

Financial Services Flash

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Quebec Court Upholds Priority of Provincial Pension Deemed Trust in Timminco CCAA

By Sam Babe

In a January 24, 2014 decision in the *Companies' Creditors Arrangement Act* (the "CCAA") proceedings of Timminco Limited and Bécancour Silicon Inc. [2014 QCCS 174] ("*Timminco*"), the Quebec Superior Court (the "Court") held that the *Supplemental Pension Plans Act* (Quebec), in conjunction with the *Civil Code of Québec*, created a deemed trust for pension claims, including claims for special payments, which deemed trust ranked ahead of the claims of secured creditors in the CCAA proceedings.

Timminco stands in stark contrast to the earlier decision, by the same judge, in *White Birch Paper Holdings Co., Re* [2012 QCCS 1679] ("*White Birch*") wherein it was held that: (a) no such deemed trust existed; and (b) based on the reasoning (somewhat aggressively interpreted) of the Supreme Court of Canada (the "SCC") in *Century Services Inc. v. Canada (Attorney General)* [2010 SCC 60] ("*Century Services*" also known as *Ted Leroy Trucking Ltd.*), any such deemed trust would have to be explicitly preserved by the CCAA to maintain its priority. The Court in *Timminco* reconsidered its assessment of Quebec law and traded the interpretive guidance of *Century Services* for the SCC's reasoning in *Sun Indalex Finance, LLC v. United Steelworkers* [3013 SCC 6] ("*Indalex*"), wherein the deemed trust under the *Pension Benefits Act* (Ontario) (the "PBA") was held to have "survived" commencement of CCAA proceedings.

The relevance of *Timminco* is that it is the first post-*Indalex* decision (and the only decision apart from *White Birch*) to rule on the survival of provincial pension deemed trust claims in CCAA proceedings, where the proceedings are being conducted under the new CCAA. The CCAA was amended in 2009 to include, for the first

time, relatively limited protections for pension claims in a restructuring or a sale. These amendments came too late to be applied by the SCC in *Indalex*, thus leaving a large question mark about the impact of *Indalex* on non-DIP secured lenders going forward under the new CCAA regime.

Unfortunately, the Court in *Timminco* was focused narrowly on the questions of whether a deemed trust existed under Quebec law and what affect such a deemed trust had on the debtor's assets. The Court's attention was, apparently, not drawn to the issue of the impact of the 2009 amendments to the CCAA (which issue was also left untouched in *White Birch*). In my article "After *Indalex*: Pension Claims under the New CCAA" (published in the May 2013 edition of *Collateral Matters* and the June 2013 edition of *National Creditor Debtor Review*), I argued that the limitations to the new pension protections in the CCAA should be read to imply that the PBA deemed trust can no longer survive in CCAA proceedings to give additional protection. The same logic would apply to the pension deemed trust that the Court in *Timminco* found to exist under Quebec law, which deemed trust creates protections that are, like those under the Ontario statute, much broader than those in the new CCAA.

An analogous argument was recently expressed by the Quebec Superior Court in the CCAA proceedings of Aveos Fleet Performance Inc. and Aero Technical US, Inc. [2013 QCCS 5762] ("*Aveos*") when it considered the impact of the new CCAA pension protections on pension claims under the federal *Pension Benefits Standard Act, 1985* (the "PBSA"). There the Court held that the limited scope of the protections in the new CCAA suggested that Parliament did not intend that the

broader protections of the *PBSA* deemed trust should survive. In making that finding, the Court applied a more nuanced understanding of the principles of CCAA statutory interpretation utilized by the SCC in *Century Services*.

Unfortunately, the Court in *Timminco* did not consider the application of the reasoning in *Aveos*, as the *Timminco* hearing took place six months before the *Aveos* decision was released. If this *Timminco* decision is appealed, attention will hopefully be paid to *Aveos* and its application of *Century Services* interpretive rules to the new CCAA.

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