

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

BETWEEN:

G.E. CANADA EQUIPMENT FINANCING G.P.

Applicant

- and -

NORTHERN SAWMILLS INC.

Respondent

APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND
INSOLVENCY ACT*, R.S.C. 1985, c. C-36, as amended, AND SECTION 101 OF THE
COURTS OF JUSTICE ACT, R.S.O. 1990, c. C.43, as amended.

**FACTUM OF PRICEWATERHOUSECOOPERS INC.,
IN ITS CAPACITY AS RECEIVER OF NORTHERN SAWMILLS INC.**

November 12, 2012

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PART I – OVERVIEW

1. PwC¹ was appointed as Receiver over the Northern Property in January 2011. It has completed a sale process and liquidated substantially all of the Northern Property, generating proceeds of almost \$2.2 million. Once certain disputes are resolved, the Receiver will be able to finalize its distributions to the Secured Lenders. The Receiver brings this motion seeking (1) advice and direction to resolve disputes that are delaying finalizing distributions and (2) an order authorizing the Receiver to make certain distributions, amongst other orders.

2. The issue is whether reserves are required for normal cost and wind-up deficiencies in Northern's Hourly and Salaried Plans. Morneau (as Plan administrator) makes two claims: (1) a PBA deemed trust claim, and (2) a section 81.6 BIA Claim.

3. ***PBA Deemed Trust Claim:*** The Receiver submits that no reserves are required. Morneau alleges that pursuant to *Re Indalex*² and section 57(4) of the PBA, it has a deemed trust claim over all Northern Property. However, at the time any PBA deemed trust arose, Northern's assets were already encumbered by security interests in favour of the Secured Lenders. Section 30(7) of the PPSA makes it clear that any subsequent PBA deemed trust is only given priority over existing security interests in "an account or inventory and its proceeds" but not in other property. As a result, the deemed trust only has priority over the proceeds of Northern's accounts and inventory (which is \$4,725). Furthermore, the Receiver intends to assign Northern into bankruptcy as permitted by the Receivership Order. This assignment will reorder the priorities such that the Secured Lenders' security ranks ahead of any PBA deemed trust. Accordingly, the Receiver is of the view that no reserve is required for this claim.

¹ All capitalized terms in this overview are defined below or in the Receiver's Fifth Report.

² 2011 ONCA 265, on appeal to the Supreme Court of Canada, Receiver's Book of Authorities, Tab 1.

4. **Section 81.6 BIA Claim:** A maximum reserve of \$147,732 should be held until the normal cost deficiency in the Salaried Plan can be verified. The amount of Morneau's section 81.6(c)(i) claim depends on whether Morneau convinces the Superintendent of Financial Services to approve the merger of the Salaried Plan into the Hourly Plan and order a change in the Wind Up Date for the Hourly Plan.

(a) *Status Quo:* If the status quo is maintained, then (1) there is no normal cost deficit and no section 81.6 claim in the Hourly Plan, and (2) Morneau alleges a \$147,732 normal cost deficit (which includes \$12,117 in interest) in the Salaried Plan based on an assumed termination date of November 16, 2010. The Receiver has not verified this figure and requires more information. The Receiver proposes to reserve a maximum of \$147,732 pending receipt of further information.

(b) *Pension Plans Change:* Despite the stay of proceedings, Morneau asked the Superintendent to change the Wind Up Date for the Hourly Plan and to merge the deregistered Salaried Plan into the Hourly Plan (the "Morneau Recommendation"). If the Morneau Recommendation is accepted, these changes may increase the normal cost deficiency and Morneau's section 81.6 claim. The Receiver asks this Honourable Court to declare that the process of the Superintendent considering the Morneau Recommendation is a Proceeding that is stayed by the Receivership Order. It is the Receiver's submission that it would be unjust in the circumstances of this case to lift the stay of proceedings.

5. The Receiver therefore submits that the maximum reserve for pension claims is \$147,732 pending confirmation of the normal cost deficit, if any, in the Salaried Plan.

