

## **RE INDALEX: THE CONFLUENCE OF PENSION, INSOLVENCY, AND FIDUCIARY LAW**

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### **ABSTRACT**

The landmark decision of the Supreme Court of Canada in *Re Indalex Ltd.* dealt with many issues, including both the treatment of a deemed trust prescribed under the Ontario *Pension Benefits Act* (“PBA”) in the context of insolvency proceedings under the *Companies Creditors’ Arrangement Act* (“CCAA”), and the fiduciary duty owed by a debtor company in its dual role as employer sponsor and administrator of pension plans. This paper analyzes and critiques the court’s handling of these two issues, arguing that the court’s holding that the PBA deemed trust continues to apply under the CCAA (subject to the doctrine of federal paramountcy) represents a departure from its prior decisions, raises troubling policy implications, and calls into question established jurisprudence on a related issue in Canadian insolvency law. In addition, this paper shows that the five justices who formed the majority in the result did not formulate a unified approach to ascertaining the nature and scope of the fiduciary duty of an employer-administrator of pension plans, though they were in agreement that the insolvent company’s decision to commence proceedings under the CCAA in and of itself did not create a conflict between the company’s self interest and its fiduciary duty as plan administrator. Finally, this paper argues that the interplay between the court’s holdings on the two issues leads to a legal contradiction for employer-administrators that are insolvent or nearing insolvency.

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## I. INTRODUCTION

Since its release, the Supreme Court of Canada's (the "SCC") decision in *Re Indalex Ltd.*<sup>1</sup> has engendered extensive commentary by practitioners and scholars of insolvency law in Canada. An extraordinarily complex decision that is situated at the confluence of pension law, insolvency law and fiduciary law, *Indalex* dealt with four main issues, as follows:

- I. Does the deemed trust provided for in s. 57(4) of the Ontario *Pension Benefits Act*<sup>2</sup> ("PBA") (the "PBA deemed trust") apply to wind-up deficiencies?
- II. If so, does the deemed trust supersede the debtor-in-possession ("DIP") charge?
- III. Did the debtor, Indalex Limited ("Indalex") owe any fiduciary obligations to the members of its pension plans when making decisions in the context of the insolvency proceedings?
- IV. Did the Ontario Court of Appeal (the "ONCA") properly exercise its discretion in imposing a constructive trust to remedy the breaches of fiduciary duties?<sup>3</sup>

The seven justices who heard the case produced three separate sets of written reasons: Justice Deschamps penned the reasons for judgment on behalf of herself and Justice Moldaver; Justice Cromwell wrote concurring reasons on behalf of himself, Chief Justice McLachlin and Justice Rothstein; and Justice LeBel issued dissenting reasons with Justice Abella concurring. On issue I, the dissent agreed with Justice Deschamps in answering in the affirmative, while Justice Cromwell disagreed. All seven justices unanimously answered issue II in the negative and the issue III in the affirmative, though for significantly different reasons. With respect to issue IV, the five-member majority were in agreement that the answer was no, while Justice LeBel and Justice Abella disagreed.

<sup>1</sup> *Re Indalex Ltd.*, 2013 SCC 6, 1 SCR 271 [*Indalex* (SCC)].

<sup>2</sup> *Pension Benefits Act*, RSO 1990, c P8.

<sup>3</sup> *Indalex* (SCC), *supra* note 1 at para 25.

This paper focuses on issues II and III stated above. On issue II, the SCC in *Indalex* held that the *PBA* deemed trust continues to apply in the context of proceedings under the *Companies Creditors' Arrangement Act*<sup>4</sup> (“*CCAA*”), subject to the doctrine of federal paramountcy.<sup>5</sup> This paper argues that this represents a departure from the SCC’s prior decisions where the court treated the *CCAA* and the *Bankruptcy and Insolvency Act*<sup>6</sup> (“*BLA*”) as having a consistent scheme for determining priorities in insolvency proceedings. Such a departure is troubling from a public policy perspective, because inconsistent treatment of priorities under the twin insolvency regimes would create skewed incentives against reorganizing under the *CCAA*, to the detriment of the *CCAA*’s legislative objectives. Moreover, the holding calls into question the existing case law on the related legal issue of under what circumstances the stay of proceedings under the *CCAA* should be lifted to permit creditors to petition a debtor into bankruptcy.

With respect to issue III, this paper examines the fiduciary duty of a plan administrator both at common law and as prescribed by the *PBA*. The facts of the *Indalex* case challenged the SCC to re-fashion the law of fiduciary duty in order to properly apprehend the nature and scope of the fiduciary duty of *Indalex* that acted as both the employer sponsor and the administrator of its pension plans—a dual role commonly referred to as “employer-administrator”. Justice Deschamps and Justice Cromwell articulated two somewhat different approaches in their written reasons, but they and their respective concurring justices were in agreement that *Indalex*’s decision to pursue restructuring under the *CCAA* in and of itself did not create a conflict between the company’s self-interest and its fiduciary duty as plan administrator.

Beyond analyzing and critiquing two of the SCC’s holdings in *Indalex*, this paper considers the interplay between these holdings and concludes that the two holdings lead to a legal contradiction regarding whether an employer-administrator is permitted to commence insolvency proceedings under the

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<sup>4</sup> *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended.

<sup>5</sup> *Indalex* (SCC), *supra* note 1 at para 52 and 242.

<sup>6</sup> *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.

*CCAA* without first winding up its pension plans. The resolution of this contradiction may require legislative amendment or regulatory oversight aimed at providing courts with clearer guidance on the proper balancing of the interests of various stakeholders in the context of corporate insolvency.

## II. BACKGROUND FACTS OF *INDALEX*

Indalex was a wholly-owned Canadian subsidiary of the US-based company, Indalex Holding Corp (“Indalex US”).<sup>7</sup> The Indalex group operated an aluminum extrusion business in North America.<sup>8</sup> On 3 April, 2009, Indalex filed for protection under the *CCAA*.<sup>9</sup> At the time, Indalex was the employer-administrator of two defined benefit pension plans.<sup>10</sup> The plan for Indalex’s salaried employees was in the process of being wound up<sup>11</sup>, while the other, for certain former executives, was closed to new entrants but not yet in wind-up.<sup>12</sup> When Indalex initiated the *CCAA* proceedings, both plans had funding deficiencies calculated on a wind-up basis.<sup>13</sup>

Less than a week after Indalex sought protection from its creditors by applying for a stay under the *CCAA*, the company persuaded the *CCAA* judge, Justice Morawetz to grant a court order approving a DIP financing loan.<sup>14</sup> The order granted, in favour of the DIP lenders, a super-priority status over all existing debt and other claims. Subsequently, Indalex and Indalex US pursued a sale of all of their assets on a going-concern basis under a court-approved process. They received only one bid, whereby the bidder would not assume the debtor companies’ pension liabilities.<sup>15</sup> The debtor companies then brought motions for a court order approving the bid and directing the sale proceeds to be paid to the DIP lenders. Indalex’s pension plan members opposed the proposed distribution

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<sup>7</sup> *Indalex* (SCC), *supra* note 1 at para 3.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid* at para 3. Indalex US had already filed for Chapter 11 bankruptcy protection in Delaware in March 2009.

