

Court of Appeal File No. C58636
Court of Appeal File No. M42978
Court File No. CV-09-8247-00CL

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C 1985. C. C-36, as amended

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST
PRODUCTS SALES INC., and GRANT U.S. HOLDINGS G.P.

Applicants

and

THE TORONTO-DOMINION BANK, in its capacity as agent for the secured lenders holding
first lien security and THE BANK OF NEW YORK MELLON, in its capacity as agent for
secured lenders holding second lien security

Respondents

FACTUM OF THE PROPOSED INTERVENOR

February 20, 2015

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PART I – NATURE OF THE MOTION

1. By letters from the Court of Appeal dated February 11, and 17, 2015, Representative Counsel was permitted to bring the within motion to intervene in this appeal as a friend of the court.

2. This is the factum in support of an order for leave to intervene by the court-appointed Representatives of all non-union active employees and retirees of United States Steel Canada Inc. (“USSC”), and the court-appointed Representative Counsel in the proceedings of USSC under the *Companies’ Creditors Arrangement Act*, R.S.C 1985. c. C-36 (“CCAA”) in relation to the appeal in *Re Grant Forest*, 2013 ONSC 5933.

3. The Supreme Court of Canada confirmed in *Sun Indalex Finance, LLC v. United Steelworkers, inter alia*, that the deemed trust in section 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P-8 (“PBA”) that protects beneficiaries of underfunded pension plans on plan wind up is valid in CCAA proceedings, subject to the doctrine of paramountcy.¹ The Supreme Court also confirmed that section 30(7) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 (“PPSA”) operates to give priority to the beneficiaries of the s. 57(4) PBA deemed trust ahead of “all other secured creditors” over specific assets: “an account, inventory, and its proceeds”.²

¹ *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, Brief of Authorities of the Representative Counsel (“**Representative Counsel BOA**”), Tab 1, at para. 52. The second major ruling of the Supreme Court was that Indalex breached its fiduciary duty to the plan members, however, the majority of the Supreme Court found that the breaches were not sufficiently egregious to warrant upholding the remedy ordered by this Court (which found more incidents of breaches of fiduciary duty) of a constructive trust in favour of the pension plan beneficiaries.

² Representative Counsel BOA, Tab 1, para. 48.

4. The motion judge in *Grant Forest* made numerous errors that are contrary to the Supreme Court's decision in *Indalex*, and which require correction by this Court. The motion judge's errors undermine the deemed trust PPSA priority for pension plan beneficiaries. In particular, the motion judge:

- a) erred by stating that a pension plan must be wound up as of a CCAA filing date for the deemed trust to apply in the CCAA proceeding;
- b) erred by stating that the "federal insolvency regime" prevails over provincial pension law;
- c) erred by concluding that the initial CCAA order overrides the PBA/PPSA deemed trust priority regime and renders it of no effect; and
- d) erred in the factors he considered in granting a bankruptcy application brought in CCAA proceedings.

5. The appeal before this Court therefore raises issues which are expected to have a significant impact on the operation and application of the deemed trust in favour of pension plan beneficiaries in the PBA and the priority expressly granted to the beneficiaries of the deemed trust in section 30(7) of the PPSA.

PART II – THE FACTS

Background of the USSC CCAA proceeding

6. On September 16, 2014, United States Steel Canada Inc. (formerly Stelco Inc.; "USSC") obtained protection from its creditors by order of the Ontario Superior Court of Justice

(Commercial List) under the *Companies' Creditors Arrangement Act*, R.S.C 1985. C. C-36 ("CCAA"). The Court appointed Patrick Mousseau, Gary Dallin, George Hanson, Ron McClure, Paul Wendling, and Frank Dalimonte, as the representatives (the "Representatives") of all non-union active and retired employees of USSC in the CCAA proceedings.³

7. In paragraph 2 of the Representation Order, the Court authorizes the Representatives to represent all non-union active employees and retirees in relation to "all matters pertaining to any recovery, compromise of rights or entitlements under" the USSC pension and benefit plans. The unionized employees and retirees of USSC are represented by the United Steelworkers.⁴

