

February 2013

SCC Releases its Decision in *Sun Indalex Finance, LLC v. United Steelworkers*

In a decision released on Friday, February 1, 2013, the Supreme Court of Canada set aside the Ontario Court of Appeal's decision in *Sun Indalex Finance, LLC v. United Steelworkers*. The majority of the SCC upheld the priority of charges created in *Companies' Creditors Arrangement Act* ("CCAA") proceedings over claims for wind-up funding deficiencies in an insolvent company's pension plans.

In its decision, the SCC addresses three primary issues:

- the application of Ontario's *Pension Benefits Act* ("PBA") deemed trust provisions to pension plan wind-up deficiencies;
- the priority between provincial statutory deemed trusts and charges created in CCAA proceedings; and
- the fiduciary duties of pension plan administrators in CCAA proceedings and whether a constructive trust is the appropriate remedy for a breach of such duties.

Background

Indalex Limited ("**Indalex**"), an aluminum manufacturer, was the sponsor and administrator of two pension plans, one for salaried employees and the other for executive employees. In 2009, Indalex became insolvent and sought protection from its creditors under the CCAA. At that time, the plan for salaried employees was being wound up and had wind-up deficiencies and the plan for executive employees was closed but not wound-up and had solvency deficiencies.

Indalex was authorized by the CCAA court to obtain debtor-in-possession ("**DIP**") financing in order to continue its operations. In connection with the financing, the DIP lenders were granted priority over the claims of all other lenders and the parent company of Indalex, Indalex Holding Corp. ("**Indalex US**"), guaranteed repayment of the DIP loans.

Indalex subsequently sought approval from the CCAA court for the sale of its assets and distribution of the sale proceeds to the DIP lenders, which would result in insufficient funds to satisfy the deficiencies in the plans. Accordingly, the plan members objected. They claimed that they had a deemed trust pursuant to the PBA over the sale proceeds as well as a constructive trust arising from Indalex's alleged breach of its fiduciary duties as administrator of the plans. The court approved the sale, but ordered that an amount in respect of the plans' funding deficiencies be retained by the monitor pending the outcome of the plan members' claims.

The judge at first instance dismissed the plan members' motions on the basis that the deemed trust did not apply to wind up deficiencies and as a result the plan members were unsecured creditors with respect to the funding deficiencies. The Ontario Court of Appeal reversed this decision and held that the funding deficiencies were subject to deemed (wind-up deficiencies only) and constructive trusts which had priority over the DIP charges and other secured creditors.

Deemed Trust Provisions Apply to Wind-Up Deficits

The majority of the SCC found that the deemed trust provided for in s. 57(4) of the PBA does apply to wind-up deficiencies, even if the exact amount of such deficiencies cannot be calculated at the date of wind up. As the Salaried Plan was wound up, the PBA creates a deemed trust over its wind-up deficits. However, since the Executive Plan was not wound-up, the deemed trust did not apply to its solvency deficiencies.

It is important to note that this portion of the decision is based on the Ontario pension standards legislation. The application of this part of the decision to a pension plan not governed by the PBA will depend on the language used in the pension standards legislation that applies to a particular pension plan.

As a result of Federal Paramourncy, the DIP Charges Supersede the Deemed Trust

The SCC unanimously agreed that the DIP charges granted in the CCAA proceedings had priority over the deemed trust. The deemed trust created under the provincial PBA and the DIP charges authorized by the federal CCAA court gave rise to different and conflicting orders of priority: one giving priority to the plan members and the other giving priority to the DIP lenders (and subsequently Indalex US). The SCC held that while a deemed trust created under provincial legislation such as the PBA still applied in federal CCAA proceedings, it remained subject to the doctrine of federal paramourncy. Thus, the conflict between the federal DIP charges and the provincial deemed trust must be resolved in favour of the charges created under federal legislation. Accordingly, the DIP charge supersedes the deemed trust.

Breach of Fiduciary Duty Occurred but a Constructive Trust was not Appropriate Remedy

The SCC unanimously found that Indalex breached its fiduciary duty as administrator of the pension plans (although the reasons for judgement differ on the extent of the breaches). The majority of the Court determined that Indalex breached its fiduciary duty by failing to take steps to ensure that the plan members were informed and had the opportunity to be represented in the CCAA proceedings, particularly in the early DIP financing stages. The majority of the SCC also found that while there was a breach of fiduciary duty, the imposition of a constructive trust over the funds held in reserve was not the appropriate remedy. They decided that a constructive trust was only appropriate if the breach gave rise to assets which would be unjust for the wrongdoer to retain and in this case, Indalex's breach of fiduciary duty gave rise to no such assets.

The full decision can be found [here](#).

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