

## **MEDIA RELEASE FROM RIGHTS FOR NORTEL DISABLED EMPLOYEES**

**Released Monday, April 11, 2011, 8:00 AM EST**

**Subject: Court of Appeal of Ontario Decision on Indalex Pension Deficit Getting Priority Due to Breach of Fiduciary Obligation**

There was a Court of Appeal of Ontario decision on Thursday, April 7, 2011, which gave super-priority for pension deficits affecting 33 executives and managers at Indalex, a corporation that liquidated under CCAA protection.

The Indalex Ontario Court of Appeal decision shows Canada has a two-tier justice system: one for corporate executives and the other for workers, with disabled workers at the bottom rung.

This decision allows what Prime Minister Harper and his Conservative colleagues worked vigorously to reject when they killed both Bill C-501 and Bill S-216

Court of Appeal of Ontario Indalex Pension Fund Decision April 7, 2011

<http://cfcanada.fticonsulting.com/indalex/docs/Court%20of%20Appeal%20Decision%204-07-2011.pdf>

Ontario Superior Court of Ontario Indalex Pension Fund Decision Feb. 18, 2010

<http://www.canlii.org/en/on/onsc/doc/2010/2010onsc1114/2010onsc1114.pdf>

### **Overall Conclusions on the Impact of this Decision on the Nortel Disabled:**

Despite this being a case on pensions, this decision says that the remedy for breach of fiduciary obligation in a trust is to restore money to the trust on a priority basis. This is what the dissenting Nortel disabled employees have been fighting for in regards to their Health and Welfare Trust.

Indalex executives got an appeal to avoid having their pension income cut by up to 70%, while the same court refused to hear an appeal from the Nortel disabled employees. Justice James MacPherson sits on both judge panels, one making a positive decision for the Indalex executives and the other making a catastrophically negative decision for the Nortel disabled. Similar fact circumstances and the same legal arguments apply to the two cases.

Koskie Minsky and Sacks Goldblatt Mitchell, who represented the executives and managers in the Indalex case, are the same law firms that advised Sue Kennedy to sign settlement agreements impoverishing the Nortel disabled. The two law firms argued that Indalex breached its fiduciary obligation to put enough assets in the trust account to fund the executives' and managers' pension income. One of the Indalex executives is disabled. More details are provided below on the Indalex decision and the interplay of deemed trusts under the Ontario Pension Benefit Act, breach of fiduciary obligation within a trust and the remedial purpose of the Companies' Creditors Arrangement Act.

The Nortel disabled had \$75 M of assets wrongfully removed from their Health and Welfare Trust. There are 360 disabled employees with 160 dependent children.

Koskie Minsky appears not to have advised Sue Kennedy that the Nortel disabled had the legal right to seek the same remedy for breach of fiduciary obligation in their trust account. The dissenting Nortel disabled hired independent legal counsel Rochon Genova to oppose the settlement Sue Kennedy signed.

Mr. Rochon presented the same legal argument used in the Indalex case, that there was a breach of fiduciary obligation in the trust account for the Nortel disabled. Koskie Minsky fought against the dissenting Nortel disabled in the lower court and the lower court judge approved the settlement because Sue Kennedy had signed it. The Nortel disabled had no vote on the settlement where Sue Kennedy signed away the legal rights of the whole Nortel disabled group. The Ontario appeal court refused to hear their appeal.

It isn't just the Indalex executive case that proves Canada has a two-tier justice system.

**J. Morawetz decided to award 9 Nortel executives a constructive trust** on \$7 million of Nortel investments that were earmarked to pay their retirement income. These 9 executives had their post-retirement income protected despite contract terms to the contrary. On the other hand, the withdrawal of assets from the true trust for the Nortel disabled was determined to be acceptable to this judge.

