



DECEMBER 1, 2011

Pension *Pulse*

Leave to Appeal Granted in *Indalex*

The Supreme Court of Canada today granted leave to appeal in *Indalex Limited (Re)*. This is an appeal from the Ontario Court of Appeal (2011 ONCA 265). Please see our *Pension Pulse* dated April 20, 2011, for a detailed summary of the decision of the Ontario Court of Appeal.

Indalex Limited and its U.S. parent sought protection from their creditors under the *Companies Creditors Arrangement Act* and under Chapter 11 of the *U.S. Bankruptcy Code*. The court authorized a loan under a debtor-in-possession credit agreement and gave the lenders a super-priority charge against Indalex' assets. Upon the sale of Indalex' assets, two groups of pension plan members argued that a portion of the proceeds should be reserved for payment of pension fund deficiencies.

The court of appeal decided in favour of the pension plan members, notwithstanding the super-priority granted under the DIP loan. The court held that the deemed trust provisions in the Ontario *Pension Benefits Act*, in respect of the Salaried Pension Plan that had been wound up prior to the CCAA proceedings, was effective as against the guarantor of the DIP loan. The court also applied a constructive trust in respect of the deficiency in the Executive Pension Plan that had not been wound up.

The decision of the court of appeal came as a surprise to most pension and insolvency practitioners. It has potentially far-reaching implications for lending transactions and has already found its way into the negotiation of financing agreements. It has also created uncertainty with respect to the extent of an employer's fiduciary obligations in its role as pension plan administrator and how conflicts in corporate sponsor and administrator roles may be resolved.

It is certainly good news that the leave to appeal to the Supreme Court of Canada has been granted. Hopefully the country's highest court will bring much needed clarity to these areas of law.



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As a member of our firm's Labour and Employment group, Mark handles all aspects of pensions and benefits law, including governance, regulatory compliance, collective bargaining, litigation, due diligence, mergers and acquisitions, financing agreements, bankruptcy and insolvency, and the tax aspects of compensation, pensions and benefits.

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