appeal reversed this ruling and held that the pension plan wind-up deficiencies were subject to deemed and constructive trusts which had priority over the DIP financing priority and over other secured creditors. In addition, the Court of Appeal rejected a claim brought by the United Steelworkers, which represented some members of the salaried plan, seeking payment of its costs from the latter's pension fund.

Held (LeBel and Abella JJ. dissenting): The Sun Indalex Finance, George L. Miller and FTI Consulting appeals should be allowed.

Held: The United Steelworkers appeal should be dismissed.

(1) Statutory Deemed Trust

Per Deschamps and Moldaver JJ.: It is common ground that the contributions provided for in s. 75(1)(a) of the *PBA* are covered by the deemed trust contemplated by s. 57(4) of the *PBA*. The only question is whether this statutory deemed trust also applies to the wind-up deficiency payments required by s. 75(1)(b). The response to this question as it relates to the salaried employees is affirmative in view of the provision's wording, context and purpose. The situation is different with respect to the executive plan as s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up.

The wind-up deemed trust provision (s. 57(4) *PBA*) does not place an express limit on the "employer contributions accrued to the date of the wind up but not yet due". Section 75(1)(a) explicitly refers to "an amount equal to the total of all payments" that have *accrued*, even those that were not yet due as of the date of the wind-up, whereas s. 75(1)(b) contemplates an "amount" that is calculated on the basis of the value of assets and of liabilities that have *accrued* when the plan is wound up. Since both the amount with respect to payments (s. 75(1)(a)) and the one ascertained by subtracting the assets from the liabilities accrued as of the date of the wind-up (s. 75(1)(b)) are to be paid upon wind up as employer contributions, they are both included in the ordinary meaning of the words of s. 57(4) of the *PBA*: "amount of money equal to employer contributions accrued to the date of the wind-up but not yet due under the plan or regulations".

The time when the calculation is actually made is not relevant as long as the liabilities are assessed as of the date of the wind-up. The fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes. As a result, the words "contributions accrued" can encompass the contributions mandated by s. 75(1)(b) of the *PBA*.

It can be seen from the legislative history that the protection has expanded from (1) only the service contributions that were due, to (2) amounts payable calculated as if the plan had been wound up, to (3) amounts that were due and had accrued upon wind-up but excluding the wind-up deficiency payments, to (4) all amounts due and accrued upon wind-up. Therefore, the legislative history leads to the conclusion that adopting a narrow interpretation that would dissociate the employer's payment provided for in s. 75(1)(b) of the *PBA* from the one provided for in s. 75(1)(a) would be contrary to the Ontario legislature's trend toward broadening the protection.

The deemed trust provision is a remedial one. Its purpose is to protect the interests of plan members. The remedial purpose favours an approach that includes all wind-up payments in the value of the deemed trust. In this case, the Court of Appeal correctly held with respect to the salaried plan, that Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency.

Per LeBel and Abella JJ.: There is agreement with the reasons of Deschamps J. on the statutory deemed trust issue.

Per McLachlin C.J. and Rothstein and **Cromwell** JJ.: Given that there can be no deemed trust for the executive plan because that plan had not been wound up at the relevant date, the main issue in connection with the salaried plan boils down to the narrow statutory interpretative question of whether the wind-up deficiency provided for in s. 75(1)(b) is "accrued to the date of the wind-up" as required by s. 57(4) of the *PBA*.

When the term "accrued" is used in relation to a sum of money, it will generally refer to an amount that

is at the present time either quantified or exactly quantifiable but which may or may not be due. In the present case, s. 57(4) uses the word "accrued" in contrast to the word "due". Given the ordinary meaning of the word "accrued", the wind-up deficiency cannot be said to have "accrued" to the date of wind-up. The extent of the wind-up deficiency depends on employee rights that arise only upon wind-up and with respect to which employees make elections only after wind-up. The wind-up deficiency therefore is neither ascertained nor ascertainable on the date fixed for wind-up.

The broader statutory context reinforces the view according to which the most plausible grammatical and ordinary sense of the words "accrued to the date of wind up" is that the amounts referred to are precisely ascertained immediately before the effective date of the plan's wind-up. Moreover, the legislative evolution and history of the provisions at issue show that the legislature never intended to include the wind-up deficiency in a statutory deemed trust. Rather, they reinforce the legislative intent to *exclude* from the deemed trust liabilities that arise only *on* the date of wind-up.

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

In this case, the s. 57(4) deemed trust does not apply to the wind-up deficiency. This conclusion to exclude the wind-up deficiency from the deemed trust is consistent with the broader purposes of the legislation. The legislature has created trusts over contributions that were due or accrued to the date of the wind-up in order to protect, to some degree, the rights of pension plan beneficiaries and employees from the claims of the employer's other creditors. However, there is also good reason to think that the legislature had in mind other competing objectives in not extending the deemed trust to the wind-up deficiency. While the protection of pension plans is an important objective, it is not for this Court to decide the extent to which that objective will be pursued and at what cost to other interests. The decision as to the level of protection that should be provided to pension beneficiaries under the *PBA* is one to be left to the Ontario legislature.

(2) Priority Ranking

Per Deschamps and Moldaver JJ.: A statutory deemed trust under provincial legislation such as the *PBA* continues to apply in federally-regulated *CCAA* proceedings, subject to the doctrine of federal paramountcy. In this case, granting priority to the DIP lenders subordinates the claims of other stakeholders, including the plan members. This court-ordered priority based on the *CCAA* has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

Per McLachlin C.J. and Rothstein and Cromwell JJ.: Although there is disagreement with Deschamps J. in connection with the scope of the s. 57(4) deemed trust, it is agreed that if there was a deemed trust in this case, it would be superseded by the DIP loan because of the operation of the doctrine of federal paramountcy.

Per LeBel and Abella JJ.: There is agreement with the reasons of Deschamps J. on the priority ranking issue as determined by operation of the doctrine of federal paramountcy.

(3) Constructive Trust As A Remedy for Breach of Fiduciary Duties

Per McLachlin C.J. and Rothstein and **Cromwell JJ.**: It cannot be the case that a conflict of interests arises simply because an employer, exercising its management powers in the best interests of the corporation, does something that has the potential to affect the beneficiaries of the corporation's pension plan. This conclusion flows inevitably from the statutory context. The existence of apparent conflicts that are inherent in the two roles of employer and pension plan administrator being performed by the same party cannot be a breach of fiduciary duty because those conflicts are specifically authorized by the statute which permits one party to play both roles. Rather, a situation of conflict of interest occurs when there is a substantial risk that the employer-administrator's representation of the plan beneficiaries would be materially and adversely affected by the employer-administrator's duties to the corporation.

Seeking an initial order protecting the corporation from actions by its creditors did not, on its own, give rise to any conflict of interest or duty on the part of Indalex. Likewise, failure to give notice of the initial CCAA proceedings was not a breach of fiduciary duty to avoid conflicts of interest in this case. Indalex's decision to act as an employer-administrator cannot give the plan members any greater benefit than they would have if their plan was managed by a third party administrator.

It was at the point of seeking and obtaining the DIP orders without notice to the plan beneficiaries and seeking and obtaining the sale approval order that Indalex's interests as a corporation came into conflict with its duties as a pension plan administrator. However, the difficulty that arose here was not the existence of the conflict itself, but Indalex's failure to take steps so that the plans' beneficiaries would have the opportunity to have their interests protected in the CCAA proceedings as if the plans were administered by an independent administrator. In short, the difficulty was not the existence of the conflict, but the failure to address it.

An employer-administrator who finds itself in a conflict must bring the conflict to the attention of the CCAA judge. It is not enough to include the beneficiaries in the list of creditors; the judge must be made aware that the debtor, as an administrator of the plan is, or may be, in a conflict of interest. Accordingly, Indalex breached its fiduciary duty by failing to take steps to ensure that the pension plans had the opportunity to be as fully represented in those proceedings as if there had been an independent plan administrator, particularly when it sought the DIP financing approval, the sale approval and a motion to voluntarily enter into bankruptcy.

Regardless of this breach, a remedial constructive trust is only appropriate if the wrongdoer's acts give rise to an identifiable asset which it would be unjust for the wrongdoer (or sometimes a third party) to retain. There is no evidence to support the contention that Indalex's failure to meaningfully address conflicts of interest that arose during the CCAA proceedings resulted in any such asset. Furthermore, to impose a constructive trust in response to a breach of fiduciary duty to ensure for the pension plans some procedural protections that they in fact took advantage of in any case is an unjust response in all of the circumstances.

Per **Deschamps** and Moldaver JJ.: A corporate employer that chooses to act as plan administrator accepts the fiduciary obligations attached to that function. Since the directors of a corporation also have a fiduciary duty to the corporation, the corporate employer must be prepared to resolve conflicts where they arise. An employer acting as a plan administrator is not permitted to disregard its fiduciary obligations to plan members and favour the competing interests of the corporation on the basis that it is wearing a "corporate hat". What is important is to consider the consequences of the decision, not its nature.

In the instant case, Indalex's fiduciary obligations as plan administrator did in fact conflict with

management decisions that needed to be taken in the best interests of the corporation. Specifically, in seeking to have a court approve a form of financing by which one creditor was granted priority over all other creditors, Indalex was asking the *CCAA* court to override the plan members' priority. The corporation's interest was to seek the best possible avenue to survive in an insolvency context. The pursuit of this interest was not compatible with the plan administrator's duty to the plan members to ensure that all contributions were paid into the funds. In the context of this case, the plan administrator's duty to the plan members meant, in particular, that it should at least have given them the opportunity to present their arguments. This duty meant, at the very least, that they were entitled to reasonable notice of the DIP financing motion. The terms of that motion, presented without appropriate notice, conflicted with the interests of the plan members.

As for the constructive trust remedy, it is settled law that proprietary remedies are generally awarded only with respect to property that is directly related to a wrong or that can be traced to such property. There is agreement with Cromwell J. that this condition was not met in the case at bar and his reasoning on this issue is adopted. Moreover, it was unreasonable for the Court of Appeal to reorder the priorities in this case.

Per LeBel and Abella JJ. (dissenting): A fiduciary relationship is a relationship, grounded in fact and law, between a vulnerable beneficiary and a fiduciary who holds and may exercise power over the beneficiary in situations recognized by law. It follows that before entering into an analysis of the fiduciary duties of an employer as administrator of a pension plan under the *PBA*, it is necessary to consider the position and characteristics of the pension beneficiaries. In the present case, the beneficiaries were in a very vulnerable position relative to Indalex.

Nothing in the *PBA* allows that the employer *qua* administrator will be held to a lower standard or will be subject to duties and obligations that are less stringent than those of an independent administrator. The employer is under no obligation to assume the burdens of administering the pension plans that it has agreed to set up or that are the legacy of previous decisions. However, if it decides to do so, a fiduciary relationship is created with the expectation that the employer will be able to avoid or resolve the conflicts of interest that might arise.

Indalex was in a conflict of interest from the moment it started to contemplate putting itself under the protection of the *CCAA* and proposing an arrangement to its creditors. From the corporate perspective, one could hardly find fault with such a decision. It was a business decision. But the trouble is that at the same time, Indalex was a fiduciary in relation to the members and retirees of its pension plans. The solution was not to place its function as administrator and its associated fiduciary duties in abeyance. Rather, it had to abandon this role and diligently transfer its function as manager to an independent administrator.

In the present case, the employer not only neglected its obligations towards the beneficiaries, but actually took a course of action that was actively inimical to their interests. The seriousness of these breaches amply justified the decision of the Court of Appeal to impose a constructive trust.

(4) Costs in United Steelworkers Appeal

Per McLachlin C.J. and Rothstein and Cromwell JJ.: There is no basis to interfere with the Court of Appeal's costs endorsement as it relates to United Steelworkers in this case. The litigation undertaken here raised novel points of law with all of the uncertainty and risk inherent in such an undertaking. The Court of Appeal in essence decided that the United Steelworkers, representing only 7 of 169 members of the salaried plan, should not without consultation be able to in effect impose the risks of that litigation on all of the plan members, the vast majority of whom were not union members. There is no error in principle in the Court of Appeal's refusal to order the United Steelworkers costs to be paid out of the

pension fund, particularly in light of the disposition of the appeal to this Court.

Per Deschamps and Moldaver JJ.: There is agreement with the reasons of Cromwell J. on the issue of costs in the United Steelworkers appeal.

Per LeBel and Abella JJ.: There is agreement with the reasons of Cromwell J. on the issue of costs in the United Steelworkers appeal.

Cases Cited

By Deschamps J.

Referred to: *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Hydro-Electric Power Commission of Ontario v. Albright* (1922), 64 S.C.R. 306; *Canadian Pacific Ltd. v. M.N.R.* (1998), 41 O.R. (3d) 606; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, [2004] 1 S.C.R. 60; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307; *Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273; *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558.

By Cromwell J.

Referred to: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53; *Hydro-Electric Power Commission of Ontario v. Albright* (1922), 64 S.C.R. 306; *Canadian Pacific Ltd. v. M.N.R.* (1998), 41 O.R. (3d) 606; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152; *Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273, affg 2008 ONCA 394, 67 C.C.P.B. 1; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, [2011] 2 S.C.R. 175; *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247; *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403; *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177; *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560; *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631; *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282; *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4) 194; *Marine Drive Properties Ltd., Re*, 2009 BCSC 145, 52 C.B.R. (5) 47; *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5) 169; *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6459 (CanLII); *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299 (CanLII); *Nortel Networks Corp., Re* (2009), 75 C.C.P.B. 206; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4) 314; *Donkin v. Bugoy*, [1985] 2 S.C.R. 85; *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217; *Peter v. Beblow*, [1993] 1 S.C.R. 980; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678; *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303.

By LeBel J. (dissenting)

Galambos v. Perez, 2009 SCC 48, [2009] 3 S.C.R. 247; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261; *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4) 293; *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534; *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217.

Statutes and Regulations Cited

Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage

Earnar Protection Program Act and chapter 47 of the Statutes of Canada, 2005, S.C. 2007, c. 36.

Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts, S.C. 2005, c. 47, s. 128.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.

Bill C-501, *An Act to amend the Bankruptcy and Insolvency Act and other Acts (pension protection)*, 3 Sess., 40 Parl., March 24, 2010 (as am. by the Standing Committee on Industry, Science and Technology, March 1, 2011).

Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 122(1)(a).

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 2 "secured creditor", 11.

Pension Benefits Act, R.S.O. 1980, c. 373, ss. 21(2), 23, 32.

Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 1(1) "administrator", "wind up", 8(1)(a), 9, 10(1)12, 12, 19, 20, 22, 25, 26, 42, 56, 57, 58, 59, 68, 69, 70, 73, 74, 75.

Pension Benefits Act, 1965, S.O. 1965, c. 96, s. 22(2).

Pension Benefits Act, 1987, S.O. 1987, c. 35, ss. 58, 59, 75(1), 76(1).

Pension Benefits Amendment Act, 1973, S.O. 1973, c. 113, s. 23a.

Pension Benefits Amendment Act, 1980, S.O. 1980, c. 80.

Pension Benefits Amendment Act, 1983, S.O. 1983, c. 2, ss. 21, 23, 32.

Pension Benefits Amendment Act, 2010, S.O. 2010, c. 9, s. 52(5).

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

R.R.O. 1990, Reg. 909, ss. 4(4)3, 5(1)(b), (e), 14, 29, 31.

Securing Pension Benefits Now and for the Future Act, 2010, S.O. 2010, c. 24, s. 21(2).

Authors Cited

Arnold, Brian J. *Timing and Income Taxation: The Principles of Income Measurement for Tax Purposes*. Toronto: Canadian Tax Foundation, 1983.

Black's Law Dictionary, 9 ed. St. Paul, Minn.: Thomson Reuters, 2009, "accrued liability".

Canada. Senate. Standing Committee on Banking, Trade and Commerce. *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*. Ottawa: Senate of Canada, 2003.

Canadian Institute of Chartered Accountants. *CICA Handbook -- Accounting, Part II, Accounting Standards for Private Enterprises*. Toronto: The Institute, 2012.

Driedger, Elmer A. *Construction of Statutes*, 2 ed. Toronto: Butterworths, 1983.

Dukelow, Daphne A. *The Dictionary of Canadian Law*, 4 ed. Toronto: Carswell, 2011, "accrued liability".

Hogg, Peter W., Joanne E. Magee and Jinyan Li. *Principles of Canadian Income Tax Law*, 7 ed. Toronto: Carswell, 2010.

Jackson, Georgina R., and Janis Sarra. "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007*. Toronto: Thomson Carswell, 2008, 41.

Kaplan, Ari N. *Pension Law*. Toronto: Irwin Law, 2006.

The Mercer Pension Manual, vol. 1, by William M. Mercer Limited. Toronto: Carswell, 1994 (loose-leaf updated November 2009, release 6).

Ontario. Legislative Assembly. *Legislature of Ontario Debates: Official Report (Hansard)*, No. 99, 2 Sess., 32 Parl., July 7, 1982, p. 3568.

Sarra, Janis P. *Rescue! The Companies' Creditors Arrangement Act*. Toronto: Thomson Carswell, 2007.

Waters' Law of Trusts in Canada, 3 ed. by Donovan W. M. Waters, Mark R. Gillen and Lionel D. Smith, eds. Toronto: Thomson Carswell, 2005.

History and Disposition:

APPEALS from a judgment of the Ontario Court of Appeal (MacPherson, Gillese and Juriansz JJ.A.), 2011 ONCA 265, 104 O.R. (3d) 641, 276 O.A.C. 347, 331 D.L.R. (4) 352, 75 C.B.R. (5) 19, 89 C.C.P.B. 39, 17 P.P.S.A.C. (3d) 194, [2011] O.J. No. 1621 (QL), 2011 CarswellOnt 2458, setting aside a decision of Campbell J., 2010 ONSC 1114, 79 C.C.P.B. 301, [2010] O.J. No. 974 (QL), 2010 CarswellOnt 893. Appeals allowed, LeBel and Abella JJ. dissenting.

APPEAL from a judgment of the Ontario Court of Appeal (MacPherson, Gillese and Juriansz JJ.A.), 2011 ONCA 578, 81 C.B.R. (5) 165, 92 C.C.P.B. 277, [2011] O.J. No. 3959 (QL), 2011 CarswellOnt 9077. Appeal dismissed.

Counsel:

Benjamin Zarnett, Frederick L. Myers, Brian F. Empey and Peter Kolla, for the appellant Sun Indalex Finance, LLC.

Harvey G. Chaiton and George Benchetrit, for the appellant George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors.

David R. Byers, Ashley John Taylor and Nicholas Peter McHaffie, for the appellant FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited.

Darrell L. Brown, for the appellant/respondent the United Steelworkers.

Andrew J. Hatnay and Demetrios Yiokaris, for the respondents Keith Carruthers, et al.

Hugh O'Reilly and Amanda Darrach, for the respondent Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership).

Mark Bailey, Leonard Marsello and William MacLarkey, for the respondent/intervener the Superintendent of Financial Services.

Robert I. Thornton and D. J. Miller, for the intervener the Insolvency Institute of Canada.

Steven Barrett and Ethan Poskanzer, for the intervener the Canadian Labour Congress.

Kenneth T. Rosenberg, Andrew K. Lokan and Massimo Starnino, for the intervener the Canadian Federation of Pensioners.

Éric Vallières, Alexandre Forest and Yoine Goldstein, for the intervener the Canadian Association of Insolvency and Restructuring Professionals.

Mahmud Jamal, Jeremy Dacks and Tony Devir, for the intervener the Canadian Bankers Association.

The judgment of Deschamps and Moldaver JJ. was delivered
by

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

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

I. Facts

3 Indalex is a wholly owned Canadian subsidiary of a U.S. company, Indalex Holding Corp. ("Indalex

U.S."). Indalex and its related companies formed a corporate group (the "Indalex Group") that manufactured aluminum extrusions. The U.S. and Canadian operations were closely linked.

4 In 2009, a combination of high commodity prices and the economic recession's impact on the end-user market for aluminum extrusions plunged the Indalex Group into insolvency. On March 20, 2009, Indalex U.S. filed for Chapter 11 bankruptcy protection in Delaware. On April 3, 2009, Indalex applied for a stay under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"), and Morawetz J. granted the stay in an initial order. He also appointed FTI Consulting Canada ULC (the "Monitor") to act as monitor.

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

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

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

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

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

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

The Plan Members were given notice of all subsequent proceedings. None of the Plan Members appealed the Amended Initial Order to contest the DIP charge.

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

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

13 Indalex received a bid from SAPA Holding AB ("SAPA"). It was for approximately US\$30 million, and SAPA did not assume responsibility for the pension plans' wind-up deficiencies. According to the Monitor's estimate, the liquidation value of Indalex's assets was US\$44.7 million. Indalex brought an application for an order approving a bidding procedure for a competitive auction and deeming SAPA's bid to be a qualifying bid. The Executive Plan's members opposed the application, expressing concern that the pension liabilities would not be assumed. Morawetz J. nevertheless issued the order on July 2, 2009; in it, he approved the bidding procedure for sale, noting that the Executive Plan's members could raise their objections at the time of approval of the final bid.

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

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

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

17 Following the sale of Indalex's assets, its directors resigned. Indalex U.S., a part of Indalex Group, took over the management of Indalex, whose assets were limited to the sale proceeds held by the

Monitor. A Unanimous Shareholder Declaration was executed on August 12, 2009; in it, Mr. Keith Cooper was appointed to manage Indalex's affairs. Mr. Cooper was an employee of FTI Consulting Inc.

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

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

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

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

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

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

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

II. Issues

25 The appeals raise four issues:

1. Does the deemed trust provided for in s. 57(4) of the *PBA* apply to wind-up deficiencies?
2. If so, does the deemed trust supersede the DIP charge?
3. Did Indalex have any fiduciary obligations to the Plan Members when making decisions in the context of the insolvency proceedings?
4. Did the Court of Appeal properly exercise its discretion in imposing a constructive trust to remedy the breaches of fiduciary duties?

III. Analysis

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

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

57... .

(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

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

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

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

report shows an actuarial deficit, the employer must make wind-up deficiency payments. Consequently, s. 75(1)(a) and (b) jointly determine the amount of the contributions owed when a plan is wound up.

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

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

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

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

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

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

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

deficiency had risen back up to \$1.8 million as a result of a decline in the fund's asset value. According to this argument, the amount could not have accrued as of the date of the wind up, because it could not be calculated with certainty.

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

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

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

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

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

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

39 The original statute provided solely for the employer's obligation to pay all amounts required to be paid to meet the test for solvency (*The Pension Benefits Act*, 1965, S.O. 1965, c. 96, s. 22(2)), but the legislature subsequently afforded employees the protection of a deemed trust on the employer's assets in an amount equal to the sums withheld from employees as contributions and sums due from the employer as service contributions (s. 23a, added by *The Pension Benefits Amendment Act*, 1973, S.O. 1973, c.

113, s. 6). In a later version, it protected not only contributions that were due, but also those that had accrued, with the amounts being calculated as if the plan had been wound up (*The Pension Benefits Amendment Act, 1980*, S.O. 1980, c. 80).

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

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

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

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

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

45 In sum, the relevant provisions, the legislative history and the purpose are all consistent with inclusion of the wind-up deficiency in the protection afforded to members with respect to employer contributions upon the wind up of their pension plan. I therefore find that the Court of Appeal correctly held with respect to the Salaried Plan, which had been wound up as of December 31, 2006, that Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency.

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

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

B. Does the Deemed Trust Supersede the DIP Charge?

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

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

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

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

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

Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will

happen if a *CCAA* reorganization is ultimately unsuccessful. [para. 23]

51 In order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements. Yet this does not mean that courts may read bankruptcy priorities into the *CCAA* at will. Provincial legislation defines the priorities to which creditors are entitled until that legislation is ousted by Parliament. Parliament did not expressly apply all bankruptcy priorities either to *CCAA* proceedings or to proposals under the *BIA*. Although the creditors of a corporation that is attempting to reorganize may bargain in the shadow of their bankruptcy entitlements, those entitlements remain only shadows until bankruptcy occurs. At the outset of the insolvency proceedings, Indalex opted for a process governed by the *CCAA*, leaving no doubt that although it wanted to protect its employees' jobs, it would not survive as their employer. This was not a case in which a failed arrangement forced a company into liquidation under the *BIA*. Indalex achieved the goal it was pursuing. It chose to sell its assets under the *CCAA*, not the *BIA*.

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

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

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

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

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

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

307 (at p. 356), and reproduced in *Canadian Western Bank* (at para. 75):

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

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

- (a) the Applicants are in need of the additional financing in order to support operations during the period of a going concern restructuring;
- (b) there is a benefit to the breathing space that would be afforded by the DIP Financing that will permit the Applicants to identify a going concern solution;
- (c) there is no other alternative available to the Applicants for a going concern solution;
- (d) a stand-alone solution is impractical given the integrated nature of the business of Indalex Canada and Indalex U.S.;
- (e) given the collateral base of Indalex U.S., the Monitor is satisfied that it is unlikely that the Post-Filing Guarantee with respect to the U.S. Additional Advances will ever be called and the Monitor is also satisfied that the benefits to stakeholders far outweighs the risk associated with this aspect of the Post-Filing Guarantee;
- (f) the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing against the assets of the Applicants;
- (g) the Pre-Filing Security has been reviewed by counsel to the Monitor and it appears that the unsecured creditors of the Canadian debtors will be in no worse position as a result of the Post-Filing Guarantee than they were otherwise, prior to the CCAA filing, as a result of the limitation of the Canadian guarantee set forth in the draft Amended and Restated Initial Order ... ; and
- (h) the balancing of the prejudice weighs in favour of the approval of the DIP Financing. [para. 9]

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

advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate" (2009 CanLII 37906, at paras. 7 and 8).

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

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

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

62 The first stage of a fiduciary duty analysis is to determine whether and when fiduciary obligations arise. The Court has recognized that there are circumstances in which a pension plan administrator has fiduciary obligations to plan members both at common law and under statute (*Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273, at para. 41). It is clear that the indicia of a fiduciary relationship attach in this case between the Plan Members and Indalex as plan administrator. Sun Indalex and the Monitor do not dispute this proposition.

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

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

65 Section 22(4) of the *PBA* explicitly provides that a plan administrator must not permit its own interest to conflict with its duties in respect of the pension fund. Thus, where an employer's own interests do not converge with those of the plan's members, it must ask itself whether there is a potential conflict and, if so, what can be done to resolve the conflict. Where interests do conflict, I do not find the

two hats metaphor helpful. The solution is not to determine whether a given decision can be classified as being related to either the management of the corporation or the administration of the pension plan. The employer may well take a sound management decision, and yet do something that harms the interests of the plan's members. An employer acting as a plan administrator is not permitted to disregard its fiduciary obligations to plan members and favour the competing interests of the corporation on the basis that it is wearing a "corporate hat". What is important is to consider the consequences of the decision, not its nature.