Sue Kennedy hired Sacks Goldblatt Mitchell to oppose the dissenting Nortel disabled, who are seeking to double their Health and Welfare Trust wind-up settlement in an Application for Leave to Appeal to the Supreme Court of Canada. This law firm is also turning a blind eye to the breach of fiduciary obligation within the Nortel Health and Welfare Trust, even though they made the same legal argument on lesser grounds for the Indalex executives. Both Sacks Goldblatt Mitchell and Koskie Minsky have their legal fees paid by Nortel and it is Nortel that has breached its fiduciary obligation to its disabled employees.

**If the dissenting Nortel disabled cannot get their case heard at the Supreme Court of Canada, Canada has a justice system that works for corporations and their executives and not for average Canadians. 1.1 million Canadians do not know their disability insurance isn't going to be there when they need it. The second shock will be that their courts are not going to be there for them either. It's disgraceful that the families of the Nortel disabled are forced to suffer this injustice.**

For further information on the court and government treatment of the Nortel disabled go to [www.protectourtomorrow.com](http://www.protectourtomorrow.com) or contact:

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**More Details on the Indalex Decision to Remedy the Breach of Fiduciary Obligation:**

— The deficit in the trust (pension plan) formulates a constructive trust. "Constructive trust may be imposed "where good conscience requires it."" [Point 202]

- The constructive trust is warranted when there is a breach of fiduciary duties involving wrongful conduct in the trust, or it applies even where there is no wrongful conduct but where there is unjust enrichment to the bankruptcy estate. [Point 202]
- The deficit arising from breach of fiduciary obligation in the trust has priority over the unsecured creditors since there is a significant difference between being a mere unsecured creditor and being an unsecured creditor to whom a fiduciary duty is owed. [Point 200] Without the proprietary remedy, the Plans' beneficiaries have no meaningful remedy. Moreover, there must be some incentive to require employers who are also the administrators of their pension plans to remain faithful to their duties [Point 204]
- Equitable remedies are sufficiently flexible ... to meet requirements of fairness and justice. [Point 201]
- The decision gives priority to deemed trusts under the Ontario Pension Benefit Standards Act (PBA), but it does not rely on the concept of statutory deemed trusts for priority. The CAO judges say, "However, even if I am wrong in concluding that the deemed trust has priority over the secured creditor in this case, I would make the order on the basis that it is the appropriate remedy for the breaches of fiduciary obligation. [Point 197] The Executive Pension Plan did not qualify for the deemed trust priority because it was not wound-up before the date of the sale proceeds distribution, yet the judges gave it a constructive trust and priority due to the breach of fiduciary obligation. [Point 205]

[Background on Deemed Trusts under PBA: This decision interprets the PBA such that the whole pension fund deficit is in a deemed trust, not just the mandatory unpaid regular employer contributions and mandatory special employer contributions that are due and payable at the time of the pension plan wind-up. Statutory deemed trust claims in respect of the underfunded pension liabilities is pursuant to ss. 57 and 75 of the PBA. Also, s. 30(7) of the Ontario Personal Property Security Act, R.S.O. 1990, c. P.10 (PPSA), expressly gives priority to the deemed trust in the PBA over secured creditors.

In his 2005 IVACO CCAA decision, Justice James Farley had determined that the CCAA remedial purpose to promote restructurings was in conflict with Ontario PBA's objective to protect pension beneficiaries through deemed trusts. He determined that he had the authority to use the paramountcy of the Federal CCAA statute to supersede the Provincial PBA and set the precedent that only mandatory unpaid regular employer contributions that are due and payable get priority in CCAA proceedings.]

**More Details on Remedial Purpose of CCAA Not Applying When Corporation is Liquidating and not Restructuring:**

- "The CCAA court was not designed to allow a company to avoid its pension obligations." [Point 199]
- "This was a "liquidating CCAA" from the outset. There was no restructuring of the company. There was no plan of compromise or arrangement prepared and presented to creditors. Within days of obtaining CCAA protection, Indalex began a marketing process to sell itself. Very shortly thereafter, it sold its business as a going-concern. There is nothing in the record to suggest that giving the deemed trust priority would have frustrated Indalex's efforts to sell itself as a going-concern business." [Point 180]