WeirFoulds LLP

CASE LAW UPDATE

*Mandy L. Seidenberg**

Indalex Limited (Re)

2001 ONCA 265 (Released 7 April, 2011)

***Companies' Creditors Arrangement Act* – Pensions – Priorities – Fiduciary Obligations – Funding Pension Plans**

This decision considers the obligations of a company acting as both employer and pension administrator where the company becomes insolvent. Indalex Limited ("Indalex") obtained protection from creditors under the *Companies' Creditors Arrangements Act* ("CCAA"). At the time, Indalex provided two pension plans, the "Executive Plan" and the "Salaried Plan", and was the sponsor and administrator of both.

During the CCAA proceedings, the court authorized Indalex to borrow funds pursuant to a DIP credit agreement and granted the DIP lenders a super-priority charge in Indalex's property. A few months after obtaining CCAA protection, Indalex moved for approval of the sale of its assets on a going-concern basis, and for approval to distribute the sale proceeds to the DIP lenders. The result was nothing would remain to fund the deficiencies in the Plans. Representatives for the Plans' beneficiaries objected. The court approved the sale, but ordered an amount be held by the Monitor pending a determination on the rights of the Plans' beneficiaries (the "Reserve Fund"). As the sale funds were insufficient to completely repay the DIP lenders, the guarantor paid the shortfall.

In their motions, the Plans' beneficiaries claimed the Reserve Fund was subject to deemed trusts in their favour pursuant to the *Pension Benefits Act* ("PBA"), and should be paid to them in priority to the guarantor. They also claimed Indalex breached its fiduciary obligations to them during the CCAA proceedings. The motion judge dismissed the beneficiaries' motions on the basis that, at the date of sale, no deemed trust under the PBA had arisen in respect of either plan, and did not deal with the fiduciary obligation argument. The appeal to the Court of Appeal was allowed.

In respect of the Salaried Plan, the PBA Regulations permitted Indalex to make up the deficiency owed pursuant to s. 75 of the PBA over a period of years. The motion judge held that amount was not "due" and thus no deemed trust arose at the date of wind up. The Court of Appeal disagreed, holding the owed amounts were accrued to the date of wind up. The fact that the employer was given time to make the required contributions did not change their status as

liabilities as at the wind-up date. The deemed trust under the PBA applied to all amounts payable under s. 75.

In respect of the Executive Plan, the fact that it had not been wound up caused both levels of court to doubt that a deemed trust arose, as the wording in the PBA appeared to require wind up for a deemed trust to arise. The Court of Appeal declined to decide whether a deemed trust applied, as it disposed of the matter on the basis that Indalex breached its fiduciary obligations.

The Court held that Indalex owed a fiduciary duty as administrator of the Plans, both pursuant to common law and s. 22 of the PBA. Indalex wore "two hats" during these proceedings: its corporate hat, and its administrator's hat. While it had the right to decide to commence CCAA proceedings as a corporate actor, Indalex could not ignore its obligations as the Plans' administrator and make all its decisions during the proceedings on a solely corporate basis. Even were the pension beneficiaries not the beneficiaries of a deemed trust, they were unsecured creditors to whom a fiduciary duty is owed, which put them on different standing that other unsecured creditors. The Court could consider their equitable position in deciding how the Reserve Fund should be distributed.

The Court considered the recent Supreme Court of Canada decision, *Century Services*, which it distinguished on several bases, including that nothing in the CCAA expressly excluded the provincial deemed trust for unpaid pension contributions from applying in CCAA proceedings. The Court rejected the respondents' contention that *Century Services* stood for the unqualified proposition that the federal priorities under the *Bankruptcy and Insolvency Act* apply in CCAA proceedings. Where the provincial obligation was alleged to conflict with a priority granted under the federal CCAA, the facts would have to be examined to determine if the CCAA purpose was frustrated, and the doctrine of federal paramountcy would have to be invoked and determined. The Court held this would not lead to "strange asymmetry" between the CCAA and the BIA, as it would be open to the court to find the super-priority charge made under the CCAA order overrode the deemed trust, giving the CCAA court greater flexibility in considering various interests in the reorganization.

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