

[3] On April 3, 2009, the Applicants commenced parallel proceedings and filed for and obtained protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, as amended (the "CCAA") pursuant to an order of Morawetz J. (the "Initial Order") Pursuant to the Initial Order, FTI Consulting Canada ULC was appointed as Monitor of the Applicants.

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

[5] The Applicants' obligation to repay the DIP Borrowings was guaranteed by Indalex US. The guarantee by Indalex US was a condition to the extension of credit by the DIP Lenders to the Applicants.

[6] On April 22, 2009, this Court granted an Order which, *inter alia*, extended the stay of proceedings to June 26, 2009, and approved a marketing process.

[7] By Order dated July 20, 2009 (the "Approval and Vesting Order"), this Court approved the sale of the Applicants' assets as a going concern to SAPA Holding AB (including any assignees, "SAPA"), and ordered that upon closing of the SAPA transaction, the proceeds of sale (the "Canadian Sale Proceeds") were to be paid to the Monitor.

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

[9] At the sale approval hearing, both the Former Executives and the United Steel Workers (USW) asserted deemed trust claims over the Canadian Sale Proceeds in respect of underfunded pension liabilities in connection with certain pension plans administered by Indalex Limited, and requested that an amount representing their estimate of the under-funded deficiencies be included in the amount retained by the Monitor as Undistributed Proceeds, pending further order of the Court.

[10] As a result of the Former Executives and USW's reservation of rights, the Monitor has retained the amount of \$6.75 million as Undistributed Proceeds, in addition to other amounts reserved by the Monitor.

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

[12] The approval motion was either supported or unopposed by all parties except for an issue raised on behalf of certain retirees under pension plans of the Company. Pursuant to paragraph 14 of the Approval and Vesting Order, Indalex US is fully subrogated to the rights of the DIP Lenders under the DIP Lenders' Charge for the amount of the Guarantee Payment.

[13] Counsel for the retirees objected to the sale on the basis that the liquidation values set forth in the 7th Monitor's Report would, it was suggested, provide greater return for unsecured creditors than would the proposed sale. That objection was dismissed 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 of the Applicants' plant employees in Canada.¹

[14] The second objection by certain retirees and employees involves a claim based on a statutory deemed trust said to be in respect of certain funds held by the Monitor proposed to be reserved from the funds for distribution on closing to the DIP Lenders.

[15] At the July 20, 2009 hearing, the Court expressed concern that the position of the retirees and employees, which was brought only at the time of the approval motion, if it were to be dealt with at all, without an adjournment of the approval hearing, should be dealt with promptly as part of the overall approval process.

[16] Following the submissions of counsel, it was agreed that an expedited hearing process on the retirees' and employees' positions would be undertaken promptly, and that the funds on hand with the Monitor would be sufficient if required to satisfy retirees' alleged trust claims.

[17] The motion in respect of the deemed trust came on for hearing on August 28, 2009. The position of the retirees was opposed by the Applicants and the purchaser. Submissions were also made by counsel for the Superintendent under the Ontario *Pension Benefits Act*, R.S.O. 1990 c. P-8 ("*PBA.*") This decision was then reserved pending the November 26, 2009 ruling of the Court of Appeal rendered in *Sproule v. Nortel Networks Corporation*, reported, 2009 ONCA 833.

[18] There are two groups of retired employees at issue in this matter. Those represented by Mr. Hatnay and his colleagues seek a declaration that the amount of \$3.2 million, which represents the wind up liability said to be owing by the Applicants to the Retirement Plan for Executive Employees of Indalex Canada and Associated Companies (the "Executive Plan") and which is currently held in reserve by the Monitor, is subject to the deemed trust for the benefit of the beneficiaries of the Executive Plan under section 57(4) of the *PBA*. The Pensioners further seek an order that such amounts are not distributable to other creditors of the Applicants and are to be paid into the fund of the Executive Plan and that such orders and declarations survive any subsequent bankruptcy of the Applicants.

[19] There were, as of January 1, 2008, eighteen members of the Executive Plan, none of whom are active employees.

¹ Monitor's 7th Report, July 15, 2009, p. 13, paragraphs 34(c)(d)

[20] The second group of pension claimants are members of the United Steel Workers, who seek recovery from the sale proceeds based on deemed trust of a pension plan in wind-up of an amount equal to the deficiency in the Retirement Plan for Salaried Employees of Indalex and Associated Companies ("Salaried Plan.") The deficiency in the Salaried Plan is said to be \$1,795,600 as of December 31, 2008.

