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HR Law Update

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Indalex Limited: Application to Other Jurisdictions?

The April 7, 2011 *Indalex Limited (Re)* ("*Indalex*")[1] decision of the Ontario Court of Appeal granted priority to pension plan beneficiaries over the claims of a secured creditor.

In this article, we discuss the potential application of this Ontario decision to federally-regulated pension plans, and to provincially-regulated pension plans registered in Alberta or British Columbia.

BACKGROUND

Indalex Limited was an insolvent company that sought and obtained creditor protection under the *Companies' Creditors Arrangement Act* ("*CCAA*"), at a time when its two pension plans were underfunded by a combined total of approximately $6.75 million. Indalex borrowed funds pursuant to a debtor-in-possession ("DIP") credit arrangement, and a court order granted the DIP lender super-priority status. Indalex's parent company, Indalex US, guaranteed the amounts borrowed from the DIP lender.

Indalex arranged for the sale of its assets, and sought to distribute the proceeds to the DIP lender. Notably, the amounts owing to the DIP lender were such that no proceeds would be left to pay an amount into the pension plans to reduce the underfunded status.

At the time of the *CCAA* proceedings, the plan referred to as the Salaried Plan was in the process of being wound up, and there was some indication that Indalex would wind up the second plan (the Executive Plan). The wind up of the underfunded plans would have resulted in a reduction of the pension benefits payable to the beneficiaries.

At the sale approval hearing, in response to objections by the pension plan members, the court ordered $6.75 million of the sale proceeds set aside in a reserve fund ("Reserve Fund") by the *CCAA* monitor (the "Monitor"). The DIP lender then enforced the guarantee against Indalex US to receive full payment on the DIP loans. Indalex US claimed the super-priority interest in the Reserve Fund assets by virtue of being subrogated to the DIP lender's position.

[1] *Indalex Limited (Re)*, 2011 ONCA 265

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SPECTRUM HAPPENINGS

Colin Galinski was elected to the Executive of the CBABC Pension Subsection as Secretary Treasurer.

Craig Natsuhara and Meika Lalonde will present at the Building Bridges to Prosperity Symposium on June 10, 2011 in Surrey, BC.

Scott Sweatman will be speaking at Insight's Inaugural Western Canada Construction Labour Relations Conference in Vancouver on June 21, 2011.

Michael Wolpert will present the Spectrum HR Law LLP Award of Excellence at the Human Resources Association of Calgary's Awards and Recognition Night, which recognizes Calgary's outstanding leaders in the Human Resources community, on June 22, 2011.

Catherine McAteer will be speaking at the Lorman Educational Services' Employment Standards Code seminar on August 3, 2011 in Calgary.

Michael Wolpert will be speaking at the Certificate in Canadian Benefit Plans in Niagara Falls from August 15-17, 2011.

CLE TV will air a presentation by **Colin Galinski** and Tom Anderson, QC, Anderson Pension Law Consulting, on Pension Division on Marital Breakdown Basics on September 27, 2011 from 10:00-11:30 a.m. PST. Click here for further information.

Scott Sweatman will teach the University of British Columbia's Sauder School of Business' "The Responsible Trustee – Introductory Level" course on October 3, 2011, on the topic "Trust Fund Legal Issues," and "The Responsible Trustee – Intermediate Level" course on October 31, 2011, on the topic "Legal Issues – Conflict of Interest."

Craig Natsuhara will co-present at the Canadian Institute's 4th Annual Legal and Human Resource Guide to Employing Foreign Workers from October 18-19, 2011 at the Fairmont Palliser in Calgary.

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The claim by the plan beneficiaries to the Reserve Fund was premised on the statutory deemed trust provisions of the Ontario *Pension Benefits Act* ("*PBA*"), as well as the claim that Indalex breached its fiduciary obligations to the plan beneficiaries. The court in the *CCAA* proceedings rejected the claim on the basis that at the date of the sale of Indalex, the statutory deemed trust under the *PBA* did not apply to the plans, as all required payments to the plans had then been made.

COURT OF APPEAL DECISION

On appeal, Madam Justice Gillese, writing for the unanimous Court, reversed the lower court's decision and ordered the Monitor to pay into the Salaried and Executive Plans the amounts required to fund the deficiencies.

For the Salaried Plan, which was being wound up at the time of the sale, the Court held that the deemed trust provisions of the *PBA* applied to all liabilities accrued by the wind up date, notwithstanding the fact that payments were not due at that time. Under the Regulations to the *PBA*, an employer has up to five years to make all required contributions to a wound up plan. The Court interpreted the deemed trust provisions to mean that all future payments (as per the schedule in the Regulations) had accrued to the date of wind up and thus took priority over the claims of Indalex US.