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

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

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

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

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

71 First, a stay operates only to freeze the parties' rights. In most cases, stays are obtained *ex parte*. One of the reasons for refraining from giving notice of the initial stay motion is to avert a situation in which creditors race to court to secure benefits that they would not enjoy in insolvency. Subjecting as

many creditors as possible to a single process is seen as a way to treat all of them more equitably. In this context, plan members are placed on the same footing as the other creditors and have no special entitlement to notice. Second, one of the conclusions of the order Indalex sought was that it was to be served on all creditors, with a few exceptions, within 10 days. The notice allowed any interested party to apply to vary the order. Third, Indalex was permitted to pay all pension benefits. Although the order excluded special solvency payments, no ruling was made at that point on the merits of the creditors' competing claims, and a stay gave the Plan Members the possibility of presenting their arguments on the deemed trust rather than losing it altogether as a result of a bankruptcy proceeding, which was the alternative.

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

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

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

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

administrator, could have presented when it requested the amendment to the initial order. It cannot now be argued, therefore, that the Plan Members are barred from defending their interests by the collateral attack doctrine.

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

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

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

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

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

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

IV. Conclusion

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

Although the Committee recognizes the vulnerability of current pensioners, we do not believe that changes to the BIA regarding pension claims should be made at this time. Current pensioners can also access retirement benefits from the Canada/Quebec Pension Plan, and the Old Age Security and Guaranteed Income Supplement programs, and may have private savings and Registered Retirement Savings Plans that can provide income for them in retirement. The desire expressed by some of our witnesses for greater protection for pensioners and for employees currently participating in an occupational pension plan must be balanced against the interests of others. As we noted earlier, insolvency - at its essence - is characterized by insufficient assets to satisfy everyone, and choices must be made.

The Committee believes that granting the pension protection sought by some of the witnesses would be sufficiently unfair to other stakeholders that we cannot recommend the changes requested. For example, we feel that super priority status could unnecessarily reduce the moneys available for distribution to creditors. In turn, credit availability and the cost of credit could be negatively affected, and all those seeking credit in Canada would be disadvantaged.

Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act (2003), at p. 98; see also p. 88.)

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

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

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

The reasons of McLachlin C.J. and Rothstein and Cromwell JJ. were delivered by

CROMWELL J. (Concurring in Result):--

I. Introduction

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

[para86 Indalex Limited, the sponsor and administrator of employee pension plans, became insolvent and sought protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). Although all current contributions were up to date, the company's pension plans did not have sufficient assets to fulfill the pension promises made to their members. In a series of court-

sanctioned steps, which were judged to be in the best interests of all stakeholders, the company borrowed a great deal of money to allow it to continue to operate. The parties injecting the operating money were given a super priority over the claims by other creditors. When the business was sold, thereby preserving hundreds of jobs, there was a shortfall between the sale proceeds and the debt. The pension plan beneficiaries thus found themselves in a dispute about the priority of their claims. The appellant, Sun Indalex Finance LLC, claimed it had priority by virtue of the super priority granted in the *CCAA* proceedings. The trustee in bankruptcy of the U.S. Debtors (George Miller) and the Monitor (FTI Consulting) joined in the appeal. The plan beneficiaries claimed that they had priority by virtue of a statutory deemed trust under the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), and a constructive trust arising from the company's alleged breaches of fiduciary duty.

[para87 The Ontario Court of Appeal sided with the plan beneficiaries and Sun Indalex, the trustee in bankruptcy and the Monitor all appeal. The specific legal points in issue are:

- A. Did the Court of Appeal err in finding that the statutory deemed trust provided for in s. 57(4) of the *PBA* applied to the salaried plan's wind-up deficiency?
- B. Did the Court of Appeal err in finding that Indalex breached the fiduciary duties it owed to the pension plan beneficiaries as the plans' administrator and in imposing a constructive trust as a remedy?
- C. Did the Court of Appeal err in concluding that the super priority granted in the *CCAA* proceedings did not have priority by virtue of the doctrine of federal paramountcy?
- D. Did the Court of Appeal err in its cost endorsement respecting the United Steelworkers ("USW")?

[para88 My view is that the deemed trust does not apply to the disputed funds, and even if it did, the super priority would override it. I conclude that the corporation failed in its duty to the plan beneficiaries as their administrator and that the beneficiaries ought to have been afforded more procedural protections in the *CCAA* proceedings. However, I also conclude that the Court of Appeal erred in using the equitable remedy of a constructive trust to defeat the super priority ordered by the *CCAA* judge. I would therefore allow the main appeals.

II. Facts and Proceedings Below

A. Overview

[para89 These appeals concern claims by pension fund members for amounts owed to them by the plans' sponsor and administrator which became insolvent.

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

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

overrides the claims of two of Indalex's pension plans for funds owed to them.

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

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

94 Ultimately, with the approval of the CCAA court, Indalex sold its business; the purchaser did not assume pension liabilities. A reserve fund was established by the CCAA Monitor to answer any outstanding claims. The proceeds of the sale were not sufficient to pay back the DIP lenders and so the U.S. debtors, as guarantors, paid the shortfall and stepped into the shoes of the DIP lenders in terms of priority.

95 The appellant Sun Indalex is a pre-CCAA secured creditor of both Indalex and the U.S. debtors. It claims the reserve fund on the basis that the US\$10.75 million paid by the guarantors would otherwise have been available to Sun Indalex as a secured creditor of the U.S. debtors in the U.S. bankruptcy proceedings. The respondent plan beneficiaries claim the reserve fund on the basis that they have a wind-up deficiency which is covered by a deemed trust created by s. 57(4) of the PBA. This deemed trust includes "an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations" (s. 57(4)). They also claim the reserve fund on the basis of a constructive trust arising from Indalex's failure to live up to its fiduciary duties as plan administrator.

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

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

B. Indalex's CCAA Proceedings

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

98 As noted earlier, Indalex was in financial trouble and, on April 3, 2009, sought and obtained protection from its creditors under the CCAA. The order (which I will refer to as the initial order) also contained directions for service on creditors and others: paras. 39-41. The order also contained a so-called "comeback clause" allowing any interested party to apply for a variation of the order, provided that that party served notice on any other party likely to be affected by any such variation: para. 46. It is common ground that the plan beneficiaries did not receive notice of the application for the initial order

but the *CCAA* court nevertheless approved the method of and time for service. Full particulars of the deficiencies in the pension plans were before the court in the motion material and the initial order addressed payment of the employer's current service pension contributions.

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

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

- He approved abridged notice: para. 1;
- He allowed Indalex to continue making current service contributions to the pension plans, but not special payments: paras. 7(a) and 9(b);
- He barred all proceedings against Indalex, except by consent of Indalex and the Monitor or leave of the court, until May 1, 2009: para. 15;
- He granted the DIP lenders a so-called super priority:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(6) The Sale and Distribution of Funds

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

(7) The Order Under Appeal

109 On August 28, 2009, Campbell J. heard claims by the USW (appearing on behalf of some

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

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

(8) The Decision of the Ontario Court of Appeal

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

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

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

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

115 She held that as a plan administrator who was also an employer, Indalex had fiduciary duties both to the plan beneficiaries and to the corporation: para. 129. In her view, Indalex was subject to both sets of duties throughout the *CCAA* proceedings and it had breached its duties to the plan beneficiaries in several ways. While Indalex had the right to initiate *CCAA* proceedings, this action made the plan beneficiaries vulnerable and therefore triggered its fiduciary obligations as plan administrator: paras. 132-33. Gillese J.A. enumerated the many ways in which she thought Indalex subsequently failed as plan administrator: it did nothing in the *CCAA* proceedings to fund the deficit in the underfunded plans; it applied for *CCAA* protection without notice to the beneficiaries; it obtained DIP financing on the condition that DIP lenders be granted a super priority over "statutory trusts"; it obtained this financing without notice to the plan beneficiaries; it sold its assets knowing the purchaser was not taking over the plans; and it attempted to enter into voluntary bankruptcy, which would defeat any deemed trust claims the beneficiaries might have asserted: para. 139. Gillese J.A. also noted that throughout the *CCAA* proceedings Indalex was in a conflict of interest because it was acting for both the corporation and the

beneficiaries.

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

III. Analysis

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

(1) Introduction

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

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

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

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

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

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

(2) Employer Obligations on Wind Up

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

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

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

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

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

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

126 The assets and liabilities of the plan as of the wind-up date must be determined. As noted earlier, the precise extent of the liability, while *fixed as of that date*, will not be ascertained or ascertainable *on that date*. The extent of the liability may depend on choices open to plan beneficiaries under the plan and on the exercise by them of certain statutory rights beyond the options that would otherwise have been available under the plan itself. The plan members must be notified of the wind-up and have their

entitlements and options set out for them and given an opportunity to make their choices. The plan administrator must file a wind-up report which includes a statement of the plan's assets and liabilities, the benefits payable under the terms of the plan, and the method of allocating and distributing the assets including the priorities for the payment of benefits: *PBA*, s. 70(1), and R.R.O. 1990, Reg. 909, s. 29 (the "*PBA Regulations*").

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

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

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

(3) The Deemed Trust Provisions

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

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

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

133 When a pension is ongoing, employers need to make regular current service cost contributions. These are made monthly, within 30 days after the month to which they relate: *PBA Regulations*, s. 4(4)3. There are also special payments, which relate to deficiencies between a pension plan's assets and liabilities. There are "going-concern" deficiencies and "solvency" deficiencies, the distinction between which is unimportant for the purposes of these appeals. A plan administrator must regularly file actuarial reports, which may disclose deficiencies: *PBA Regulations*, s. 14. Where there is a going-concern deficiency the employer must make equal monthly payments over a 15-year period to rectify it: *PBA Regulations*, s. 5(1)(b). Where there is a solvency deficiency, the employer must make equal monthly payments over a five-year period to rectify it: *PBA Regulations*, s. 5(1)(e). Once these regular or special

payments become due but have not been paid, they are subject to the s. 57(3) deemed trust.

134 I turn next to the s. 57(4) deemed trust, which gives rise to the question before us. The subsection provides that "[w]here a pension plan is wound up ... an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations."

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

(4) The Interpretative Approach

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

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

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

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

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

140 Of course, the meaning of the word "accrued" may vary with context. In general, when the term "accrued" is used in relation to legal rights, its common meaning is that the right has become fully

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

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

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

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

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

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

144 Given my understanding of the ordinary meaning of the word "accrued", I must respectfully disagree with my colleague, Justice Deschamps' position that the wind-up deficiency can be said to have "accrued" to the date of wind up. In her view, "[s]ince the employees cease to accumulate entitlements

when the plan is wound up, the entitlements that are used to calculate the contributions have all been accumulated before the wind-up date" (para. 34) and "no new liabilities accrue at the time of or after the wind up" (para. 36). My colleague maintains that "[t]he fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes" (para. 37 referring to *Canadian Pacific Ltd. v. M.N.R.* (1998), 41 O.R. (3d) 606 (C.A.)).

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

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

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

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

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

...

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

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

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

pension plan on the effective date of the partial wind up.

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

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

(b) *The Scheme of the Act*

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

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

152 The important point is how these two deemed trust provisions relate to the wind-up liabilities as described in ss. 75(1)(a) and 75(1)(b). The two paragraphs refer to sums of money that are different in kind: while s. 75(1)(a) refers to liabilities that accrue before wind up and that are created elsewhere in the Act, s. 75(1)(b) creates a completely new liability that comes into existence only once the plan is wound up. There is no dispute, as I understand it, that these two paragraphs refer to different liabilities and that it is the liability described in s. 75(1)(b) that is the wind-up deficiency in issue here. The parties do not dispute that s. 75(1)(a) does *not* include wind-up deficiency payments.

153 It is striking how closely the text of s. 75(1)(a) -- which does not relate to the wind-up deficiency -- tracks the language of the deemed trust provisions in s. 57(3) and (4). As noted, s. 57(3) deals with "employer contributions due and not paid", while s. 57(4) deals with "employer contributions accrued to the date of the wind up but not yet due." Section 75(1)(a) includes both of these types of employer

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

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

(c) *Legislative History and Evolution*

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

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

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

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

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

159 So far as I can determine, statutory deemed trusts were first introduced into the *PBA* by *The Pension Benefits Amendment Act, 1973*, S.O. 1973, c. 113, s. 6. Those amendments created deemed

trusts over two amounts: employee pension contributions received by employers (s. 23a (1), similar to the deemed trust in the current s. 57(1)) and employer contributions that had fallen due under the plan (s. 23a (3), similar to the current s. 57(3) deemed trust for employer contributions "due and not paid"). The full text of these provisions and those referred to below, up to the current version of the 1990 Act, are found in the Appendix.

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

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

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

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

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

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

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

(4) An employer who is required by a pension plan to contribute to the pension plan shall be deemed to hold in trust for the members of the pension plan an amount of money equal to the total of,

- (a) all moneys that the employer is required to pay into the pension plan to meet,
 - (i) the current service cost, and
 - (ii) the special payments prescribed by the regulations,

that are due under the pension plan or the regulations and have not been paid into the pension plan; and

- (b) where the pension plan is terminated or wound up, any other money that the employer is liable to pay under clause 21 (2) (a).

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

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

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

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

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

The first group of today's amendments makes up the housekeeping changes needed for us to do what we set out to do in late 1980; that is, to guarantee pension benefits following the windup of a defined pension benefit plan. These amendments will clarify the ways in which we can attain that goal.

In Bill 214 [i.e. the 1980 amendments] the employees were given a lien on the employer's assets for employee contributions to a pension plan collected by the employer, as well as accrued employer contributions...

Unfortunately, this protection has resulted in different legal interpretations on the extent of the lien. An argument has been advanced that the amount of the lien includes an employer's potential future liability on the windup of a pension plan. This was never intended and is not necessary to provide the required protection. The amendment to section 23 clarified the intent of Bill 214. [Emphasis added.]

(*Legislature of Ontario Debates: Official Report (Hansard)*, No. 99, 2nd Sess., 32nd Parl., July 7, 1982, p. 3568)

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

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

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

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

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

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

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

(d) *The Purpose of the Legislation*

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

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

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

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

178 While I agree that the protection of pension plans is an important objective, it is not for this Court to decide the extent to which that objective will be pursued and at what cost to other interests. In her conclusion, Justice Deschamps notes that although the protection of pension plans is a worthy objective, courts should not use the law of equity to re-arrange the priorities that Parliament has established under the *CCAA*. This is a matter of policy where courts must defer to legislatures (reasons of Justice Deschamps, at para. 82). In my view, my colleague's comments on this point are equally applicable to the policy decisions reflected in the text of the *PBA*. The decision as to the level of protection that should be provided to pension beneficiaries is one to be left to the Ontario legislature. Faced with the language in the *PBA*, I would be slow to infer that the broader protective purpose, with all its potential disadvantages, was intended. In short, the interpretation I would adopt is consistent with a balanced approach to protection of benefits which the legislature intended.

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

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

(1) Introduction

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

the CCAA court.

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

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

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

- (i) What fiduciary duties did Indalex have in its role as plan administrator and did it breach them?
- (ii) If so, was imposition of a constructive trust an appropriate remedy?

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

(a) *Legal Principles*

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

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

The obligation imposed [on a fiduciary] may vary in its specific substance depending on the relationship ... [N]ot every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty... . It is only

in relation to breaches of the specific obligations imposed because the relationship is one characterized as fiduciary that a claim for breach of fiduciary duty can be founded. [Emphasis added; pp. 646-47.]

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

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

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

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

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

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

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

...

(4) [Conflict of interest] An administrator or, if the administrator is a pension

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

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

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

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

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

194 This was the case for Indalex. As an employer-administrator, Indalex acted through its board of directors and so it was that body which owed fiduciary duties to the plan members. The board of directors also owed a fiduciary duty to the company to act in its best interests: *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 122(1)(a); *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, at para. 36. In deciding what is in the best interests of the corporation, a board may look to the interests of shareholders, employees, creditors and others. But where those interests are not aligned or may conflict, it is for the directors, acting lawfully and through the exercise of business judgment, to decide what is in the overall best interests of the corporation. Thus, the board of Indalex, as an employer-administrator, could not always act exclusively in the interests of the plan beneficiaries; it also owed duties to Indalex as a corporation.

(c) *Breaches of Fiduciary Duty*

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

(i) Conflict of Interest

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

arises?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

208 This provision was renumbered but not substantially changed when the Act was amended in

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

209 This is not to say, however, that *ex parte* initial orders will always be required or acceptable. Without attempting to be exhaustive or to express any final view on these issues, I simply note that there have been at least three ways in which courts have mitigated the possible negative effect on creditors of making orders without notice to potentially affected parties. First, courts have been reluctant to grant *ex parte* orders where the situation of the debtor company is not urgent. In *Rescue!*, Janis Sarra explains that courts are increasingly expecting applicants to have given notice before applying for a stay under the *CCAA*: p. 55. An example is *Marine Drive Properties Ltd., Re*, 2009 BCSC 145, 52 C.B.R. (5th) 47, a case in which Butler J. held that "[i]nitial applications in *CCAA* proceedings should not be brought without notice merely because it is an application under that Act. The material before the court must be sufficient to indicate an emergent situation": para. 27. Second, courts have included "come-back" clauses in their initial orders so that parties could return to court at a later date to seek to set aside some or all of the order: *Rescue!*, at p. 55. Note that such a clause was included in the initial order by Morawetz J.: para. 46. Finally, courts have limited their initial orders to the issues that need to be resolved immediately and have left other issues to be resolved after all interested parties have been given notice. Thus, in *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169, Morawetz J. limited the initial *CCAA* order so that priorities were only granted over the party that had been given notice. The discussion of suspending special payments or granting creditors priority over pension beneficiaries was left to a later date, after the parties that would be affected had been given notice. A similar approach was taken in the case of *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6459 (CanLII). In his initial *CCAA* order, Gascon J. put off the decision regarding the suspension of past service contributions or special payments to the pension plans in question until the parties likely to be affected could be advised of the applicant's request: para. 7.

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

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

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

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

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

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

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

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

218 Given their expertise and their knowledge of particular cases, *CCAA* judges are well placed to decide how best to ensure that the interests of the plan beneficiaries are fully represented in the context of "real-time" litigation under the *CCAA*. Knowing of the conflict, a *CCAA* judge might consider it appropriate to appoint an independent administrator or independent counsel as *amicus curiae* on terms appropriate to the particular case. Indeed, there have been cases in which representative counsel have been appointed to represent tort claimants, clients, pensioners and non-unionized employees in *CCAA* proceedings on terms determined by the judge: *Rescue!*, at p. 278; see, e.g., *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299 (CanLII); *Nortel Networks Corp., Re*, (2009), 75 C.C.P.B. 206 (Ont. S.C.J.). In other circumstances, a *CCAA* judge might find that it is feasible to give notice directly to the pension beneficiaries. In my view, notice, though desirable, may not always be feasible and decisions on such matters should be left to the judicial discretion of the *CCAA* judge. Alternatively, the judge might consider limiting draws on the DIP facility until notice can be given to the beneficiaries: *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Ct. J. (Gen. Div.)), at para. 24. Ultimately, the appropriate response or combination of responses should be left to the discretion of the *CCAA* judge in a particular case. The point, as well expressed by the Court of Appeal, is that the insolvent corporation which is also a pension plan administrator cannot "simply ignore its obligations as the Plans' administrator once it decided to seek *CCAA* protection": para. 132.

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

(iii) The Bankruptcy Motion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a constructive trust to be awarded:

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

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

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

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

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

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

237 I would add only two further comments with respect to the constructive trust. A major concern of

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

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

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

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

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

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

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

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

(1) Introduction

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

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

para. 7.

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

246 USW sought an order for payment of its costs from the fund of the salaried plan. However, the Court of Appeal declined to make such an order because the USW was in a "materially different position" than that of the former executives: costs endorsement, at para. 3. The latter were beneficiaries to the pension fund (14 of the 17 members of the plan), and they consented to the payment of costs from their individual benefit entitlements. Those who had not consented would not be affected by the payment. In contrast, the USW was the bargaining agent (not the beneficiary) for only 7 of the 169 beneficiaries of the salaried plan, none of whom was given notice of, or consented to, the payment of legal costs from the salaried plan. Moreover, the USW sought and seeks an order that its costs be paid out of the fund. This request is significantly different than the order made in favour of the former executives. The former executives explicitly ensured that their choice to pursue the litigation would not put at risk the pension benefits of those members who did not retain counsel even though of course those members would benefit in the event the litigation was successful. The USW is not proposing to insulate the 162 members whom it does not represent from the risk of litigation; it seeks an order requiring all members to share the risk of the litigation even though it represents only 7 of the 169. The proposition advanced by the USW was thus materially different from that advanced on behalf of the executive plan and approved by the court.

(2) Standard of Review

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

(3) Analysis

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

249 The premise of the USW's appeal appears to be that it was entitled to costs because it met what it refers to in its submissions as the Costs Payment Test and that if the executive plan members got their

costs out of their pension fund, the union should get its costs out of the salaried employees' pension fund. Respectfully, I do not accept the validity of either premise.

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

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

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

253 The litigation undertaken here raised novel points of law with all of the uncertainty and risk inherent in such an undertaking. The Court of Appeal in essence decided that the USW, representing only 7 of 169 members of the plan, should not without consultation be able to in effect impose the risks of that litigation on all of the plan members, the vast majority of whom were not union members. Whatever arguments might be raised against the Court of Appeal's decision in light of the success of the litigation and the sharing by all plan members of the benefits, the failure of the litigation seems to me to leave no basis to impose the cost consequences of taking that risk on all of the plan members of an already underfunded plan.

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

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

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

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

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

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

IV. Disposition

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

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

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

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

The reasons of LeBel and Abella JJ. were delivered by

LeBEL J. (dissenting):--

I. Introduction

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

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

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

federal paramountcy doctrine. I also agree that the costs appeal of the United Steelworkers should be dismissed.

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

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

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

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

269 Indalex was in a conflict of interest from the moment it started to contemplate putting itself under the protection of the *CCAA* and proposing an arrangement to its creditors. From the corporate perspective, one could hardly find fault with such a decision. It was a business decision. But the trouble is that at the same time, Indalex was a fiduciary in relation to the members and retirees of its pension plans. The "two hats" analogy offers no defence to Indalex. It could not switch off the fiduciary relationship at will when it conflicted with its business obligations or decisions. Throughout the arrangement process and until it was replaced by an independent administrator (Morneau Shepell Ltd.) it remained a fiduciary.

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

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

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

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

subsequently appointed administrator of the plan, aptly sums up the behaviour of Indalex and the Monitor towards the beneficiaries, whose representations were always deemed to be either premature or late:

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

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

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

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

III. Procedural Fairness in CCAA Proceedings

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

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

IV. Imposing a Constructive Trust

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

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

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

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

* * * * *

APPENDIX

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

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

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

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

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

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

21... .

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

...

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

...

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

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

(b) the amount has been kept separate and apart by the employer,

and the members have a lien upon the assets of the employer in such amount that in the ordinary course of business would be entered into the books of account whether so entered or not.

(4) For the purpose of determining the amount deemed to be held in trust under subsection (3) on a specific date, the calculation shall be made as if the plan had been wound up on that date.

...

32. In addition to any amounts the employer is liable to pay under subsection 21 (2), where a defined benefit pension plan is terminated or wound up or the plan is amended so that it is no longer a defined benefit pension plan, the employer is liable to the plan for the difference between,

(a) the value of the assets of the plan; and

(b) the value of pension benefits guaranteed under subsection 31 (1) and any other

pension benefit vested under the terms of the plan,

and the employer shall make payments to the insurer, trustee or administrator of the pension plan to fund the amount owing in such manner as is prescribed by regulation.

Pension Benefits Amendment Act, 1983, S.O. 1983, c. 2

2. Subsection 21 (2) of the said Act is repealed and the following substituted therefor:

(2) Upon the termination or winding up of a registered pension plan, the employer of employees covered by the pension plan shall pay to the administrator, insurer or trustee of the pension plan,

(a) an amount equal to,

- (i) the current service cost, and
- (ii) the special payments prescribed by the regulations,

that have accrued to and including the date of the termination or winding up but under the terms of the pension plan or the regulations, are not due on that date; and

(b) all other payments that, by the terms of the pension plan or the regulations, are due from the employer to the pension plan but have not been paid at the date of the termination or winding up.

(2a) For the purposes of clause (2) (a), the current service cost and special payments shall be deemed to accrue on a daily basis.

3. Section 23 of the said Act is repealed and the following substituted therefor:

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

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

(3) The administrator or trustee of the pension plan has a lien and charge upon the assets of the employer in an amount equal to the amount that is deemed to be held in trust under subsection (1).

(4) An employer who is required by a pension plan to contribute to the pension plan shall be deemed to hold in trust for the members of the pension plan an amount of money equal to the total of,

- (a) all moneys that the employer is required to pay into the pension plan to meet,
 - (i) the current service cost, and
 - (ii) the special payments prescribed by the regulations,

that are due under the pension plan or the regulations and have not been paid into the pension plan; and

(b) where the pension plan is terminated or wound up, any other money that the

employer is liable to pay under clause 21 (2) (a).

(5) The administrator or trustee of the pension plan has a lien and charge upon the assets of the employer in an amount equal to the amount that is deemed to be held in trust under subsection (4).

(6) Subsections (1) and (4) apply whether or not the moneys mentioned in those subsections are kept separate and apart from other money.

...

8. Sections 32 and 33 of the said Act are repealed and the following substituted therefor:

32. -- (1) The employer of employees who are members of a defined benefit pension plan that the employer is bound by or to which the employer is a party and that is partly or wholly wound up shall pay to the administrator, insurer or trustee of the plan an amount of money equal to the amount by which the value of the pension benefits guaranteed by section 31 plus the value of the pension benefits vested under the defined benefit pension plan exceeds the value of the assets of the plan allocated in accordance with the regulations for payment of pension benefits accrued with respect to service in Ontario.

(2) The amount that the employer is required to pay under subsection (1) is in addition to the amounts that the employer is liable to pay under subsection 21 (2).

(3) The employer shall pay the amount required under subsection (1) to the administrator, insurer or trustee of the defined benefit pension plan in the manner prescribed by the regulations.