PART II – THE FACTS

The Northern Receivership and Liquidation Process

6. Northern Sawmills Inc. (“Northern”) produced a range of structural and dimensional softwood lumber products for customers in North America. Northern’s operations were idled in the fall of 2008 and virtually all of its employees were laid off.³

7. On January 4, 2011, PwC was appointed as Receiver pursuant to section 243(1) of the BIA and section 101 of the *Courts of Justice Act* over all of Northern’s assets, undertakings and properties (the “Northern Property”).⁴ On the same day, the Court authorized the Receiver to conduct a sale process in respect of the Northern Property.⁵

8. After attempts to complete a going concern sale were not successful, the Receiver entered an Agency Sale Agreement with a liquidator, Maynards Industries Ltd. (“Maynards”), which was approved by the Court.⁶ On September 29 and 30, 2011, Maynards conducted an auction (the “Auction”), liquidating virtually all of Northern’s assets except its real property.⁷ The value of Northern’s assets that constitute “account or inventory and its proceeds” realized in the Auction was \$4,725.⁸

³ Report of PricewaterhouseCoopers Inc. as proposed Receiver of Northern dated December 30, 2010, Compendium, Tab 9, p 79, para 7.

⁴ Fifth Report, Receiver’s Motion Record, Tab 2, para 1; Receivership Order, Compendium, Tab 1.

⁵ Fifth Report, Receiver’s Motion Record, Tab 2, para 2; Sale Procedure Order, Compendium, Tab 2.

⁶ Fifth Report, Receiver’s Motion Record, Tab 2, para 5; Maynards Order dated Aug. 12, 2011, Compendium, Tab 7.

⁷ Fifth Report, Receiver’s Motion Record, Tab 2, para 5.

⁸ Fifth Report, Receiver’s Motion Record, Tab 2, para 51.

9. The Receiver also successfully marketed Northern's real property (the "Real Property") and, on March 20, 2012, the Court granted an approval and vesting order approving the sale of Northern's Real Property to 2308703 Ontario Inc.⁹

10. The Receiver has liquidated virtually all of the Northern Property, generating proceeds of \$2.2 million (net the cost of liquidation but not the receivership).¹⁰ These proceeds will not satisfy Northern's obligations to its secured creditors, who will suffer a shortfall.

Priority Charges Over Northern's Assets

11. The Northern Property is subject to certain charges that rank ahead of the Secured Lenders (defined and discussed below) as follows:

- (a) *Receiver's Charge*: The Receiver's Charge ranks in priority to all other security interests.¹¹ The Receiver seeks approval of its fees and its counsels' fees and proposes to reserve \$150,000 for unpaid professional fees and work in progress.¹²
- (b) *Property Tax Claim*: The City of Thunder Bay claims for property taxes owing on the Real Property up to March 30, 2012 (the date of the sale of the Real Property) in the amount of \$157,864.¹³ The Receiver undertook to pay the Property Tax Claim as part of the sale of the Real Property.¹⁴

⁹ Fifth Report, Receiver's Motion Record, Tab 2, para 6; Approval and Vesting Order, Compendium, Tab 8.

¹⁰ Fifth Report, Receiver's Motion Record, Tab 2, para 59.

¹¹ Fifth Report, Receiver's Motion Record, Tab 2, para 69. Note that Morneau has alleged the only claim that might rank ahead of the Receiver's Charge and Morneau advised that it would not seek to have the Receiver's Charge subordinated to Morneau's claims: Fifth Report, Receiver's Motion Record, Tab 2, para 70.

¹² Fifth Report, Receiver's Motion Record, Tab 2, para 62.

¹³ Fifth Report, Receiver's Motion Record, Tab 2, para 75.

¹⁴ Fifth Report, Receiver's Motion Record, Tab 2, para 77.