<sup>10</sup> *Ibid* at para 5.

<sup>11</sup> *Ibid.* The effective date of the wind up was 31 December 2006.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid* at para 6.

<sup>14</sup> *Ibid* at para 9.

<sup>15</sup> *Ibid* at para 13 and 14.

to the DIP lenders; they argued that their claims—that is, the funding deficiencies in the pension plans—were deemed to be held in trust pursuant to s.57(4) of the *PBA*, and therefore ranked in priority to the claims of the DIP lenders.<sup>16</sup>

### III. TREATMENT OF *PBA* DEEMED TRUSTS IN THE *CCAA*

After the going-concern sale of the Canadian business, a priority dispute ensued between the pension plan members—who relied on the deemed trust provisions under the Ontario *PBA*—and the DIP lenders—who held a super-priority charge granted by Justice Morawetz. The SCC unanimously sided with the latter. Their reasoning proceeded in two steps. First, the *CCAA* does not expressly provide for all of the priorities set out in the *BLA*, and courts may not read *BLA* priorities into the *CCAA* at will.<sup>17</sup> Hence, priorities created under provincial legislation, such as the *PBA* deemed trust, continue to apply in *CCAA* proceedings subject to the doctrine of federal paramountcy.<sup>18</sup> Second, a court-ordered priority has the same effect as a statutory priority.<sup>19</sup> Applying this reasoning to the facts, the Court found the DIP charge superseded the *PBA* deemed trust on the basis that the latter was incompatible with and frustrated the purpose of the court-ordered DIP charge pursuant to the doctrine of federal paramountcy.<sup>20</sup>

The first step of the above analysis necessarily implies that the *CCAA* and the *BLA* need not be consistent with respect to priority rules. Such an implication flies in the face of pre-*Indalex* case law<sup>21</sup> which treated the *BLA* as setting out a

<sup>16</sup> *Ibid* at para 14.

<sup>17</sup> *Indalex* (SCC), *supra* note 1 at para 51.

<sup>18</sup> *Ibid* at para 52-53.

<sup>19</sup> *Ibid* at para 60.

<sup>20</sup> *Ibid* at para 54-60.

<sup>21</sup> *Continental Casualty Co v MacLeod-Stedman Inc*, [1996] M.J No 551, 43 CBR (3d) 211 (CA); *British Columbia v Henfrey Samson Belair Ltd*, [1989] 2 SCR 24 [Henfrey]; and *General Chemical Canada Ltd (Re)*, [2007] OJ No 3296, 2007 ONCA 600, including the lower court decision at [2006] OJ No. 3087, 22 CBR (5th) 298 (SCJ), leave to appeal refused [2007] SCCA No 539 (SCC). See also *GE Canada Equipment Financing GP v Northern Savills Inc*, [2012] OJ No 5633, 2012 ONSC 6664 and *Everingham Brothers Ltd (Re)*, [1999] OJ No 774, 43 OR (3d) 594 (CA).

complete code of priority rules that occupied the whole legislative field and rendered all statutory deemed trusts ineffective, with the exceptions of those deemed trusts which have all the common law attributes of trusts and those that are set out in s.67(3) of the *BLA*. The leading authority predating *Indalex* is the 2010 decision in *Century Services Inc v Canada (Attorney General)*<sup>22</sup>. In that case, the SCC considered whether the statutory deemed trust in respect of GST remittances continued to apply in *CCAA* proceedings. The majority answered in the negative on the basis that the twin insolvency regimes were “in harmony”<sup>23</sup> and shared a “point of convergence”<sup>24</sup> with respect to priorities. Justice Deschamps, writing for the majority in *Century Services*, stated:

Because the *CCAA* is silent about what happens if reorganization fails, the *BLA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful.<sup>25</sup>

In *Indalex*, Justice Deschamps downplayed the significance of the foregoing statement from *Century Services*, instead emphasizing that creditors’ rights under the *BLA* “remain only shadows until bankruptcy occurs,” so that “at the end of a *CCAA* liquidation proceeding, priorities may be determined by the PPSA’s scheme rather than the federal scheme set out in the *BLA*.”<sup>26</sup> This acknowledgement of the inconsistency between the two federal insolvency regimes not only creates troubling policy implications, but also constitutes a departure from the pre-*Indalex* jurisprudence.

## 1. Policy implications of the inconsistent Priority Rules Under the *CCAA* and the *BIA*

Inconsistency in priority treatment under the *CCAA* and the *BLA* is troubling from a public policy perspective. If a claim retained priority under one insolvency regime but not under the other, the claimant would have incentives to

<sup>22</sup> *Re Ted Leroy Trucking [Century Services] Ltd.*, 2010 SCC 60, 3 SCR 379 [*Century Services*].

<sup>23</sup> *Century Services*, *supra* note 22 at para 45.

<sup>24</sup> *Ibid* at para 23.

<sup>25</sup> *Ibid*.

<sup>26</sup> *Indalex* (SCC), *supra* note 1 at para 52.

subject the debtor to that regime which would recognize the claimant's priority. The majority in *Century Services* recognized that such incentives could be created.<sup>27</sup> Indeed, they considered it a key factor influencing the outcome of the case: if the Crown's GST deemed trust retained priority under the *CCAA*, secured creditors would have "skewed incentives against reorganizing under the *CCAA*"<sup>28</sup> and would prematurely petition the debtor into bankruptcy in order to subvert the Crown's priority. The majority denounced such opportunistic behaviour as "statute shopping" that "can only undermine the [*CCAA*'s] remedial objectives," namely, to avoid the social and economic costs of liquidation on bankruptcy.<sup>29</sup> The same policy argument ought to be equally applicable to the facts of *Indalex*: if \$300,000 in unremitted GST was sufficient to incentivize statute shopping, surely a *PBA* deemed trust to the tune of millions of dollars would have more pronounced effects.

While the SCC in *Indalex* made no attempt to justify the inconsistent approach to priority treatment under the twin insolvency regimes from a policy perspective, there are two potential justifications for such an approach. The first posits that the adverse effects caused by the "skewed incentives" on the part of the secured creditors should not be overblown given the fact that restructuring under the *CCAA* is a debtor-driven process. The debtor company is usually the party applying for *CCAA* protection at the initial hearing, and, moreover, the debtor may decide to make such application without notice to any person interested in the matter. Section 11 of the *CCAA* gives courts discretion to grant the initial order on an *ex parte* basis. Accordingly, the secured creditors might not exert the same degree of influence on the debtor's course of action in restructuring as the SCC suggested in *Century Services*.