Pension Benefits Act, 1987, S.O. 1987, c. 35

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

...

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

(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

...

59. -- (1) Money that an employer is required to pay into a pension fund accrues on a daily basis.

(2) Interest on contributions shall be calculated and credited at a rate not less than the prescribed rates and in accordance with prescribed requirements.

...

75. -- (1) A member in Ontario of a pension plan whose combination of age plus years of

continuous employment or membership in the pension plan equals at least fifty-five, at the effective date of the wind up of the pension plan in whole or in part, has the right to receive,

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

...

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

- (a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and
- (b) an amount equal to the amount by which,
 - (i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Commission declares that the Guarantee Fund applies to the pension plan,
 - (ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and
 - (iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 40 (3) (50 per cent rule) and section 75,

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

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

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

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

- (ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the activating event had not occurred and if the member's membership continued to that date; or
- (c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the activating event had not occurred and if the member's membership continued to that date.

(2) [Part year] In determining the combination of age plus employment or membership, one-twelfth credit shall be given for each month of age and for each month of continuous employment or membership on the effective date of the activating event.

(3) [Member for 10 years] Bridging benefits offered under the pension plan to which a member would be entitled if the activating event had not occurred and if his or her membership were continued shall be included in calculating the pension benefit under subsection (1.3) of a person who has at least 10 years of continuous employment with the employer or has been a member of the pension plan for at least 10 years.

(4) [Prorated bridging benefit] For the purposes of subsection (3), if the bridging benefit offered under the pension plan is not related to periods of employment or membership in the pension plan, the bridging benefit shall be prorated by the ratio that the member's actual period of employment bears to the period of employment that the member would have to the earliest date on which the member would be entitled to payment of pension benefits and a full bridging benefit under the pension plan if the activating event had not occurred.

(5) [Notice of termination of employment] Membership in a pension plan that is wound up includes the period of notice of termination of employment required under Part XV of the *Employment Standards Act, 2000*.

(6) [Application of subs. (5)] Subsection (5) does not apply for the purpose of calculating the amount of a pension benefit of a member who is required to make contributions to the pension fund unless the member makes the contributions in respect of the period of notice of termination of employment.

(7) [Consent of employer] For the purposes of this section, where the consent of an employer is an eligibility requirement for entitlement to receive an ancillary benefit, the employer shall be deemed to have given the consent.

(7.1) [Consent of administrator, jointly sponsored pension plans] For the purposes of this section, where the consent of the administrator of a jointly sponsored pension plan is an eligibility requirement for entitlement to receive an ancillary benefit, the administrator shall be deemed to have given the consent.

(8) [Use in calculating pension benefit] A benefit described in clause (1.3) (a), (b) or (c) for which a member has met all eligibility requirements under this section shall be included in calculating the member's pension benefit or the commuted value of the pension benefit.

...

75. (1) [Liability of employer on wind up] Where a pension plan is wound up, the employer shall pay into the pension fund,

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

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

Appeals of Sun Indalex Finance, George L. Miller and FTI Consulting allowed, LEBEL and ABELLA JJ. dissenting. Appeal of USW dismissed.

Solicitors:

Solicitors for the appellant Sun Indalex Finance, LLC: Goodmans, Toronto.

Solicitors for the appellant George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors: Chaitons, Toronto.

Solicitors for the appellant FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited: Stikeman Elliott, Toronto.

Solicitors for the appellant/respondent United Steelworkers: Sack Goldblatt Mitchell, Toronto.

Solicitors for the respondents Keith Carruthers, et al.: Koskie Minsky, Toronto.

Solicitors for the respondent Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership): Cavalluzzo Hayes Shilton McIntyre & Cornish, Toronto.

Solicitor for the respondent/intervener the Superintendent of Financial Services: Attorney General of Ontario, Toronto.

Solicitors for the intervener the Insolvency Institute of Canada: Thornton Grout Finnigan, Toronto.

Solicitors for the intervener the Canadian Labour Congress: Sack Goldblatt Mitchell, Toronto.

Solicitors for the intervener the Canadian Federation of Pensioners: Paliare, Roland, Rosenberg, Rothstein, Toronto.

Solicitors for the intervener the Canadian Association of Insolvency and Restructuring Professionals: McMillan, Montréal.

Solicitors for the intervener the Canadian Bankers Association: Osler, Hoskin & Harcourt, Toronto.

CITATION: G.E. Canada v. Northern Sawmills, 2012 ONSC 6664
COURT FILE NO.: CV10-9042-00CL
DATE: 20121126

**SUPERIOR COURT OF JUSTICE - ONTARIO
COMMERCIAL LIST**

RE: G.E. CANADA EQUIPMENT FINANCING G.P., Applicant

NORTHERN SAWILLS INC., Respondent

APPLICATION UNDER SECTION 243(1) OF THE BANKRUPTCY AND
INSOLVENCY ACT, R.S.C. 1985 c. C-36 and SECTION 101 OF THE
COURTS OF JUSTICE ACT, R.S.O. 1990, c. C.43

BEFORE: Justice Newbould

COUNSEL: Mary Paterson, for the Receiver PricewaterhouseCoopers Inc.
Elizabeth Pillon and Maria Konyukhova, for G.E. Canada Equipment
Financing G.P.
Kristina Desimini, for Lucky Star Holdings Inc.
Stuart Brotman, for Morneau Shepell Ltd
Mark E. Bailey, for the Financial Services Commission of Ontario

DATE HEARD: November 19, 2012

ENDORSEMENT

[1] PwC was appointed as Receiver over the assets of Northern Sawmills Inc. in January 2011. It has completed a sale process and liquidated substantially all of the Northern assets. Once certain disputes are resolved, the Receiver will be able to finalize its distributions to the secured lenders. The Receiver brings this motion seeking (1) advice and direction to resolve disputes that are delaying finalizing distributions, (2) an order authorizing the Receiver to make certain distributions, and (3) an order approving its activities and its accounts and disbursements and those of its counsel.

[2] A total of \$1,623,614 is available for distribution by the Receiver. Of this amount, and in accordance with the Receiver's Charge as provided in the initial receivership order and a prior

arrangement with Morneau, the costs of the Receiver are to rank in priority to all other charges and claims. The balance of the proceeds, less property taxes to be paid, total \$498,181.20.

[3] The issue is what reserves are required for normal cost and wind-up deficiencies in Northern's Hourly and Salaried Plans. Morneau Shepell Ltd ("Morneau") as Plan Administrator makes two claims: (1) a section 81.6 *Bankruptcy and Insolvency Act* ("BIA") claim and (2) a *Pension Benefit Act* ("PBA") deemed trust claim.

[4] PwC was appointed on January 4, 2011 as receiver pursuant to section 243(1) of the BIA and section 101 of the *Courts of Justice Act* over all the assets, undertakings and properties acquired for or used in relation to a business carried on by Northern, including all proceeds thereof.

[5] At the initial hearing, the Receiver was authorized and directed to conduct a sales process in respect of the Northern property. The Northern property was sold by way of a liquidation sale/auction in respect of personal property and an agreement of purchase and sale in respect of the real property. The Receiver has liquidated virtually all of the Northern property. The proceeds will not satisfy Northern's obligations to its secured creditors, who will suffer a shortfall. GE is the largest secured creditor.

[6] The Northern assets are subject to two charges ranking ahead of the secured lenders, being a Receiver's charge and a tax liability to Thunder Bay in the amount of \$157,864 undertaken to be paid in the sale of the realty. Northern has obligations to four secured lenders: GE, Royal Bank of Canada, Lucky Star Holdings Inc. and Buchanan Sales Inc.

Northern pension plans

[7] Northern was the employer under, and the administrator of, two defined benefit pension plans:

- i) a Retirement Plan for Employees of Northern (the "Hourly Plan"); and
- ii) a Retirement Plan for Salaried Employees of Northern (the "Salaried Plan").

[8] Unionized and non-unionized employees of Northern participated in the Hourly Plan prior to June 1, 2007. In February 2008, Northern filed amendments to the Hourly Plan with the Superintendent under the PBA seeking to cease participation of the non-unionized employees in the Hourly Plan effective June 1, 2007. Subsequently, on March 3, 2008, Northern filed documents with the Superintendent requesting the establishment of the Salaried Plan to be effective June 1, 2007.

[9] In the fall of 2008, Northern idled its operations and virtually all of its employees were laid off.

[10] In March 2010, the Superintendent issued notices of proposal giving notice that he intended to wind up the Hourly Plan and refuse to register the Salaried Plan.

[11] On September 2, 2010, the Superintendent ordered that:

(a) the Hourly Plan be wound-up with a wind-up date of January 1, 2008; and

(b) the Salaried Plan's registration be revoked, which operated to terminate the Salaried Plan as of a date to be specified by the Superintendent. The Superintendent has not yet specified the date.

[12] It would seem logical that the Superintendent could not revoke the registration of the Salaried Plan that had not been registered, but all counsel, including counsel for the Financial Services Commission of Ontario (FSCO), agreed that for the purposes of the PBA, revocation of a registered plan and a refusal to register a plan have the same effect.

[13] The Receiver was appointed on January 4, 2011, several months after the Superintendent made his orders in relation to the Hourly and Salaried Plans. The January 4, 2011 order also approved the proposed Sale Process.

[14] Morneau was appointed Administrator of the Hourly Plan on March 11, 2011 and Administrator of the Salaried Plan several months later on August 3, 2011.

Morneau recommendations

[15] In March 2011, the Superintendent sought Morneau's submissions on: (a) whether there were contribution arrears for the Hourly Plan relating to periods before and after the wind up date for the Hourly Plan; and (b) what date should be used as the termination date of the Salaried Plan.

[16] In response to the first question, on July 6, 2011 Morneau advised that if January 1, 2008, is the wind-up date, it had determined that there were no unpaid normal cost contributions with respect to the period prior to January 2008 for Hourly members. Morneau has since confirmed that there were no unpaid normal cost contributions for the period before January 2008 in relation to the Hourly Plan.

[17] In response to the second question, Morneau did not answer the question directly but rather made the preliminary suggestion that FSCO should approve a transfer of the assets in the Salaried Plan to the Hourly Plan.

[18] On November 7, 2011, Morneau's counsel wrote to the Receiver advising that Morneau intended to recommend to the Superintendent that the Hourly Plan and the Salaried Plan be treated as one plan and that the wind up date be November 16, 2010. Based on Morneau's initial calculations, if these two changes were made i.e., merging the Salaried Plan into the Hourly Plan and changing the wind up date for the Hourly Plan, normal cost arrears would be \$335,777. Morneau also sought interest in the amount of \$39,780 calculated to January 3, 2011, the day before the Receiver was appointed.

[19] Morneau also alleged that sections 57(4) and 57(5) of the PBA established a deemed trust and lien over all of the Northern assets for any wind-up deficiency under both Plans. Morneau alleged that, if the Salaried Plan was merged into the Hourly Plan in accordance with its Recommendation, the wind-up deficiency would be more than \$12 million.

[20] On November 18, 2011, Morneau made submissions to the Insolvency Coordinator at FSCO, recommending that (1) the Superintendent issue a Notice of Intended Decision to revise

the wind up date of the Hourly Plan from January 1, 2008 to November 16, 2010; and (2) the Salaried Plan be merged into the Hourly Plan.

[21] On November 29, 2011, the Insolvency Coordinator at FSCO asked the Receiver and GE to make submissions on the Morneau Recommendation.

[22] On September 6, 2012, both GE and the Receiver made submissions to the Superintendent regarding the Morneau recommendations. They noted that if the Superintendent was to issue an order changing the wind up date for the Hourly Plan, such action could be a "proceeding" that was stayed by the receivership order. They also contended that the Superintendent had no jurisdiction under the PBA to change the wind up date for the Hourly Plan. The Superintendent has not taken any steps since GE and the Receiver made their submissions.

[23] On October 22, 2012, the Receiver asked Morneau for additional information to assist in quantifying any unpaid normal cost if the status quo was maintained. On November 6, 2012, Morneau confirmed that there was no normal cost deficiency with respect to the Hourly Plan and advised that, assuming the Salaried Plan was given a termination date of November 16, 2010, there was a normal cost deficiency in the amount of \$147,732, which included \$12,117 in interest. The Receiver does not yet have sufficient information to confirm this number.

[24] The amount of the claims asserted by Morneau on this motion depends in part on whether the wind up date for the Hourly Plan can be changed from January 1, 2008 to the date recommended by Morneau of November 16, 2010.

Issues

1. Stay of proceedings

[25] The Receiver, supported by PwC, take the position that the stay contained in the initial receivership order prevents the attempt by Morneau to have the Superintendent change the wind up date for the Hourly Plan and that no leave should be given to lift the stay for that purpose. They do not take the position that the stay prevents the Superintendent from determining the

wind up date of the Salaried Plan or from considering the merger of the Salaried Plan into the Hourly Plan.

[26] Morneau takes the position that the stay does not cover what it is asking the Superintendent to do and that if it does, leave should be given to lift the stay for that purpose. The Superintendent supports the position of Morneau insofar as the “issues” before the Superintendent are not stayed. What those issues are is not spelled out in the factum of the Superintendent, i.e. whether what is properly before the Superintendent includes the recommendation of Morneau to change the wind up date for the Hourly Plan.

[27] The stay of proceedings in the Receivership order is as follows:

NO PROCEEDINGS AGAINST THE RECEIVER

7. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a “Proceeding”), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY

8. THIS COURT ORDERS that no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

9. THIS COURT ORDERS that all rights and remedies against the Debtor, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, ...

[28] Paragraph 7 stays a proceeding in a court or tribunal. The regulatory process in question is not in a court or tribunal and thus paragraph 7 is not applicable.

[29] Paragraph 8 stays a Proceeding against or in respect of Northern or its property, which includes the proceeds of that property. Morneau says that a Proceeding is only one in a court or

tribunal because it is so defined in paragraph 7 of the order. Paragraph 9 stays any remedies “affecting” the property of Northern. The Receiver and PwC contend that changing the wind up date of the Hourly Plan would affect the property, being the proceeds of the sale of Northern assets. Morneau contends that it would not affect the property, but only determine the claims against it.

[30] I do not think that it can be said that Proceedings in paragraph 8 are limited to proceedings in a court or tribunal. It is the case that paragraph 7 states that a process in a court or tribunal is a Proceeding, but that paragraph does not define a Proceeding or purport to limit a Proceeding to a process in a court or tribunal. It merely states that a court or tribunal process is a Proceeding.

[31] This reading of the stay provisions is supported by the decision in *Re Nortel Networks Limited* (2010), 65 C.B.R. (5th) 231 (Comm. List); aff’d (2010), 67 C.B.R. (5th) 19 (Ont. C.A.). In that case a stay provision in an initial CCAA order containing the same language as the stay in this case was held by Morawetz J. to prevent warning notices given by the U.K. Pensions Regulator to various Nortel entities. The process by the U.K. regulator was not a court or tribunal process. Morawetz J. referred to authorities that broadly interpreted the word “proceedings” to cover both judicial and extra-judicial proceedings. His decision was upheld by the Court of Appeal.

[32] Morneau refers to the recent legislative changes to the BIA and CCAA that prevent stays in proceedings under those statutes from affecting a regulatory body’s investigations or a proceeding by or before a regulatory body. I am dealing however with a term of a court order that contains different language and cannot ignore that language.

[33] In my view, the process whereby the Superintendent is being asked to change the wind up date for the Hourly Plan is stayed by paragraphs 8 and 9 the receivership order. The process sought by Morneau to be undertaken is a proceeding in respect of Northern or its property, and thus is caught by section 8 of the order. It is also a remedy affecting the property of Northern, and is thus caught by section 9 of the order.

[34] In considering whether the stay should be lifted, a court is to consider the totality of the circumstances and the relative prejudice to both sides. See Houlden, Morawetz and Sarra, *The 2012-2013 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2012) at L5, p. 993. See also *General Motors Corp. v. Tiercon Industries Inc.* [2005] O.J. No. 3750 per Hoy. J. (as she then was). A court may order that a stay be lifted if satisfied that a party seeking leave is likely to be materially prejudiced by the stay or there are other equitable grounds on which to justify lifting the stay. See *Village Green Lifestyle Community Corp., Re*, [2007] 27 C.B.R. (5th) 199 at para. 13 per Pepall J. (as she then was).

[35] In considering an application for leave to lift a stay under the BIA, it has been held that there is no requirement to establish a *prima facie* case but an applicant must establish that there are sound reasons to relieve against the stay. See *Re Ma* (2001), 24 C.B.R. (4th) 68 (Ont. C.A.). I think the principle can safely be applied to a stay in a receivership order. However, in *Re Ma*, it was stated that if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay.

[36] I see no purpose in lifting the stay to permit consideration by the Superintendent to change the wind up date of the Hourly Plan. The Hourly Plan was wound up at the initiation of the Superintendent with a wind up date of January 1, 2008. This was a final order. It is conceded by counsel for the Superintendent that there is no authority in the PBA permitting the Superintendent to reconsider the wind up date of the Hourly Plan.

[37] The position of the Receiver and GE is that the Superintendent is *functus officio* with respect to the wind up date of the Hourly Plan.

[38] Morneau takes the position that with an administrative proceeding, a court has discretion to reopen the proceeding, and relies on *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848. I do not think the case is of assistance to Morneau. In that case, Sopinka J. for the majority stated the following:

21. To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision

was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.

22. Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. (Underlining added)

[39] Morneau and the Superintendent concede that there are no indications in the PBA that the decision of the Superintendent in question can be reopened. Thus the exception to the principle of *functus officio* enunciated by Sopinka J. has no application.

[40] I also see substantial prejudice to GE if the stay were lifted. At the time the receivership action was commenced in January, 2011, the Hourly Plan had been wound up on the initiation of the Superintendent and the wind up date of January 1, 2008 was set by a final order. The Salaried Plan had been refused or revoked. In correspondence on February 9, 2011 and July 6, 2011 FSCO confirmed that the wind up date of the Hourly Plan was January 1, 2008. Sales proceedings had been initiated, approved by the Court and implemented by the Receiver, on notice to FSCO and Morneau. The sales and receivership proceedings were funded by GE and it and other stakeholders participating in the receivership proceedings incurred costs in pursuing their claims with expectations of recovery. Only in November 2011, some ten months after the initiation of the Receivership, did Morneau seek to implement a new wind up date and merge the Plans, the result of which if successful would be to alter existing priorities and negatively affect GE and other secured creditors of the Northern estate. By this time, the vast majority of the costs associated with this receivership had been incurred and paid out of the proceeds or directly by GE.

[41] In these circumstances, I agree with the Receiver that given the fact that GE relied on the status quo in seeking to appoint the Receiver and the fact that Morneau raised and quantified its claims after the Receiver had incurred the majority of the expenses associated with the estate, it is not equitable to lift the stay and permit Morneau to seek priority over the secured creditors or

to permit the Superintendent to revise his final order in a manner that increases Morneau's claim at the direct expense of the other secured creditors.

[42] I would also note that even if there had been no stay, the proceedings sought to be initiated by Morneau would be futile as the Superintendent has no power to change the wind up date of the Hourly Plan. No attempt is made by the Receiver or GE to prevent the Superintendent from carrying out his obligation to set a wind-up date for the Salaried Plan or to consider merging the Salaried Plan into the Hourly Plan. Thus I see no prejudice to the Superintendent.

2. Section 81.6 BIA claim

[43] Section 81.6 of the BIA grants a limited super-priority with respect to "normal costs" owed to a pension plan. Under section 81.6(2), claims for payment of normal costs rank ahead of the claims of secured creditors. Normal costs are defined in section 81.6(c)(i).

[44] Morneau has confirmed that if the wind up date remains the same, then there are no unpaid normal costs in relation to the Hourly Plan. As I have held that the wind up date is to remain, no reserve is required for the Hourly Plan.

[45] The Superintendent revoked the registration of the Salaried Plan by an order made under section 18(1)(b) of the PBA. That order operates to terminate the Salaried Plan as of a date specified by the Superintendent. The Superintendent has not yet specified a termination date for the Salaried Plan. Based on information provided by Morneau, it appears that the latest possible termination date is November 16, 2010 because that appears to be the last date of employment for an employee who participated in the Salaried Plan.

[46] Morneau claims that there is a normal cost deficit of \$147,732 including interest in the Salaried Plan using a termination date of November 16, 2010. The Receiver does not have sufficient information to confirm this figure. However the Receiver is agreeable to holding back this amount until the figure has been confirmed.

[47] If the wind up date of the Hourly Plan were changed to November 16, 2010 and the Salaried Plan merged into the Hourly Plan with that changed wind up date, Morneau calculates

the normal cost claim under section 81.6 of the PBA to be \$383,646 inclusive of interest to November 19, 2012, and for the purposes of this motion asserts a priority claim in the amount of \$383,646 plus interest to the date of payment. Counsel for the Receiver in argument said that if it was open to change the wind up date, the Receiver was prepared to hold back this amount of \$383,646.

[48] In view of the fact that the wind up date for the Hourly Plan cannot be changed, the amount of the holdback agreed to by the Receiver for the Salaried Plan of \$147,732 is sufficient for the section 81.6 Salaried Plan claim. I assume it will be held in an interest bearing account so that if that amount is to be eventually paid, there will be interest on that money available.

[49] During the argument on this motion, GE contended that because the Salaried Plan had never been registered by the Superintendent and because it had never been registered under the *Income Tax Act*, it was a retirement compensation arrangement as defined in section 248(2) of the *Income Tax Act* and therefore exempt by virtue of section 47(3) 5. of PBA regulation 909 from the application of the PBA. Therefore, GE contends, there can be no section 81.6 claim regarding the Salaried Plan and there should be no holdback by the Receiver.

[50] This argument was not included in the GE factum and counsel for Morneau and for the Superintendent said they would want time to consider it before responding to it. In the circumstances, the order I make is that there should be a holdback of \$147,732 as undertaken by the Receiver but if GE wishes to pursue the point, a motion can be brought by GE requesting that the holdback be terminated and Morneau and the Superintendent will then be able to deal with the point.

3. PBA deemed trust claim

[51] Morneau alleges that special payment deficits as well as a wind-up deficit of \$12,384,000 exists, assuming the Plans are merged, and claims this amount which is substantially more than the assets available for distribution. Morneau's calculation assumes that the Superintendent decides to follow Morneau's recommendations and merge the Salaried Plan into the Hourly Plan and change the wind up date for the Hourly Plan from January 1, 2008 to November 16, 2010.

[62] On October 27, 2011, Morneau confirmed to the Receiver in writing that Morneau would not assert a priority of the claims pursuant to the PBA or the BIA over the costs of the receivership proceedings, including amounts subject to the Receiver's Charge and the Receiver's Borrowings Charge. The letter stated that the confirmation represented a concession to achieve a commercial resolution in the circumstances that does not prejudice the position of any party with respect to the priority of the PBA Claims or the BIA Claims relative to other claims. One of its terms was that the Receiver would obtain court approval of its fees and disbursements and those of its counsel in accordance with the receivership order and that Morneau would have the right to oppose any request for approval.

[63] Morneau takes the position that in raising the stay issue and seeking to distribute all the amounts the Receiver thinks is owing rather than protecting the pension claimants, the Receiver has not acted properly and has breached its fiduciary duties.

[64] I do not agree with Morneau's assertions. The Receiver owed a duty as a court officer to take into account the interests of all stakeholders, including the secured creditors, and not just the pension claimants who would benefit from the pension claims asserted by Morneau. If the Receiver thought the claims of Morneau were not correct, it was entitled to raise that in its motion for directions, and even if the Receiver were not successful in the positions it took, that would not mean that it acted improperly.

[65] In this case, the Receiver readily agreed to hold back the amount of the section 81.6 claim as determined by the Court, which depended on the issue of the change of the wind up date for the Hourly Plan. It objected to any other holdback for the pension claims asserted by Morneau as it took the position that there were no other legitimate claims. I see nothing improper in that that would require its fees to be reduced.

[66] Morneau claims that the regulatory process in this case was developed by the Superintendent in consultation with the Receiver and that the Receiver should not have sat back with its position that the stay provisions of the receivership order prevented an attempt to change the wind up date for the Hourly Plan. I do not agree. First, everyone including the Superintendent was represented by counsel, and there is no reason why the Receiver was the person to advise

interested parties what the stay provisions meant. More importantly, it was only in November, 2011 that Morneau took the position that the wind up date for the Hourly plan should be changed. Prior to that, the Superintendent had not suggested looking at any change. By the time that Morneau took its position on the claims in November, 2011, the bulk of the Receiver's fees and those of its counsel had been incurred. It was at that stage that Morneau agreed to subordinate any pension claims to the Receiver's past and future receivership cost. While the Receiver could have provided a more timely response, I would not see that as a basis for reducing its fees.

[67] I have reviewed the Receiver's fees and disbursements and those of its counsel. They appear appropriate. No one has questioned the time spent or the hourly charges.

[68] In the circumstances, the activities of the Receiver in its Fifth Report and in its Supplement to its Fifth Report are approved, as are its fees and disbursements and those of its counsel.

Conclusion

[69] The Receiver may make distributions in accordance with the distribution schedule in paragraph 5 of its Supplement to its Fifth Report, which incorporates a holdback of \$147,732 for the potential section 81.6 PBA claim. The cross-motion of Morneau is dismissed.

[70] If any party claims costs, and they cannot be agreed, brief written submissions may be made within 10 days, along with a cost outline, and brief written reply submissions may be made within a further 10 days.

Newbould J.

DATE: November 26, 2012

Case Name:
Collins & Aikman Automotive Canada Inc. (Re)

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

[2007] O.J. No. 4186

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

63 C.C.P.B. 125

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

2007 CanLII 45908

2007 CarswellOnt 7014

Court File No. 07-CL-7105

Ontario Superior Court of Justice

J.M. Spence J.

Heard: September 20 and 26, 2007.

Judgment: October 31, 2007.

(141 paras.)

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

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

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

Statutes, Regulations and Rules Cited:

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

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

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

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

Counsel:

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

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

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

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

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

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

C.J. Hill, for Chrysler LLC.

REASONS FOR DECISION

1 **J.M. SPENCE J.:**-- Each of the three moving parties, the Superintendent of Financial Services, the USW and the CAW - Canada, seeks relief relating to the Initial Order made by this Court under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") on July 19, 2007 (the "Initial Order") with respect to Collins & Aikman Automotive Canada Inc. ("Automotive" or the "Applicant").

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

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

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

The Impugned Provisions of the Initial Order

Paragraph 4

5 Paragraph 4 of the Initial Order provides as follows:

Applicants shall be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "Assistants") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

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

6 The CAW supports the Superintendent and the USW with respect to their submissions in respect

of the above provisions of the Order.