Northern's Secured Lenders

12. After the Receiver's Charge and the Property Tax Claim are satisfied, Northern has obligations to four secured lenders (the "Secured Lenders"): Royal Bank of Canada ("RBC"), G.E. Canada Equipment Financing G.P. and its related entities (the "GE Entities"), Lucky Star Holdings Inc. ("Lucky Star") and Buchanan Sales Inc. ("Buchanan Sales").¹⁵

13. The Receiver obtained a security opinion from its independent counsel (the "Security Opinion") on the validity and enforceability of the security granted by Northern to the GE Entities, RBC, Lucky Star and Buchanan Sales as well as the related inter-creditor arrangements among the Secured Lenders.¹⁶ The Security Opinion confirms:

- (a) the security granted by Northern in favour of RBC in July 2008 ranks in priority to the other secured parties in respect of the GIC held by Northern in the GIC collateral account (the "GIC Account") with RBC;
- (b) except for the personal property of Northern classified as "motor vehicle", the security granted by Northern in favour of the GE Entities (the "GE Security") in March 2007, as amended in March 2009 and June 2009, ranks in priority to the security granted by Northern in favour of Buchanan Sales in personal property;
- (c) the security granted by Northern in favour of Buchanan Sales in January 2008 ranks in priority to the security granted by Northern in favour of the GE Entities solely in respect of personal property classified as "motor vehicle"; and

¹⁵ Fifth Report, Receiver's Motion Record, Tab 2, para 64.

¹⁶ Fifth Report, Receiver's Motion Record, Tab 2, para 65.

- (d) the security granted by Northern in favour of Lucky Star in March 2007 ranks in priority to the security granted by Northern in favour of Buchanan Sales in respect of personal property.¹⁷

Pension Plan Claims

14. In addition to the claims by secured creditors set out above, Morneau Shepell Ltd. (“Morneau”), acting as administrator of Northern’s two pension plans, has asserted claims against the receivership estate based on PBA deemed trusts and section 81.6 of the BIA. Morneau’s claims substantially exceed the value of the Northern Property and need to be determined to finalize the amounts to be distributed to the Secured Lenders and complete the administration of the receivership. This motion seeks the Court’s advice with respect to Morneau’s claims, among other things.

Northern’s Pension Plans

15. Northern was the employer under, and the administrator of, two defined benefit pension plans:

- (a) *The Hourly Plan*: the Retirement Plan for Employees of Northern Sawmills Inc. (the “Hourly Plan”); and
- (b) *The Salaried Plan*: the Retirement Plan for Salaried Employees of Northern Sawmills Inc. (the “Salaried Plan”).¹⁸

16. In the fall of 2008, Northern idled its operations and virtually all of its employees were laid off.

¹⁷ Fifth Report, Receiver’s Motion Record, Tab 2, para 66.

¹⁸ Fifth Report, Receiver’s Motion Record, Tab 2, para 14.

17. In March 2010, the Superintendent of FSCO issued Notices of Proposal giving notice that he intended to wind up the Hourly Plan and refuse to register the Salaried Plan.¹⁹

18. On September 2, 2010, the Superintendent ordered that:

(a) the Hourly Plan be wound-up with a wind-up date of January 1, 2008 (the “Wind Up Date”); and

(b) the Salaried Plan’s registration be revoked, which operates to terminate the Salaried Plan as of the date specified by the Superintendent.²⁰ The Superintendent has not yet specified the date.

19. The Receiver was appointed on January 4, 2011, several months after the Superintendent made his orders in relation to the Hourly and Salaried Plans. On January 4, 2011, the Court also approved the proposed Sale Process.

20. On January 7, 2011, the Superintendent was advised that the Receiver had been appointed and was added to the service list in this proceeding.²¹

Morneau’s Requests and Recommendations to the Superintendent

21. Morneau was appointed administrator of the Hourly Plan on March 11, 2011 and administrator of the Salaried Plan several months later on August 3, 2011.²²

¹⁹ Fifth Report, Receiver’s Motion Record, Tab 2, para 19.

²⁰ PBA, s. 18(3); Fifth Report, Receiver’s Motion Record, Tab 2, para 19.

²¹ Fifth Report, Receiver’s Motion Record, Tab 2, para 25.

²² Fifth Report, Receiver’s Motion Record, Tab 2, para 28, 30.