However, the Court declined to apply the deemed trust provisions to the Executive Plan, which had not yet been wound up at the date of the sale. Instead, the Court accepted the plan beneficiaries' argument that Indalex breached its fiduciary obligations as plan administrator to plan members and beneficiaries. The Court found that Indalex was in a conflict of interest between its duties as administrator and its corporate position and, in the specific circumstances of this case, failed to satisfy its duties to plan members and beneficiaries. As a result of the breach, the Court held that assets equal to the deficiency amounts were held in a constructive trust by Indalex for the benefit of plan members and beneficiaries, and as a result must be paid into the plans from the Reserve Fund and not distributed to the secured creditor.

IMPLICATIONS FOR FEDERALLY-REGULATED PLANS

Certain amendments to the *Pension Benefits Standards Act, 1985* ("*PBSA*"), the legislation governing private sector, federally-regulated pension plans, came into force on April 1, 2011. The amendments include a significant new obligation on employers to fully fund registered pension plans on wind up.

Notably, the application of the deemed trust provided by the *PBSA* to the amounts due on wind up is somewhat different than the statutory provisions of the Ontario *PBA* as considered in *Indalex*. The *PBSA* specifically provides that the deemed trust does not apply in respect of the amount that the employer is required to pay into the pension fund to fund a deficiency on wind up; however, the deemed trust does apply in respect of any payments that are due and that have not been paid into the pension fund.

The *PBSA* provisions closely reflect the more common understanding of the application of the deemed trust prior to *Indalex*. As a result of the clarity provided by this different statutory scheme, it is unlikely that the decision in *Indalex* will have general application to federally-registered plans under the *PBSA*.

However, some uncertainty does arise from the wording of these new deemed trust provisions in the *PBSA*. Due to the fact-specific nature of insolvency proceedings, until a court interprets the new provisions in circumstances similar to *Indalex*, federal plan sponsors should seek advice and exercise caution with respect to the application of the federal deemed trust provisions.

IMPLICATIONS FOR PROVINCIALLY-REGULATED PLANS

The statutory deemed trust provisions of the B.C. *Pension Benefits Standards Act* ("BC *PBSA*") and the Alberta *Employment Pension Plans Act* ("*EPPA*") more closely resemble the deemed trust provisions of the Ontario *PBA* than the federal *PBSA*.

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Subsection 51(3) of the *EPPA* is very similar to subsection 57(4) of the *PBA*, the deemed trust provision at issue in *Indalex*. While the deemed trust provision in subsection 43.1(3) of the BC *PBSA* differs somewhat from the Ontario and Alberta deemed trust provisions, it applies a deemed trust to contributions due or owing to the pension plan by an employer involved in an insolvency proceeding.

Thus, there is a significant chance that a BC or Alberta court would rely on the respective deemed trust provisions and the *Indalex* decision to apply a deemed trust to amounts equal to a solvency deficiency as being due or owing to a pension plan by an insolvent BC or Alberta employer. If an appeal of *Indalex* is heard by the Supreme Court of Canada, the issue may be clarified.

FIDUCIARY DUTY ISSUES

Perhaps the findings of the Court of Appeal in *Indalex* that will ultimately find more general application are those relating to fiduciary obligations of pension plan administrators.

The Court found that Indalex breached both its common law fiduciary obligations as plan administrator, as well as its statutory obligation under the *PBA* to avoid conflicts of interest between the administrator's own interests and its duties in respect of the pension fund. The Court held that actions taken by Indalex during the *CCAA* proceedings did not satisfy its fiduciary duties to protect members' interests. Even if the Court was wrong in its application of the common law, it concluded that Indalex had breached its statutory obligations.

Indalex had argued that, even if a finding of breach of fiduciary obligation was made by the Court, the proper remedy was to make the claimants unsecured creditors in respect of that judgment. However, the Court disagreed and used its equitable jurisdiction to impose a constructive trust on the assets set aside from the sale proceeds.

This decision is significant in that the Court recognized the "two hats" worn by Indalex as both employer and plan administrator. Indalex had argued that the actions it took in the *CCAA* proceedings were taken as an employer and should not have attracted fiduciary obligations to the plan members. However, the Court determined that, in the specific circumstances of this case, Indalex had not only taken no steps to protect the members' interests, it took active steps to undermine the funding of the plans.