Paragraph 6

7 Paragraph 6 of the Initial Order provides as follows:

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

- (a) all outstanding and future wages, salaries, employee benefits, contributions to pension plans, vacation pay, bonuses and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements ...

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

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

Paragraph 11

10 Paragraph 11 of the Initial Order provides as follows:

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

...

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

...

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

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

11 The Superintendent seeks an order directing the Applicant to make all required employer

contributions to its Pension Plans in accordance with the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the "PBA") and an order amending the Initial Order as is necessary to reflect this relief.

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

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

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

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

16 The Applicant has indicated that monthly special payments for the Pension Plans are approximately \$345,000 as of June 2007. The Superintendent is not in a position to confirm this amount precisely but advises that, owing to the funded position of the Plans it is clear that special payments are required for all the Pension Plans on the basis of the actuarial valuation reports last filed with the FSCO. The requirement to make special payments also applies to two of the Pension Plans which have been wound up, the Gananoque and Stratford Plans, although the special payment requirement arises on an annual rather than a monthly basis.

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

Paragraph 26

18 Paragraph 26 provides as follows:

THIS COURT ORDERS that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the

Business or Property, or any part thereof - or be deemed to have been or become an employer of any of the Applicant's employees.

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

19 The CAW seeks the same order.

Paragraph 29

20 Paragraph 29 provides as follows:

THIS COURT ORDERS that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions on this Order, save and except for any gross negligence or willful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

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

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

The CRO Order

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

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

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

THIS COURT ORDERS that the CRO shall not incur any liability or obligation as a result of the fulfillment of its duties, save and except for any liability or obligation arising from the gross negligence or willful misconduct of the CRO, and no action or other proceedings may be commenced against the CRO relating to its appointment or its conduct as CRO except with the prior leave of this Court obtained on at least seven (7) days' notice to Automotive and the CRO and provided further that any liability of the CRO hereunder shall not in any event exceed the quantum of the fees and disbursements paid to or incurred by the CRO in connection herewith. This last limitation of liability will be effective up until + including Sept. 20/07 + thereafter as directed by the judge hearing the motion on Sept. 20/07.

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

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

Relevant Statutory and Regulatory Provisions

The Companies Creditors Arrangement Act

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

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

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

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

Other than initial application court orders -

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

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

Burden of Proof on Application -

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

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

28 Section 11.3 of the CCAA provides as follows:

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

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

The Pension Benefits Act

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

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

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

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

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

...

 - (e) with respect to any solvency deficiency arising on or after the Regulation

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

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

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

69. (1) In this section,

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

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

Successor employer

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

...

Power of Board to determine whether sale

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

32 Section 116 of the LRA provides as follows:

Board's orders not subject to review

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

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

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

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

The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating *or to otherwise deal with its assets* but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA (citations omitted)

[emphasis added]

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

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

The Paramountcy Argument and the Jurisdiction of the Courts

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

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

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

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

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

Administrative Charge with a super-priority ranking over the claims of the other creditors.

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

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

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

At para 18:

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

Later, at para.32:

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

...

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

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

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

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

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

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

para. 30 In *Royal Oak*, Farley J. also relied on *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*⁶, where the Supreme Court of Canada remarked that there is a limit to the inherent jurisdiction of superior courts and, in the circumstances of that particular case, the Court's inherent jurisdiction should not be applied to override an express statutory provision. At p. 480 the Court wrote the following:

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

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

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

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

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

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

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

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

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

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

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

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

Paramountcy

para. 37 Having established that the Court has a statutory basis to use its inherent jurisdiction in the exercise of a discretion granted under the CCAA, the next

question is whether this jurisdiction can be used to override an express provincial statutory provision, in this case s. 32 of the BLA.

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

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

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

Jurisdiction

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

[32] The CCAA is remedial legislation and is to be given a liberal interpretation to facilitate its objectives: *Babcock & Wilcox Canada Ltd. (Re)*, [2000] O.J. No. 786, 5 B.L.R. (3d) 75 (S.C.J.), at para. 11. See also, *Chef Ready Foods Ltd. v. Hong Kong Bank of Canada*, [1990] B.C.J. No. 2384, 4 C.B.R.(3d) 311 (C.A.), at p. 320 C.B.R.; *Re Lehndorff General Partners Ltd.*, [1993] O.J. No. 14, 17 C.B.R.(3d) 24 (Gen. Div.). [page 17] Courts have adopted this approach in the past to rely on inherent jurisdiction, or alternatively on the broad jurisdiction under s. 11 of the CCAA, as the source of judicial power in a CCAA proceeding to "fill in the gaps" or to "put flesh on the bones" of that Act: see *Re Dylex Ltd.*, [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div. (Commercial List)), *Royal Oak Mines Inc. (Re)*, [1999] O.J. No. 864, 7 C.B.R. (4th) 293 (Gen. Div. (Commercial List)); and *Westar Mining Ltd. (Re)*, [1992] B.C.J. No. 1360, 70 B.C.L.R. (2d) 6 (S.C.).

[33] It is not necessary, for purposes of this appeal, to determine whether inherent jurisdiction is excluded for all supervisory purposes under the CCAA, by reason of the existence of the statutory discretionary regime provided in that Act. In my opinion, however, the better view is that in carrying out his or her supervisory

functions under the legislation, the judge is not exercising inherent jurisdiction but rather the statutory discretion provided by s. 11 of the CCAA and supplemented by other statutory powers that may be imported into the exercise of the s. 11 discretion from other statutes through s. 20 of the CCAA.

...

[35] ... [I]nherent jurisdiction does not operate where Parliament or the legislature has acted. As Farley J. noted in *Royal Oak Mines*, supra, inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should [page 18] not be brought into play" (para. 4). See also, *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*, [1976] 2 S.C.R. 475, 57 D.L.R. (3d) 1, at p. 480 S.C.R.; *Righttree Inc. (Re)* (2005), 74 O.R. (3d) 174, [2005] O.J. No. 251 (S.C.J.).

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

... the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. ... This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above (See Note 2 at the end of the document), rather than the integrity of their own process.

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

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

[38] I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to control its own process, should the need arise. There is a distinction, however -- difficult as it may be to draw -- between the court's process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the company's process, on the other hand. The court simply supervises the latter [page 19] process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period "on such terms as it may impose" (See Note 3 at the end of the document).

Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it is designed to supervise the company's process, not the court's process.

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

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

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

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

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

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

39 It appears to me that in making the analysis set out in the above paragraphs and coming to the conclusion that it reached, the Court was addressing the need to ensure that the "terms" imposed by the Court under its s. 11 powers to do so are terms that are properly related to the jurisdiction given under s. 11 to the Court to grant stays and the purpose of that jurisdiction under the CCAA. In that regard, the Court did not consider that intervening in the composition of the internal management of the company contrary to the applicable laws in that regard was proper. This conclusion is perhaps

best understood in the context of the earlier discussion in the decision of the nature of the jurisdiction of the Court under s. 11. In particular, the Court emphasized the role of the Court as a supervisory one which is exercised through its ability "to stay, restrain or prohibit proceedings against the company during the plan negotiation period" on such terms as the Court may impose (paragraph 38). It is not apparent how an order removing directors would be inherently or functionally related to the Court's role to provide a protection against legal proceedings which are potentially adverse to the facilitation of "the continuation of the corporation as a viable entity" (paragraph 36, in the quoted passage from the *Skeena* decision).

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

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

42 In view of the reasoning and the decisions in the above cases considered, the Court has a jurisdiction under the CCAA which, in the words of the decision in *Re Sulphur Corp. of Canada Ltd., supra*, at paragraph 37, "can be used to override an express provincial statutory provision" where that would contribute to carrying out the protective function of the CCAA as reflected particularly in the provisions of s. 11 of the CCAA.

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

The Context of the Initial Order and the CRO Order

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

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

46 The Commitment Letter provides:

The Borrower covenants as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

57 Automotive brought a motion to the Court on August 23, 2007 for an Order, inter alia, extending the stay of proceedings and increasing the amount of an amended DIP Facility. The motion was made on notice to the Unions and the Superintendent. The revised Cash Flow approved

by Chrysler and filed with the Court (as a Schedule to the Monitor's Second Report) clearly stated that special payments would not be made and that such payments were not included in the cash flow projections.

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

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

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

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

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

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

The Issues

Paragraph 4

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

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

64 Paragraph 4 is, as it is stated, consistent with the protective function of s. 11 because it effectively restrains proceedings that might otherwise be brought against the Applicant for making

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

Paragraph 6

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

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

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

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

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

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

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

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

Jurisdiction under the CCAA re the Special Payments

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

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

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

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

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

- (a) there shall only be one collective agreement in force between a trade union and an employer;
- (b) the trade union that is a party to the collective agreement is recognized as the exclusive bargaining agent of the employees in the bargaining unit defined therein;

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

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

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

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

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

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

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

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

As discussed above, the relative size of the Canadian problems *vis-a-vis* the

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

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

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

86 It was submitted that the text of the *Jeffrey Mine* decision at paragraph 57 shows that in that case there was no suspension of the special payments obligation in respect of the employees who continued to work in the post-filing period. The phrase in paragraph 57 that is relied on in this regard is that the monitor was authorized to suspend pension contributions "except for employees whose services are retained by the monitor". This phrase is stated in the text to be a translation. The text of the original version of the initial order in *Jeffrey Mine* is set out at paragraph 9 of the decision. Paragraph [22] of the order authorizes the monitor to suspend "contributions to pension plans made by employees other than those kept by the monitor". At paragraphs 10 and 11 of the decision, the text makes clear that, in respect of the pension plan, the monitor advised that the payments that would continue to be paid were the current service payments, which are described as monthly remuneration to the employees to be paid to them by being paid to the plan. Nothing is said there about making any other payments to the plan. Paragraphs 68 and 70 express the Court's rejection of paragraph 16 of the Court's Order of November 29, 2006 which exempted the monitor from the collective agreements. However, paragraphs 54 and 55 of the decision deal with the suspension by the Court of payments to offset actuarial liability, which would seem to be payments in the nature of the special payments that are in issue in the present case. At paragraph 55 the Court gave its opinion that it was within the power of the Superior Court to suspend those payments. The Court of Appeal may have been making a distinction between the powers of the monitor and the Court.

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

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

change in the amounts that were due and the payments that were required to be made as at the time of the CCAA filing, but what that amount might be and how, if at all, it could be attributed materially to the continuing service as opposed to other factors such as plan asset valuation is impossible to determine.

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

Exercise of the Statutory Discretion under the CCAA

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

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

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

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

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

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

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

order being granted at that time to deal with any variations to the Initial Order, this raises a question of whether it is fair to regard the motion now before the Court as a collateral attack on the DIP Approval Order.

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

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

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

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

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

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

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

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

105 If there had been an objection to paragraph 34 of the Initial Order, that might well have occasioned negotiations of this kind, but there was no such objection. As noted, if there had been,

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

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

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

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

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

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

Paragraph 11

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

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

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

114 Reference is made to the discussion set out earlier with respect to the provision in paragraph 4 relating to further hirings. The comments made there are, with appropriate changes, applicable with respect to the issue relating to paragraph 11.

Paragraph 26

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

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

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

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

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

Paragraph 29

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

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

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

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

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

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

...

As Major J. stated in *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3 (CanLII), [2004] 1 S.C.R. 60, 2004 SCC 3:

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

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

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

126 The decision in *T.C.T. Logistics* did not deal with the CCAA. The monitor in that case had been appointed by the Court with a mandate to hire employees and carry on the business, but in the present case the monitor is restricted from hiring any employees and Automotive remains the employer of all of the unionized employees. The statements quoted from the *T.C.T. Logistics*

decision are made in the context of a consideration of the issue whether a bankruptcy court judge can determine successor rights issues relating to the LRA. The immunity given in that case was that no action could be taken against the interim receiver without the leave of the Court.

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

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

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

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

131 For these reasons, paragraph 29 is acceptable.

Paragraph 4 of the CRO Order

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

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

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

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

The [CCAA] is intended to facilitate restructuring to serve the public interest. In many cases such as the present it is necessary for the Court to appoint officers whose expertise is required to fulfill its mandate. It is clearly in the public interest that capable people be willing to accept such assignments. It is to be expected that such acceptance be contingent on protective provisions such as are included in the

order of May 23, 2006, appointing Mr. Duval. It is important that the Court exercise caution in removing such restrictions; otherwise, the ability of the Court to obtain the assistance of needed experts will necessarily be impaired. Qualified professionals will be less willing to accept assignments absent the protection provisions in the appointing order.

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

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

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

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

Conclusion

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

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

J.M. SPENCE J.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. C-36, AS
AMENDED;
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST
PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. AND GRANT
U.S. HOLDINGS G.P.

Court of Appeal File No: C58636
Court of Appeal File No. M42978
Court File No.: CV-09-8247-00CL

Applicants

COURT OF APPEAL FOR ONTARIO
Proceeding commenced at Toronto

RESPONDING BOOK OF
AUTHORITIES OF THE MONITOR

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

David R. Byers LSUC#: 22992W
Tel: (416) 869-5697

Daniel S. Murdoch LSUC#: 53123L
Tel: (416) 869-5529
Fax: (416) 947-0866

Lawyers for the Monitor
Ernst & Young Inc.

Court of Appeal File No. C58636
Court of Appeal File No. M42978
Court File No.: CV-09-824700CL

COURT OF APPEAL FOR ONTARIO

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC.,
GRANT FOREST PRODUCTS SALES INC., and GRANT U.S. HOLDINGS G.P.**

Applicants

- and -

**THE TORONTO-DOMINION BANK, in its capacity as agent for the secured
lenders holding first lien security and THE BANK OF NEW YORK MELLON, in
its capacity as agent for secured lenders holding second lien security**

Respondents

RESPONDING COMPENDIUM OF THE MONITOR

**STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9**

**David R. Byers LSUC#: 22992W
Tel: (416) 869-5697
Daniel S. Murdoch LSUC#: 53123L
Tel: (416) 869-5529
Fax: (416) 947-0866**

Lawyers for the Monitor

TO:

CASSELS BROCK & BLACKWELL LLP

Suite 2100, Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Jane O. Dietrich

Telephone: 416-860-5223
Facsimile: 416-640-3144
E-mail: jdietrich@casselsbrock.com

Lawyers for the Applicants Grant Forest Products Inc.,
Grant Alberta Inc. and Grant Forest Products Sales Inc.

**MINISTRY OF THE ATTORNEY GENERAL FOR THE PROVINCE OF
ONTARIO**

Financial Services Commission of Ontario
Legal Services branch
5160 Yonge St., 17th floor
Toronto, ON M2N 6L9

BORDEN LADNER GERVAIS LLP

40 King Street West, Suite 4400
Toronto, ON M5H 3Y4

Craig J. Hill

Telephone: 416-367-6156
Facsimile: 416-361-7301

Roger Jaipargas

Telephone: 416-367-6266
Facsimile: 416-361-7067

Lawyers for West Face Capital Inc.

OSLER, HOSKIN & HARCOURT LLP

Box 50, 1 First Canadian Place
Toronto, ON M5X 1B8

Alexander Cobb

Telephone: 416-862-5964
Facsimile: 416-862-6666

Lawyers for Mercer (Canada) Limited

BENNETT JONES LLP

One First Canadian Place, Ste. 3400

P.O. Box 130

Toronto, ON M5X 1A4

Richard Swan

Telephone: 416-777-7479

Facsimile: 416-863-1716

Lawyers for Peter Grant Sr.

ERNST AND YOUNG INC.

P.O. Box 251

Ernst & Young Tower

Toronto-Dominion Centre

Toronto, ON M5K 1J7

Alex Morrison

Telephone: 416-941-7743

Facsimile: 416-864-1174

E-mail: alex.morrison@ca.ey.com

Simone Carvalho

Telephone: 416-943-2085

Facsimile: 416-864-1174

E-mail: simone.carvalho@ca.ey.com

Monitor

COURT OF APPEAL FOR ONTARIO

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC.,
GRANT FOREST PRODUCTS SALES INC., and GRANT U.S. HOLDINGS G.P.**

Applicants

- and -

**THE TORONTO-DOMINION BANK, in its capacity as agent for the secured
lenders holding first lien security and THE BANK OF NEW YORK MELLON, in
its capacity as agent for secured lenders holding second lien security**

RESPONDING COMPENDIUM OF THE MONITOR

INDEX

TAB DOCUMENT

1. Transition Order of Justice Campbell, dated September 20, 2013
2. Justice Campbell's Reasons for Decision, dated July 23, 2013
3. Justice Newbould's Initial Order, dated June 25, 2009
4. Justice Campbell's Order dated August 26, 2011
5. Justice Campbell's Order dated September 21, 2011
6. Justice Campbell's Order, dated June 4, 2010



Court File No.: CV-09-8247-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

THE HONOURABLE MR.

JUSTICE CAMPBELL

) FRIDAY, THE 20th DAY OF
)
) SEPTEMBER, 2013

**IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST
PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS GP,
SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT ALLENDALE
LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT EXCLUDED GP**

Applicants

- and -

**THE TORONTO-DOMINION BANK, in its capacity as agent for secured lenders holding
first lien security and THE BANK OF NEW YORK MELLON, in its capacity as agent for
secured lenders holding second lien security**

Respondents

TRANSITION ORDER

THIS MOTION, made by Grant Forest Products Inc. ("GFPI"), Grant Alberta Inc. ("GAI") and Grant Forest Products Sales Inc. ("GFPSI", and together with GFPI and GAI, the "**Remaining Applicants**") for the relief set out in paragraph 1(f) of the Notice of Motion dated June 8, 2012 (the "**June Notice of Motion**"), originally returnable June 25, 2012 and adjourned pursuant to the endorsements of Mr. Justice Campbell made on June 25, 2012, August 27, 2012, September 17, 2012 and October 22, 2012, and **THIS MOTION** made by West Face Long Term Opportunities Limited Partnership, West Face Long Term Opportunities (USA) Limited Partnership, West Face Long Term Opportunities Master Fund L.P. and West Face Long Term

- 2 -

Opportunities Global Master L.P. (together, the **"West Face Funds"**), by their adviser, West Face Capital Inc. (**"WFCI"**) originally returnable on October 22, 2012 and adjourned pursuant to the endorsement of Mr. Justice Campbell made on October 22, 2012 for an Order, inter alia, lifting the stay of proceedings to permit the issuance of an application for a bankruptcy order and a bankruptcy order against GFPI, were heard together on November 27, 2012, with additional submissions heard on July 23, 2013, at 330 University Avenue, Toronto, Ontario.

ON READING the Twenty-Fifth Report to the Court of Ernst & Young Inc. (**"E&Y"**), in its capacity as Court-appointed monitor (the **"Monitor"**), dated June 20, 2012 (the **"Twenty-Fifth Report"**), the Twenty-Sixth Report of the Monitor dated August 22, 2012 (the **"Twenty-Sixth Report"**), the Twenty-Ninth Report of the Monitor dated February 21, 2013, (the **"Twenty-Ninth Report"**), the affidavit of Hap Stephen, sworn June 8, 2012 (the **"Stephen Affidavit"**), the affidavit of Charlie Evans, sworn August 17, 2012, the affidavit of Peter Fraser, sworn October 19, 2012, the Affidavit of Chantal Laurin, sworn April 2, 2013, filed, and the written and oral submissions from counsel for the Remaining Applicants, WFCI, the Monitor, Peter Grant Sr., the Superintendent of Financial Services, and PricewaterhouseCoopers Inc., in its capacity as administrator of (i) the Pension Plan for the Salaried Employees of GFPI - Timmins Plant, Registration Number 1053008 (the **"Timmins Salaried Plan"**) and (ii) the Pension Plan for Executive Employees of GFPI, Registration Number 0992537 (the **"Executive Plan"**) (collectively, in such capacities, the **"Pension Administrator"**) and upon reading the Affidavit of Service of Roger Jaipargas, sworn October 22, 2012, filed.

SERVICE

1. **THIS COURT ORDERS** that the Motions are properly returnable and hereby dispenses with further service thereof.

CAPITALIZED TERMS

2. **THIS COURT ORDERS** that all capitalized terms not defined herein shall have the meaning ascribed to them in the Stephen Affidavit.

APPROVAL OF ACTIVITIES

3. **THIS COURT ORDERS** that the Twenty-Sixth Report, the Twenty-Seventh Report and the Twenty-Ninth Report and the activities of the Monitor as set out therein be and are hereby approved.

EXTENSION OF STAY PERIOD

4. **THIS COURT ORDERS** that the Stay Period in respect of the Remaining Applicants as defined in the Order of Mr. Justice Newbould made in these proceedings on June 25, 2009 (the "**Initial Order**"), as previously extended until January 31, 2014, be and is hereby extended until the filing of the Monitor's Discharge Certificate as defined in paragraph 23 hereof or further order of this Court.
5. **THIS COURT ORDERS** that none of GFPI, Stonecrest Capital Inc. ("**SCI**") in its capacity as Chief Restructuring Organization (the "**CRO**"), or the Monitor shall make any further payments to either of the Timmins Salaried Plan or the Executive Plan

(collectively, the "**Pension Plans**") or their respective trustees or to the Pension Administrator.

6. **THIS COURT ORDERS** and declares that none of GFPI, the CRO or the Monitor shall incur any liability for not making any payments when due to the Pension Plans or their respective trustees or the Pension Administrator.

OPERATION OF ORDER

7. **THIS COURT ORDERS** that paragraphs 8 to 28 of this Order become effective only on further order of this Court or on the Monitor's filing with the Court a certificate in the form attached as Schedule "A" hereto (the "**Monitor's Certificate**") confirming that: (i) October 15, 2013 has passed and no person sought leave to appeal this Order; (ii) any leave to appeal sought in respect of this Order has been denied with any further time periods for seeking additional leave to appeal having expired or such additional leave requests having been denied; or (iii) this Order has been upheld in whole on appeal and no further leave to appeal has been sought in respect of the decision on appeal within the time periods for seeking such leave or, if further leave is sought, such leave is denied or if such leave is granted this Order has be upheld in whole on such further appeal.

PENSION PLANS AND RESERVES

8. **THIS COURT ORDERS** and declares that none of the funds held by GFPI or the Monitor are subject to a deemed trust pursuant to subsections 57(3) or 57(4) of the *Pension Benefits Act* (Ontario).

- 5 -

9. **THIS COURT ORDERS** and declares that none of GFPI, the CRO, or the Monitor shall make any further payments to either of the Pension Plans or their respective trustees or to the Pension Administrator and none of GFPI, the CRO or the Monitor shall incur any liability for not making any payments when due to the Pension Plans or their respective trustees or the Pension Administrator.
10. **THIS COURT ORDERS** and declares that the Monitor be and is hereby relieved of any obligation to hold back from distribution to creditors of GFPI the funds currently held by the Monitor in the amount of \$191,245.00 in respect of the Timmins Salaried Plan Reserve referred to in the Order of Mr. Justice Campbell dated August 26, 2011 and increased to the amount of \$726,372 pursuant to the Order of Mr. Justice Campbell dated June 25, 2012 (the "**Timmins Reserve Funds**").
11. **THIS COURT ORDERS** and declares that the Monitor be and is hereby relieved of any obligation to hold back from distribution to creditors of GFPI the funds currently held by the Monitor in the amount of \$2,185,000 in respect of the Executive Plan Reserve referred to in the Order of Mr. Justice Campbell dated September 21, 2011 and increased to the amount of \$2,384,688 pursuant to the Order of Mr. Justice Campbell dated June 25, 2012 (the "**Executive Reserve Funds**").
12. **THIS COURT ORDERS** and declares that none of GFPI, the CRO, or the Monitor shall incur any liability for the release of the Timmins Reserve Funds or the Executive Reserve Funds (collectively, the "**Reserves**") or any other liabilities associated with the Pension Plans.

**TERMINATION OF PROCEEDINGS UNDER THE COMPANIES' CREDITORS
ARRANGEMENT ACT ("CCAA") WITH PROCEEDINGS UNDER THE BANKRUPTCY
AND INSOLVENCY ACT ("BIA")**

13. **THIS COURT ORDERS** that GFPI, of the City of Toronto, Province of Ontario; GAI, of the City of Toronto, Province of Ontario; and GFPSI, of the City of Toronto, Province of Ontario, be and are hereby adjudged bankrupt and a bankruptcy order is hereby made against each of the Remaining Applicants and as necessary this Order may issue in those bankruptcy proceedings.
14. **THIS COURT ORDERS** that Ernst & Young Inc., of the City of Toronto, Province of Ontario, be and is hereby appointed trustee of the estates of the Remaining Applicants (the "Trustee"), without security.
15. **THIS COURT ORDERS** that the CRO be and is hereby authorized and directed to transfer any and all cash, cash equivalents, negotiable instruments and demand deposits held by or in the name of the Remaining Applicants to the Monitor or to bank accounts held by, in the name of or controlled exclusively by the Monitor (the "Transferred Funds").
16. **THIS COURT ORDERS** that the CRO be and is hereby authorized and directed to transfer control of all books and records of the Remaining Applicants to the Trustee.
17. **THIS COURT ORDERS** that, except as expressly provided in paragraph 18 hereof, the assets, undertakings and properties of the Remaining Applicants shall vest in the Trustee (as defined below) in accordance with the provisions of the BIA, and the Trustee may

rely on Orders in this proceeding in respect of the security opinion for the indebtedness of the Second Lien Lenders.

18. **THIS COURT ORDERS** that the Monitor shall:

- (a) hold or continue to hold all of the funds currently in its possession or which it receives and all Transferred Funds (collectively, the **"GFPI Cash Proceeds"**) pursuant to the terms hereof; for greater certainty, all amounts previously held in respect of the Reserves shall be deemed to be GFPI Cash Proceeds;
- (b) from the GFPI Cash Proceeds, establish, maintain and hold a reserve of cash or cash equivalents in the amount of \$550,000 CAD (the **"Administration Charge Reserve"**), which funds shall be used by the Monitor only for the payment of all amounts secured by the Administration Charge (as defined in the Initial Order);
- (c) from the GFPI Cash Proceeds, pay to WFCI, the fees and expenses of WFCI in the amount actually invoiced to WFCI by Borden Ladner Gervais LLP in connection with these motions (the **"WFCI Costs"**) up to a maximum of \$300,000, plus any amounts responding to any appeal from this Order (the **"WFCI Appeal Costs"**) upon receipt of a copy of an account statement indicating such invoiced amount; and
- (d) from the GFPI Cash Proceeds, pay to the Trustee, the amount of \$275,000 CAD as a third party guarantee (the **"Third Party Guarantee"**) pursuant to a third party retainer agreement (the **"Third Party Retainer"**) in respect of the Trustee's fees and expenses to complete its statutory obligations under the BIA.