This first justification is flawed in that it ignores the practical reality of corporate restructuring. A recent article by two leading insolvency practitioners

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<sup>27</sup> *Century Services*, *supra* note 22 at para 47.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

illustrates this practical reality.<sup>30</sup> Often, a debtor company commences the *CCAA* proceeding with the goal of effecting a sale of the debtor company—a strategy commonly known as a “liquidating *CCAA*”—after having already started soliciting offers for a going-concern sale of its business.<sup>31</sup> In fact, the preliminary sales efforts undertaken by the debtor company are likely to be the reason for which a secured creditor agrees to “forbear on enforcing its security.”<sup>32</sup> The authors also point out that by the time a debtor company is considering a court-supervised insolvency process, it will have already entered into discussions with its secured creditors regarding the various restructuring or liquidation options.<sup>33</sup> Moreover, the judicial test for determining the appropriateness of an initial *CCAA* order is whether the debtor has “a germ of a reasonable and realistic plan;”<sup>34</sup> accordingly, whether the secured creditors support or are opposed to the debtor’s application for *CCAA* protection is a material factor that the judge presiding over the initial hearing will consider.<sup>35</sup>

The second potential rationale that could be advanced to downplay the importance of curbing secured creditors’ incentives for statute shopping asserts that efforts to curb the skewed incentives are unlikely to affect the outcome. Secured creditors’ preferred alternative to the *CCAA* process is to have a receiver appointed under the *BLA* to effect a going-concern sale of the debtor’s business, thereby achieving the same outcome as a liquidating *CCAA* process. This argument is also flawed, because it relies on an implicit assumption that liquidation on a going-concern basis is the only or ideal outcome attainable in the *CCAA* proceedings. Professor Roderick Wood of the University of Alberta observes that the *CCAA* restructuring regime was originally designed with the goal of enabling insolvent corporations to develop a plan of compromise or arrangement that would gain the approval of its creditor body.<sup>36</sup> Though in recent

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<sup>30</sup> Michelle Grant and Tevia R. M. Jeffries, “Having Jumped Off the *Cliffs*, When Liquidating Why Choose *CCAA* over Receivership (or vice versa)?”, in Janis Sarra, ed, *Annual Review of Insolvency Law 2013* (Toronto: Thomson Carswell, 2014) at 325.

<sup>31</sup> *Ibid* at 343.

<sup>32</sup> *Ibid*.

<sup>33</sup> *Ibid*.

<sup>34</sup> *Alberta Treasury Branches v Tallgrass Energy Corp*, 2013 ABQB 432, AWLD 4492 (Alta QB) [*Tallgrass*] at para 14 and 18.

<sup>35</sup> Grant and Jeffries, *supra* note 30 at 344.

<sup>36</sup> Roderick J. Wood, “Rescue and Liquidation in Restructuring Law”, 53 Can Bus LJ (2012) 407, at 411.



years the *CCAA* has increasingly been used to effect asset sales, “we cannot conclude from this alone that the traditional restructuring [process by way of a plan of compromise or arrangement] is on the road to extinction.”<sup>37</sup> Using the *CCAA* process to effect a sale of the debtor company does not always benefit all creditors. Secured creditors will support the sale as long as the expected proceeds are sufficient to cover their claims, even if it may not maximize recovery by other creditors.

## 2. Departure with Prior Jurisprudence

*Indalex* calls into question the existing case law on the issue of under what circumstances a *CCAA* stay of proceedings should be lifted to permit petitions into bankruptcy to proceed. Pre-*Indalex*, the leading authority was *Re Ivaco Inc.*<sup>38</sup> There, Justice Farley granted the creditors’ motion to petition the debtor companies into bankruptcy on two grounds. First, “[o]ne of the primary purposes of a bankruptcy proceeding is to secure an equitable distribution of the debtor’s property amongst the creditors.”<sup>39</sup> Second, the debtor companies had sold all of their operational assets and were “essentially in a distribution of proceeds mode.”<sup>40</sup> Justice Farley acknowledged that the creditors’ motive was to enhance their position by taking advantage of the *BLA* priority scheme which would give them priority over the pension claims. Nonetheless, Justice Farley and the ONCA, who later affirmed his decision, were satisfied that Parliament chose the *BLA*, rather than the *CCAA*, as the regime under which to effect a distribution of debtor’s property, including the proceeds of a liquidating *CCAA*.<sup>41</sup>

*Indalex* casts doubt on the holding in *Re Ivaco Inc* to the extent that the SCC now regards the *CCAA* as recognizing provincial priorities, subject to

<sup>37</sup> *Ibid* at 408.

<sup>38</sup> *Re Ivaco Inc.* (2006), 56 CCPB 1, 83 OR (3d) 108 (Ont CA); affirming (2005), 47 CCPB 62 (Ont SCJ [Commercial List]) [*Ivaco*].

<sup>39</sup> *Ibid* at para 13.

<sup>40</sup> *Ibid* at para 18.

<sup>41</sup> *Ibid* at para 76.

reprioritization by way of court-ordered super-priority charges. Post-*Indalex*, a new issue that arises at the end of a liquidating *CCAA* becomes: should courts order an immediate distribution of proceeds under the *CCAA*, or lift the *CCAA* stay to effect a distribution under the *BIA*? Judicial determination of this issue can have a dramatic effect on the rights of vulnerable claimants, such as pension plan members, especially where the proceeds of sale are insufficient to satisfy secured creditors' claims. Is such a determination properly within the jurisdiction of the courts? It is tempting to answer "yes" by drawing a parallel with the judicial discretion of *CCAA* courts to grant super-priority charges in favour of critical suppliers or DIP lenders. However, this parallel is flawed. Whereas the super-priority charges in favour of critical suppliers or DIP lenders can be justified by reference to the *CCAA*'s remedial objective of facilitating debtor companies' reorganization and avoiding the social and economic costs of bankruptcy, the choice between two alternative sets of priority rules for the distribution of sale proceeds cannot rely on this reasoning.

The recent case of *Grant Forest Products Inc. v G.E. Canada Leasing Services Co.*<sup>42</sup> has not clarified the issue. Justice Campbell granted the motion brought by second lien lenders to lift the *CCAA* stay in order to petition the debtor companies into bankruptcy.<sup>43</sup> Despite referencing *Indalex*, Justice Campbell did not apply the SCC's holding in *Indalex* that provincial priorities may be applied to determine distribution in a liquidating *CCAA* proceeding. Such a holding should have even more force on the facts in *Grant Forest* than in *Indalex*, as there was no court-ordered super-priority prior to the asset sale. Nonetheless, Justice Campbell distinguished *Indalex* on the grounds that the pension plans of GFPI<sup>44</sup> were not being wound up when the initial order was granted and thus could not have the benefit of the *PBA* deemed trust.<sup>45</sup> Consequently, it remains unclear whether a *PBA* deemed trust that is effective under the *CCAA* and not subverted by any court-ordered super-priority may receive payment prior to a bankruptcy order being granted.