The Issues

1. Do the deemed trust provisions of s. 57 and s. 75 of the *PBA* apply to the funds currently held in reserve by the Monitor in respect of:
 - a. The Executive Plan;
 - b. The Salaried Plan?
2. Should the stay currently in place under the *CCAA* be lifted to permit the Applicants to file for bankruptcy under the *BIA*?

[21] There are several differences between the Executive Plan and the Salaried Plan. The Salaried Plan contains both a defined benefit and defined contribution component. Indalex and members of the Salaried Plan were required to make joint contributions to the Salaried Plan.

[22] The Salaried Plan is in the process of being fully wound up with an effective wind-up date of December 31, 2006. No pensions have accrued since that date. The wind-up deficiency in the Salaried Plan at December 31, 2008 was \$1,795,600, has been subject to special payments to deal with that deficiency, of \$709,013 in 2007, \$875,313 in 2008 and \$601,000 in 2009, all of which have been made. The last special payment was scheduled to be made on December 31, 2009.

The Executive Plan

[23] The Executive Plan has not been wound up. The material filed with the Court exhibits an intention on the part of the Applicants to wind up that Plan. The uncontested evidence of Bob Kavanagh on behalf of the Applicants in his affidavit sworn August 12, 2009 is to the following effect:

16. Indalex has made all required contributions to the Executive Plan to date and no amounts are currently due or owing to the Executive Plan, including special payments.
17. As at January 1, 2008, the Executive Plan had an estimated deficiency of \$2,996,400 determined on a wind-up basis. In 2008, Indalex made total special payments of \$897,000 to the Executive Plan. No further special payments are due to be made to the Executive Plan until 2011.
18. If the Executive Plan were to be fully wound up, the funded status of the plan as of the wind-up date could only be determined by an actuarial valuation of the plan performed after the wind-up date once the plan's assets and liabilities have been determined. No actuarial valuation of the Executive Plan has been prepared since the valuation performed with an effective date of January 1, 2008.
19. Sixteen individuals with benefit entitlements under the Executive Plan were last employed by Indalex in Ontario and two individuals with benefit entitlements under the Executive Plan were last employed by Indalex in Alberta.

20. There is currently one member of the Executive Plan who is on long term disability and continues to accrue benefits under the plan.
21. Currently, approximately 80% of the assets of the Executive Plan are invested in fixed income securities and approximately 20% of the assets of the Executive Plan are invested in equities.
22. The market value of the assets of the Executive Plan as at June 30, 2009 was \$5,022,940. Attached hereto as Exhibit "C" is a copy of the Statement of Net Assets Available for Benefits as of June 30, 2009.

[24] The affidavit of Keith Carruthers exhibits a letter of July 13, 2009 on behalf of the Monitor confirming the intention of the Applicants to wind up the Executive Plan in accordance with the provisions of the *PBA*. There are no deficiencies in payments under the Executive Plan as of July 20, 2009. The Executive Plan is not wound up. Given the analysis that follows in respect of the Salaried Plan, I see no basis for a deemed trust of any amount at this time in respect of the Executive Plan.

The Salaried Plan

[25] This motion essentially involves one aspect of the Salaried Plan of Indalex, namely the windup deficiency of the said plan. It is the position of the *CCAA* Applicants that prior to the sale of assets approved on July 20, 2009, all pension payments required under obligation to Indalex employees, both statutory and contractual, were met.

[26] What is at issue here is the requirement for an annual deficiency payment that was established to be made when the Salaried Plan was wound up as at December 31, 2006.

[27] The term "wind up" can be a misnomer unless understood in context. When a pension plan is "wound up," at the effective date it means that no new entrants are permitted. An actuarial calculation is then made of the assets to determine whether, based on certain actuarial assumptions, there will be sufficient monies available at the times required to pay the pension entitlement of employees who have and will retire.

[28] If the assets as of the wind-up date are found to be insufficient, that deficiency will be required to be made up under the *PBA*. As in this case, the Plan may be permitted to have the deficiency rectified in a period of up to five years by annual instalments.