22. In March 2011, the Superintendent sought Morneau's submissions on:
- (a) whether there were contribution arrears for the Hourly Plan relating to periods before and after the Wind Up Date for the Hourly Plan; and
 - (b) what date should be used as the termination date of the Salaried Plan.²³

23. In response to the first question, on July 6, 2011 Morneau advised that as of the Wind Up Date for the Hourly Plan (January 2008), it appeared that there were no normal cost arrears but special payments had been underpaid by \$125,000.²⁴ Morneau has since confirmed that there were no unpaid normal cost contributions for the period before January 2008 in relation to the Hourly Plan.²⁵ The Receiver notes that Northern made contributions to the Hourly Plan after the Wind Up Date.

24. In response to the second question, Morneau did not answer the question directly but rather made the preliminary suggestion that FSCO should approve a transfer of the assets in the Salaried Plan to the Hourly Plan.²⁶

25. On November 7, 2011, Morneau's counsel wrote to the Receiver advising that Morneau intended to recommend to the Superintendent that the Hourly Plan and the Salaried Plan be treated as one plan and that the Wind Up Date be November 16, 2010. Based on Morneau's initial calculations, if these two changes were made (*i.e.*, merging the Salaried Plan

²³ Fifth Report, Receiver's Motion Record, Tab 2, para 27; Appendix I to the Fifth Report, Receiver's Motion Record, p 63.

²⁴ Fifth Report, Receiver's Motion Record, Tab 2, para 29.

²⁵ Fifth Report, Receiver's Motion Record, Tab 2, para 39.

²⁶ Fifth Report, Receiver's Motion Record, Tab 2, para 29; Appendix G to the Fifth Report, Receiver's Motion Record, p 67.

into the Hourly Plan and changing the Wind Up Date for the Hourly Plan), then normal cost arrears would be \$335,777. Morneau also sought interest in the amount of \$39,780 calculated to January 3, 2011 (the day before the Receiver was appointed).²⁷

26. Morneau also alleged that sections 57(4) and 57(5) of the PBA established a deemed trust and lien over all of the Northern Property for any wind-up deficiency under both Plans. Morneau alleged that, if the Salaried Plan was merged into the Hourly Plan in accordance with its Recommendation, the wind-up deficiency would be more than \$12 million.²⁸

27. On November 18, 2011, Morneau made submissions to the Insolvency Coordinator at FSCO, recommending that (1) the Superintendent issue a Notice of Intended Decision to revise the Wind Up Date of the Hourly Plan from January 1, 2008 to November 16, 2010; and (2) the Salaried Plan be merged into the Hourly Plan (collectively, the “Morneau Recommendation”).²⁹

28. The Morneau Recommendation, if adopted, may increase the required normal cost contributions for the Hourly Plan and, consequentially, the amount that would be subject to a super-priority granted by section 81.6 of the BIA.

29. On November 29, 2011, the Insolvency Coordinator at FSCO asked the Receiver and GE to make submissions on the Morneau Recommendation.³⁰

²⁷ Fifth Report, Receiver’s Motion Record, Tab 2, para 31; Appendix H to the Fifth Report, p 69.

²⁸ Fifth Report, Receiver’s Motion Record, Tab 2, para 47; Appendix H to the Fifth Report, p 69; Appendix M to the Fifth Receiver’s Report, p 130.

²⁹ Fifth Report, Receiver’s Motion Record, Tab 2, para 34; Appendix I to the Fifth Report, p 84.

³⁰ Appendix J to the Fifth Report, p 117.

30. On September 6, 2012, both GE and the Receiver made submissions to the Superintendent regarding the Morneau Recommendation.³¹ They noted that if the Superintendent was to issue an order changing the Wind Up Date for the Hourly Plan, such action could be a “proceeding” that was stayed by the Receivership Order. The Superintendent has not taken any steps since GE and the Receiver made their submissions.

31. On October 22, 2012, the Receiver asked Morneau for additional information to assist in quantifying any unpaid normal cost if the status quo was maintained.³² On November 6, 2012, Morneau confirmed that there was no normal cost deficiency with respect to the Hourly Plan and advised that, assuming the Salaried Plan was given a termination date of November 16, 2010, then there was a normal cost deficiency in the amount of \$147,732 (which included \$12,117 in interest).³³ The Receiver does not yet have sufficient information to confirm this number and has requested additional information. In particular, the Receiver intends to consider:

- (a) The appropriate termination date for the Salaried Plan;
- (b) The allocation of Northern’s contributions to the Salaried Plan against normal cost and special payment obligations in the Salaried Plan; and
- (c) Whether interest is included in “normal cost” and granted priority by section 81.6.³⁴

³¹ Fifth Report, Receiver’s Motion Record, Tab 2, para 34; Appendices J and K to the Fifth Report.