<sup>42</sup> *Grant Forest Products Inc. v G.E. Canada Leasing Services Co.* 2013 ONSC 5933, 7 CCPB (2nd) 239 (Ont SCJ) [Commercial List] [*Grant Forest*].

<sup>43</sup> *Ibid* at para 127.

<sup>44</sup> *Grant Forest Products Inc.*, the debtor company.

<sup>45</sup> *Grant Forest*, *supra* note 42 at para 46.

As analyzed above, the SCC's resolution of the priority dispute in *Indalex* exhibits shortcomings. The inconsistencies with its own prior jurisprudence, coupled with the attendant public policy concerns, justify a call for the highest court in the land to revisit the issue, with a view to improving the functioning of Canada's twin insolvency regimes.

## IV. FIDUCIARY DUTY OF AN EMPLOYER-ADMINISTRATOR

In opposing Indalex's motion to seek court approval of the liquidating CCAA sale, the pension plan members contended that Indalex had breached the fiduciary duty it owed to them in its capacity as the plan administrator.<sup>46</sup> This issue can be parsed into three sub-issues: (1) whether a pension administrator owes a fiduciary duty to the members of its pension plan, (2) what is the content of such fiduciary duty, and (3) whether Indalex acted in breach of such fiduciary duty in the course of the CCAA proceedings.

### 1. Fiduciary Duty of a Plan Administrator

Well-recognized categories of fiduciary relationships exist at common law, including trustee-beneficiary, director-company, and solicitor-client relationships. These categories are not closed and courts can recognize relationships in novel fact settings as attracting fiduciary obligations.<sup>47</sup> In *Frame v Smith*<sup>48</sup>, Justice Wilson set forth three indicia of a fiduciary relationship:

- (1) the fiduciary has scope for the exercise of some discretion or power;
- (2) the fiduciary can unilaterally exercise that power or discretion so as to effect the beneficiary's legal or practical interests; and

<sup>46</sup> *Indalex Ltd., Re*, 2011 ONCA 265, 331 DLR (4th) 352, [*Indalex* (ONCA)] at para 76.

<sup>47</sup> Anthony Duggan, "Fiduciary Obligations in the Supreme Court of Canada: A Retrospective", 50 Can Bus LJ 453 (2011) at 453.

<sup>48</sup> *Frame v Smith*, [1987] 2 SCR 99, 42 DLR (4th) 81.

(3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.<sup>49</sup>

In *Burke v Hudson's Bay Co.*<sup>50</sup>, the SCC held that “there is no doubt that” the three indicia were found in the relationship between the pension plan administrator and the employees/beneficiaries under the pension plan.<sup>51</sup> Both ONCA and the SCC in *Indalex* cited *Burke* as binding authority when finding that Indalex owed a fiduciary duty to its pension plan members.<sup>52</sup>

## 2. Content of a Plan Administrator's Fiduciary Duty

### 1. Fiduciary Duty at Common Law

At common law, a fiduciary owes the principal a number of specific duties, including: a duty of loyalty and good faith, commonly formulated as a requirement to act solely in the best interests of the principal;<sup>53</sup> a duty to avoid any actual or perceived conflict of interest;<sup>54</sup> a duty of even-handedness requiring the fiduciary to treat each beneficiary or class of beneficiaries impartially;<sup>55</sup> and a duty to disclose “material information sufficient to permit a beneficiary to make a fully informed decision.”<sup>56</sup> Where the fiduciary is given the powers to manage property on behalf of the principal, the fiduciary's conduct is measured by reference to what an ordinary prudent person would do when managing his or her own property.<sup>57</sup>

While *Burke* established that a plan administrator is a fiduciary vis-à-vis plan beneficiaries at common law, the plan administrator is not subject to all of the common law duties mentioned above. The SCC in *Burke* determined the content of a plan administrator's fiduciary duties based on a close reading of the terms of

<sup>49</sup> *Ibid* at 99 (DLR).

<sup>50</sup> *Burke v Hudson's Bay Co.*, 2010 SCC 34, 2 SCR 273 [*Burke*].

<sup>51</sup> *Ibid* at para 41.

<sup>52</sup> *Indalex* (ONCA), *supra* note 46 at 117; *Indalex* (SCC), *supra* note 1 at 62.

<sup>53</sup> Ari Kaplan and Mitch Frazer, *Pension Law, 2nd Edition* (Toronto: Irwin Law, 2013) at 323.

<sup>54</sup> *Ibid* at 324.

<sup>55</sup> *Ibid* at 331.

<sup>56</sup> *Ibid* at 334.

<sup>57</sup> *Ibid* at 321.

the pension plan documentation as well as the governing pension legislation.<sup>58</sup> The provisions of the plan documentation did not give the employees of Hudson's Bay Company ("HBC") any equitable interest in the actuarial surplus in the pension fund. Thus, the Court held that HBC did *not* breach its fiduciary duty of even-handedness by not transferring a portion of the actuarial surplus to the acquiror of HBC's sold division for the benefit of those employees who were transferred to the acquiror. Writing on behalf of a unanimous court, Justice Rothstein stated:

The duty of even-handedness must be anchored in the terms of the pension plan documentation. It does not operate in a vacuum ... [J]ust because HBC has fiduciary duties as plan administrator does not obligate it under any purported duty of even-handedness to confer benefits upon one class of employees to which they have no right under the plan.<sup>59</sup>

If a plan administrator's duty of even-handedness is contextualized based on the plan terms, it raises the related question of whether the duty of loyalty or the duty to avoid conflicts of interest are similarly contextualized. The ONCA in *Indalex* indicate they are not; after citing *Burke*, Justice Gillese remarked, "Thus, at common law, *Indalex* as the Plan's administrator owed a fiduciary duty to the Plan's members and beneficiaries to act in their best interests."<sup>60</sup>

The phrase "act in [the] best interests" is commonly used to refer to the duty of loyalty which is "the distinctive and defining feature of fiduciary relationships"<sup>61</sup> in private law. For example, the phrase is used in corporate statutes to impose a fiduciary duty on corporate directors and officers.<sup>62</sup> However, the ONCA's use of this phrase alone to define the content of *Indalex*'s

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<sup>58</sup> *Burke*, *supra* note 50 at paras 61-82.

<sup>59</sup> *Burke*, *supra* note 50 at para 85.

<sup>60</sup> *Indalex* (ONCA), *supra* note 46 at para 119.

<sup>61</sup> Lionel Smith, "Fiduciary Relationships: Ensuring the Loyal Exercise of Judgment on Behalf of Another", 130 LQR (2014) 608.