[29] The issue for this Court is whether or not under the *PBA* there is a requirement that the deficiency commencing at the wind up date be paid as at the date of closing of the sale and transfer of assets, namely July 20, 2009.

[30] The issue is to be determined by analysis and application of the provisions of the *PBA*. The sections involved are the following:

57.

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

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. R.S.O. 1990, c. P.8, s. 75 (1); 1997, c. 28, s. 200.
- (2) The employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times. R.S.O. 1990, c. P.8, s. 75 (2).

[31] Section 75 of the *PBA* is amplified by sections of the regulations under the statute * * (see R.R.O. 1990 Regulation 909.) Section 28 and the following 144 pages of the Regulation deal with wind-up notices. Section 31(1) and (2) are as follows:

31. (1) The liability to be funded under section 75 of the Act shall be funded by annual special payments commencing at the effective date of the wind up and made by the employer to the pension fund. O. Reg. 712/92, s. 19.
- (2) The special payments under subsection (1) for each year shall be at least equal to the greater of,
- (a) the amount required in the year to fund the employer's liabilities under section 75 of the Act in equal payments, payable annually in advance, over not more than five years; and
 - (b) the minimum special payments required for the year in which the plan is wound up, as determined in the reports filed or submitted under sections 3, 4, 5.3, 13 and 14, multiplied by the ratio of the basic Ontario liabilities of the plan to the total of the liabilities and increased liabilities of the plan as determined under clauses 30 (2) (b) and (c). O. Reg. 712/92, s. 19.

[32] The most pertinent of all of these sections are 57(4) and 75(2), as they apply to this windup situation. The submission on behalf of the Superintendent distinguished between the words "due" and "accruing due." The assertion is that the word "accrue" must be given meaning. The meaning suggested is that by virtue of the inclusion of the word "accrue," the remaining deficiency payments become payable since they fall within the deemed trust provisions.

[33] The distinction to be made between amounts that are accruing and amounts that are due is that, in the case of an amount accruing, it is not yet payable, while generally an amount that is due is payable.

[34] The deemed trust provision of s. 57(4) requires the employer to accrue "to the date of the windup but not yet due." The windup in this case is December 31, 2006. In my view the section contemplates the calculation to be made as of the date of wind-up of the amounts required to make up the deficiency. If, as here, the regulator permits that deficiency to be made up over a

period of years, the amount of the yearly payments does not become due until it is required to be paid. It is "payable annually in advance."

[35] In *Re Ganong Estate; Ganong v Belyea*, [1941] S.C.R. 125, it was held:

...the words 'all dividends accrued due' can surely only mean dividends which have become payable by the corporation to the shareholder, as the words "dividends accruing due" during any stated period can only mean dividends as they become payable by the corporation to the shareholder.

The court went on to say:

How can these dividends possibly be said to have 'accrued due' or to be 'accruing due' when no profits have been earned to provide for their payment and no declaration has been made by the directors fixing any date therefor? The shareholders acquire no right to payment of any dividends until there are net profits, out of which alone they can be paid and until such time as the directors determine they shall be paid.

[36] The use of the word "accrue" connotes the ability to calculate a precise amount of money. The word "due" connotes that it is payable whether or not the time for payment has arrived. See *Black's Law Dictionary*, 6th ed., The West Group at p. 499, where it is noted that with respect to the word "due," "it imports a fixed and settled obligation or liability but with reference to the time for its payment, there is considerable ambiguity in the use of the term."

[37] In *Toronto Dominion Bank v. Usarco Ltd.*, [1991] 42. E.T.R. 235, Ont. C.J. (Gen. Div.), Farley J. dealt with the deemed trust provisions under what is now section 57(4) of the *PBA* in a context in which a declaration was sought prior to a bankruptcy petition. He said at paragraph 26:

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

[38] The issue was dealt with again in *Ivaco Inc. Re.* [2006] 25 C.B.R. [5th] 176. (Ont. C.A.), J. Laskin J.A. speaking for the Court of Appeal noted at paragraph 38 that "in a series of cases, the Supreme Court of Canada has repeatedly said that a province cannot, by legislating a deemed trust, alter the scheme of priorities under the federal statute."

