Financial Services Flash

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Supreme Court Rules on Pension Claims in CCAA

On February 1, the Supreme Court of Canada (the "SCC") released its long-awaited decision in *Sun Indalex Finance, LLC v. United Steel Workers*. By a five to two majority, the SCC allowed the appeal from the 2011 decision of the Ontario Court of Appeal (the "OCA") which had created so much uncertainty about the priority of pension claims in *Companies' Creditors Arrangement Act* (the "*CCAA*") proceedings.

The SCC majority held that the deemed trust for pension claims created by subsection 57(4) of the *Pension Benefits Act* (Ontario) (the "*PBA*") extends only to amounts owing under pension plans whose wind-up had already commenced but, in such circumstances, extends to all amounts that are determined to be owing by the employer up to the date of wind-up (even if not determined until a later date), and not just those amounts that could be determined on the date of wind-up. For pension plans in wind-up, the scope of the *PBA* deemed trust is therefore now wider than previously thought.

The SCC was unanimous in holding that the PBA deemed trust, elevated to priority status by the operation of subsection 30(7) of the *Personal Property Security Act* (Ontario) (the "*PPSA*"), had survived into the commencement of Indalex's CCAA proceeding, but then had its priority reversed by the court-ordered charge in favour of the debtor-in-possession ("DIP") lender. A DIP charge in a *CCAA* proceeding has the same paramountcy over a conflicting priority scheme under provincial legislation as if the court-ordered DIP Charge priority scheme had been proscribed by the *CCAA* itself.

As a result of amendments enacted in 2009 after the start of, and thus not binding on, the Indalex *CCAA* proceedings, section 6 of the *CCAA* now prohibits a court from sanctioning a *CCAA* plan unless the plan ensures payment of certain amounts to pension plans. These pension amounts are limited in subsection 6(6) to (i) unpaid amounts deducted from payroll, (ii) unpaid normal costs contributions, and (iii) any unpaid defined employer contributions. Because underfunded amounts are limited to unpaid normal cost contributions, the effective priority the *CCAA* now gives to pension claims is far narrower in scope than the claims given priority under the *PBA* deemed trust (by operation of *PPSA* subsection 30(7)). In its language, *CCAA* subsection 6(6) largely mirrors the language of section 60 of the *Bankruptcy and Insolvency Act* (the "*BIA*") which imposes similar requirements when a court is approving a *BIA* proposal and follows closely the language in sections 81.5 and 81.6 of the *BIA* which create super-priority charge for certain pension claims in bankruptcy and receivership. The 2009 *CCAA* amendments also include the section 36 provisions governing going-concern sales in *CCAA* proceedings. Subsection 36(7) requires, as a pre-condition to court sale approval, payment of certain arrears in wages and, apparently (despite a cross-reference to a non-existent subsection of section 6), source deductions arrears, but leaves out payment of even the limited pension amounts referred to in subsection 6(6). In that respect, *CCAA* subsection 36(7) is inconsistent with the new BIA provisions governing going concern sales in proposal proceedings, as the latter (specifically subsection 65.13(8)) do require payment in a going-concern sale of the same pension amounts as must be satisfied in a proposal.

The SCC did not address the question of whether the *PBA* deemed trust for pension amounts would still survive under today's CCAA (as amended to provide for limited payment of pension claims). This question is important to lenders to the extent their claims are secured by contractual security pursuant to the *PPSA* rather than by a court-ordered DIP charge. If the *PBA* deemed trust survives a *CCAA* filing, then non-DIP charge secured claims would still be primed

in respect of proceeds of current assets by the operation of subsection 30(7) of the *PPSA* which elevates *PBA* (and *Employment Standards Act* (Ontario)) deemed trust claims above other secured claims. This risk to lenders is increased because of the now expanded scope of the *PBA* deemed trust for amounts owing to pension plans in wind-up. We would hope that the courts will read the new *CCAA* subsections 6(6) and 36(7) as limiting the scope of priority pension claims in plans and going-concern sales, thereby reversing the conflicting priority created by the *PBA* deemed trust and the *PPSA*. Such a reading would be consistent with the principle of preserving harmony between the priority regimes in *CCAA* proceedings and bankruptcy, as expressed in the SCC's earlier 2010 decision in *Century Services Inc. v. Canada* (*sub nom Re Ted Leroy Trucking Ltd*.).

The SCC also held by a majority that the OCA should not have imposed the equitable remedy of constructive trust to reverse the priority of the DIP charge. This aspect of the OCA's decision had been essential to the claims of the beneficiaries of the management pension plan which did not benefit from the *PBA* deemed trust because it was not in wind up at the commencement of the *CCAA* proceedings. The SCC majority found that Indalex had not breached its fiduciary duty as pension plan administrator merely by seeking protection pursuant to the *CCAA* or by bringing motions in the *CCAA* proceedings that would have adversely affected the plans, but that Indalex did breach its duty by failing to give the employees fulsome notice of all such adverse motions in order to give them the chance to obtain the same representation as they would have if the plans had an independent administrator. The SCC majority found, however, that the employees had managed by other means to obtain adequate legal representation and were not, in fact, prejudiced. The harm the employees suffered was due to their employer's insolvency and not due to Indalex's actions or omissions in the *CCAA* proceedings.

It is notable that the three justices of the SCC who specifically addressed the issue of the motion Indalex had brought to allow itself to make a strategic assignment in bankruptcy (to definitively reverse the priority of the *PBA* deemed trust) found nothing inappropriate about the motion itself. Rather, they found that Indalex failed to ensure that the plan beneficiaries had sufficient representation to properly respond to such a motion. This is something of a relief to lenders because it responds to potentially worrisome comments made by the *CCAA* court and OCA. The *CCAA* court judge had found it unnecessary to decide on the bankruptcy motion but had made the comment, in *obiter*, that he did not think it appropriate for the Indalex to strategically assign itself into bankruptcy for the benefit of its parent (the DIP facility guarantor who had paid out the DIP and thus benefitted from the DIP charge by subrogation). This comment was echoed, again in *obiter,* by the OCA, raising concern among some commentators that any strategic bankruptcy might now be considered inappropriate, despite the fact that there exists good authority that a secured creditor is free to seek a strategic bankruptcy of its debtor in either a receivership or *CCAA* proceeding. We now have a strong confirming signal from the SCC that a strategic bankruptcy in a *CCAA* proceeding is not inherently inappropriate.

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