<sup>62</sup> For example, s.122(a) of the *Canada Business Corporations Act* provides, "Every director and officer of a corporation in exercising their powers and discharging their duties shall (a) act honestly and in good faith with a view to the best interests of the corporation [...]"

fiduciary duty as plan administrator effectively stretches the holding in *Burke* beyond its intended limit. By contrast, Justice Cromwell, in his concurring opinion in *Indalex*, adopted a view more consistent with the *Burke* decision. Recognizing that "fiduciary duties do not exist at large, but arise from and relate to the specific legal interests at stake,"<sup>63</sup> he ascertained the nature and scope of Indalex's fiduciary duty "in the legal framework governing the relationship out of which the fiduciary duty arises."<sup>64</sup> By "legal framework", he meant the plan documents and the provisions of the *PBA* relating to pension administration.<sup>65</sup> The statutory duties of an administrator are examined below.

## II. Statutory Duties of a Pension Plan Administrator

Under the Ontario *PBA*, a pension plan administrator has two basic statutory functions. Pursuant to s. 19(1) of the *PBA*, the administrator shall ensure that the pension plan and fund are administered in accordance with the *PBA* and the regulations.<sup>66</sup> Section 19(3) provides that the administrator shall ensure that the pension plan and fund are administered in accordance with the terms of the plan.<sup>67</sup> Additionally, s. 19(4) provides that s. 19(3) does not enable the administrator to administer the pension plan contrary to the *PBA* and the regulations.<sup>68</sup> Accordingly, where a conflict arises between the plan terms and the statutory requirements, the latter will prevail. This rule gives effect to the principle that the *PBA* is minimum standards legislation that sets out "a statutory 'floor' beneath which a pension plan's terms may not fall."<sup>69</sup> Moreover, employers and employees are permitted to contract for "enhanced pension benefits greater than the minimum standards set forth in the *PBA*."<sup>70</sup>

In addition to the two statutory functions discussed above, the *PBA* imposes on an administrator a number of specific obligations, including the following:

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<sup>63</sup> *Indalex* (SCC), *supra* note 1 at para 185.

<sup>64</sup> *Ibid* at para 186.

<sup>65</sup> *Ibid* at para 187.

<sup>66</sup> *PBA*, *supra* note 2, s. 19(1).

<sup>67</sup> *Ibid*, s. 19(3).

<sup>68</sup> *Ibid*, s. 19(4).

<sup>69</sup> Kaplan and Frazer, *supra* note 53.

<sup>70</sup> *Smiley v Ontario (Pension Board)* (1994), 116 DLR (4th) 337, 6 CCPB 166, at 343 (Ont Gen Div) [*Smiley*].

- s. 22(1) requires the administrator to “exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person”;<sup>71</sup>
- s. 22(4) prohibits the administrator from “knowingly permit the administrator’s interest to conflict with the administrator’s duties and powers in respect of the pension fund”;<sup>72</sup>
- ss. 22(9) and 22.1(1) prohibits the administrator from receiving “any benefit from the pension plan other than pension benefits, ancillary benefits and a refund of contributions” and “reasonable fees and expenses relating to the administration of the pension plan and the administration and investment of the pension fund”;<sup>73</sup>
- ss. 25 and 26 prescribe disclosure requirements regarding eligible/required plan members and proposed plan amendments, respectively;<sup>74</sup>
- s. 56(1) requires the administrator “ensure that all contributions are paid when due”;<sup>75</sup> and
- where an employer does not pay all contributions when due, the administrator must notify the Superintendent pursuant to s. 56(2) of the *PBA* and s. 6.1 of the general regulations<sup>76</sup>, and s. 59 of the *PBA* permits the administrator to commence court proceedings to obtain such payment.<sup>77</sup>

A comparison of these statutory duties with the fiduciary duties at common law discussed earlier reveals two important observations. First, many of the statutory duties resemble but are not identical to the common law fiduciary duties. For example, the standard of care set out in s. 22(1) is similar but not identical to the common law standard of care. Though both use an “ordinary prudent

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<sup>71</sup> *PBA*, *supra* note 2, s. 22(1).

<sup>72</sup> *Ibid*, s. 22(4).

<sup>73</sup> *Ibid*, ss. 22(9) and 22.1(1).

<sup>74</sup> *Ibid*, ss. 25 and 26.

<sup>75</sup> *Ibid*, s. 56(1).

<sup>76</sup> *Ibid*, s. 56(2); General, RRO 1990, Reg 909, s. 6.1.

<sup>77</sup> *Ibid*, s. 59.

person” test, the statutory standard considers how an ordinary prudent person would act when dealing with the property of another person. In contrast, the common law standard considers how the ordinary prudent person would act when dealing with her own property. This divergence has led to a general recognition that pension plan administrators are subject to a higher standard of care than the common law standard.<sup>78</sup> Likewise, the conflict-of-interest prohibition under s. 22(4) differs from the corresponding duty at common law with respect to the knowledge qualifier.

The second observation is that the Ontario *PBA* does not expressly prescribe a duty of loyalty. Indeed, the words “loyalty” and “best interests” do not appear at all in the Act. The same is true for the pension legislation in New Brunswick, Nova Scotia and Manitoba. In contrast, the federal *Pension Benefits Standards Act*<sup>79</sup> (“*PBSA*”) as well as five provincial pension statutes expressly require administrators to act in the best interests of pension plan members.<sup>80</sup> It is beyond the scope of this paper to investigate the legislative intent behind the absence of a duty of loyalty provision in the Ontario *PBA*. Nonetheless, the discrepancies as identified above between the common law fiduciary duties and the statutory duties imposed by the *PBA* raise an interesting question: namely, whether the latter are meant to displace or supplement the former as the legal framework governing the relationship between plan administrators and plan members. This question is brought into a sharper focus in the context of employer-sponsored administration of pension plans.

### III. The Dual Role of Employer-Administrator, the “Two Hats” Principle, and Index

Subsection 8(1)(a) of the Ontario *PBA* expressly permits an employer to act as the administrator of its pension plan.<sup>81</sup> A corporation that plays the dual role as employer-administrator attracts concerns about conflicts of interest for the

<sup>78</sup> Kaplan and Frazer, *supra* note 53 at 322. See also: *Lloyd v Imperial Oil Ltd*, 2008 ABQB 379 at para 57, 68.

<sup>79</sup> *Pension Benefits Standards Act*, 1985, RSC 1985, c 32 (2nd Supp).

<sup>80</sup> *PBSA*, *supra* note 80, s.8(10)(b); Alberta (*AEPPA*, s.35(3)); British Columbia (*BCPBSA*, s.8(5); Newfoundland and Labrador (*NLPBA*, s.17(3)(b)); Quebec (*QSPPA*, s.151); Saskatchewan (*SPBA*, 11(2)(c)).

<sup>81</sup> *PBA*, *supra* note 2, s.8(1)(a).



simple reason that the employer's own interests do not always align perfectly with the interests of the plan beneficiaries. This raises the question of whether a fundamental tension exists between s. 8(1)(a) and s. 22(1)(4), and to what extent the conflict, if any, affects the content of an employer-administrator's fiduciary duty to plan members.

