

Supreme Court Of Canada To Hear Indalex Appeal

December 1, 2011 by [Ian J.F. McSweeney](#)

The Supreme Court of Canada has [granted leave to appeal](#) the decision of the Ontario Court of Appeal in [Re Indalex](#).

In its April 2011 ruling, the Court of Appeal held that the entire amount an employer is required to contribute to fund a pension plan wind-up deficiency under the Ontario *Pension Benefits Act* (PBA) is subject to the [deemed trust provisions of the PBA](#) and, in the circumstances, should be paid in priority to outstanding secured creditor claims. A detailed account of the facts is available in a previous [Osler Update](#) relating to the Ontario Court of Appeal decision.

In 2009, Indalex Limited (Indalex) obtained creditor protection under the [Companies' Creditors Arrangement Act](#) (CCAA) and debtor-in-possession (DIP) financing pursuant to a CCAA court order which granted super priority status to its DIP loan ahead of other creditors. A sale of Indalex's assets was approved by the CCAA court, and the monitor was directed to make a distribution to repay the DIP loan from the proceeds of the sale. The sale of the assets was opposed by pension claimants who argued that assets equal to the entire amount of the funding deficiencies under the company's pension plans were deemed to be held in trust and should be remitted to the plans in priority to the DIP loan repayment.

The Ontario Court of Appeal held that:

1. the deemed trust under subsection 57(4) of the PBA extended to all amounts owed by the employer on plan wind-up, regardless of the fact that the regulations under the PBA permit employers to pay the pension shortfall over a period of five years;
2. the DIP charge granted by the CCAA court did not have priority over such deemed trust; and
3. with respect to one of the affected pension plans that had not been wound up, Indalex was in a conflict of interest position with respect to its sponsor and administrator roles in dealing with pension issues under the CCAA proceedings, giving rise to a constructive trust in respect of the plan deficit which took priority over the DIP charge.

A review of the *Indalex* decision by the Supreme Court of Canada is welcome news for borrowers, lenders and pension plan administrators.

The Ontario Court of Appeal decision represented a significant departure from what was widely viewed as established law, and has caused much uncertainty concerning the ability of DIP lenders and other secured creditors to protect the value of their security interest against pension claims, as well as raising pension plan governance concerns in the context of CCAA and more generally. We will keep you posted with any further updates relating to this matter.