8. Paragraph 7 of the Representation Order describes the role of the Representatives and Representative Counsel broadly and includes authorization to "take all steps and to do all acts necessary or desirable" in furtherance of their court-ordered mandate, including "dealing with any Court":⁵

7. THIS COURT ORDERS that the Representatives or Representative Counsel on their behalf are authorized to take all steps and to do all acts necessary or desirable to carry out the terms of this Order, including dealing with any Court, regulatory body and other government ministry, department or agency, and to take all such steps as are necessary or incidental thereto.

³ Motion Record of the Representative Counsel, Affidavit of Patrick Mousseau sworn on February 19, 2015, Tab 2 ("Mousseau Affidavit"), para. 4.

⁴ Mousseau Affidavit, para. 6.

⁵ Mousseau Affidavit, para. 7.

9. Shortly after Stelco restructured under the CCAA in 2006, it was acquired by United States Steel Corporation in the United States, and Stelco's name was changed to "United States Steel Canada".⁶

10. While under CCAA protection, USSC is currently engaged in restructuring discussions with its stakeholders, including the Representatives. The Representatives do not know at this stage whether USSC will restructure and conclude a Plan of Compromise with its creditors, or whether USSC will liquidate its assets, wind up the pensions (either by itself or by an administrator appointed by the Ontario Superintendent of Financial Services), and have employees and retirees make claims against the sale proceeds. In short, the outcome of the USSC CCAA and what USSC will do with the pension plans is highly uncertain.⁷

11. In its publicly filed CCAA materials, USSC acknowledges that the four main USSC pension plans are underfunded and a major issue for the restructuring. USSC has publicly reported that the total Solvency Deficiency of the four main pension plans as of December 31, 2013 is \$838.7 million. Since USSC is currently in restructuring discussions with its stakeholders, the four main USSC pension plans have not been wound up. Pursuant to an order of the CCAA judge, USSC is updating the actuarial valuations of the pension plans. It is expected that the deficits in the USSC pension plans have worsened since the December 31, 2013 valuations. If a restructuring of USSC is not achievable and the pension plans are wound up in an underfunded state, there will not be enough assets in the plans to pay pension benefits at full amounts and pension benefits paid each month to plan members will be reduced.⁸

⁶ Mousseau Affidavit, para. 9.

⁷ Mousseau Affidavit, para. 10.

⁸ Mousseau Affidavit, para. 11.

12. The City of Hamilton has recently performed an Economic Impact Study on USSC's CCAA proceeding and the impact of the USSC pension plans on Hamilton. The Study states at page 18:

With USSC currently under CCAA protection and the company stating their existing business liabilities far exceed existing business assets, there is a serious risk of business failure in the near future. As USSC continues to work with its many creditors to determine if there is a way to emerge successfully from CCAA as a viable company, the current employees and company pension plan members worry about the consequences and impacts of bankruptcy.⁹

13. The conclusions in this Study include:

- (a) The four main USSC pension plans provide USSC pensioners with over \$231 million in total pension income annually;¹⁰
- (b) The Solvency Deficiency for the main Hamilton Salaried Plan pensioners is over \$71,000 per member, which is the equivalent to more than two years of the average pension income for that plan;¹¹ and
- (c) Approximately 1.4% (i.e., Hamilton's total population or 1 in 72 persons) are known USSC pensioners. Approximately 6.3% (i.e., 1 in 16 persons) of Hamilton's over age 60 population are known USSC pensioners.¹²

14. The USSC CCAA proceedings, whether concluded by a restructuring or liquidation, have a profound impact on employees and retirees of USSC, as well as on the Hamilton area.

⁹ Mousseau Affidavit, para. 12.

¹⁰ Mousseau Affidavit, para. 13.

¹¹ Mousseau Affidavit, para. 13.

¹² Mousseau Affidavit, para. 13.