- 8 -

19. **THIS COURT ORDERS** that, following the reservation and payment of funds set out in paragraph 18 hereof, all of the Charges (as defined in the Initial Order) created by the Initial Order, including without limitation, the Administration Charge, shall be fully and finally discharged.

DISTRIBUTION OF PROCEEDS TO SECOND LIEN LENDERS

20. **THIS COURT ORDERS** that after reservation or payment of the amounts set out in Paragraph 18(b) (c) and (d) hereof, the Monitor be and is hereby authorized and directed to forthwith make a distribution of immediately available funds from the remaining GFPI Cash Proceeds to the Second Lien Lenders' Agent for the Second Lien Lenders pursuant to the Second Lien Credit Agreement; and (ii) after payment of other amounts as set out in this Order the Monitor be and is authorized to make a distribution of any remaining funds from time to time, without further Court order to the Second Lien Lenders' Agent for the Second Lien Lenders pursuant to the Second Lien Credit Agreement (collectively, the "Distributions"), free and clear of any and all security interest, trusts, deemed trusts, or other claims, liens or encumbrances whatsoever.
21. **THIS COURT ORDERS** that the Distribution is to be applied on account of the indebtedness owing by the Remaining Applicants under the Second Lien Credit Agreement.

TERMINATION OF CCAA PROCEEDINGS AND DISCHARGE OF MONITOR AND CRO

22. **THIS COURT ORDERS** that upon payment of the amounts set out in paragraph 15 hereof and delivery of the books and records set out in paragraph 16 hereof and upon the CRO filing with the Court a certificate in the form set out in Schedule "B" hereto certifying that it has completed such, SCI shall be discharged as CRO of the Remaining Applicants, provided however that notwithstanding its discharge herein: (a) SCI shall remain CRO for the performance of such incidental duties as may be required to complete its administration; and (b) SCI shall continue to have the benefit of the provisions of all Orders made in this proceeding, including all approvals, protections and stays of proceedings in favour of SCI in its capacity as CRO.
23. **THIS COURT ORDERS** that upon payment of the amounts set out in paragraphs 18 and ^{20 We} ~~19~~ hereof and upon the Monitor filing with the Court a certificate in the form set out in Schedule "C" (the "**Monitor's Discharge Certificate**") certifying that it has completed all necessary actions, E&Y shall be discharged as the Monitor of the Remaining Applicants, provided however that notwithstanding its discharge herein: (a) E&Y shall remain the Monitor for the performance of such incidental duties as may be required to complete its administration; and (b) E&Y shall continue to have the benefit of the provisions of all Orders made in this proceeding, including all approvals, protections and stays of proceedings in favour of E&Y in its capacity as Monitor.
24. **THIS COURT ORDERS** that upon filing of the Monitor's Discharge Certificate these CCAA Proceedings and the Stay Period shall be and are hereby terminated.

PROTECTION OF CCAA PROFESSIONALS

25. **THIS COURT ORDERS** that the CRO, the Monitor, their respective affiliates and legal counsel and GFPI's legal counsel, Dentons Canada LLP, and their respective officers, directors, partners, employees and agents (collectively, the "**Released Parties**") shall be on issuance of this Order released from any and all claims that any person may have or be entitled to assert against them (and any of them), whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission of the CRO or the Monitor while acting in such capacities in respect of the Applicants (or any of them), or on any act or omission of any of the other Released Parties who have assisted the CRO or Monitor in the exercise of their powers and obligations, or based in whole or in part on any act, omission, transaction, dealing or other occurrence existing or taking place on or prior to the date of this Order in any way relating to, arising out of or in connection with the Applicants (or any of them) or these CCAA proceedings (collectively, the "**Released Claims**"), and any such Released Claims shall be on issuance of this Order released, stayed, extinguished and forever barred and the Released Parties shall have no liability in respect thereof; provided that the Released Claims shall not include any claim or liability arising out of any gross negligence or willful misconduct on the part of the Released Parties.
26. **THIS COURT ORDERS** that no action or other proceeding shall be commenced against the CRO or the Monitor or any of the other Released Parties in any way related to their capacity or conduct in connection with any Applicant or Applicants, except with prior leave of this Court on at least seven (7) days prior written notice to the CRO, the Monitor, and any other applicable Released Party, and upon further order securing, as

- 11 -

security for costs, the solicitor and client costs of the CRO, the Monitor, and such other Released Party in connection with any proposed action or proceeding.

27. **THIS COURT ORDERS** that, notwithstanding any provisions of this Order, the CRO, the Monitor and other Released Parties shall continue to have the benefit of all orders made in the CCAA Proceedings (including all protections and stays of proceedings) and nothing contained in this Order shall affect, vary, derogate from or amend any of the protections in favour of the CRO or Monitor or the other Released Parties pursuant to the Initial Order and any other orders in the CCAA Proceedings.

ADVICE AND DIRECTION

28. **THIS COURT ORDERS** that each of the Trustee, the Monitor and the CRO shall be entitled to seek the advice and direction of this Court as to the implementation of this Order and, in the case of the Trustee, the discharge of the powers and duties of the Trustee under the BIA in connection with this Order, and/or any of them may apply for such further Order or Orders as may be appropriate.


ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO..
SEP 30 2013
MB

SCHEDULE "A"

Court File No.: CV-09-8247-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST
PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS GP,
SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT
ALLENDAL LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT
EXCLUDED GP**

Applicants

- and -

**THE TORONTO-DOMINION BANK, in its capacity as agent for secured lenders
holding first lien security and THE BANK OF NEW YORK MELLON, in its capacity
as agent for secured lenders holding second lien security**

Respondents

MONITOR'S CERTIFICATE

Pursuant to an Order of the Honourable Mr. Justice Campbell of the Ontario Superior Court of Justice (the "**Court**") dated September 20, 2013 (the "**Transition Order**") Ernst & Young Inc. in its capacity as Court-appointed monitor of the Remaining Applicants hereby certifies:

[check one]

☐ October 15, 2013 has passed and no person sought leave to appeal this Order;

☐ any leave to appeal sought in respect of this Order has been denied with any further time periods for seeking additional leave to appeal having expired or such additional leave requests having been denied; OR

☐ this Order has been upheld in whole on appeal and no further leave to appeal has been sought in respect of the decision on appeal within the time

- 13 -

periods for seeking such leave or, if further leave is sought, such leave is denied or if such leave is granted this Order has been upheld in whole on such further appeal.

such that paragraphs 8 to 28 of the Transition Order are now operative.

THE MONITOR CERTIFIES the following:

This Certificate was delivered by the Monitor at _____ [TIME] on _____ [DATE].

ERNST & YOUNG INC., in its capacity as Court-appointed monitor of all of the assets, undertakings and properties of Grant Forest Products Inc., Grant Forest Products Sales Inc., and Grant Alberta Inc.

Per:

Name:

Title:

SCHEDULE "B"

Court File No.: CV-09-8247-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

**IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST
PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS GP,
SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT
ALLENDALE LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT
EXCLUDED GP**

Applicants

- and -

**THE TORONTO-DOMINION BANK, in its capacity as agent for secured lenders
holding first lien security and THE BANK OF NEW YORK MELLON, in its capacity
as agent for secured lenders holding second lien security**

Respondents

CRO'S DISCHARGE CERTIFICATE

RECITALS

A. Pursuant to an Order of this Court made on June 30, 2010, Stonecrest Capital Inc. ("SCI") was appointed as Chief Restructuring Organization (the "CRO") of all of the assets, undertakings and properties of Grant Forest Products Inc., Grant Forest Products Sales Inc., and Grant Alberta Inc. (the "Remaining Applicants").

B. Pursuant to an Order of this Court dated September 20, 2013, (the "Transition Order") SCI was discharged as CRO of the Remaining Applicants upon the filing of this CRO's Certificate with the Court certifying that the CRO has completed the activities set out in paragraphs 15 and 16 of the Transition Order.

- 15 -

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Discharge Order.

THE CRO HEREBY CERTIFIES that it has completed all of the actions set out in paragraphs 15 and 16 of the Transition Order.

This certificate was delivered by the CRO at _____ on _____, 20____.

STONECREST CAPITAL INC., in its capacity as court-appointed Chief Restructuring Organization of all of the assets, undertakings and properties of Grant Forest Products Inc., Grant Forest Products Sales Inc. and Grant Alberta Inc.

Per:

Name:

Title:

SCHEDULE "C"

Court File No.: CV-09-8247-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

**IN THE MATTER OF A PLAN OF COMPROMISE OR
 ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST
 PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS GP,
 SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT
 ALLENDALE LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT
 EXCLUDED GP**

Applicants

- and -

**THE TORONTO-DOMINION BANK, in its capacity as agent for secured lenders
 holding first lien security and THE BANK OF NEW YORK MELLON, in its capacity
 as agent for secured lenders holding second lien security**

Respondents

MONITOR'S DISCHARGE CERTIFICATE

RECITALS

A. Pursuant to an Order of this Court made on June 25, 2009, Ernst & Young Inc. ("E&Y") was appointed as monitor (the "**Monitor**") of all of the assets, undertakings and properties of Grant Forest Products Inc., Grant Forest Products Sales Inc. and Grant Alberta Inc. (the "**Remaining Applicants**").

B. Pursuant to an Order of this Court made dated September 20, 2013, (the "**Transition Order**") E&Y was discharged as Monitor of GFPI upon the filing of this Monitor's Certificate with the Court certifying that the Monitor has completed the actions set out in paragraphs 18 and 19 of the Transition Order and all other necessary actions.

20 ME

4484181_11|NATDOCS

- 17 -

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Transition Order.

THE MONITOR HEREBY CERTIFIES that it has completed all of the actions set out in the paragraphs 18 and ~~19~~ of the Transition Order and all other necessary actions.

20 p. 40

This certificate was delivered by the Monitor at _____ on _____, 20____.

ERNST & YOUNG INC., in its capacity as Court-appointed monitor of all of the assets, undertakings and properties of Grant Forest Products Inc., Grant Forest Products Sales Inc. and Grant Alberta Inc.

Per:

Name:

Title:

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS GP, SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT ALLENDALE LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT EXCLUDED GP (the "Applicants")
and

THE TORONTO-DOMINION BANK, in its capacity as agent for secured lenders holding first lien security and THE BANK OF NEW YORK MELLON, in its capacity as agent for secured lenders holding second lien security (the "Respondents")

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

TRANSITION ORDER

BORDEN LADNER GERVAIS LLP

Barristers and Solicitors
Scotia Plaza
40 King Street West
Toronto, Ontario
M5H 3Y4

Craig J. Hill

Tel: 416-367-6156
Fax: 416-361-7301
LSUC No. 31888K

Roger Jaipargas

Tel: 416-367-6266
Fax: 416-361-7067
LSUC No. 43275C

Lawyers for West Face Capital Inc.

124

CITATION: Grant Forest Products Inc. (Re), 2013 ONSC 5933
FILE NO.: CV-09-8247-00CL
DATE: 20130920

**ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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

BETWEEN

**IN THE MATTER OF A PLAN OF COMPROMISE OF ARRANGEMENT OF GRANT
FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS
SALES INC. and GRANT U.S. HOLDINGS GP, Applicants**

- and -

GE CANADA LEASING SERVICES COMPANY, et al, Defendants

BEFORE: C. CAMPBELL J.

COUNSEL: Craig J. Hill, Roger Jaipargas for West Face Capital

Alex Cobb, for PWC, Pension Administrator

Mark Bailey, for Superintendent of Financial Services

Richard Swan, Jonathan Bell, for Peter Grant Sr.

David Byers, Daniel Murdoch, for Ernst & Young

Jane Dietrich, for the remaining applicants

HEARD: July 23, 2013

REASONS FOR DECISION

[1] This decision deals with issues in respect of two defined benefit pension plans of Grant Forest Products Inc. (GFPI) both now in the process of being wound up.

Procedural Issues

[2] The motion seeking relief was originally made returnable June 25, 2012 and adjourned on several occasions, the latest being to enable counsel to make submissions following the release in February of this year of the decision of the Supreme Court of Canada in *Sun Indalex Finance, LLC v. United Steelworkers* [2013] SCJ No. 6. (*Indalex*). A

[3] The several specific issues arise based on certain of the facts of this case which give rise to a priority claim by pension beneficiaries in respect of the remaining funds in the hands of the Monitor following the sale of the assets of GFPI. The priority issue is between the Administrator on behalf of the pension plans of GFPI and a Second Lien creditor of GFPI, namely, West Face Capital.

[4] The Initial Order under the CCAA was made June 25, 2009 and provided for a Stay of proceedings to enable a restructuring (liquidation) of the assets of the various entities which for the purposes of this decision can be referred to as the remaining applicant or GFPI.

[5] As at June 25, 2009 there was an outstanding Petition in Bankruptcy issued March 19, 2009 in respect of GFPI initiated by various senior secured creditors which has not to date been proceeded with.

[6] The Initial Order contained a term (standard model order language) that "entitled but not required" GFPI to make pension contributions among other ongoing expenses.

The Pension Plans

[7] As at the date of the Initial Order there were 4 pension plans of GFPI, two of which were defined benefit plans and are the ones at issue here.

[8] The relevant dates with respect to the windup of the two defined benefit plans are as follows:

Salaried Plan:

The initiation of windup was as a result of an Order dated February 27, 2012. The effective date of windup was made as of March 31, 2011.

Executive Plan:

The initiation of Plan windup was undertaken by the Superintendent of Financial Services as a result of the Order dated February 27, 2012 with the effective date of wind up being June 30, 2010.

[9] The "effective date" as the term appears in the *Pension Benefit Act* (PBA) Ontario is chosen for actuarial purposes as the last date of contributions to the Plans.

[10] None of the above dates preceded the Initial Order of June 2009. The major sale of assets to Georgia Pacific was by Order dated May 26, 2010 with the last significant sale of assets February 20, 2011.

- Page 3 -

[11] There were no deemed trusts in existence either at the date of the Initial Order of June 2009 or the last significant sale of assets in February 2011.

[12] The Court granted Orders that were unopposed on the 26th day of August and the 21st day of September 2011 which authorized the following:

- i) GFPI to take steps to initiate windup of the Timmins Salaried Plan, the appointment of a replacement administrator of such plan;
- ii) GFPI to take steps to initiate a windup of both the Salaried and Executive Plans.

[13] The orders directed the Monitor to hold back from any distribution to creditors of GFPI the amount estimated at that time to be the windup deficit in the plans. The Monitor began holding in escrow an amount of \$191,245 with respect to the Salaried Plan and \$2,185,000 with respect to the Executive Plan.

[14] The issue of deemed trust arising as a result of the Windup Orders was not sought to be determined by any party at the time of the August and September 2011 Orders.

[15] When motions now before the Court first came on for hearing on August 27, 2012 the Court was advised that the Supreme Court of Canada had under reserve its decision in *Indalex* which among other things was to deal with the existence and priority of deemed trust amounts under the *PBA* in the context of *CCAA* proceeding.

[16] The motion returnable on August 27, 2012 by the applicant was for direction with respect to the payment of amounts held in escrow by the Monitor in respect of pensions.

[17] The position of both the Monitor and GFPI at that time was that there should be no further payments made on behalf of the pension plans or distribution of any further amounts to the Second Lien Lenders until following release of the decision of the Supreme Court of Canada in *Indalex*.

[18] The Monitor reported for the motion of August 2012 that the expectation of a windup deficit of both plans would be in excess of \$2.3 million. The position of PWC as Administrator of the Plans was that amounts available by way of windup deficit under both plans should be made pursuant to the provisions of the *PBA*.

[19] The position of the Monitor and GFPI prevailed, and the motion for direction adjourned to November 2012 when both that motion and the companion motion of West Face on behalf of Second Lien Lenders for a lifting of the stay under the *CCAA* to permit the petition in bankruptcy to proceed were heard.

[20] Following submissions in November 2012, decision was reserved and following the decision of the Supreme Court of Canada in *Indalex* in February 2013 the parties to this proceeding were invited to provide further submissions based on that decision together with updated figures on amounts held and sums claimed due under the windup of the Pension Plans.

[21] In addition Counsel and their clients did attempt to see if the issues could be resolved without the necessity of further decision. Not surprisingly, given the complexity of issues that still remain following *Indalex* and despite diligent efforts a determination on the motions is required.

Legal Analysis

[22] In the *Indalex* decision — the members of Supreme Court of Canada were divided and in particular on the issue of deemed trust arising on windup in the context of a *CCAA* proceeding.

[23] Justice Cromwell in the introduction to his reasons in *Indalex* at paragraph 85 of the decision describes the general problem associated with pensions and insolvent corporations.

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

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

[24] Justice Deschamps described in paragraph 44 the importance of the deemed trust under the *PBA*:

The deemed trust provision is a remedial one. Its purpose is to protect the interests of plan members. This purpose militates against the adopting the limited scope proposed by *Indalex* and some of the interveners. In the case of competing

priorities between creditors, the remedial purpose favors an approach that includes all wind up payments in the value of the deemed trust in order to achieve a broad protection.

[25] The majority position as set out above in the reasons of Justice Deschamps prevailed over the reasons of Justice Cromwell (for himself Chief Justice McLachlan and Rothstein J.) which held in essence the deficiency amounts could only "accrue" as that word is used in s.57(4) of the *PBA* when the amount is ascertainable. All of the justices agreed that the deemed trust provision contained in s.57(4) of the *PBA* does not apply to the windup deficit of a pension plan that has not been wound up (the *Indalex* Executive Plan) at the time of *CCAA* proceedings.

[26] The legal analysis in *Indalex* commenced with the 2010 decision of the Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General)* 2010 SCC 60.

[27] In addition to providing definitive guidance on the purpose of the *CCAA* and the relationship between the *CCAA* and the *BIA*, more specifically on the facts of *Century Services* the Court held the deemed trust provisions of the *Federal Excise Tax Act* did not give rise to a priority over other creditors in a *CCAA* proceeding.

[28] It was held in *Century Services* that the *CCAA* and the *BIA* are to be read harmoniously and further that in the absence of express language carving out an exception for GST claims the provisions in both statutes nullify statutory deemed trusts in favour of the Crown.

[29] In summary, the more limited and general provisions of the *CCAA* permit insolvent corporations to restructure or indeed liquidate in a flexible and less formal fashion than would otherwise prevail with respect to priorities under the *BIA*.

[30] Prior to the arrival of *Indalex* in this Court in 2009¹, the governing decision dealing with pension claims of a deemed trust under the *PBA* seeking priority for unpaid pension contributions over secured creditors in a *CCAA* proceeding where the companies were unable to restructure and secured creditors sought to put the company into bankruptcy is *Ivaco (Re)* [2006] OJ No. 4152 (C.A.).

[31] Laskin JA for the Court of Appeal dealt with the argument that the provincial deemed trust takes priority based on a gap that exists between the *CCAA* and the *BIA* in the following passage:

[61] The Superintendent's submission that the motions judge was required to order payment of the outstanding contributions rests on the proposition that a gap exists between the *CCAA* and the *BIA* in which the Provincial deemed trusts can be executed. This proposition runs contrary to the federal bankruptcy and insolvency regime and to the principle that the province cannot reorder priorities in bankruptcy.

¹ Decision in this Court at 2010, ONSC 1114 and in Court of Appeal for Ontario, 2011 ONCA 265.

[62] The federal insolvency regime includes the *CCAA* and the *BIA*. The two statutes are related. A debtor company under the *CCAA* is defined in s.2 by the company's bankruptcy or insolvency. Section 11(3) authorizes a thirty-day stay of any current or prospective proceedings under the *BIA*, and s.11(4) authorizes an extension of the initial thirty-day period. During the stay period, creditor claims and bankruptcy proceedings are suspended. Once the stay is lifted by court order or terminates by its own terms, simultaneously the creditor claims and bankruptcy proceedings are revived and may go forward.

[63] For the Superintendent's position to be correct, there would have to be a gap between the end of the *CCAA* period and bankruptcy proceedings, in which the pension beneficiaries' rights under the deemed trusts crystallize before the rights of all other creditors, including their right to bring a bankruptcy petition. That position is illogical. All rights must crystallize simultaneously at the end of the *CCAA* period. There is simply no gap in the federal insolvency regime in which the provincial deemed trusts alone can operate. That is obviously so on the facts in this case because the Bank of Nova Scotia had already commenced a petition for bankruptcy, which was stayed by the initial order under the *CCAA*. Once the motions judge lifted the stay, the petition was revived. In my view, however, the situation would be the same even if no bankruptcy petition was pending.

[64] Where a creditor seeks to petition a debtor company into bankruptcy at the end of *CCAA* proceedings, any claim under a provincial deemed trust must be dealt with in bankruptcy proceedings. The *CCAA* and the *BIA* create a complementary and interrelated scheme for dealing with the property of insolvent companies, a scheme that occupies the field and ousts the application of provincial legislation. Were it otherwise, creditors might be tempted to forgo efforts to restructure a debtor company and instead put the company immediately into bankruptcy. That would not be a desirable result.

[65] Also, giving effect to the Superintendent's position, in substance, would allow a province to do indirectly what it is precluded from doing directly. Just as a province cannot directly create its own priorities or alter the scheme of distribution of property under the *BIA*, neither can it do so indirectly. See *Husky Oil*, *supra*, at paras, 32 and 39. At bottom the Superintendent seeks to alter the scheme for distributing an insolvent company's assets under the *BIA*. It cannot do so.

[66] The Superintendent relies on one authority in support of its position: the decision of the motions judge in *Usarco*, *supra*. In that case, although a bankruptcy petition had been brought, Farley J. nonetheless ordered the receiver to pay to the pension plan administrator the amount of the deemed trusts under the *PBA*. However, the facts in *Usarco* differed materially from the facts in this case.

[67] In *Usarco*, *CCAA* proceedings did not precede the bankruptcy petition. Moreover, in *Usarco* the petitioning creditor was not proceeding with its bankruptcy petition because its principal had died, and no other creditor took steps to advance the petition. Thus, unlike in this case, in *Usarco* it was unclear whether bankruptcy proceedings would ever take place.

- Page 7 -

[68] Recently in *Re General Chemical Canada Ltd.*, [2005] O.J. No. 5436, Campbell J. relied on this distinction, followed the motions judge's decision in the present case and refused to order payment of the amount of the deemed trusts under the PBA. He wrote at para. 35:

To conclude otherwise (absent improper motive on the part of Company or a major creditor) would be to negate both CCAA proceedings and bankruptcy proceedings by preventing creditors from pursuing a process of equitable distribution of the debtor's property as they believe it to be when making their decisions.

I agree. The factual differences between *General Chemical* and this case on the one hand, and *Usarco* on the other, render *Usarco* of no assistance to the Superintendent on this appeal.

[69] Because the federal legislative regime under the CCAA and the BIA determines the claims of creditors of an insolvent company, if the rights of pension claimants are to be given greater priority, Parliament, not the courts, must do so. And Parliament has at least signalled its intention to do so.

[32] The further argument of unfairness in permitting a petition into bankruptcy to proceed if the companies was rejected (see paragraph 77 in *Ivaco*):

The motions judge took into account the likely result of the Superintendent's claims if the Companies are put into bankruptcy. He recognized that bankruptcy would potentially reverse the priority accorded to the pension claims outside bankruptcy. Nonetheless, having weighed all the competing considerations, he exercised his discretion to lift the stay and permit the bankruptcy petitions to proceed. In my view, he exercised his discretion properly. I would not give effect to this ground of appeal.

[33] The issues in *Indalex* involved, as those in this instance do, pension plans, but with a difference. While both the plans faced funding deficiencies when *Indalex* filed for an Initial Order under the CCAA and requested a stay, the financial distress threatened the interests of all plan members. Following the Initial Order the Company was authorized to borrow US\$24.4 million from DIP (Debtor in Possession) lenders who were granted priority over all other creditors.

[34] The plan members in *Indalex* sought, at the time of the Sanction and Approval Order a declaration that a deemed trust equal in amount to the unfunded pension liability was enforceable by way of priority over secured creditors with respect to the proceeds of assets sold. The parties reached agreement on an amount to be held by the Monitor subject to the Courts' determination as to whether or not the funds held were being held subject to a deemed trust.

[35] This Court's decision in *Indalex*² held that the deemed trust did not prevail over the priority of DIP financiers was appealed. On appeal to the Court of Appeal of Ontario the claims

² 2010 ONSC 114, 2011 ONCA 265.

of deemed trust, of breach of fiduciary duty against the company and the requested remedy of constructive trust were successful.

[36] At the time of the Initial Order in *Indalex* the *Indalex* salary plan was in windup with a windup deficiency order. As at the date of the *Indalex* Initial Order the executive plan had not been wound up.

[37] The Supreme Court of Canada in *Indalex* was divided on the issues before it. Four of the judges being Deschamps, Moldaver JJ joined by Lebel J. and Abella J. on the issue held that the deemed trust provision of s.57 (4) of the *PBA* did provide a statutory scheme to provide a deemed trust in respect of the plan which had been wound up, which trust extended to the windup deficiency payments required by s.75(1)(b) of the Act which had "accrued" but were not yet due at the time of the sale of assets.³

[38] The three judges of the minority on the issue, being Chief Justice McLachlin, Justices Rothstein and Cromwell JJ., concluded that given the legislative history and evolution of the provisions the legislature never intended to include windup deficiency in a statutory deemed trust — rather the legislative intent is to exclude from the deemed trust liabilities that arise only on the date of wind up.

[39] Five of the judges, which excluded Lebel and Abella JJ., concluded that given the doctrine of federal paramountcy the DIP charges superseded the provincial statutory deemed trust which Abella J., Lebel J., Deschamps J. and Moldaver J. had found.

[40] Those same five judges concluded that the circumstances for the application of a constructive trust were not met notwithstanding a breach of duty by the applicant to give all plan members notice prior to the return of the motion seeking an Initial Order.

[41] The context of *Indalex's* distress was set out in the following paragraph from the reasons of Deschamps J.:

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

³ Pension Benefit Act RSO 1990, c. P.8 57 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 a pension fund. R.S.O. 1990, c. P.8, s. 57 (3).

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. R.S.O. 1990, c.P.9.s.57 (4).

- Page 9 -

[1995] 3 S.C.R. 453. Although the priority was not rendered ineffective by the CCAA the Plan Members' position was uncertain.

