

Financial Services Flash

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Quebec Court Overturns Federal Pension Deemed Trust in Aveos CCAA

By Sam Babe

In a November 20, 2013 decision in the *Companies Creditors' Arrangement Act* (the "CCAA") proceedings of Aveos Fleet Performance Inc. and Aero Technical US, Inc. (collectively, "Aveos"), the Quebec Superior Court (the "Court") held that the deemed trust created by the federal *Pension Benefits Standard Act, 1985* (the "PBSA") does not give pension claimants a super-priority in CCAA proceedings. The PBSA governs, among others, pension plans of federally regulated employers including, without limitation, those engaged in maritime shipping, broadcasting, banking and, as in the case of Aveos, aviation.

The Superintendent of Financial Institutions (the "Superintendent") had sought standing in the proceedings and brought a motion for a declaration that, due to operation of the deemed trust provisions of the PBSA, claims for \$2.8 million in prescribed special payments to the Aveos pension plan ranked ahead of claims of secured creditors. The Court rejected the Superintendent's arguments, accepting instead the responding secured lenders' argument that the reasoning of the 1997 decision of the Supreme Court of Canada (the "SCC") in *Royal Bank v. Sparrow Electric Corp.* ("*Sparrow Electric*") applied. An attached and properly perfected security interest was a fixed charge which could not be primed by a statutory deemed trust created by language like that found in the PBSA (which paralleled the old *Income Tax Act* (the "ITA") deemed trust language that the SCC dealt with in *Sparrow Electric*). In particular, the PBSA deemed trust only arises upon certain insolvency events, a trigger that was long ago removed from the ITA and almost all other federal deemed

trust statutes in legislative response to *Sparrow Electric*. Since the deemed trust only arose when Aveos sought to liquidate its assets in its CCAA proceedings, it was, at best, subordinate to the pre-existing security interests of the lenders.

The Court also found that the legislative history of the PBSA, of the so-called "*Sparrow Electric Amendments*" made to the ITA and other federal statutes, and of the CCAA and the *Bankruptcy and Insolvency Act* (the "BIA"), clearly showed Parliament's intent to limit the protection of PBSA claims to that found in the CCAA and the BIA, namely protections for: (a) employee pension contributions deducted at source but unremitted; (b) defined employer contributions owing to the plan; and (c) amounts owing by the employer to the plan administrator.

These arguments were presented in my recent article, "What about Federal Pension Claims? The Status of *Pension Benefits Standard Act, 1985* and *Pooled Registered Pension Plans Act* Deemed Trust Claims in Insolvency," first published in the September 2013 edition of the *National Creditor Debtor Review* (and then, abridged, in the December 2013 edition of Aird & Berlis LLP's *Collateral Matters* newsletter), which article was cited and quoted in the secured lenders' submissions.

One particularly important aspect of this Quebec decision for Ontario lenders who are still vexed by the SCC's *Sun Indalex Finance, LLC v. United Steelworkers* decision ("*Indalex*") was the Court's application of what could be

called the rule of implied exclusion in interpreting the CCAA. In its 2010 *Century Services Inc.* decision (“*Century Services*,” also known as *Ted Leroy Trucking Ltd.*), the SCC held that the fact that the CCAA explicitly preserved some deemed trusts in favour of the Crown while remaining silent on the deemed trust for GST/HST implied that Parliament did not intend there to be additional protection for such sales taxes. Citing *Century Services*, the Court in *Aveos* held that the limited scope of the protection given to pension claims in the CCAA suggests that Parliament did not intend that the additional protection of the *PBSA* deemed trust should survive. 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 pension protections in the CCAA, which protections were enacted in 2009, too late to be applied by the SCC in *Indalex*, should be read to imply that the *Pension Benefits Act* (Ontario) deemed trust cannot survive

in CCAA proceedings to give additional protection. The fact that the Court in *Aveos* applied essentially the same logic to the *PBSA* deemed trust bolsters the argument that the *Pension Benefits Act* (Ontario) deemed trust should be treated the same way under the new CCAA, and not allowed to “survive” as it was under the old CCAA pursuant to *Indalex*.

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