³² Fifth Report, Receiver’s Motion Record, Tab 2, para 39; Appendix L to the Fifth Report.

³³ Fifth Report, Receiver’s Motion Record, Tab 2, para 40; Appendix L to the Fifth Report.

³⁴ Fifth Report, Receiver’s Motion Record, Tab 2, para 41.

PART III – THE ISSUES

32. Once the pension plan claim disputes are resolved, the Receiver will be in a position to make final distributions to the secured creditors. The Receiver seeks this Honourable Court's advice and directions with respect to the following issues:

- (a) *PBA Deemed Trust and Indalex Claim*: Does section 30(7) of the PPSA have the effect of creating only a limited priority for a subsequent PBA deemed trust over accounts and inventory and not other property? Is the Receiver required to hold a reserve for this alleged deemed trust given the Receiver's intention to assign Northern into bankruptcy as permitted by the Receivership Order, thereby reordering the priorities such that any PBA deemed trust does not rank ahead of the Secured Lenders?
- (b) *Section 81.6 Claim (Status Quo) and Approach to Calculations*: How should the contributions made by Northern to the Hourly Plan and the Salaried Plan be allocated against the normal cost and special payment obligations? Is interest part of "normal cost" as defined in the *Pension Benefits Standards Regulations* and therefore included in a section 81.6 claim?
- (c) *Section 81.6 Claim, the Morneau Recommendation and the Stay of Proceedings*: Does the stay of proceedings in the Receivership Order apply to the process of the Superintendent considering the Morneau Recommendation such that the parties are stayed by the Receivership Order from taking further steps without leave of the Court? If so, should that stay be lifted?

PART IV – THE LAW

ISSUE A: PBA DEEMED TRUST CLAIM

Morneau's PBA Deemed Trust Claim

33. Morneau alleges that special payment deficits as well as a wind-up deficit of \$12,384,000 (assuming the Plans are merged) exist and claims substantially more than the assets available for distribution.³⁵

34. Morneau also claims that, based on the Ontario Court of Appeal's decision in *Re Indalex*, all of the Northern Property is subject to a deemed trust in the amount of this wind-up deficiency and that Morneau, as plan administrator, has a lien and charge over all of the Northern Property. As is set out below, the Receiver submits that pursuant to section 30(7) of the PPSA a subsequent PBA deemed trust only has priority with respect to "account and inventory" but not other property.

35. Morneau has not advanced a claim based on a constructive trust and, as is set out below, such a claim would have no basis in this case.

Re Indalex

36. The Receiver submits that the Supreme Court of Canada's decision in *Re Indalex*, regardless of what is decided, will not impact the result in this case because the facts in *Re Indalex* are distinguishable.³⁶

³⁵ Morneau's calculation assumes that the Superintendent decides to follow Morneau's recommendations and merge the Salaried Plan into the Hourly Plan and change the Wind Up Date for the Hourly Plan from January 1, 2008 to November 16, 2010. Even if the Superintendent is not permitted or chooses not to make the changes recommended by Morneau, as at January 1, 2008 the Hourly Plan would have had a wind-up deficit of more than \$5 million, which is well in excess of the assets of Northern available for distribution.

³⁶ 2011 ONCA 265, on appeal to the Supreme Court of Canada, Receiver's Book of Authorities, Tab 1.

37. In *Re Indalex*, the Court considered section 57(4) of the PBA, which reads:

57(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.

The Court of Appeal concluded that section 57(4) of the PBA operated to create a deemed trust over all employer contributions payable to a pension plan on the wind-up of the plan, including contributions in respect of wind-up deficiencies, even if such payments were not yet due.