Prior to *Indalex*, the leading case on these questions<sup>82</sup> was a decision by the Pension Commission of Ontario ("PCO"). In *Imperial Oil Ltd v Ontario (Superintendent of Pension)*,<sup>83</sup> an employer amended its pension plans for efficiency reasons, thereby denying employees enhanced early retirement annuities unless they would have been eligible to retire within five years of termination of employment. A group of employees challenged the amendment on the grounds that the employer, acting in its dual role as employer-administrator, was in conflict and acted to the detriment of the employees' interests contrary to s. 22(4) of the *PBA*.<sup>84</sup> The PCO rejected the employees' argument and set forth three propositions comprising what has since been referred to as the "two hats" principle:

- 1) The *PBA* clearly distinguishes between the role of an employer and the role of an administrator in respect of a pension plan.<sup>85</sup>
- 2) The *PBA* expressly permits an employer to play both roles even though the "two roles may come into conflict from time to time."<sup>86</sup>
- 3) An act of an employer-administrator in its capacity as employer does not violate the conflicts-of-interest prohibition in s. 22(4).<sup>87</sup>

Essentially, the third proposition states that an employer-administrator is subject to the statutory and common law fiduciary duties when it acts in a capacity

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<sup>82</sup> Kaplan and Frazer, *supra* note 53.

<sup>83</sup> *Imperial Oil Ltd v Ontario (Superintendent of Pensions)* (1995), 18 CCPB 198 [*Imperial Oil*].

<sup>84</sup> *Ibid* at paras 13-14.

<sup>85</sup> *Ibid* at para 29.

<sup>86</sup> *Ibid* at para 30.

<sup>87</sup> *Ibid* at paras 33-36.

*qua* administrator, but not when it acts *qua* employer.<sup>88</sup> This reflects the underlying public policy consideration in favour of allowing employers to make certain decisions to its own advantage, rather than in the best interests of the employees.<sup>89</sup> It follows that the “two hats” principle recognizes the tension that exists between ss. 8(1)(a) and 22(1)(4), and attempts to resolve it by limiting the scope of the acts of employer-administrators to which the fiduciary duty, and the conflict-of-interest prohibition in particular, extend.

The *Indalex* case gave the SCC its first opportunity to opine on the validity of the “two hats” principle. Justice Deschamps, who penned the reasons for the judgment, was patently critical of it. In her view, the conflict-of-interest prohibition imposed on an employer-administrator should not be predicated on whether the impugned act or decision “can be classified as being related to either the management of the corporation or the administration of the pension plan.”<sup>90</sup> She found such a classification unhelpful, because even a sound management decision of the employer could have harmful consequences for the plan members. By contrast, Justice Cromwell did not explicitly comment on the “two hats” principle. His written reasons nevertheless suggest that he supported the rationale behind the principle. Specifically, he observed that the dual role of an employer-administrator is expressly authorized by the *PBA* and is therefore “an important aspect of the legal context for Indalex’s fiduciary duties as a plan administrator.”<sup>91</sup> To this he added:

The broader business interests of the employer corporation and the interests of pension beneficiaries in getting the promised benefits are almost always at least potentially in conflict.<sup>92</sup>

Therefore, the fact that an act or a decision of the corporation *qua* employer has a potential impact on the plan members’ interests does not, in and of itself, constitute a breach of the corporation’s fiduciary duty *qua* administrator.<sup>93</sup>

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<sup>88</sup> Kaplan and Frazer, *supra* note 53 at 327.

<sup>89</sup> *Imperial Oil*, *supra* note 83 at para 33.

<sup>90</sup> *Indalex* (SCC), *supra* note 1 at para 65.

<sup>91</sup> *Ibid* at para 193.

<sup>92</sup> *Ibid* at para 198.

<sup>93</sup> *Ibid* at paras 198-199.

Justice Deschamps was not unaware of s. 8(1)(a) of the *PBA*. However, unlike Justice Cromwell, she interpreted the provision to be indicative of the legislature's view that not all corporate functions of employer-administrator are necessarily in conflict with its duties to the plan members.<sup>94</sup> But where a conflict does arise, s.22(4) obliges the employer-administrator to resolve the conflict in a manner that preserves and protects the plan members' interests.<sup>95</sup> The difference of opinion between Justice Deschamps and Justice Cromwell may be summarized, without too great a loss of subtlety, as follows: Justice Deschamps held an employer-administrator to the same conflict-of-interest prohibition that other fiduciaries recognized by law are subject to, whereas Justice Cromwell would subject an employer-administrator to a conflict-of-interest prohibition that would be modified in light of its statutorily authorized dual role. Justice Cromwell modified the conflict-of-interest prohibition by adding two qualifiers to the definition of a conflict of interest in respect of an employer-administrator:

[A] situation of conflict of interest occurs when there is a ***substantial risk*** that the employer-administrator's representation of the plan beneficiaries would be ***materially and adversely*** affected by the employer-administrator's duties to the corporation [emphasis added].<sup>96</sup>

Together, these two qualifiers raise the conflict-of-interest prohibition applicable to an employer-administrator above the common law no-conflict rule applicable to fiduciaries.

### 3. Whether Indalex Breached of its Fiduciary Obligations

The question of whether Indalex breached its fiduciary obligation turned on two interrelated legal issues: (1) whether Indalex found itself in a conflict situation, and (2) whether Indalex responded to the situation in accordance with its fiduciary duty.

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<sup>94</sup> *Ibid* at para 65.

<sup>95</sup> *Ibid*.

<sup>96</sup> *Ibid* at para 201.

Despite their divergent views of the application of the conflict-of-prohibition to an employer-administrator, Justices Deschamps and Cromwell agreed that a conflict arose when Indalex filed the DIP motion. In Justice Cromwell's view, his modified version of the conflict-of-interest prohibition was triggered because the super-priority charge sought by Indalex in favour of the DIP lenders "could easily have the effect of making it impossible for Indalex to satisfy its funding obligations to the plan beneficiaries."<sup>97</sup> The fact that Justices Cromwell and Deschamps reached the same conclusion in the result was viewed by some insolvency lawyers as a clear message to employer-administrators that they must be cognizant of their fiduciary duties to pension plan beneficiaries and take active steps to protect and preserve the interest of these plan members, even in insolvency.<sup>98</sup>

Justice Deschamps and Justice Cromwell agreed that Indalex failed to fulfil its fiduciary duty. According to Justice Deschamps, Indalex should have either given the plan members notice of the DIP motion so as to give them the opportunity to present their arguments against the motion, or found a replacement administrator or representative counsel to resolve the conflict.<sup>99</sup> Justice Cromwell reasoned that Indalex should have brought the conflict of interest to the attention of the *CCAA* judge, who would be "well placed" to make discretionary decisions on "how best to ensure that the interests of the plan beneficiaries are fully represented" in the *CCAA* proceedings.<sup>100</sup> The key takeaway here is not the difference between measures of conflict resolution favoured by the justices, but rather the common proposition underlying them: there are steps short of abandoning its corporate restructuring under the *CCAA* that Indalex could have taken to properly address the conflict.