PART III – THE LAW AND ARGUMENT

Principles Applicable to Intervention as Friend of the Court

15. The criteria for intervention as a friend of the court are set out by this Court in *Peel (Municipality) v. Great Atlantic and Pacific of Canada Ltd.* Each criteria is met in this motion and is addressed below:

- a) the nature of the case;
- b) the issues which arise; and
- c) the likelihood the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.¹³

a) Nature of the case

16. This case involves the deemed trusts in section 57 of the PBA and the priority expressly given to the deemed trust in section 30(7) of the PPSA. The PBA deemed trusts and the PPSA priority are very important legal remedies for Ontario pension plan members in CCAA proceedings. The Supreme Court in *Indalex* confirmed that the PBA deemed trust is valid in CCAA proceedings, subject to the doctrine of paramountcy.¹⁴ The Supreme Court also confirmed that section 30(7) of the PPSA applies to grant priority to the beneficiaries of the PBA

¹³ *Peel (Municipality) v. Great Atlantic and Pacific of Canada Ltd.* (1990), 74 O.R. (2d) 164 (C.A.), Representative Counsel BOA, Tab 2, para. 10.

¹⁴ Representative Counsel BOA, Tab 1, para. 52.

deemed trust over “all other secured creditors” in relation to specific assets: “an account, inventory, and its proceeds”.¹⁵

17. The decision of this Court in this appeal, as an appellate decision, is expected to have a significant impact on the rights of the USSC pension plan members, both in the current restructuring negotiations and, where the pension plans are wound up in a liquidation of USSC under the CCAA, if restructuring is not achievable.

b) The Issues

18. The decision of the lower court in *Grant Forest* contain numerous errors that are contrary to the Supreme Court decision in *Indalex* and that require correction by the Court. The issues before the Court in this appeal include:

- (a) whether a pension plan has to be wound up as of the CCAA filing date for the PBA deemed trust and the section 30(7) priority in the PPSA to be effective in the CCAA proceeding;
- (b) the priority of the PBA deemed trust in a priority contest with a secured creditor who does not have a CCAA-ordered priority;
- (c) the factors for a court to consider when an application is brought in a CCAA proceeding to bankrupt a company in order to neutralize the PBA deemed trust and the priority in section 30(7) of the PPSA; and
- (d) what actions pension creditors should take to assert the PBA deemed trust.

¹⁵ Representative Counsel BOA, Tab 1, para. 48.

19. Furthermore, this appeal raises issues of public law involving the application of the constitutional doctrine of paramountcy and the interpretation of provincial and federal statutes concerning personal property security. These issues go beyond the parties' own private interests and will impact pension plan members in other insolvency proceedings. The courts show greater latitude to granting intervention motions in public law cases because the issues in such cases involve a public interest and have impact beyond the immediate parties.¹⁶

c) Representative Counsel will make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties

i) Useful contribution

20. Representative Counsel will provide the perspective of the employees and retirees on the issues. There is no employee or retiree representation on the appeal before this Court. Representative Counsel has experience and expertise in cases involving pension plan members, administrators, retirees, and employees in many insolvency proceedings, including major CCAA cases such as *Eaton's*, *Stelco*, *Air Canada*, *Indalex*, *Nortel*, and many others.

21. In the appeal, Representative Counsel's factum, a draft of which is attached to the motion record, will provide submissions in relation to the following issues:

- Does a pension plan have to be wound up as of the CCAA filing date for the PBA deemed trust/PPSA priority to apply in CCAA proceedings?
- What is the effect of the PBA deemed trust/PPSA priority in CCAA proceedings?

¹⁶ See *Halpern v. Toronto (City) Clerk*, [2000] O.J. No. 4514 (Div.Ct.) Representative Counsel BOA, Tab 3, at paras. 16 & 18; *Peel*, Representative Counsel BOA, Tab 2, at paras. 6-10; *Dalton v. Hutton*, [2003] N.J. No. 28 (NTD) Representative Counsel BOA, Tab 4, para. 35; *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham*, [1997] O.J. No. 1180 (Gen.Div.) Representative Counsel BOA, Tab 5, para. 8.