38. In *Re Indalex*, the Court of Appeal considered the competing priority claims of the DIP Lender and the two pension plans (a salaried plan and an executive plan). More than two years before Indalex obtained protection from its creditors, the salaried plan was terminated and an effective date of wind up was set. The process of winding up the Indalex salaried plan had not been completed as the wind up deficiency was being liquidated over time. Since the deemed trust in relation to the Indalex salaried plan under section 57(4) came into existence before the DIP Charge was granted, the Court concluded that the deemed trust had first-in-time priority. The Court then held that the super-priority charge in favour of the DIP Lender did not override the provincial deemed trust in the circumstances of the case.

39. In contrast, the Court of Appeal noted that the Indalex executive plan was not wound up before the DIP Charge was granted. Instead, both the Superintendent's order and the effective date of the wind up post-dated the DIP Charge. As a result, the PBA deemed trust did not have first-in-time priority over the DIP Charge. The Court then analysed whether a constructive trust existed.

40. In this case, Northern granted security to the Secured Lenders³⁷ before the process to wind up the Hourly Plan and revoke the registration of the Salaried Plan was started³⁸ and before the Superintendent made his orders setting the Wind Up Date for the Hourly Plan and revoking the registration of the Salaried Plan.³⁹ As a result, the Secured Lenders' security is first-in-time and ranks ahead of any PBA deemed trust, unless that priority is legislatively reversed. The PBA contains no language that would alter the first-in-time principle.⁴⁰

Section 30(7) of the PPSA Limits the Super-Priority of a Subsequent PBA Deemed Trust

41. The PPSA creates a limited exception to the first-in-time rule that would ordinarily apply to determining priority between a security interest and a subsequent PBA deemed trust. Section 30(7) of the PPSA states:

30(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*.

This provision makes it clear that the first-in-time principle is reversed only with respect to certain assets: the beneficiaries of a PBA deemed trust have priority *only* over “an account or inventory and its proceeds”. They are not granted priority over other property.

³⁷ Security was granted the Secured Lenders in 2007-2009: Appendix M to the Fifth Report, Receiver's Motion Record, Tab 2(M).

³⁸ March 2010: Fifth Report, Receiver's Motion Record, Tab 2, para 19.

³⁹ September 2010: Fifth Report, Receiver's Motion Record, Tab 2, para 23.

⁴⁰ See, by way of contrast to the PBA, section 227(4) of the *Income Tax Act*, which contains language that alters the first-in-time principle: “(4) Every person who deducts or withholds an amount under this Act is deemed, ***notwithstanding any security interest*** (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person ***and from property held by any secured creditor*** (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.

42. The Court of Appeal decision in *Re Indalex* does not affect the application of the first-in-time rule nor the limited effect of section 30(7) of the PPSA. In *Re Indalex*, the Court held that the DIP Charge, which came into existence after the PBA deemed trust in the salaried plan, did not have first-in-time priority over the PBA deemed trust. As a result, although mentioned in the decision, section 30(7) was not a factor in ranking the PBA deemed trust ahead of the DIP Charge in *Re Indalex*. It is a factor in the case of Northern because, as is set out above, the PBA deemed trust (if any) came into existence after the security interests in question.

43. Two decisions support the conclusion that section 30(7) of the PPSA permits a PBA deemed trust to prime a pre-existing security interest in account or inventory but not in other property. In *Toronto-Dominion Bank v. Usarco Ltd.*, the plan administrator acknowledged that the Receiver was only required to reserve the proceeds of accounts receivable and inventories even though the Receiver had collected proceeds for other assets.⁴¹ Mr. Justice Farley applied section 30(7) of the PPSA and held that the security granted in a general security agreement was subordinate to the PBA deemed trust with respect to the accounts and inventory.

44. In *Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.*, the Court considered section 30(8) of the PPSA, which explains when section 30(7) does not apply and also uses the “inventory or its proceeds” language found in section 30(7). In *Textron*, the Court held that section 30(7) was not applicable pursuant to section 30(8) and concluded:

[T]he applicant has a PMSI in Beta Brands’ inventory and its proceeds...
Therefore, s. 30(7) would not be applicable and the deemed trust would not rank
in priority to the applicant’s PMSI *in inventory and its proceeds*.⁴²

⁴¹ [1991] O.J. No. 1314, Receiver’s Book of Authorities, Tab 2.