[39] Paragraph 44 of that decision states:

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

[40] In the text "Essentials of Canadian Law-Pension Law" (Toronto: IrwinLaw, 2006) author Ari N. Kaplan at page 396 states:

The *PBA* does not expressly state whether a funding deficiency on the wind up of a pension plan is secured by the deemed trust, but it appears that the deemed trust is intended to apply to the deficiency to the extent it relates to employer contributions and remittances due and owing to the pension fund on wind up, but which have not been paid."

[41] The author goes on in the next paragraph:

The deemed trust does not extend to the obligation of an employer to fund pension obligations that have not yet become due or which "crystallize" only upon the windup of the pension plan.

The *Usarco* decision referred to above is the foundation for that statement.

[42] In his paper given at an Insight Conference, "Pension Management in Insolvency and Restructuring: What Is At Stake?" September 20, 2005, Gregory J. Winfield at page 29 states:

Of particular note to secured creditors will be the fact that the courts have determined that the deemed trust created under that *OPBA* does not extend to the unfunded pension liability upon the windup of the plan, but is limited to the outstanding unremitted contributions that are past due plus those arising in respect of the stub period. Accordingly while the entirety of the pension fund shortfall remains an obligation of the employer, and an obligation exists under the *OPBA* to fund this deficiency over a period not exceeding five years from the date of wind up, at present this is an unsecured claim on the assets of the debtor." [Reference omitted]

[43] The difficulty in reconciling the requirements of the pension statute with the regime of the *CCAA* is that a company such as Indalex is entitled to carry on business and to make payments in the ordinary course of such business including those that may be required under the initial order which may well, as here, include certain ongoing pension obligations while in *CCAA*.

[44] Were it not for the provisions in s. 31 of the Regulations, Indalex would have had under s. 75 of the *PBA* to pay in as of the date of wind-up any Plan deficiency. Section 31 of the Regulation as anticipated in s. 75 of the Act spreads that into five equal annual instalments.

[45] One obvious purpose behind the provision in s. 31 of the Regulation is to ease the burden on the Company to enable it to have the funds to operate its normal business operations while it earns the revenue to make up the deficiency.

[46] The pension issues that have arisen given the nature of the recent recession, as here, are often complex and pit as adversaries creditors of a corporation who most often having advanced funds under security which creditors assert give them priority as to the repayment, as against employees many of whom are long-term or even retired who have seen the assets supporting their pensions decrease in value, risking the payments to which the employees are otherwise entitled by the terms of the plan of which they are members.

[47] In circumstances such as this, the Court does not have the mandate to exercise the discretion to do what it or any group might consider fair and equitable. The federal insolvency legislation in force (the *CCAA* and *BIA*) provide schemes of priority among creditors commencing with those who have security over the assets of the company. Pitted against those with security are those unsecured creditors who must share in whatever is left over after the secured creditors are paid.

[48] Employees or retired employees are entitled to pensions in accordance with the contractual terms of their pension plan. In certain circumstances those contractual terms will be augmented by the provisions of the *PBA* to the extent that they do not conflict with federal insolvency legislation. In some of these circumstances, a "deemed trust" will arise.

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

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

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

Motion To Lift Stay

[52] The Applicants and Indalex US, in addition to disputing the validity of the deemed trust claim, sought to file a voluntary assignment in bankruptcy to ensure the priority regime they urged as the basis for resisting the deemed trust.

[53] In support of that position, it was urged that since the Applicants no longer carried on business, have no active employees and no tangible assets apart from tax refunds (other than the cash sale proceeds associated with the above motion), and no directors (they having resigned), an assignment in bankruptcy is appropriate. The stay granted under the Initial Order, it is urged, should be lifted for that purpose.

[54] The decision on the voluntary assignment was reserved pending a decision in the main motion above, since to allow the bankruptcy to proceed might have deprived employees of an argument under the *CCAA*.

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

[56] I conclude that it is not necessary to deal with the issue of the voluntary assignment, at least on the basis sought by the Applicants at this time. I did not find conflict between the federal and provincial regimes.

[57] Should the Applicants wish to renew the request for bankruptcy relief, the motion can be scheduled through the Commercial List.

C. CAMPBELL J.

Released:

CITATION: Re Indalex 2010 ONSC 1114
Court File No. CV-09-8122-00CL
Date: 20100218

**SUPERIOR COURT OF JUSTICE
ONTARIO
(Commercial List)**

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

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

REASONS FOR DECISION

C. CAMPBELL J.

RELEASED: February 18, 2010