- Does an Initial CCAA order operate to bar a priority claim by beneficiaries of the PBA deemed trust/PPSA priority?
- Under what circumstances should a court grant a bankruptcy application brought in a CCAA proceeding that is aimed to neutralize the PBA deemed trust/PPSA priority?
- What is the appropriate role for a CCAA Monitor in a priority dispute among represented creditors?

ii) No injustice

22. The appeal hearing was heard very recently and is under reserve in the Court. The intervention will not unduly delay the release of the decision by this Court.

23. The fact that any party opposing the intervention motion may have to incur costs at this stage is not an injustice. If Representative Counsel had known of the appeal hearing earlier, the intervention motion would have been brought prior to the hearing, at which time opposing parties would have responded and incurred costs, the same as they would now.

24. A proposed intervenor need not show that its interest is different from that of the parties to the litigation, nor should the Court inquire as to whether the intervenor's interest will be adequately represented by one of the parties.¹⁷

25. Any overlap with another party's position is not a ground for precluding intervention by the interested party, so long as the proposed intervenor offers a unique perspective.¹⁸

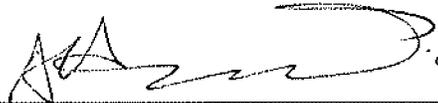
¹⁷ *Canadian Labour Congress v. Bhindi*, [1985] B.C.J. No. 2235 (BCCA) Representative Counsel BOA, Tab 6, pp. 7-8; and *Peel (Municipality) v. Great Atlantic and Pacific of Canada Ltd.*, Representative Counsel BOA, Tab 2, supra.

¹⁸ *Ethyl Canada Inc. v. Canada (Attorney General)*, [1997] O.J. No. 4225 (Gen.Div.) Representative Counsel BOA, Tab 7, at para. 10.

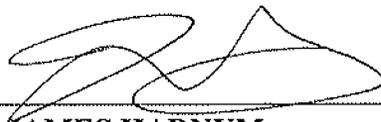
PART V - ORDER REQUESTED

26. The moving party requests an Order:
- a) granting leave to the Representatives and Representative Counsel to intervene as a friend of the court in this appeal;
 - b) permitting Representative Counsel to file a factum not exceeding 20 pages within 5 days of an order granting leave to intervene; and
 - c) that the Representatives and Representative Counsel shall not be entitled to, nor subject to, any costs of this motion or the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of February, 2015.



ANDREW J. HATNAY



JAMES HARNUM

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271
2. *Peel (Municipality) v. Great Atlantic and Pacific of Canada Ltd.* (1990), 74 O.R. (2d) 164 (C.A.)
3. *Halpern v. Toronto (City) Clerk*, [2000] O.J. No. 4514 (Div.Ct.)
4. *Dalton v. Hutton*, [2003] N.J. No. 28
5. *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham*, [1997] O.J. No. 1180 (Gen.Div.)
6. *Canadian Labour Congress v. Bhindi*, [1985] B.C.J. No. 2235 (BCCA)
7. *Ethyl Canada Inc. v. Canada (Attorney General)*, [1997] O.J. No. 4225 (Gen.Div.)

SCHEDULE "B"
RELEVANT STATUTES

1. *Companies' Creditors Arrangement Act*, R.S.C 1985. c. C-36
2. *Pension Benefits Act*, R.S.O. 1990, c. P-8

Trust property

57. (1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund. R.S.O. 1990, c. P.8, s. 57 (1).

Money withheld

(2) For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from money payable to an employee shall be deemed to be money received by the employer from the employee. R.S.O. 1990, c. P.8, s. 57 (2).

Accrued contributions

(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund. R.S.O. 1990, c. P.8, s. 57 (3).

Wind up

(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations. R.S.O. 1990, c. P.8, s. 57 (4).

3. *Personal Property Security Act*, R.S.O. 1990, c. P.10

Priorities

30. Deemed trusts

(7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the *Employment Standards Act* or under the *Pension Benefits Act*.

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