[42] As was noted by the Supreme Court of Canada in *Century Services*⁴ the CCAA and the BIA are two statutory regimes for re-organization and or liquidation. Of the two federal statutes the CCAA provides the opportunity for orderly restructuring and or liquidation with supervision by the Court.

[43] The BIA deals with priority distribution when there is no further purpose for the application of the CCAA. In the ordinary case under the CCAA an applicant company, following the Initial Order, seeks out agreement with its creditors and the formulation of a proposed Plan to be voted on by the creditors which when approved by the Court in effect creates a contract between the company and its creditors. (see *Red Cross* (2002) 35 CBR (4th) 43 (SCJ)).

[44] What has become more prominent in recent times has been the occurrence of what has become to be known as the liquidating CCAA of which both *Indalex* and GFPI are leading examples.

The Factual Distinction between *Indalex* and GFPI

[45] In this case the 29th Report of the Monitor dated February 21, 2013 describes the nature of the business of GFPI and its subsidiaries which manufactured Strand Board from facilities located in Canada and the United States.

[46] The Report goes on at paragraphs 29 to 32 to detail the deficiencies in the special payments required to be paid under the PBA to fund the windup deficiencies in the plans. Unlike the situation in *Indalex* neither of the pension plans of GFPI were in windup process at the time of the Initial Order or for some time after. Unlike *Indalex* there was no request made for DIP prior to a sale of assets following the Initial Order.

[47] Unlike *Indalex*, the Initial Order re GFPI contemplated in this case that the business of the company would continue for the purpose of the orderly disposition of various assets being various types of mills in Canada and the United States. The most significant of which were sold to Georgia Pacific, which has continued the operation of some of the mills.

[48] The summary of the position of the Plans as of the date of July 2013 is as follows:

The Salaried Plan Wind Up Report disclosed an estimated windup deficit of \$726,481. The Required Salaried Plan Payment as of August 24, 2012 was \$328,298 plus interest from March 31, 2012, which amount was due to be paid by GFPI into the Salaried Plan.

The required Salaried Plan Payment as at November 27, 2012 was \$339,923. This amount includes interest in the amount of \$11,625 (determined using the same

⁴ 2010 SCC60 at para. 77.

rate used in determining the amount of the annual special payments needed to liquidate the windup deficiency). It is contested that interest should be included.

The Required Salaried Plan Payment as at March 31, 2013 was \$485,715, including interest in the amount of \$15,883. It is contested that interest should be included.

The Executive Plan Wind-Up Report disclosed an estimated wind-up deficit of \$2,384,688.

The required Executive Plan Payment as of August 24, 2012 was \$1,263,186 plus interest from February 29, 2012, which amount was due to be paid by GFPI into the Executive Plan.

The required Executive Plan Payment as at November 27, 2012 was \$1,281,639, including interest in the amount of \$18,453. It is contested that interest should be included.

The required Executive Plan Payment as at March 31, 2013 was \$1,764,275, including interest in the amount of \$20,803. GFPI does not accept that interest should be included.

[49] Submissions with respect to the Pension Motion were heard on November 27, 2012. During the same hearing, submissions were also heard on a motion by West Face Capital Inc. for an order lifting the stay of proceedings herein to facilitate a bankruptcy order against GFPI (the Bankruptcy Motion). Following that hearing, further written submissions were provided by the parties concerning the impact of the decision of the Supreme Court of Canada in *Re Indalex* on the issues in the two motions.

[50] The GFPI situation is a prime example of the flexible operation of the *CCAA*. The assets of the liquidating company were sold in a manner to provide the maximum benefit possible to the widest group of stakeholders.

[51] In this case the sale of certain of the assets on a going concern basis permitted the continuation of employment and benefits for many in the locality of the plants that they had previously worked in. The alternative in bankruptcy under the *BIA* might well have resulted in loss of employment for many and less recovery for all the secured creditors.

[52] The liquidation of the applicant under the *CCAA* did not proceed under an explicit Plan voted on by the creditors and approved by the Court.

[53] What did proceed was an Initial Order that in addition to a stay of proceedings (which has continued), permitted, but did not require the Applicant to pay ordinary operating expenses in the course of liquidating assets under the *CCAA* for the benefit of all stakeholders.

[54] The Initial Order specifically provides in paragraph 5 as follows:

27

[5] **THIS COURT ORDERS** that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order;

- (a) all outstanding and future wages, salaries, employee benefits and pension contributions, vacation pay, bonuses, and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements, which, for greater certainty, shall not include any payments in respect of employee termination or severance; and

[55] No creditors including those representing the members of the pension plans opposed the granting of the Initial Order; the representatives of pension plans did not oppose the sale of assets on the occasions in which approval was sought and did not raise the issue of deemed trust until the windup orders made in August 2012.

[56] There was no objection on the part of any party to the payment which the Applicant made to the pension plans being the regular and ordinary contributions under the plans from 2009 until the wind up date.

[57] Up to August 2012 there was no request made on the part of the pension plans to set aside the Initial Order and provide for what might have been expected to be a deemed trust under wind up.

THE FIRST ISSUE.

Are any funds held by the Monitor and/or GFPI deemed to be held in trust pursuant to subsections 57(3) or 57(4) of the PBA for the beneficiaries of each of the Pension Plans as a result of the wind-up of the Pension Plans, and if so, what amounts of the funds held by the Monitor and/or GFPI are deemed to be held in trust?

[58] As noted above one of the two defined benefit pension plans at issue in *Indalex* was wound up prior to the commencement of the CCAA proceeding, and the other pension plan was wound up after the filing and the sale of *Indalex's* assets. The Supreme Court of Canada in *Indalex* did not find a deemed trust in respect of the latter pension plan. In considering this first issue, therefore, it is necessary to address the threshold issue of whether a deemed trust can be created during the pendency of a stay of proceedings.

[59] The majority in the Supreme Court of Canada in *Indalex* concluded that prior to an Initial Order a deemed trust did indeed arise when a pension plan was wound up in respect of windup deficits notwithstanding the difficulty in ascertaining the precise amount of the trust.

[60] One of the arguments made before the Supreme Court of Canada in *Indalex* and was rejected was that the priorities under the CCAA should parallel those under the BIA with the result that at the time of the Initial Order under the CCAA the BIA priorities by which pension claims would be unsecured would prevail. The following passage in the decision of Deschamps J. for herself and the majority that dealt with that issue rejected the proposition:

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

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

[51] In order to avoid a race to liquidation under the BIA, courts will favour an interpretation of the CCAA that affords creditors analogous entitlements. Yet this does not mean that courts may read bankruptcy priorities into the CCAA at will. Provincial legislation defines the priorities to which creditors are entitled until that legislation is ousted by Parliament. Parliament did not expressly apply all bankruptcy priorities either to CCAA proceedings or to proposals under the BIA. Although the creditors of a corporation that is attempting to reorganize may bargain in the shadow of their bankruptcy entitlements, those entitlements remain only shadows until bankruptcy occurs. At the outset of the insolvency proceedings, Indalex opted for a process governed by the CCAA, leaving no doubt that although it wanted to protect its employees' jobs, it would not survive as their employer. This was not a case in which a failed arrangement forced a company into liquidation under the BIA. Indalex achieved the goal it was pursuing. It chose to sell its assets under the CCAA, not the BIA.

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

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

[57] None of the parties question the validity of either the federal provision that enables a CCAA court to make an order authorizing a DIP charge or the provincial provision that establishes the priority of the deemed trust. However, in considering whether the CCAA court has, in exercising its discretion to assess a claim, validly affected

a provincial priority, the reviewing court should remind itself of the rule of interpretation stated in *Attorney General of Canada v. Law Society of British Columbia*, 1982 CanLII 29 (SCC), [1982] 2 S.C.R. 307 (at p. 356), and reproduced in *Canadian Western Bank* (at para. 75):

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

[61] In the context of evaluating the important policy considerations of maintaining a stay of proceedings under a liquidating *CCAA*, it is important for the Court to consider the appropriate time for the *CCAA* proceeding to either come to an end or to lift the stay of proceedings to provide for an orderly transition from the *CCAA* process to the *BIA*. These proceedings are a good example. Initially, GE Canada initiated bankruptcy proceedings against GFPI. The response of GFPI was to seek protection under the *CCAA* and carry out an orderly liquidation of its assets. The Court permitted the orderly liquidation of the assets in the context of the *CCAA* to maximize recovery in the assets.

[62] Now, the usefulness of the *CCAA* proceedings has come to an end. Is it appropriate for the Court to allow the Second Lien Lenders to institute bankruptcy proceedings and to forthwith issue a Bankruptcy Order in respect of GFPI? The Second Lien Lenders urge that the regime that will be in place as a result of the Bankruptcy Order will be that contemplated by Parliament in the context of a liquidation and distribution of a bankrupt's assets. The process carried out for the transition from the *CCAA* proceedings to the *BIA* will it is suggested be as intended by Parliament and consistent with the principles established by the Supreme Court of Canada in the *Re Century Services* case.

[63] It is clear that there are insufficient proceeds to pay the claims of all of the creditors of GFPI. Reversing priorities can be a legitimate purpose for the institution of bankruptcy proceedings. Lifting the stay provided for in the Initial Order at this time, the Second Lien Lenders submit is the logical extension of that legitimate purpose. Accordingly, it is said appropriate in the circumstances of this case that the stay be lifted and that a Bankruptcy Order be issued by the Court in respect of GFPI forthwith.

[64] I accept that to impose the same priorities under the *CCAA* as the *BIA* without careful consideration might well undermine the flexibility of the *CCAA*. For example the *CCAA* Court itself may make an order on application on notice declaring a person to be a critical supplier (s.11.4) with the charge in favour of that supplier. This is but one example of the flexibility of the *CCAA* that may not be available under the *BIA* once approved by the Court. The same is the case for DIP financing as was the case in *Indalex*.

(65) Where there is a *CCAA* Plan approved by creditors the effect of the contract created may alter what would otherwise be priorities under the *BIA*.

[66] Where there is a liquidating *CCAA* which proceeds by way of an Initial Order and the subsequent sale of assets with Vesting Orders all the creditors have an opportunity to object to the

sales or process which is in effect an implicit *CCAA* Plan. A vote becomes necessary only when there is lack of consensus and a priority dispute requires resolution by a vote. In this case the claim of the secured creditors exceeded and continues to exceed, the value of the assets.

[67] There may be good and solid reasons acceptable to creditors and stakeholders who agree to a process under the *CCAA* either in a formal Plan or during the course of a liquidation to alter the priorities that would come into play should there be an assignment or petition into bankruptcy.

[68] The position of the Pension Administrator, the Superintendent of Financial Services and those parties in support of their position, in this case is that in the circumstances the deemed trust which they say arises under the *PBA* should prevail over other creditor claims notwithstanding the *CCAA* Initial Order.

[69] The arguments in support of a deemed trust arising upon windup of the pension plans within the *CCAA* regime are summarized as follows:

- i) GFPI should not be excused from any obligation with respect to the pension plans.
- ii) The wind ups which triggered the deemed trusts were the subject of specific judicial authorization and even assuming the stay of proceedings under the Initial Order applies, leave of the Court has been given to windup which triggers the deemed trusts.
- iii) The deemed trusts are triggered automatically upon wind up by independent operation of a valid provincial law which has not been overridden by specific order.
- iv) The Second Lien Creditor should not be permitted to challenge the deemed trusts at this stage since they did not challenge the windup orders.⁵

[70] From my review of the decisions of the Supreme Court of Canada in *Century Services* and *Indalex* I am of the view that the task of a *CCAA* supervising judge when confronted with seeming conflict between Federal insolvency statute provisions and those of Provincial pension obligations is to make the provisions work without resort to the issue of federal paramountcy except where necessary.

[71] The decision of the Supreme Court of Canada in *Indalex* assists in the execution of this task. The deemed trust that arises upon wind up prevails when the windup occurs before insolvency as opposed to the position that arises when wind up arises after the granting of an Initial Order.

⁵ submission was made in the factum of PWC that all funds held by the Monitor should be regarded as proceeds of accounts and inventory therefore resulting in priority being directed by the Personal Property Security Act (PPSA) s.30 (7) which would subordinate other security to the deemed trusts. This submission was not seriously pursued and in view of the conclusion I reached on other grounds it is not necessary to deal with the argument.

[72] The *Indalex* decision provides predictability and certainty of entitlement to the stakeholders of an insolvent company. If on the application for an Initial Order any party seeks to challenge that priority for the purpose of providing DIP financing in furtherance of a Plan or work out liquidation they are free to do so at the time of the Initial Order. Secured creditors can then decide whether they are willing to pursue a Plan or immediately apply for a bankruptcy order.⁶

Should GFPI be excused from wind up deficiency payments?

[73] I am of the view that the question advanced by the Pension Administrators should be put another way "Is GFPI obligated in view of the provisions in para. 5 of the Initial Order (see paragraph 54) above to make the special payments that arise by virtue of the provisions of the PBA?"

[74] I accept the argument of the Pension Administrator and all those urging the deemed trust application that the Approval and Vesting Orders necessarily do not for all purposes freeze priorities at the point of sale. Absent other order of the Court, made at the time however, they do provide the certainty required by creditors who are asked to concur with the sales.

[75] In the situation of GFPI there was a recognition in para. 5 of the Initial Order that there may be a challenge to expenses on an ongoing basis.

[76] Where distribution to creditors is made following a sale of assets on full notice, that distribution in accordance with an Approval and Vesting Order does freeze the priorities with respect to that distribution, absent specific direction otherwise.

[77] In this case, the issue of priority is said to arise in respect of a specific sum of money in the hands of the Monitor in respect of funds from assets sold and not distributed and is said to be determined in accordance with the Court Order made at the time of determination which acknowledged all the pension obligations including wind up.

[78] To suggest that all claims and priorities never sought would apply to the Approval Orders past or future would, in my view, be entirely contrary to the principles and scheme of the CCAA. To conclude otherwise would risk that secured creditors to whom distribution had been made would be at risk of disgorgement and unpaid secured creditors to uncertainty of priority in future recovery.

[79] This is why in my view the only consistent and predictable operation of the CCAA should give predictability as of the Initial Order to enable an informed decision to be made whether or not to proceed with bankruptcy. This issue is implicitly revisited every time there is a sale and distribution of assets.

⁶ It is not entirely clear from the various decisions in *Indalex* as to precisely when the deemed trust which can take priority operates. The date of the Initial Order was given as one possibility the other being the date of sale of the assets. In this case it does not really matter which date applies as the Initial Order and primary asset sale pre-date any deemed trust.

29

- Page 16 -

[80] The Supreme Court of Canada decision in *Indalex* stands for the proposition that provincial provisions in pension areas prevail prior to insolvency but once the federal statute is involved the insolvency provision regime applies.

[81] Justice Cromwell at paragraphs 177 and 178 in *Indalex* spoke of the problem of extending the deemed trust. While he was speaking of the entirety of the issue his comments below are equally applicable to a deemed trust said to arise during insolvency:

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

178 While I agree that the protection of pension plans is an important objective, it is not for this Court to decide the extent to which that objective will be pursued and at what cost to other interests. In her conclusion, Justice Deschamps notes that although the protection of pension plans is a worthy objective, courts should not use the law of equity to re-arrange the priorities that Parliament has established under the *CCAA*.

[82] That consistency prevails if the limitation on deemed trust is limited to those plans already in windup as of the date of the Initial Order.

[83] During the course of the sale of assets the Initial Order continued to operate presumably to the advantage of all stakeholders since the asset sale as here proceeded in an advantageous fashion for maximizing return on assets, for the benefit of those who were able to transfer employment and in an advantageous fashion for the pension plans which received the benefit of ongoing regular payments.

[84] The alternative had the bankruptcy petition proceeded would have seen a significant loss particularly to the pension plans.

[85] I note as have many judges before me that the solution to the problem created by section 67 of the *BIA* which leaves pension obligations unsecured and Provincial statutes which seek to raise the priority lies with the federal and provincial governments not with judicial determination. As Justice Deschamps noted in *Indalex*:

[81] There are good reasons for giving special protection to members of pension plans in insolvency proceedings. Parliament considered doing so before enacting the most recent amendments to the *CCAA*, but chose not to (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005, S.C. 2007, c. 36, in force September 18, 2009, SI/2009- 68; see also Bill C-*

501, *An Act to amend the Bankruptcy and Insolvency Act and other Acts (pension protection)*, 3rd Sess., 40th Parl., March 24, 2010 (subsequently amended by the Standing Committee on Industry, Science and Technology, March 1, 2011)). A report of the Standing Senate Committee on Banking, Trade and Commerce gave the following reasons for this choice:

Although the Committee recognizes the vulnerability of current pensioners, we do not believe that changes to the BIA regarding pension claims should be made at this time. Current pensioners can also access retirement benefits from the Canada/Quebec Pension Plan, and the Old Age Security and Guaranteed Income Supplement programs, and may have private savings and Registered Retirement Savings Plans that can provide income for them in retirement. The desire expressed by some of our witnesses for greater protection for pensioners and for employees currently participating in an occupational pension plan must be balanced against the interests of others. As we noted earlier, insolvency — at its essence — is characterized by insufficient assets to satisfy everyone, and choices must be made.

The Committee believes that granting the pension protection sought by some of the witnesses would be sufficiently unfair to other stakeholders that we cannot recommend the changes requested. For example, we feel that super priority status could unnecessarily reduce the moneys available for distribution to creditors. In turn, credit availability and the cost of credit could be negatively affected, and all those seeking credit in Canada would be disadvantaged.

[86] I conclude that given the uncertainty in this area of legal decision together with the provisions of paragraph 5 of the Initial Order that GFPI was not under an obligation to make the special windup payments and was correct in seeking direction from this Court.

[87] I can only presume that had GFPI sought to make the special payments that they would have been opposed on much the same grounds as now advanced by the Second Lien Lenders.

THE SECOND ISSUE

Did the Court Order authorize the Deemed Trust?

[88] It is urged in the second ground for priority of the deemed trust that this Court authorized the wind up of the Pension plans which by the operation of the *PBA* imposes the deemed trust.

[89] The Order authorizing the windup in its operative provisions with respect to wind up is as follows:

This Court Orders that the Monitor is hereby authorized and directed, until further Court Order, to hold back from any distribution to creditors of GFPI an

amount of \$191,245.00 which is estimated to be the amount necessary to satisfy the wind-up deficit of the Timmins Salaried Plan. For greater certainty nothing in this order affects or determines the priority or security of the claims against these funds.

This Court Orders that with respect to the Remaining Applicants, the Stay Period as defined by the Initial Order, be and is hereby extended to November 30, 2011.

[90] Similar wording was in the order with respect to the Executive Plan.

[91] Nothing in those Orders dealt with the issue of deemed trust. No one appearing raised the issue of deemed trust. The paragraph above dealt with the issue presented and preserved the argument that arises today namely whether in context of a claimed deemed trust the estimated windup deficit was to be held from distribution.

[92] One can understand why the issue was not raised beyond setting aside the amount and leaving the issue for later determination. For their own reasons each side was content to have the CCAA process continued. It was to the benefit of all party stakeholders.

[93] When a pension plan is wound up the precise amount of money necessary to fulfill the obligation to each and every pensioner is at that time uncertain. Over time as windup occurs those amounts become more certain and that is why the deemed trust concept comes into play.

[94] It does seem to me that a commitment to make wind up deficiency payments is not in the ordinary course of business of an insolvent company subject to a CCAA order unless agreed to. Even if the obligation could be said to be in the ordinary course for an insolvent company GFPI was not obliged to make the payments, (See paragraph 45 of the Initial Order above).

[95] This is precisely the reason for the granting of a stay of proceedings that is provided for by the CCAA. Anyone seeking to have a payment made that would be regarded as being outside the ordinary course of business must seek to have the stay lifted or if it is to be regarded as an ordinary course of business obligation, persuade the applicant and creditors that it should be made. The decision of the Supreme Court of Canada in *Indalex* appears to stand for the proposition that once a valid Initial Order is made under the CCAA the Federal insolvency regime is paramount, and absent any agreement or other Order where there is conflict, the Initial Order prevails over an applicant's obligation under the provincial statute.

[96] This conclusion provides the predictability and certainty that is necessary for those who are willing to consider financing a distressed entity. It is unlikely that lenders would be willing to support a distressed entity if they had little or no information on the amount or timing of pension obligations.

[97] The Supreme Court of Canada decision in *Indalex* alerts lenders who are aware or are taken to be aware prior to insolvency of the fact of a deemed trust when there is wind up even though the amount may not be known.

[98] Where a pension plan has not been wound up prior to insolvency the potential for a windup deficiency is entirely uncertain. Since a deemed trust does not arise until there is a windup order it would be entirely inconsistent with the insolvency regime of the *CCAA* (absent additional legislation) to expose lending creditors to an uncertain priority both in time and amount.

[99] It is to be noted that on the sale of assets as they occurred there was no issue raised about the priority of claims prior to those sales or distribution of assets as reflected in the fact that payments were made to entirely discharge the security of the First Lien Lenders and a portion of the obligation to the Second Lien lenders.

[100] The Court did not authorize a deemed trust to prevail in insolvency by granting windup orders.

Should the Stay be lifted to permit the petition in bankruptcy to proceed?

[101] If one accepts the above analysis a lifting of the stay to permit bankruptcy is not necessary to defeat a deemed trust said to arise after the Initial Order.

[102] The basis of the motion on behalf of West Face Capital Inc. (the Second Lien Lenders) is set out in paragraph 2 of their factum:

The Second Lien Lenders seek an Order lifting the stay of proceedings in respect of GFPI for the purpose of facilitating the issuance of a Bankruptcy Order in respect of GFPI forthwith. It is appropriate that a bankruptcy proceeding be put into place immediately, otherwise the priority secured interests of the Second Lien Lenders will be irrevocably prejudiced. In the absence of a bankruptcy proceeding, certain parties with an interest in advancing the claims of the pension beneficiaries have taken steps to re-position claims as priority claims or claims that must be paid immediately. The factual and legal basis for those claims have been advanced during the *CCAA* proceedings, notwithstanding the stay of proceedings.

[103] Those opposed to the motion to lift the stay (which is supported by GFPI and the Monitor) urge that what is being requested is extraordinary relief from the requirements of the *PBA* and GFPI should not be excused from its obligation to make special payments simply at the asking.

[104] While acknowledging that the court does have broad discretion, it is urged there is nothing in the circumstances of this case which would justify relieving GFPI of its obligation to make special payments.

[105] It is further submitted that there is no decision that stands for the proposition that bankruptcy is automatic at the end of a *CCAA* proceeding and no independent reason for granting the bankruptcy order.

[106] It is well settled that bankruptcy may well be an appropriate outcome of a *CCAA* process that has failed or has run its course. In *Century Services* 2010 SCC 60 at paragraph 23, Justice Deschamps noted "because the *CCAA* is silent about what happens if reorganization fails, the

BIA scheme of liquidation distribution necessarily supplies the backdrop for what will happen if a *CCAA* is ultimately unsuccessful".

[107] The issue of terminating a *CCAA* proceeding by permitting a petition in bankruptcy to proceed is one of discretion on the part of the supervising judge (see *Ivaco* (Re) [2006] O.J. No. 4152 para. 77 and *Nortel Networks Corp.* (Re) 2009 ONCA 833 at para 41.)

[108] Those who seek to have a stay lifted or to oppose the stay being lifted to obtain other relief must be acting in good faith. There is no evidence of lack of good faith here beyond the suggestion of delay.

[109] The parties resisting the lifting of the stay urge that it not be granted on several grounds. The first is based on the delay on the part of West Face in bringing the motion. It is asserted that the motion should have been brought when the applicant first made it returnable on its motion for direction.

[110] It is also urged that given the passage of time that the Monitor should be directed to make payments of those amounts which would otherwise have been made to date under the windup orders of the Superintendent.

[111] The argument advanced by the Pension Administrator is that the *CCAA* process has completed what it set out to do, namely, liquidate the assets of GFPI and therefore there is no purpose to be served by lifting the stay and therefore the Order should not be granted to allow bankruptcy.

[112] West Face seeks to lift the stay of proceedings granted by the Initial Order to enable the Petition commenced in March 2010 to proceed.

[113] Like those opposing, West Face takes the position that the *CCAA* process has run its course and there is no likelihood of recovery on any other assets and adds therefore no reason for the applicant to continue to make any pension payments on account of pension plans. Since the security of West Face on behalf of the Second Lien Lenders is valid they are entitled to be paid from the assets on hand and a bankruptcy Order would expedite recovery.

[114] What then is the process that is involved under the *CCAA* when there is not one but several sales of assets of an insolvent company over a period of time during which no one objects to the continuation of "payments being made in the ordinary course" which include ongoing payments to pension plans.

[115] The *CCAA* continues to be sufficiently flexible to allow for an ongoing sale of assets without the necessity of a formal plan voted on by creditors. As I noted above, a sale of assets following an Initial Order is an implicit plan.

[116] In this case following the sale of the major assets to Georgia Pacific there was a distribution the effect of which was to pay out the First Lien Lenders in entirety and indeed some payments to the Second Lien Lenders.

[117] Following the granting of leave in *Indalex* by the Supreme Court of Canada all of the parties in this case recognized that the issue of priority of deemed trusts would likely be clarified by that Court's decision in that case.

[118] From the time that the motion of GFPI for direction with respect to payments on windup deficiency was first brought before this court, there was agreement by all Counsel that the Supreme Court decision in *Indalex* if not determinative would provide considerable guidance on the issues in this case.

[119] To my knowledge no party has been prejudiced by the delay in dealing with the priority issue. For this reason I do not accept the proposition that West Face should be denied leave on the basis of delay.

[120] This leaves the question as to whether or not on the facts of this case leave to lift the stay should be granted. It was to the advantage of all stakeholders presumably including the pension plans and the Second Lien Lenders that the *CCAA* process be utilized for the sale of assets rather than the *BIA* process.

[121] I am of the view that in the absence of provisions in a Plan under the *CCAA* or a specific court order, any creditor is at liberty to request that the *CCAA* proceedings be terminated if that creditor's position may be better advanced under the *BIA*.

[122] The question then is whether it is fair and reasonable bearing in mind the interests of all creditors that those of the creditor seeking preference under the *BIA* be allowed to proceed. In this Court's decision in *Indalex*, I questioned whether it would be fair to permit the stay to be lifted if it was simply because of the uncertainty as to whether at that time prior to the later appeals that the deemed trust provisions of the *PBA* prevailed.

[123] In this case West Face urges its interests should prevail because otherwise a deemed trust which did not exist at the time of the Initial Order would *de facto* be given priority by the requirement that GFPI make wind up deficiency payments, to pay priorities that would not be recognized under the *BIA*.

