

Supreme Court of Canada releases its decision in Indalex: DIP charges are alive and well, but that's not all

The highly anticipated decision of the Supreme Court of Canada in Re: Indalex was released this morning.

Here are the key highlights:

- A great decision for DIP Lending. The Supreme Court unanimously upheld the super-priority of the court-ordered DIP charge.
- The Supreme Court affirmed the Ontario Court of Appeal's decision that the statutory deemed trust under section 57(4) of the Ontario *Pension Benefits Act*, as it related to the Salaried Plan that had already been wound-up, captured the wind-up deficiency under that plan.
- The majority of the Supreme Court refused to impose a constructive trust over the reserve funds for the benefit of the pension plan members, overruling the decision of the Ontario Court of Appeal.
- The Court did not provide clear guidance to companies that are also pension plan administrators relative to the nature and scope of their competing duties. It did, however, attempt to address measures that might be taken to respond to conflicts of interest that may arise in the event of a CCAA proceeding.

DIP loan charge in initial order ranked in priority to statutory deemed trust

Reversing the decision of the Ontario Court of Appeal, the Supreme Court unanimously decided that the DIP Charge ordered by Justice Morawetz had the effect of giving the court-ordered charge securing the DIP Loan priority over the provincial deemed trust. The Supreme Court concluded that the doctrine of paramountcy applied to give the DIP charge granted under the CCAA order priority over the provincial statutory deemed trust.

This aspect of the decision removes any doubt that CCAA court can make an order giving new DIP financing priority over the Ontario PBA provincial deemed trust.

scope of PBA deemed trust

In a 4 to 3 split decision, the Supreme Court affirmed the Ontario Court of Appeal's decision relative to the scope of the statutory deemed trust under section 57(4) of the Ontario *Pension Benefits Act* as it related to the Salaried Plan that had already been wound-up. In the context of that plan, the court found that the deemed trust included the amount required to pay the wind-up deficiency. The court did not extend this decision to the Executive Plan because it had not been wound up.

priority of PBA statutory deemed trusts

While there was disagreement regarding the scope of the PBA deemed trust, the Supreme Court found, prior to considering the impact of the Order imposing the DIP charge and the paramountcy doctrine referenced above, that Section 30(7) of the Ontario *Personal Property Security Act* gave the PBA deemed trust priority over other PPSA security in accounts or inventory and its proceeds in Ontario.

Significantly, not before the Supreme Court for consideration were the 2009 amendments to the CCAA and BIA, which afford specific priority to unpaid normal cost contributions, but not to special payments or pension plan wind-up deficiencies. It is anticipated that the interplay of the 2009 amendments and the doctrine of paramountcy will be important in determining the practical implications of this decision to pre-filing loan obligations and related issues in future CCAA cases.

Watch for our further analysis of this important decision.

For more information on this topic, please contact any member of McMillan's Restructuring and Insolvency Group

[a cautionary note](#)

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