That holding attracted criticism from some scholars of fiduciary law; Professor Ronald Davis, for instance, argues that it is irreconcilable with the

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<sup>97</sup> *Ibid* at para 214.

<sup>98</sup> Brian Empey and Jesse Mighton, "After *Indalex*: A Guide to Changes in Canada's Commercial Landscape", in Janis Sarra, ed, *Annual Review of Insolvency Law 2013* (Toronto: Thomson Carswell, 2014) 109 at 132.

<sup>99</sup> *Ibid* at paras 66, 73.

<sup>100</sup> *Ibid* at para 217.

existing common law with respect to fiduciary duty.<sup>101</sup> The “long-standing, settled doctrine” of fiduciary law prohibits a fiduciary facing a conflict between its own interests and its fiduciary duty from terminating the fiduciary relationship in order to pursue her interests. Applying this doctrine to the facts of the *Indalex* case, argues Professor Davis, the SCC should have concluded that Indalex was strictly prohibited from acting in self-interest—namely, pursuing restructuring under the *CCAA*—when it conflicted with its fiduciary duty to the pension plan members.<sup>102</sup> In practical terms, this means that Indalex would have been obliged to refuse to give its DIP lender super-priority over the pension plan members’ claims, or to negotiate a going-concern sale that was conditioned upon the purchaser’s assuming the pension liabilities. As Indalex did not take any such steps, Professor Davis thinks the SCC should have found Indalex breached its fiduciary duty and, as an equitable remedy for such breach, imposed a constructive trust on the proceeds from the going-concern sale of assets in favour of the pension plan members.<sup>103</sup> Yet, as discussed above, the SCC did not order an equitable remedy based on constructive trust; rather, it held that Indalex could have addressed the conflict by either giving the pension plan members notice of the DIP motion, or alternatively finding a replacement administrator or representative counsel to resolve the conflict. Professor Davis interprets the majority’s holding as tantamount to giving Indalex permission to retire from its fiduciary duty for the purpose of pursuing its self-interest.

Professor Davis further argues that the Court’s crucial error was characterizing the conflict facing Indalex, not as a conflict between its self-interest and its fiduciary duty as plan administrator (i.e. a conflict of interest and duty), but rather as one between the fiduciary duty as plan administrator and the duty to act in the best interests of the corporation as required by corporate law (i.e. a conflict of duties).<sup>104</sup> This difference in characterization is important, Professor

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<sup>101</sup> Ronald B. Davis, “*Re Indalex*: Fiduciary Duty = Conflict Management or Conflict Avoidance?”, in Janis Sarra, ed, *Annual Review of Insolvency Law 2013* (Toronto: Thomson Carswell, 2014) 69 at 96.

<sup>102</sup> *Ibid* at 83-86.

<sup>103</sup> *Ibid*.

<sup>104</sup> *Ibid*.

Davis points out, because “the law offers different avenues for the fulfillment of the obligations of the two different types of fiduciary conflict in certain circumstances.”<sup>105</sup> The law treats a conflict of duties as amenable to resolution through the fiduciary’s withdrawal from one of the duties, while a fiduciary facing a conflict of interest and duty is prohibited from continuing to act in self-interest.<sup>106</sup> In Professor Davis’s view, this mischaracterization played a critical role in shaping the SCC’s incorrect view on the lengths to which Indalex must go in an insolvency process to fulfill its fiduciary duty to the pension plan members. He concludes his article with a stinging rebuke directed at the SCC: “the majority decision in *Sun Indalex Finance* has stretched fiduciary doctrine so thin that it is almost unrecognizable.”<sup>107</sup>

Professor Davis’s criticism is thought-provoking but ultimately flawed. He correctly points out that Indalex, as a corporation, is a separate legal person from Indalex’s board of directors. This means that the fiduciary obligations owed by Indalex as plan administrator are not binding on the directors personally, unless exceptional circumstances exist that warrant the piercing of the corporate veil.<sup>108</sup> Conversely, the duty imposed by the corporate statute on Indalex’s directors to act in the best interests of the corporation is not a duty assumed by Indalex. Professor Davis is also correct that the ONCA’s decision in *Indalex* contains statements that demonstrate the ONCA conflated Indalex’s fiduciary duty to the pension plan members with the fiduciary duty owed by Indalex’s directors to the corporation.<sup>109</sup> However, the SCC majority did not make any similar statements. Indeed, Professor Davis himself admits, “It is clear from the language used in the SCC majority’s reasons there was a formal recognition that the situation facing Indalex involved a conflict between its interests and duty, not a conflict of duties”.<sup>110</sup> This diminishes the credibility of Professor Davis’s argument that the

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<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid* at 107.

<sup>108</sup> *Ibid* at 81.

<sup>109</sup> *Indalex* (ONCA) *supra* note 46 at paras 140–42.

<sup>110</sup> Davis, *supra* note 101 at 94.

ONCA's mischaracterization was adopted by the SCC and "played a critical role in that result."<sup>111</sup>

More significant, Professor Davis's entire article rests on a questionable assumption that the facts of *Indalex* call for a simple, straightforward application of traditional principles of fiduciary duty at common law, developed mainly from cases concerning solicitor-client relations or corporate fiduciaries' taking of corporate opportunities for personal gains. The *Indalex* case differed from these cases in that the conflict situation facing Indalex was engendered by its *statutorily authorized* dual role as employer-administrator. To address this unique fact situation, the majority of the SCC ascertained the nature and scope of Indalex's fiduciary duty having regard to the legal framework in which the corporation acted as a fiduciary. One part of that legal framework was the Ontario *PBA*, which authorized the dual role of employer-administrator – and its attendant potential for conflict, if you agree with Justice Cromwell. The other part of that legal framework was the *CCAA*, as the particular context in which the actual conflict of interest facing Indalex arose. The *CCAA* proceedings had neither the purpose nor the effect of extinguishing Indalex's pension obligations.<sup>112</sup> Rather, an initial order granted by the *CCAA* judge operated only to "freeze"<sup>113</sup> the rights of pension beneficiaries and other creditors of Indalex alike in order to "preserv[e] the status quo for the benefit of all stakeholders."<sup>114</sup> This is why neither Justice Deschamps nor Justice Cromwell viewed Indalex's decision to commence *CCAA* proceedings as being on its own a breach of its fiduciary obligation to avoid conflict of interests. Both Justices showed empathy for the serious financial difficulty confronting Indalex. For this same reason, it is overly simplistic and disingenuous to characterize, as Professor Davis does, Indalex's quest for a solution to its insolvency under the *CCAA* as no more than a corporate fiduciary's attempt to pursue its own interests at the expense of the plan beneficiaries to whom it owes fiduciary obligations. Thus, as the above analysis

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<sup>111</sup> *Ibid* at 86.