[124] I conclude that the argument on behalf of West Face should succeed. The purpose of the process under insolvency is to provide predictability to the interests of creditors but at the same time allow for flexibility as under the *CCAA* where that provides a greater return than would the operation of the *BIA*. That has been the case here.

[125] If the purpose under the insolvency statutes is to maximize recovery to the extent possible for all concerned, then the imposition of a priority which arises only in the middle of insolvency except where made like a DIP financing, for the purpose of enhancing recovery would likely result in credit being much more difficult if not impossible to obtain in the first instance.

[126] The Supreme Court of Canada in *Indalex* limited the deemed trust provisions of the *PBA* to obligations prior to insolvency. To deny the relief sought by West Face would in my view be at odds with that decision.

[127] For the above reasons the Order sought by West Face will be granted. Those opposing the stay urged that all payments that should have been made under the deficiency wind up be made until the date of this decision.

[128] While I have some sympathy for the position of the pension plans in these circumstances I am satisfied that the amounts held by the Monitor should not be applied to the pension plans. From the time of the return of the motion for directions all parties were aware of the need for a determination to be made following the Supreme Court of Canada decision in *Indalex*.

Conclusion

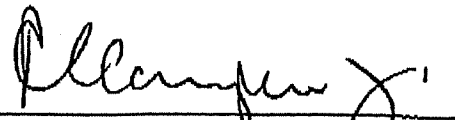
[129] As noted above in this decision virtually all of the judges who have had to deal with this difficult issue of pensions and insolvency have commented that ultimately these are matters to be dealt with by the Federal and Provincial governments.

[130] The difficulty of dealing with these complex issues is not restricted to Canada. In her book of 2008⁷ Prof. Janis Sara has chronicled the way in which various countries around the world have sought to deal with the difficulty of pension priority in the context of business financing and insolvency. The conclusion is there is no easy answer.

[131] I have no doubt that the question of pensions will be an ongoing issue for some time to come. There is an urgency that legislators both Federal and Provincial address the issue.

[132] In this case and for the above reasons the priority of proceeds will be to the Secured Creditors in respect of those amounts that otherwise would be payable in respect of windup deficiencies.

[133] I would not think this is an appropriate matter for costs disposition but if any Counsel disagrees or there is any further issue with respect to an Order following from this decision I may be spoken to.


C. L. CAMPBELL J.

Date: September 20, 2013

⁷ Employee & Pension Claims during Company Insolvency – A Comparative Study of 62 Jurisdictions, Thomson & Carswell

Court File No. CV-09-8247-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE MR.	)	THURSDAY, THE 25 TH
	)	
JUSTICE NEWBOULD	)	DAY OF JUNE, 2009

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF GRANT FOREST PRODUCTS INC.,
GRANT ALBERTA INC., GRANT FOREST PRODUCTS
SALES INC. and GRANT U.S. HOLDINGS GP**



INITIAL ORDER

THIS APPLICATION, made by Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc. and Grant U.S. Holdings GP (collectively, the "**Applicants**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Peter Lynch sworn June 22, 2009 and the exhibits thereto (the "**Lynch Affidavit**"), the supplement affidavit of Peter Lynch sworn June 25, 2009 and the exhibits thereto (the "**Supplemental Lynch Affidavit**"), the report to Court of Ernst & Young Inc. ("**E&Y**") as proposed monitor and on hearing the submissions of counsel for the Applicants, The Toronto-Dominion Bank (the "**Agent**"), as agent for the first lien lenders (the "**First Lien Lenders**"), the independent directors of Grant Forest Products Inc. ("**GFPI**"), E&Y, Peter Grant Sr., Peter Grant Jr., GE Canada Leasing Services Company, no one else appearing although duly served as appears from the affidavit of service of Jarvis Hetu sworn June 23, 2009,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

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

PLAN OF ARRANGEMENT

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

POSSESSION OF PROPERTY AND OPERATIONS

4. **THIS COURT ORDERS** that the Applicants shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the Applicants shall continue to carry on business in a manner consistent with the preservation of their businesses (the "**Business**") and Property. The Applicants shall be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively, the "**Assistants**") currently retained or employed by them, with liberty, subject to obtaining the prior consent of the Monitor or further order of the Court, to amend in any material manner the mandate of any Assistants or to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order (except that such consent or further order shall not be required for the Applicants to hire new employees in the ordinary course of business).

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

- (a) all outstanding and future wages, salaries, employee benefits and pension contributions, vacation pay, bonuses and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements, which, for greater certainty, shall not include any payments in respect of employee termination or severance; and
- (b) the fees and disbursements of any Assistants retained or employed by any of the Applicants as permitted herein in respect of these proceedings or the Applicants' proposed restructuring at their standard rates and charges.

6. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein and provided that the Applicants provide the Monitor with a list of their intended disbursements before making such disbursements, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course on or after this Order (or, in the case of the following subparagraph (c), prior to the date of this Order), and in carrying out the provisions of this Order including:

- (a) subject to paragraph 10 below, all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including payments on account of insurance (including directors' and officers' insurance), maintenance and security services;
- (b) expenses for goods or services actually supplied to any of the Applicants on or following the date of this Order; and
- (c) expenses for goods or services actually supplied to any of the Applicants prior to the date of this Order provided:
 - (i) such payments are critical to any Applicant's Business and are made with the prior written consent of the Monitor; or

- 4 -

- (ii) such payments are owing to a person or persons for the supply of logs or timber to GFPI.

7. **THIS COURT ORDERS** that the Applicants shall remit, in accordance with legal requirements, or pay:

- (a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;
- (b) all goods and services or other applicable sales taxes (collectively, "Sales Taxes") required to be remitted by any of the Applicants in connection with the sale of goods and services by any of the Applicants, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and
- (c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by any of the Applicants.

8. **THIS COURT ORDERS** that the Applicants, or any of them, may, with the prior written consent of the Monitor, lend funds to Grant Allendale LP, Grant Clarendon LP and Grant US Sales Inc. (or any of them), to enable them to continue to carry on their respective businesses in the ordinary course and the Applicants, or any of them, may receive and retain any repayments made by Grant Allendale LP, Grant Clarendon LP and Grant US Sales Inc. (or any of them).

9. **THIS COURT ORDERS** that until such time as any of the Applicants repudiate a real property lease in accordance with paragraph 12(c) of this Order, the Applicants shall pay when

- 5 -

due all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under any lease) or as otherwise may be negotiated by the Applicants from time to time ("**Rent**"), for the period commencing from and including the date of this Order, monthly in advance (but not in arrears).

10. **THIS COURT ORDERS** that, except as specifically permitted herein or included in the Cash Flow Projection (as defined by the Lynch Affidavit) as amended or prepared for later periods from time to time with the Agent's approval (the "**Cash Flow Projections**"), the Applicants and their subsidiaries are hereby prohibited, without the prior written approval of the Agent and the Monitor, from:

- (a) granting, or permitting to be outstanding, any lien, charge, security interest or any other encumbrance of any kind whatsoever (each an "**Encumbrance**") other than valid and enforceable Encumbrances existing on the date of this Order, charges created by this Order and liens arising solely by operation of law in the ordinary course of business of the Applicants and their subsidiaries;
- (b) creating, incurring, assuming or suffering to exist, directly, contingently or otherwise, any debt or obligations other than:
 - A. debt or obligations existing on the date hereof; or
 - B. unsecured current liabilities (which are not the result of borrowing) incurred and payable in the ordinary course of business of the Applicants and their subsidiaries as permitted herein;
- (c) entering into any transactions outside the ordinary course of its business;
- (d) making expenditures or commitments of the Applicants on account of any capital or fixed asset account of the Applicants in the aggregate in excess of 110% of the capital expenditure amount identified in the Cash Flow Projections, except that the Applicants may make capital expenditures or commitments for excess

amounts with the Monitor's approval, to the extent required to carry on the existing oriented strand board Business;

- (e) declaring any dividends or distributions to any shareholder or any person affiliated or associated with any shareholder whether by way of dividend or otherwise;
- (f) guaranteeing, endorsing or otherwise becoming surety for or upon any obligations of any person;
- (g) paying any amount to its employees and officers as such by way of salary, bonus, commission, directors' fees or otherwise in excess of the amounts currently being paid or at a rate in excess of the current rate thereof, provided that nothing in this Order shall prohibit the Applicants and their subsidiaries from reimbursing their employees and officers for reasonable expenses incurred by them in the ordinary course of business;
- (h) paying any amount to any shareholder of GFPI, any person who owns shares of any shareholder of GFPI or any person related by blood or marriage to any such person, except for payments permitted by the immediately preceding subparagraph;
- (i) making any cash payment (interest or otherwise) to any creditor including: (i) under the existing aircraft leases with GE Capital Equipment Financing; or (ii) under the First Lien Credit Agreement or the Second Lien Credit Agreement (as defined by the Lynch Affidavit);
- (j) making expenditures or commitments in respect of any or all assets of an Applicant not required in connection with the Business;
- (k) opening or maintaining deposit accounts other than the deposit accounts maintained with The Toronto-Dominion Bank, Wachovia Bank, National Association, Harris N.A. and Bank of Montreal as of the date hereof or such other account approved by the Agent (the "Accounts");

- (l) making any changes to the officers or senior management, or to any of the signing authorities specified on the Accounts;
- (m) making any payment of any amount owing pursuant to the tax refund purchase and sale agreement dated as of March 31, 2008 with respect to the sale by GFPI of certain of its tax refunds;
- (n) entering into any interest or currency exchange agreement or any other swap agreement; and
- (o) obtaining any debtor-in-possession financing from any lender other than one or more of the First Lien Lenders and in accordance with the further order of the Court.

11. **THIS COURT ORDERS** that, notwithstanding anything contained in this Order, the Applicants shall in all respects comply with their obligations under the First Lien Credit Agreement made as of October 26, 2005 among the Agent, the First Lien Lenders, GFPI and others in respect of reporting and the provision of information. The Applicants shall cooperate fully with PricewaterhouseCoopers Inc. ("PWC"), the financial advisor to the First Lien Lenders, in providing such information.

RESTRUCTURING

12. **THIS COURT ORDERS** that each of the Applicants shall have the right to:

- (a) permanently or temporarily cease, downsize or shut down any of its business or operations and to dispose of redundant or non-material assets not exceeding \$500,000 in any one transaction or \$2 million in the aggregate, subject to the prior written consent of the Monitor and subject to subparagraph (c) of this section, if applicable;
- (b) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate on such terms as may be agreed upon between the Applicant and such employee or, failing such agreement, to deal with the consequences thereof in the Plan or otherwise;

- (c) in accordance with paragraphs 13 and 14, vacate, abandon or quit any leased premises and/or repudiate any real property lease and any ancillary agreements relating to any leased premises, on not less than seven (7) days' notice in writing to the relevant landlord on such terms as may be agreed upon between the Applicant and such landlord or, failing such agreement, to deal with the consequences thereof in the Plan or otherwise;
- (d) repudiate such of its arrangements or agreements of any nature whatsoever, whether oral or written, as the Applicant deems appropriate on such terms as may be agreed upon between the Applicant and such counter-parties or, failing such agreement, to deal with the consequences thereof in the Plan or otherwise; and
- (e) in accordance with the Marketing Process (as hereinafter defined), pursue all avenues of refinancing and recapitalization and pursue all purchase offers for material parts of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing or recapitalization or any sale (except as permitted by subparagraph (a) of this section),

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

13. **THIS COURT ORDERS** that an Applicant shall provide the relevant landlord with notice of the applicable Applicant's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the relevant landlord disputes the Applicant's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the applicable Applicant, or by further Order of this Court upon application by an Applicant on at least two (2) days' notice to such landlord and any such secured creditors. If an Applicant repudiates the lease governing such leased premises in accordance with paragraph 12(c) of this Order, it shall not be required to

pay Rent under such lease pending resolution of any such dispute, and the repudiation of the lease shall be without prejudice to the Applicant's claim to the fixtures in dispute.

14. **THIS COURT ORDERS** that if a lease is repudiated by an Applicant in accordance with paragraph 12(c) of this Order, then: (a) during the notice period prior to the effective time of the repudiation, the relevant landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicants and the Monitor 24 hours' prior written notice; and (b) at the effective time of the repudiation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the applicable Applicant in respect of such lease or leased premises and such landlord shall be entitled to notify the Applicants of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

15. **THIS COURT ORDERS** that, subject to the other provisions of this Order (including the payment of Rent as herein provided) and any further Order of this Court, the Applicants shall be permitted to dispose of any or all of the Property located (or formerly located) at such leased premises without any interference of any kind from landlords (notwithstanding the terms of any leases) and, for greater certainty, the Applicants shall have the right to realize upon the Property and other assets in such manner and at such locations, including leased premises, as it deems suitable or desirable for the purpose of maximizing the proceeds and recovery therefrom.

MARKETING OF INVESTMENT OPPORTUNITY

16. **THIS COURT ORDERS AND DIRECTS** the Applicants to immediately commence a marketing process (the "**Marketing Process**") in accordance with the protocol attached hereto as Appendix "A" to this Order (the "**Investment Offering Protocol**") for the purpose of offering the opportunity for potential investors to purchase the business and operations of the Applicants and their subsidiaries as a going concern or to sponsor a plan of arrangement of the Applicants or any of them.

17. **THIS COURT ORDERS** that the Investment Offering Protocol is hereby approved and the Applicants and the Monitor are hereby authorized and directed to perform each of their obligations thereunder.

18. **THIS COURT ORDERS** that the Applicants are hereby authorized and directed to engage an investment offering advisor (the "**Investment Offering Advisor**") in accordance with an Investment Offering Advisor engagement letter (the "**Investment Offering Advisor Engagement Letter**"), after it is approved by the Monitor and the Agent, to act as Investment Offering Advisor in connection with the conduct of the Marketing Process. The Investment Offering Advisor Engagement Letter shall not be affected by the Plan.

19. **THIS COURT ORDERS** that the Investment Offering Advisor shall be entitled to the benefit of and is hereby granted a charge (the "**Investment Offering Advisor Charge**") in the maximum amount of \$200,000 of all Property of the Applicants to secure its fees and recoverable disbursements incurred in performing its obligations under the Investment Offering Advisor Engagement Letter but not including any indemnity or any fees or expenses incurred by the Investment Offering Advisor in connection with any right of indemnity included in the Investment Offering Advisor Engagement Letter. The Investment Offering Advisor Charge shall rank *pari passu* with the Administration Charge (as hereinafter defined) and the Applicants are directed to pay to the Investment Offering Advisor the fees and expenses payable under the Investment Offering Advisor Engagement Letter promptly when due.

20. **THIS COURT ORDERS** that the Investment Offering Advisor, its affiliates, partners, directors, employees, agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liabilities, of any nature or kind, to any person in connection with or as a result of either its engagement by the Applicants as Investment Offering Advisor or any matter referred to in the Investment Offering Advisor Engagement Letter except to the extent such losses, claims, damages or liabilities result from the gross negligence or wilful misconduct of the Investment Offering Advisor in performing its obligations under the Investment Offering Advisor Engagement Letter.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

21. **THIS COURT ORDERS** that until and including July 24, 2009 or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") (including the application for a bankruptcy order brought by GE Canada Leasing Services Company) shall be commenced or continued against or in respect of any of the Applicants or the Monitor, or affecting any Business or the Property, except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of any of the Applicants or affecting any Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

22. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of any of the Applicants or the Monitor, or affecting the Business or the Property (including any right to submit a shotgun buy or sell offer with respect to GFPI's shares of Footner Forest Products Ltd. or GFPI's interest in the OSB facility at High Level, Alberta or related assets), are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court, provided that nothing in this Order shall: (a) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on; (b) exempt the Applicants from compliance with statutory or regulatory provisions relating to health, safety or the environment; (c) prevent the filing of any registration to preserve or perfect a security interest; (d) prevent the registration of a claim for lien under the *Construction Lien Act* or the *Forestry Workers Lien for Wages Act* or any other applicable statute; or (e) prevent GE Canada Leasing Services Company from selling the 1992 Dassault Falcon 50 aircraft or the 1994 Dassault Falcon 900B aircraft and related engines and parts pursuant to its lease thereof to GFPI.

NO INTERFERENCE WITH RIGHTS

23. **THIS COURT ORDERS** that, during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right,

contract, agreement, licence or permit in favour of or held by any of the Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

24. **THIS COURT ORDERS** that, during the Stay Period, all Persons having oral or written agreements with any of the Applicants or statutory or regulatory mandates for the supply of goods and/or services including, without limitation, all resin supply, timber, log and wood supply, computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility services or other services to the Business or any of the Applicants, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by any of the Applicants, and that each of the Applicants shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with normal payment practices of the Applicants or such other practices as may be agreed upon by the supplier or service provider, the Applicants and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

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

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

26. **THIS COURT ORDERS** that, during the Stay Period and except as permitted by subsection 11.5(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of any of the Applicants with respect to any claim against the directors or officers that arose before or arises after the date hereof and that relates to any obligations of any of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or

performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

27. **THIS COURT ORDERS** that each of the Applicants shall indemnify its directors and officers from all claims, costs, charges and expenses relating to the failure of any of the Applicants, after the date hereof, to make payments due and payable after the date of this Order of the nature referred to in subparagraphs 5(a), 7(a), 7(b), and 7(c) of this Order which they sustain or incur by reason of or in relation to their respective capacities as directors and/or officers of any of the Applicants except to the extent that, with respect to any officer or director, such officer or director has actively participated in the breach of any related fiduciary duties or has been grossly negligent or guilty of wilful misconduct.

28. **THIS COURT ORDERS** that the directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on all Property, which charge shall not exceed the aggregate amount of \$3,000,000, as security for the indemnity provided in paragraph 27 of this Order. The Directors' Charge shall have the priority set out in paragraph 44 of this Order.

29. **THIS COURT ORDERS** that, notwithstanding any provision of any applicable insurance policy to the contrary: (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge; and (b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 27 of this Order or the insurer fails to fund defence costs on a timely basis (provided the insurance beneficiaries assign to the applicable Applicant the insurance beneficiaries' rights under the applicable insurance policy to receive such defence costs paid pursuant to the Directors' Charge).

APPOINTMENT OF MONITOR

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

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

- (a) monitor the Applicants' receipts and disbursements;
- (b) perform its obligations under the Investment Offering Protocol;
- (c) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, the Marketing Process and such other matters as may be relevant to the proceedings herein;
- (d) assist the Applicants, to the extent required the Applicants, in the dissemination to the Agent and BNY and their respective counsel on a bi-weekly basis or otherwise as required herein of financial and other information as agreed to between the Applicants and the Agent or BNY;
- (e) advise the Applicants in relation to the Cash Flow Projections, including the reconciliation of actual results to Cash Flow Projections and the formulation of Cash Flow Projections as may be required herein, which information shall be reviewed with the Monitor and delivered to the Agent and its counsel on a periodic basis, but not less than bi-weekly, or as otherwise agreed to by the Agent;
- (f) advise the Applicants in their development of the Plan and any amendments to the Plan;

- 15 -

- (g) report and advise the Applicants, the Court and the Agent in relation to any offers to purchase or refinance the Business received in accordance with the Marketing Process;
- (h) assist the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;
- (i) have full and complete access to the books, records, management, employees and advisors of the Applicants and to the Business and the Property to the extent required to perform its duties arising under this Order;
- (j) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;
- (k) consider, and if deemed advisable by the Monitor, prepare a report and assessment on the Plan; and
- (l) perform such other duties as are required by this Order or by this Court from time to time.

32. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

33. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario*

Water Resources Act, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "Environmental Legislation"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

34. **THIS COURT ORDERS** that that the Monitor shall provide any creditor of any of the Applicants with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

APPOINTMENT OF CHIEF RESTRUCTURING ADVISOR

35. **THIS COURT ORDERS** that GFPI be and is hereby authorized and directed to continue the engagement of Stonecrest Capital Inc. ("Stonecrest") as Chief Restructuring Advisor (the "CRA") with services to be provided by Hap Stephen ("Stephen") and Sandra Rosch ("Rosch") on the terms and conditions set out in the amended engagement letter between GFPI and Stonecrest as referred to in the Supplemental Lynch Affidavit (the "CRA Engagement Letter").

36. **THIS COURT ORDERS** that the CRA Engagement Letter is hereby approved and given full force and effect in accordance with its provisions and that the claims, if any, of Stonecrest, Stephen or Rosch pursuant to the CRA Engagement Letter shall not be affected by the Plan.

37. **THIS COURT ORDERS** that the CRA shall have and may exercise and perform the powers, responsibilities and duties described in the CRA Engagement Letter, together with such other powers, responsibilities and duties as may be agreed upon by the CRA and GFPI and approved by the Monitor or this Honourable Court.

PROVISIONS RELATED TO THE MONITOR, THE CRA AND OTHERS

38. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor, the CRA, Stephen and Rosch shall incur no liability or obligation as a result of their appointments or the carrying out of the provisions of this Order (or, in the case of the CRA, Stephen and Rosch, the provisions of the CRA Engagement Letter), except for any gross negligence or wilful misconduct on their respective parts. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

39. **THIS COURT ORDERS** that the Monitor, PWC, counsel to the Monitor, counsel to GFPI's board of directors and counsel to the Applicants shall be paid by the Applicants their reasonable fees and disbursements, in each case at their standard rates and charges and whether incurred before, on or after the date of this Order, and that the CRA shall be paid by the Applicants its fees and disbursements as set out in the CRA Engagement Letter, as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, PWC, counsel to GFPI's board of directors, counsel for the Monitor, the CRA and counsel for the Applicants on a weekly basis and to pay the CRA's monthly work fee monthly in advance in accordance with the CRA Engagement Letter. Additionally, the Applicants shall pay the fees and disbursements of the Canadian and U.S. counsel to the Agent (each, "First Lien Lenders' Agent's Counsel") promptly on receipt of copies of their invoices.

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

41. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, counsel to GFPI's board of directors, the CRA, the Applicants' counsel and the First Lien Lenders' Agent's Counsel shall be entitled to the benefit of and are hereby granted a charge (the "Administration Charge") on all Property, which charge shall not exceed the aggregate amount of \$2,000,000, as security for all amounts owing to the Monitor, counsel to the Monitor, counsel to GFPI's board of directors, the CRA, the Applicants' counsel and the First Lien Lenders' Agent's Counsel as

set out in paragraph 39 hereof, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraph 44 hereof.

KERP PAYMENT

42. **THIS COURT ORDERS** that the key employee retention plan agreement dated December 19, 2008 between Peter Lynch ("Lynch") and GFPI, as amended by an amendment agreement dated as of April 1, 2009, as described in the Lynch Affidavit (the "**KERP Agreement**") be and is hereby approved and given full force and effect in accordance with its terms and the Applicants are hereby directed to make when due the payments provided for thereunder.

43. **THIS COURT ORDERS** that Lynch shall be entitled to the benefit of and is hereby granted a charge (the "**KERP Charge**") on all Property, which charge shall not exceed the amount of \$1,134,000, as security for all amounts now or hereafter owing to Lynch pursuant to the KERP Agreement, both before and after the making of this Order. The KERP Charge shall have the priority set out in paragraph 44 hereof.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

44. **THIS COURT ORDERS** that the priorities of the Administration Charge, the Investment Offering Advisor Charge, the KERP Charge and the Directors' Charge, as among them, shall be as follows:

- (a) Firstly – Administration Charge (to the maximum amount of \$2,000,000) and the Investment Offering Advisor Charge (to the maximum amount of an additional \$200,000) on a pari passu basis; and
- (b) Secondly – KERP Charge (to the maximum amount of \$1,134,000) and Directors' Charge (to the maximum amount of \$3,000,000) on a pari passu basis.

45. **THIS COURT ORDERS** that the filing, registration or perfection of the Administration Charge, the Investment Offering Advisor Charge, the KERP Charge and the Directors' Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered,

recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

46. **THIS COURT ORDERS** that each of the Charges shall constitute charges of all Property and the Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

47. **THIS COURT ORDERS** that, except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with any of the Charges without the written consent of the Monitor, and the beneficiaries of the Administration Charge, the Investment Offering Advisor Charge, the KERP Charge and the Directors' Charge, or further Order of this Court.

48. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") shall not otherwise be limited or impaired in any way by: (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any applications for bankruptcy orders issued pursuant to BIA or any bankruptcy order made pursuant to such applications in respect of any of the Applicants; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA by any of the Applicants; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds any of the Applicants and, notwithstanding any provision to the contrary in any Agreement:

- (i) the creation of the Charges shall not create or be deemed to constitute a breach by any of the Applicants of any Agreement to which it is a party;

- (ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from, the creation of the Charges; and
- (iii) the payments made by any of the Applicants pursuant to this Order and the granting of the Charges, do not and will not constitute fraudulent preferences, fraudulent conveyances, oppressive conduct, settlements or other challengeable, voidable or reviewable transactions under any applicable law.

SERVICE AND NOTICE

49. **THIS COURT ORDERS** that the Applicants shall, within ten (10) business days of the date of entry of this Order, send a copy of this Order to their known creditors, other than employees and creditors to the Applicants owed less than \$1,000.00, at their addresses as they appear on the Applicants' records, and shall promptly send a copy of this Order: (a) to all parties filing a Notice of Appearance in respect of this Application; and (b) to any other interested Person requesting a copy of this Order, and the Monitor is relieved of its obligation under Section 11(5) of the CCAA to provide similar notice, other than to supervise this process.

50. **THIS COURT ORDERS** that the Applicants and the Monitor be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Applicants' creditors or other interested parties at their respective addresses as last shown on the records of the Applicants and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

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

extent practicable, and the Monitor may post a copy of any or all such materials on the Monitor's website.

GENERAL

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

53. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of any of the Applicants, the Business or the Property.

54. **THIS COURT ORDERS** that the Monitor is hereby authorized to apply, after consultation with the Applicants, the Agent and BNY, for recognition of these proceedings as "Foreign Main Proceedings" in the United States pursuant to Chapter 15 of the *U.S. Bankruptcy Code*.

55. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

56. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

- 22 -

57. **THIS COURT ORDERS** that any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than four (4) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

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

59. **THIS COURT ORDERS** that the unredacted copy of the CRA Engagement Letter be and is hereby sealed and treated as confidential pending completion of the marketing process contemplated by the Investment Offering Protocol or further Order of this Court.



ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JUN 25 2009

PER / PAR: JSN

Joanne Nicoara
Registrar, Superior Court of Justice

APPENDIX "A"
GRANT FOREST PRODUCTS INC.
INVESTMENT OFFERING PROTOCOL

Recitals

1. Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc. and Grant U.S. Holdings GP (collectively, the "**Grant Companies**") filed for protection with the Ontario Superior Court of Justice (the "**Court**") pursuant to the *Companies' Creditors Arrangement Act* (Canada) ("**CCAA**").
2. Pursuant to the CCAA proceedings, Ernst & Young Inc. (the "**Monitor**") has been appointed as the monitor of the Grant Companies.
3. The Grant Companies carry on business in North America as manufacturers and distributors of oriented strand board and other similar and related products (the "**Business**").
4. The Grant Companies wish to engage [] as their investment offering advisor (the "**Investment Offering Advisor**") to assist them in identifying prospective parties and negotiating the terms of a refinancing or recapitalization of the Grant Companies and their subsidiaries or a sale of the Business, in whole or in part, in consultation with the Monitor, an agent (the "**First Lien Agent**") for the first lien secured lenders (the "**First Lien Lenders**") and the agent (the "**Second Lien Agent**") for the second lien secured lenders (the "**Second Lien Lenders**").
5. The marketing process set out herein (the "**Marketing Process**") is intended to focus the efforts of the Grant Companies and the Investment Offering Advisor (with the assistance of the Monitor and in consultation with the First Lien Agent and the Second Lien Agent) on the maximization of value for the First Lien Lenders, the Second Lien Lenders, the Grant Companies' other creditors and other stakeholders (collectively, the "**Stakeholders**") either through a refinancing or recapitalization or a sale of the Business.

Leading the Marketing Process

6. In order to ensure that the Marketing Process successfully identifies the best possible buyer or investor, among other things:
- (a) the Grant Companies and the Investment Offering Advisor shall lead the marketing efforts in consultation with the Monitor, the First Lien Agent and the Second Lien Agent; and
 - (b) the Grant Companies shall devote all time and attention necessary to pursue the Marketing Process in a timely manner.

Objectives

7. The Marketing Process will be implemented to achieve the following objectives:
- (a) value maximization for the Stakeholders of the Grant Companies;
 - (b) continuity of the Business; and
 - (c) timely implementation.
8. In order to achieve these objectives:
- (a) interested parties shall be encouraged to consider:
 - (i) the opportunity of sponsoring a refinancing or a recapitalization of the Grant Companies and their subsidiaries through a plan of arrangement; or
 - (ii) the purchase of the Business in whole or in part; and
 - (b) interested parties shall be required to participate in the Marketing Process and to respect the timetable set out herein.

Supervision and Reporting

9. The Marketing Process shall be approved by the Court and subject to the Court's overriding supervision. The Monitor will facilitate and oversee the Marketing Process

undertaken by the Investment Offering Advisor, the Grant Companies and their other advisors, all in accordance with this Protocol. Any sale of the Business must be approved by the Court in accordance with the Initial Order.

10. Whether the transaction is to be implemented by a plan of arrangement or a sale of the Business, the Monitor will provide a report to the Court including a detailed summary as to how the Marketing Process was conducted, the key elements of the resulting transaction and the Monitor's recommendation with respect to such plan or sale, as the case may be.

Reporting to Stakeholders

11. The Grant Companies and the Monitor may provide periodic updates, as appropriate, to Stakeholders which have executed confidentiality agreements including the First Lien Lenders and the Second Lien Lenders.

Selection of Investment Offering Advisor

12. The Grant Companies confirm that they have selected the Investment Offering Advisor and the Investment Offering Advisor has agreed to accept its engagement in accordance with the Investment Offering Advisor Engagement Letter filed in the CCAA proceedings and approved in the Initial Order.

Identification of Potential Interested Parties

13. The Grant Companies and the Monitor will jointly agree on a preliminary potential interested party list with input from the Investment Offering Advisor with a view to ensuring that all parties that have expressed interest in the Business prior to the CCAA proceedings and any potential interested party whose interest may be known to the Grant Companies, the Monitor or the Investment Offering Advisor are included on the preliminary list. The Stakeholders may nominate interested parties for inclusion in the preliminary list.

Marketing Process

14. Phase I

- (a) The Grant Companies will work with the Investment Offering Advisor to prepare a one page marketing overview (the "Teaser"), a draft non-disclosure agreement

(an "NDA"), a communications package, a confidential information memorandum, the data room and other relevant marketing materials. The NDA shall not prohibit any person from buying or selling any debt owing by any of the Grant Companies. The Monitor and the advisors to the First Lien Lenders shall be entitled to review and provide input into these materials as they shall deem appropriate.

- (b) The Investment Offering Advisor will contact all of the parties on the final potential interested party list and provide them with a copy of the teaser memorandum and form of NDA.
- (c) Interested parties that execute the NDA (or have previously executed an NDA satisfactory to the Grant Companies) will receive information and will receive access to a limited electronic data room.
- (d) Each potential interested buyer or investor will be asked to submit a non-binding preliminary proposal on or before July 31, 2009.
- (e) The Grant Companies and the Monitor, in consultation with the Investment Offering Advisor, will evaluate the non-binding preliminary proposals based on the ability of the potential interested parties to complete due diligence on a timely basis as well as other buyer or investor selection criteria that may be developed by the Grant Companies in consultation with the Monitor and the Investment Offering Advisor.
- (f) Given that all parties recognize the need to complete a transaction as quickly as possible, the number of parties invited to participate in Phase II of the Marketing Process will be limited in number and will be jointly selected by the Monitor and the Grant Companies in consultation with the First Lien Agent and the Second Lien Agent.

15. Phase II

- (a) Interested parties invited to participate in Phase II will be provided with a management presentation and full electronic data room access.
- (b) Interested parties must complete due diligence and submit to the Grant Companies, the Monitor and the Investment Offering Advisor a revised proposal on or before August 30, 2009.
- (c) The Grant Companies and the Monitor, in consultation with the Investment Offering Advisor, will review the proposals and, in full consultation with the First Lien Agent and the Second Lien Agent, jointly select one or more parties which wish to proceed to Phase III.

16. Phase III

- (a) The Grant Companies and the Monitor, in consultation with the Investment Offering Advisor, the First Lien Agent and the Second Lien Agent, will conduct final negotiations of an agreement to sponsor a plan of arrangement or to sell the Business with or to the interested parties selected to proceed to Phase III.
- (b) The Grant Companies shall not, without the prior written approval of the First Lien Agent, at the direction of the First Lien Lenders then holding not less than 66 2/3% of the total amount of the then outstanding indebtedness owing by the Grant Companies to the First Lien Lenders:
 - (i) file any plan of arrangement with the Court; or
 - (ii) enter into an agreement to sell the Business or any material part of the Business.
- (c) If the transaction is to be completed by a plan of arrangement, such plan will be filed with the Court and submitted to all required meetings of affected creditors for approval no later than September 30, 2009.

- 28 -

- (d) If the transaction is to be completed by a sale, the asset purchase agreement will be completed and submitted by the Grant Companies to the Court for approval not later than September 30, 2009.

Adjustments to the Marketing Process

17. The Grant Companies, in consultation with the Investment Offering Advisor, may adjust the Market Process (and extend any time limits) as necessary to achieve the objectives set out in this protocol, provided the Monitor and the First Lien Agent consent to such adjustment.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC.,
GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP (the
"Applicants")

ONTARIO

SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT
TORONTO

INITIAL ORDER

FRASER MILNER CASGRAIN

LLP

1 First Canadian Place
100 King Street West,
Toronto, Ontario
M5X 1B2

Lawyer: Alex L. MacFarlane / Jane Dietrich
LSUC: 28133Q / 49302U
Email: alex.macfarlane@fmc-law.com
jane.dietrich@fmc-law.com
Telephone: 416 863-4700 / 416-863-4467
Facsimile: 416 863-4592

Lawyers for the Applicants Grant Forest Products Inc., Grant
Alberta Inc., Grant Forest Products Sales Inc., and Grant
U.S. Holdings GP

Court File No. CV-09-8247-00CL



**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE MR.

JUSTICE CAMPBELL

) FRIDAY, THE 26th DAY OF
)
) AUGUST, 2011

**IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST
PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS
GP, SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT
ALLENDALE LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT
EXCLUDED GP**

Applicants

-and-

**THE TORONTO-DOMINION BANK, in its capacity as agent for secured lenders
holding first lien security and THE BANK OF NEW YORK MELLON, in its
capacity as agent for secured lenders holding second lien security**

Respondents

ORDER

THIS MOTION, made by Grant Forest Products Inc. ("GFPI"), Grant Alberta Inc., and Grant Forest Products Sales Inc. (the "Remaining Applicants"), for *inter alia* an order in the form attached as Schedule "A" to the notice of motion of the Remaining Applicants dated April 15, 2011 (the "Notice of Motion") *inter alia*: (i) abridging and validating the timing and method of service of this Motion Record so that the Motion is properly returnable; (ii) authorizing GFPI to take steps required in accordance with the *Pension Benefits Act* (Ontario) (the "PBA") to initiate a wind-up of the two registered defined benefit pension plans of which GFPI is plan administrator namely: #0992537 - Pension Plan for Executive Employees of GFPI and #1053008 Pension Plan for the Salaried Employees of GFPI – Timmins Plant (the "Timmins

2. Salaried Plan") (collectively the "DB Plans") and authorizing GFPI to work with the Superintendent of Financial Services and the Financial Services Commission of Ontario to appoint a replacement plan administrator of the DB Plans; (iii) authorizing and directing Ernst & Young Inc. in its capacity as court-appointed Monitor of the Remaining Applicants (the "Monitor"), until further court order, to hold back from any distribution to creditors of GFPI an amount which is estimated to be the amount necessary to satisfy the wind-up deficits of the DB Plans; (iv) extending, until November 30, 2011, the Stay Period, as defined by the Order of the Honourable Mr. Justice Newbould made in these proceedings on June 25, 2009 (the "Initial Order") and as previously extended until August 31, 2011; and (v) approving the twenty-first report to Court (the "Twenty-First Report") of the Monitor, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Twenty-first Report, the affidavit of Hap Stephen sworn August 10, 2011, the affidavit of Hap Stephen sworn August 24, 2011 and on hearing submissions of counsel for GFPI, the Monitor, Financial Services Commission of Ontario, Peter Grant Sr. and the Second Lien Lenders, and no one appearing for any other person on the service list, although properly served as appears from the affidavits of Laura Bowles-Dove sworn August 10 and 17, 2011 and the affidavit of Jane Dietrich sworn August 24, 2011, filed:

1. **THIS COURT ORDERS** that the timing and method of service and filing of the notice of motion and GFPI's motion record are hereby abridged so that this motion is properly returnable today.

2. **THIS COURT ORDERS** that GFPI is hereby authorized to take steps required in accordance with the PBA to initiate a wind-up of the Timmins Salaried Plan and GFPI is authorized to work with the Superintendent of Financial Services and the Financial Services Commission of Ontario to facilitate the appointment of a replacement plan administrator of the Timmins Salaried Plan. For greater certainty, nothing in this Order shall fetter a replacement administrator's discretion, subject to the requirements of the PBA, whether to wind-up the Timmins Salaried Plan.

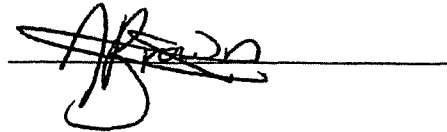
3. **THIS COURT ORDERS** that the Monitor is hereby authorized and directed, until further Court Order, to hold back from any distribution to creditors of GFPI an

3.
amount of \$191,245.00 which is estimated to be the amount necessary to satisfy the wind-up deficit of the Timmins Salaried Plan. For greater certainty nothing in this order affects or determines the priority or security of the claims against these funds.

4. **THIS COURT ORDERS** that with respect to the Remaining Applicants, the Stay Period as defined by the Initial Order, be and is hereby extended to November 30, 2011.

5. **THIS COURT ORDERS** that the Twenty-First Report and the activities of the Monitor as set out therein be and are hereby approved.

6. **THIS COURT ORDERS** that the preamble to paragraph 10 of the Initial Order be and is hereby, as of the date of this Order, deleted and replaced with the following, "**10. THIS COURT ORDERS** that, the Remaining Applicants are hereby prohibited, without the prior written approval of Bank of New York Mellon as agent for the Second Lien Lenders and the Monitor, or further order of this Court from:" and subparagraphs 10(a) to (o) of the Initial Order remain unchanged.



ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

AUG 26 2011

PER/PAR:



IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS GP, SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT ALLENDALE LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT EXCLUDED GP (the "Applicants")

^{-and-}
THE TORONTO-DOMINION BANK, in its capacity as agent for secured lenders holding first lien security and THE BANK OF NEW YORK MELLON, in its capacity as agent for secured lenders holding second lien security (the "Respondents")

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT TORONTO
(Commercial List)

ORDER
(August 26, 2011)

FRASER MILNER CASGRAIN LLP
77 King Street West, Suite 400
Toronto-Dominion Centre
Toronto, Ontario M5K 0A1

Lawyer: Jane O. Dietrich
LSUC: 49302U
Email: jane.dietrich@fmcclaw.com /
Telephone: 416 863-4467
Facsimile: 416-863-4592

Lawyers for Grant Forest Products Inc., Grant Forest Products Sales Inc., and Grant Alberta Inc.

Court File No. CV-09-8247-00CL



**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE MR.

)

WEDNESDAY, THE 21st DAY OF

JUSTICE CAMPBELL

)

SEPTEMBER, 2011

**IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST
PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS
GP, SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT
ALLENDALE LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT
EXCLUDED GP**

Applicants

-and-

**THE TORONTO-DOMINION BANK, in its capacity as agent for secured lenders
holding first lien security and THE BANK OF NEW YORK MELLON, in its
capacity as agent for secured lenders holding second lien security**

Respondents

ORDER

THIS MOTION, made by Grant Forest Products Inc. ("GFPI"), Grant Alberta Inc., and Grant Forest Products Sales Inc. (the "**Remaining Applicants**"), for an order in the form attached as Schedule "A" to the notice of motion of the Remaining Applicants dated August 10, 2011 (the "**Notice of Motion**") *inter alia*: (i) abridging and validating the timing and method of service of this Motion Record so that the Motion is properly returnable; (ii) authorizing GFPI to take steps required in accordance with the *Pension Benefits Act* (Ontario) (the "**PBA**") to initiate a wind-up of the two registered defined benefit pension plans of which GFPI is plan administrator namely: #0992537 - Pension Plan for Executive Employees of GFPI (the "**Executive Plan**") and #1053008 Pension Plan for the Salaried Employees of GFPI – Timmins Plant (the "**Timmins**

2.

Salaried Plan") (collectively the **"DB Plans"**) and authorizing GFPI to work with the Superintendent of Financial Services and the Financial Services Commission of Ontario to appoint a replacement plan administrator of the DB Plans; (iii) authorizing and directing Ernst & Young Inc. in its capacity as court-appointed Monitor of the Remaining Applicants (the **"Monitor"**), until further court order, to hold back from any distribution to creditors of GFPI an amount which is estimated to be the amount necessary to satisfy the wind-up deficits of the DB Plans; (iv) extending, until November 30, 2011, the Stay Period, as defined by the Order of the Honourable Mr. Justice Newbould made in these proceedings on June 25, 2009 (the **"Initial Order"**) and as previously extended until August 31, 2011; and (v) approving the twenty-first report to Court (the **"Twenty-First Report"**) of the Monitor, was heard August 26, 2011 at 330 University Avenue, Toronto, Ontario and the portion of the relief relating to the Executive Plan was adjourned until this day.

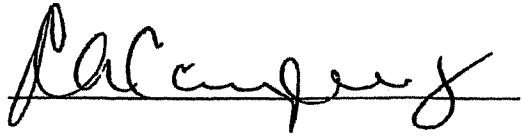
ON READING the Twenty-first Report, the affidavit of Hap Stephen sworn August 10, 2011, the affidavit of Hap Stephen sworn August 24, 2011 and on hearing submissions of counsel for GFPI, the Monitor, Financial Services Commission of Ontario, Peter Grant Sr. and the Second Lien Lenders, and no one appearing for any other person on the service list, although properly served as appears from the affidavits of Laura Bowles-Dove sworn August 10 and 17, 2011 and the affidavit of Jane Dietrich sworn August 24, 2011, filed:

1. **THIS COURT ORDERS** that the timing and method of service and filing of the notice of motion and GFPI's motion record are hereby abridged so that this motion is properly returnable today.

2. **THIS COURT ORDERS** that GFPI is hereby authorized to take steps required in accordance with the PBA to initiate a wind-up of the Executive Plan and GFPI is authorized to work with the Superintendent of Financial Services and the Financial Services Commission of Ontario to facilitate the appointment of a replacement plan administrator of the Executive Plan. For greater certainty, nothing in this Order shall fetter a replacement administrator's discretion, subject to the requirements of the PBA, whether to wind-up the Executive Plan.

3.

3. **THIS COURT ORDERS** that the Monitor is hereby authorized and directed, until further Court Order, to hold back from any distribution to creditors of GFPI an amount of \$2,185,000 which is estimated to be the amount necessary to satisfy the wind-up deficit of the Executive Plan. For greater certainty nothing in this order affects or determines the priority or security of the claims against these funds.



ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

SEP 21 2011

PER/PAR:

NB

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS GP, SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT ALLENDALE LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT EXCLUDED GP (the "Applicants")
-and-

THE TORONTO-DOMINION BANK, in its capacity as agent for secured lenders holding first lien security and THE BANK OF NEW YORK MELLON, in its capacity as agent for secured lenders holding second lien security (the "Respondents")

ONTARIO
SUPERIOR COURT OF JUSTICE

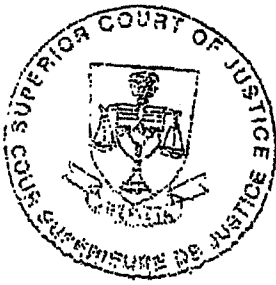
PROCEEDING COMMENCED AT TORONTO
(Commercial List)

ORDER
(Executive Plan)
(September 20, 2011)

FRASER MILNER CASGRAIN LLP
77 King Street West, Suite 400
Toronto-Dominion Centre
Toronto, Ontario M5K 0A1

Lawyer: Jane O. Dietrich
LSUC: 49302U
Email: jane.dietrich@fncoLaw.com /
Telephone: 416 863-4467
Facsimile: 416-863-4592

Lawyers for Grant Forest Products Inc., Grant Forest Products Sales Inc., and Grant Alberta Inc.



Court File No. CV-09-8247-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.) FRIDAY, THE 4th DAY OF
 JUSTICE CAMPBELL) JUNE, 2010

**IN THE MATTER OF A PLAN OF COMPROMISE OR
 ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST
 PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS
 GP, SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT
 ALLENDALE LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT
 EXCLUDED GP**

Applicants

-and-

**THE TORONTO-DOMINION BANK, in its capacity as agent for secured lenders
 holding first lien security and THE BANK OF NEW YORK MELLON, in its
 capacity as agent for secured lenders holding second lien security**

Respondents

ORDER

THIS MOTION, made by Grant Forest Products Inc. ("GFPI"), Grant Alberta Inc., and Grant Forest Products Sales Inc. (the "Remaining Applicants"), for an order in the form attached as schedule "A" to the notice of motion of the Applicants dated May 31, 2010 (the "Notice of Motion") *inter alia*: (i) abridging and validating the timing and method of service of this Motion Record so that the Motion is properly returnable; (ii) approving the fourteenth report (the "Fourteenth Report") of Ernst & Young Inc. dated June 1, 2010 in its capacity as court appointed monitor of the Remaining Applicants (the "Monitor") and the activities of the Monitor as set out therein; (iii)

2.

authorizing and directing the Monitor to make a distribution of Property (as defined in the Order of the Honourable Justice Newbould made in these proceedings on June 25, 2009 (the "Initial Order"), from the proceeds of the disposition of Property ("Proceeds") to The Toronto-Dominion Bank (the "Canadian First Lien Lenders' Agent") and Toronto Dominion (Texas) LLC as agents (the "US First Lien Lenders' Agent" and, together with the Canadian First Lien Lenders' Agent, the "First Lien Lenders' Agents") as agents on behalf of the Lenders (the "First Lien Lenders") as defined in the credit agreement made as of October 26, 2005, as amended from time to time (the "First Lien Credit Agreement") among GFPI and Grant U.S. Holdings GP as borrowers, Grant Alberta Inc., Grant Forest Products Sales Inc., Southeast Properties LLC, Grant Clarendon LP, Grant Allendale LP, Grant US Sales Inc., as guarantors and the First Lien Lenders' Agent; (iv) authorizing GFPI to pay to Hugh Saint, Inc., with respect to the construction of the Boat (as defined in the Fourteenth Report) an amount that is agreed between GFPI and Hugh Saint, Inc. and approved by the Monitor; and (iv) approving the amendments to the Employee Retention Plan (as defined by the Order of Justice Campbell made on March 30, 2010) as described in the Fourteenth Report was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Fourteenth Report and the appendices thereto and on hearing the submissions of counsel for the Remaining Applicants, the Monitor, First Lien Lenders' Agents, ~~The Bank of New York Mellon as agent for the second lien lenders,~~ the independent directors of Grant Forest Products Inc., ~~Peter Grant Sr.~~, and no one else appearing although duly served as appears from the affidavit of service of Stephanie Waugh sworn May 31, 2010;

NRG
NRG
Cyrus Capital Partners, L.P. et al.

Service

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged so that this motion is properly returnable today.

Approval of Monitor's Activities

2. **THIS COURT ORDERS** that the Fourteenth Report and the activities of the Monitor as set out therein, be and are hereby approved.

3.

Distribution to First Lien Lenders' Agents**3. THIS COURT ORDERS that:**

- (a) the Monitor be and is hereby authorized and directed to distribute from Proceeds to the First Lien Lenders' Agents or as they may in writing direct the sums of US\$340,291,419.61 and CAD\$30,943,214.65; and
- (b) the Monitor and the Remaining Applicants are hereby authorized to pay and/or distribute Proceeds and/or cash or cash equivalents in (U.S. dollars or Canadian dollars) held by the Remaining Applicants to the First Lien Lenders' Agents from time to time at such times as the Monitor may determine in its discretion or at such times as the court may direct by subsequent order until all amounts owing to the First Lien Lenders under and pursuant to the First Lien Credit Agreement have been irrevocably paid in full,

all of which to be applied on account of the indebtedness owing to the Lenders under the First Lien Credit Agreement in accordance with its terms and such Property, upon the distribution or payment in accordance with this Order, is hereby released from the Charges (as defined by the Initial Order).

4. THIS COURT ORDERS AND DECLARES that, of the Proceeds distributed by the Monitor pursuant to paragraph 3(a) of this Order:

- (a) US\$78,555,110.64 of such sum is a distribution of Net Purchased Assets Sale Proceeds (as defined by the Approval and Vesting Order dated March 30, 2010 (the "Approval and Vesting Order")); and
- (b) US\$291,540,985.00 of such sum is a distribution of Net Partnership Interests Acquisition Proceedings (as defined by the Approval and Vesting Order) and shall reduce the Assumed Partnership Indebtedness (as defined by the Approval and Vesting Order) by such amount.

5. THIS COURT ORDERS AND DECLARES that, notwithstanding:

4.

- (a) the pendency of these proceedings;
- (b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the Remaining Applicants and any bankruptcy order issued pursuant to any such applications; and
- (c) any assignment in bankruptcy made in respect of the Remaining Applicants,

the distributions and payments made pursuant to paragraph 3 of this Order are made on account of the security interests, charges and mortgages in favour of the First Lien Lenders' Agents for the benefit of the First Lien Lenders on the Property. Such distributions and payments are final and irreversible and shall be binding on any trustee in bankruptcy that may be appointed in respect of the Remaining Applicants and shall not be void, voidable or reversible by any person including creditors of the Remaining Applicants for any reason whatsoever, shall not constitute or be deemed to be a preference, assignment, fraudulent conveyance, transfer at undervalue or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or void, voidable or reversible for any reason including by reason of any other applicable federal or provincial legislation, and shall not constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

Payment in respect of the Boat

6. THIS COURT ORDERS that GFPI is hereby authorized to pay to Hugh Saint, Inc., with respect to the construction of the Boat an amount that is agreed between GFPI and Hugh Saint, Inc. and approved by the Monitor.

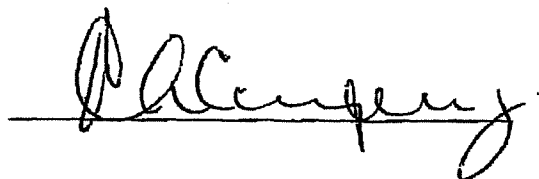
Employee Retention Plan

7. THIS COURT ORDERS that amendments to the Employee Retention Plan as described in the Fourteenth Report be and is hereby approved and the Remaining Applicants and the Monitor are hereby authorized to take such steps and do such acts as are contemplated thereby.

5.

Miscellaneous

8. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Monitor and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Monitor and its agents in carrying out the terms of this Order.



ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JUN 04 2010

PER / PAR: JSN

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS GP, SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT ALLENDALE LP, GRANT US SALES INC, GRANT NEWCO LLC AND GRANT EXCLUDED GP (the "Applicants")

-and-
THE TORONTO-DOMINION BANK, in its capacity as agent for secured lenders holding first lien security and THE BANK OF NEW YORK MELLON, in its capacity as agent for secured lenders holding second lien security (the "Respondents")

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

ORDER
(June 4, 2010)

FRASER MILNER CASGRAIN LLP

1 First Canadian Place
100 King Street West,
Toronto, Ontario M5X 1B2

Lawyer: Daniel R. Dowdall /

Jane O. Dietrich

LSUC: 16737D / 49302U

Email: daniel.dowdall@fmc-law.com /
jane.dietrich@fmcowlaw.com /

Telephone: 416 863-4700 / 416 863-4467

Facsimile: 416-863-4592

Lawyers for Grant Forest Products Inc., Grant Forest Products Sales Inc., and Grant Alberta Inc.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. C-36, AS AMENDED;
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. AND GRANT U.S. HOLDINGS G.P.

Court of Appeal File No: C58636
Court of Appeal File No. M42978
Court File No.: CV-09-8247-00CL

Applicants

COURT OF APPEAL FOR ONTARIO
Proceeding commenced at Toronto

RESPONDING COMPENDIUM OF THE
MONITOR

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

David R. Byers LSUC#: 22992W

Tel: (416) 869-5697

Daniel S. Murdoch LSUC#: 53123L

Tel: (416) 869-5529

Fax: (416) 947-0866

Lawyers for the Monitor
Ernst & Young Inc.