Conflict of interest provisions similar to those of the *PBA* are contained in subsections 8(6) and (7) of the federal *PBSA* and subsection 8(9) of the BC *PBSA*. Notwithstanding the absence of a conflict of interest provision in the Alberta *EPPA*, if *Indalex* is upheld on appeal, the Court's application of the constructive trust would likely apply to plans registered in Alberta. The Court concluded that Indalex could not ignore the conflict between its two roles and should have taken steps to avoid or otherwise resolve the conflict.

The findings in *Indalex* relating to both the common law fiduciary obligations of employer plan administrators and the statutory conflict of interest provisions could easily have application to plans governed by other legislation. These issues are a significant development in the law of fiduciary obligations and will bear watching as any appeal of the *Indalex* decision unfolds.

Chris Brown and Colin Galinski

Contact Chris at:
T. 403.444.8104
E. cbrown@spectrumhrlaw.com

Contact Colin at:
T. 604.630.2079
E. cgalinski@spectrumhrlaw.com

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Occupational Health & Safety: Alberta Update

Statistics show that Alberta's workplace injury rate is at a twenty-year low for the year 2010. Although fatalities continue to rise, the lower injury rate has recently been recognized by Employment and Immigration Minister, Thomas Lukaszuk, as "a step in the right direction." While these statistics bode well for Alberta businesses, they serve as an effective reminder for employers to consider whether all reasonable measures are being taken to promote health and safety at work.

From a business perspective, a workplace injury or fatality can cause significant delays, inefficiency of operations, damage to both reputation and worker morale, and substantial costs to bring the worksite up to acceptable standards. Enforcement of safety policies and procedures is critical to ensure a safe workplace, to avoid tragic accidents, to create a strong safety culture, and to comply with the legal duties imposed by Occupational Health and Safety legislation and other relevant laws.

Discipline of employees is an important component of these policies in order to prevent and deter future violations. The level of discipline applied must be consistent and reasonable for the safety violation that occurred; and, a contextual approach that also takes into account previous, unrelated incidents should be utilized in order to determine the appropriate level of discipline. Progressive discipline can be very effective for dealing with safety violations and, as always, the possibility of termination for cause must be loud and clear.

Certainly, failure to abide by the *Occupational Health and Safety Act*, *Regulations* and *Code* ("*OHS Act*") can lead to many serious consequences for employees, employers and businesses. With the coming into force of Bill C-45 in 2004, which amended the Canadian *Criminal Code* (the "*Code*") to expand the scope of, and penalties for, criminal liability for workplace incidents, prosecutions have been pursued under the federal legislation. Pursuant to these provisions, criminal convictions in Quebec for workplace incidents have resulted in hefty fines and jail time.

Bill C-45 established new legal duties, rules and penalties by imposing criminal liability on organizations, their representatives and those who direct the work of others. Violators, which can include organizations, who are found guilty under the *Code* could face numerous consequences, including criminal records, fines, publication orders and imprisonment (for individuals). Further, as there is no set maximum fine for breaching the relevant provisions of the *Code*, and considering that imprisonment is not an option for an organization, the sky is almost the limit for imposing fines on organizations.

In Alberta, workplace incidents are still prosecuted under the *OHS Act*, rather than under the *Code*. While penalties under the *OHS Act* do not include a criminal record, the repercussions for workplace incidents are still quite substantial. Reputations of employers will be at stake, and recent fines have ranged from $60,000 to $125,000 for work place injuries, with many hovering around $80,000, and approximately $350,000 for fatalities. Additionally, imprisonment is still an option, and there is the likelihood of associated costs for bringing the workplace into compliance with the law.

In order to avoid criminal and *OHS Act* charges, both of which can be imposed for the same incident, it is necessary to have strong, *OHS Act* compliant rules, procedures, policies and programs within the organization, from carrying out the required hazard assessments, to ensuring that education, training and personal protective equipment are properly provided, to imposing the appropriate discipline for safety violations. Indeed, it is vital that employers create clear discipline procedures that are consistently implemented in order to deter and properly manage safety-threatening conduct.

The duty on employers is clear: diligently protect your workers and the public both at and around your worksite, and ensure strict statutory compliance. The better that employers and workers understand the law and their obligations, the more likely Alberta will experience more record-breaking years for low workplace injury rates.