<sup>112</sup> *Indalex* (SCC), *supra* note 1 at para 206.

<sup>113</sup> *Ibid* at para 71.

<sup>114</sup> *Ibid* at para 206.

shows, it is incorrect to characterize this case as one to be decided strictly in accordance with the common law governing fiduciaries.

## V. INTERPLAY BETWEEN THE SCC'S HOLDINGS ON THE TWO ISSUES

So far this paper has analyzed and critiqued the SCC's handling of two major legal issues in the *Indalex* case: the priority treatment of *PBA* deemed trusts under the *CCAA*, and the fiduciary duties of an employer-administrator in the course of the *CCAA* proceedings. Though the SCC approached the *PBA* deemed trust's priority under the *CCAA* and *Indalex*'s fiduciary duty as two separate issues, these are actually interrelated. The SCC's handling of these two issues in *Indalex* creates a legal contradiction for employer-administrators that are in or near insolvency.

Recall that, as discussed in Section III, the SCC in *Indalex* found that priorities created by provincial statutes, including the *PBA* deemed trust, remain effective in *CCAA* proceedings, subject to the doctrine of federal paramountcy. The Court also held that no deemed trust could arise under s. 57(4) of the *PBA* in the case of a pension plan—such as *Indalex*'s executive plan—that had not been wound up when the proceedings under the *CCAA* were initiated.<sup>115</sup> These two holdings combine to produce a crucial implication: where a pension plan has a wind-up deficiency, that wind-up deficiency will *not* be deemed to be held in trust in favour of the plan beneficiaries under s. 57(4) of the *PBA* when the employer seeks the *CCAA* protection *unless* the plan is wound up before the commencement of the *CCAA* proceedings. Post-*Indalex*, any employer-administrator that is aware of this implication can entirely avoid liability for the wind-up deficiency by *not* winding up its pension plan voluntarily prior to seeking relief under the *CCAA*. As soon as the corporation obtains an initial order under the *CCAA*, if it has not previously wound up the pension plan, then the beneficiaries' claim to the wind-up deficiency loses the benefit of the *PBA* deemed trust. Instead, it is treated as an unsecured claim under the *CCAA*. Such an outcome clearly prejudices the interests of the plan beneficiaries.

<sup>115</sup> This holding was not mentioned previously because it relates to the quantum of *Indalex*'s liability to the pension beneficiaries but is merely tangential to the discussion in Section III.



The question of whether an employer-administrator's decision to deliberately avoid winding up its pension plan before commencing the *CCAA* proceedings amounts to a breach of its fiduciary duty to the plan beneficiaries remains unresolved. The SCC in *Indalex* did not offer any coherent guidance on this question. On the one hand, the employer's act arguably triggers the conflict-of-interest prohibition—even the higher threshold favoured by Justice Cromwell—because the loss of the *PBA* deemed trust “materially and adversely affect[s]”<sup>116</sup> the plan members' interest. On the other hand, the majority of the SCC in *Indalex* stated that a corporation's decision to seek protection under the *CCAA* is not itself a breach of its fiduciary duty as administrator. A stay of proceedings granted under the *CCAA* does not extinguish the employer's pension obligations;<sup>117</sup> rather, it “freezes”<sup>118</sup> the rights of the plan members and creditors alike in order to “preserv[e] the status quo for the benefit of all stakeholders.”<sup>119</sup> This is why neither Justice Deschamps nor Justice Cromwell viewed *Indalex*'s decision to commence proceedings under the *CCAA* alone as a breach of its fiduciary obligation to avoid conflict of interests. Moreover, where the employer initiates proceedings under the *CCAA* with the intent of restructuring (as opposed to effecting a liquidation), the employer generally will not wind up the plan prior to the filing. Instead, the employer will retain its employees and allow their benefits under the pension plan to continue accruing after the employer initiates insolvency proceedings. If the pension plan is incorporated into a collective agreement, the employer may well lack any authority to wind up the plan unilaterally. A legal contradiction thus emerges. In affirming the priority of the *PBA* deemed trust under the *CCAA*, the SCC inadvertently brought the interests of the pension plan members into conflict with the employer-administrator's self-interest in pursuing a course of action for purposes of corporate restructuring; the Court emphatically declared that course of action *not* to be a breach of fiduciary duty.

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<sup>116</sup> *Indalex* (SCC), *supra* note 1 at para 201.

<sup>117</sup> *Ibid* at para 206.

<sup>118</sup> *Ibid* at para 71.

<sup>119</sup> *Ibid* at para 206.

To resolve this contradiction, one must look outside the confines of fiduciary law. One solution is regulatory oversight. An employer-administrator is statutorily obligated to ensure that the pension plan and fund are administered in accordance with the *PBA* and the regulations.<sup>120</sup> In particular, s. 68(6) authorizes the Superintendent of Financial Services to change the effective date of a wind up by order.<sup>121</sup> In theory, the Superintendent could change the effective date to a date preceding the employer-administrator's filing under the *CCAA* so as to preserve the plan members' claim for a *PBA* deemed trust in respect of any wind-up deficiencies. However, one of the current policies of the Financial Services Commission of Ontario (FSCO) confines the effective date of a wind up to no earlier than the date of the specific event that triggers the wind up, such as insolvency.<sup>122</sup> Therefore, the FSCO's policy should be amended to allow the Superintendent to exercise her authority under s. 68(6) for the benefit of the plan members.

## VI. CONCLUSION

The insolvency of a business that sponsors pension plans for its employees presents a scenario layered with complexities. As Justice Cromwell puts it, "Pension plans and creditors find themselves in a zero-sum game with not enough money to go around."<sup>123</sup> In an attempt to preserve and protect the rights of vulnerable pension plan members, the SCC declared the deemed trust provisions in the *PBA* to be generally effective under the *CCAA*, subject to certain exceptions. Though well-intentioned, this holding creates an inconsistency between Canada's two federal insolvency regimes, raising the spectre of statute shopping as well as diminishing the coherence of the case law. On the second issue of Indalex's fiduciary duty, the majority appeared divided on the validity of the "two hats" principle, but nevertheless agreed that Indalex's failure to take

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<sup>120</sup> *PBA*, *supra* note 2, s.19(1).

<sup>121</sup> *Ibid*, s. 68(6).

<sup>122</sup> FSCO Policy W100-103 (January 2014).

<sup>123</sup> *Indalex* (SCC), *supra* note 1 at para 85.

active steps to properly resolve the conflict violated the conflict of interest prohibition.

The interplay between the SCC's holdings on these two issues, while not explicitly considered by the Court, has in fact created a legal contradiction that seemingly cannot be resolved using the existing jurisprudence on either the *CCAA* priorities or the fiduciary duty of the employer-administrator. This indicates an unmistakable need for Parliament and provincial legislatures to provide courts with clearer guidance, and they should seize the opportunity to properly balance the interests of pension plan beneficiaries and other stakeholders.