Shana Wolch and Shannon Houston (Summer Student)

Contact Shana at:
T. 403.444.8106
E. swolch@spectrumhrlaw.com

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Case Commentary: *Ontario (Attorney General) v. Fraser*

The Supreme Court of Canada released the long awaited *Ontario (Attorney General) v. Fraser*[1] ("*Fraser*") decision on April 29, 2011. Perhaps surprising some, an 8-1 majority ruled that Ontario's *Agricultural Employees Protection Act*, *2002* (the "*AEPA*") does not operate offside of the freedom of association rights in section 2(d) of the *Canadian Charter of Rights and Freedoms*.

The *AEPA* excludes farm workers in Ontario from the purview of that province's *Labour Relations Act*. The *AEPA* does set out some protections for organizing, but does not extend those rights to the collective bargaining process, to the extent that is pervasive in most labour relations legislation. Under the *AEPA*, Ontario's farm workers can organize and collectively negotiate working conditions. The *AEPA* does contain a dispute resolution system, but the farm workers argued that the *AEPA* should also contain:

1. statutory protection for majoritarian exclusivity – each bargaining unit being represented by a single bargaining agent;

2. a dispute resolution mechanism like that found in Ontario's *Labour Relations Act* to resolve bargaining impasses and interpret collective agreements (inclusive of strike and other labour action); and

3. a statutory duty to bargain in good faith.

In *Fraser*, the majority found that the dispute resolution system in the *AEPA* provided an "effective and meaningful" way to resolve a bargaining dispute. The Supreme Court confirmed the employer's obligation to consider and discuss its employees' position in good faith, and with a view to coming to terms on working conditions. As such, the *AEPA* did not infringe on the farm workers' right to organize and collective bargain.

While this decision deals with a specific exclusion to labour relations legislation, it is also instructive to employers who have non-certified employee associations.

First, the *Fraser* decision confirms the obligation of employers to recognize employee associations and to bargain in good faith with those associations – unionized or not:

> We hope that all concerned proceed on the basis that s. 2(d) of the *Charter* confirms a right to collective bargaining, defined as a process of collective action to achieve workplace goals, requiring engagement by both parties.

Second, the majority's definition of "collective bargaining" stops short of including the right to strike and other workplace action in support of collective bargaining demands. The majority confirmed that apart from statutory regimes, there is no mandatory model for labour relations under which employers must operate. While the Wagner Model, upon which most labour relations statutes are based, may be the norm, it is not the requirement.

Janet Nystedt

Contact Janet at:
T. 403.444.8108
E. jnystedt@spectrumhrlaw.com

[1] 2011 SCC 20

SPECTRUM HR LAW

CALGARY

Spectrum HR Law LLP
Suite 1950, 639 5th Ave SW
Calgary, AB
T2P 0M9

T. 403.444.8100
F. 403.444.8101

VANCOUVER

Spectrum HR Law LLP
Suite 500, 666 Burrard St.
Vancouver, BC
V6C 3P6

T. 604.630.2077
F. 604.630.2078

TOLL FREE 1.888.444.9145

www.spectrumhrlaw.com

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June 22, 2011

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Our People

CALGARY

Christopher A. Brown
Pensions, Benefits and Executive Compensation
T. 403.444.8104
E. cbrown@spectrumhrlaw.com

Will Cascadden
Employment and Labour
T. 403.444.8107
E. wcascadden@spectrumhrlaw.com

Shabnam Datta
Research and Administration
T. 403.444.8111
E. sdatta@spectrumhrlaw.com

Catherine McAteer
Business Immigration
T. 403.444.8110
E. cmcateer@spectrumhrlaw.com

Janet Nystedt
Employment and Labour
T. 403.444.8108
E. jnystedt@spectrumhrlaw.com

Kristin Smith
Pensions, Benefits and Executive Compensation
T. 403.444.8105
E. ksmith@spectrumhrlaw.com

Shana Wolch
Employment and Labour
T. 403.444.8106
E. swolch@spectrumhrlaw.com

Michael Wolpert
Pensions, Benefits and Executive Compensation
T. 403.444.8103
E. mwolpert@spectrumhrlaw.com

VANCOUVER

Colin Galinski
Pensions, Benefits and Executive Compensation
T. 604.630.2079
E. cgalinski@spectrumhrlaw.com

Meika Lalonde
Business Immigration
T. 604.630.2083
E. mlalonde@spectrumhrlaw.com

Craig Natsuhara
Business Immigration
T: 604.630.2082
E. cnatsuhara@spectrumhrlaw.com

Scott Sweatman
Pensions, Benefits and Executive Compensation
T. 604.630.2080
E. ssweatman@spectrumhrlaw.com