⁴² 2007 CarswellOnt 6705, 12 P.P.S.A.C. (3d) 46, 37 C.B.R. (5th) 107, Receiver’s Book of Authorities, Tab 3.

45. Based on the plain reading of section 30(7) of the PPSA and the cases discussed above, if a reserve is required for the deemed trust claim, then it is only in the amount of the proceeds of Northern's accounts and inventory. The value of Northern's "account or inventory and its proceeds" as realized at the Auction is \$4,725.

46. A reserve of even \$4,725 is not required, however, because the Receiver intends to exercise the power given under paragraph 3(r) of the Receivership Order to assign Northern into bankruptcy. Such an assignment is appropriate in the circumstances as there is no ongoing business and an assignment in bankruptcy will provide a structured process for completing the wind up of Northern's estate.⁴³ This assignment in bankruptcy will reorder the priorities and rank any PBA deemed trust behind the Secured Lenders. Accordingly, the Receiver is of the view that the no reserve is required in respect of these claims.

There is No Claim for an Indalex Constructive Trust

47. A second aspect of the Court of Appeal's decision in *Re Indalex* involved a finding that it was appropriate to impose a constructive trust over the assets of Indalex in favour of the beneficiaries of the Indalex pension plans because Indalex, as the administrator of the pension plans, had breached its fiduciary duty to pension plan members.

48. Morneau, quite correctly, has not grounded its claim in a constructive trust analysis. In the Receiver's view, this Receivership Proceeding is distinguishable from the Indalex CCAA Proceeding because:

- (a) This case involves a creditor-driven receivership under the BIA and not a company-driven filing under the CCAA;

⁴³ *Re Ivaco*, 2005 OJ No 3337, para 13-14, Receiver's Book of Authorities, Tab 4.

- (b) There is no legal basis on which to assign fiduciary responsibility for the Northern Pension Plans to either the Secured Lenders or PwC, as Receiver, because neither serves or ever served as administrator of the Pension Plans and neither has taken control of the Plans. As a result, there can be no allegation of breach of fiduciary duty as no such duty was owed;
- (c) There was no representation that the proposed receiver intended to comply with regulatory deemed trust requirements. In contrast, in *Re Indalex* the affidavit filed in support of the initial application expressly undertook to comply with such deemed trust requirements;
- (d) Morneau, as administrator, is competing with the Secured Lenders for priority; in contrast, the pension plan beneficiaries in *Re Indalex* were competing for priority with Indalex's US parent, which had been intimately involved with the purported breaches of fiduciary duty by Indalex;
- (e) A constructive trust cannot be imposed unless: 1) property has been obtained by a wrongful act of the defendant, notably breach of fiduciary duty or breach of the duty of loyalty; or 2) there has been unjust enrichment. There has been no allegation of wrongful act or unjust enrichment; and
- (f) The Receiver is not aware of any other facts that would support the imposition of an equitable remedy in this context.

As a result, the Receiver need not maintain reserves in relation to a PBA deemed trust claim or a potential *Re Indalex*-style constructive trust claim.

ISSUE B: CALCULATING THE SECTION 81.6 BIA CLAIM FOR NORMAL COSTS

49. Morneau's section 81.6 claim is for "normal cost" as set out in section 81.6(c)(i). In this case, the amount of the section 81.6 claim depends on whether or not the status quo is maintained. The two scenarios are:

- (a) *Status Quo*: The Plans do not change, they remain separate plans, the Hourly Plan retains its Wind Up Date of January 1, 2008, and the Superintendent sets the date of termination in relation to the Salaried Plan; and
- (b) *Pension Plans Change*: The Superintendent's process is not stayed and the Superintendent accepts the Morneau Recommendation, merges the Salaried Plan into the Hourly Plan, and changes the wind-up date for the Hourly Plan to November 16, 2010 or some other date and sets the date of termination in relation to the Salaried Plan.

To address these two scenarios, in the paragraphs below the Receiver makes submissions with respect to the appropriate calculations if the Plans remain the same and then submits that the stay of proceedings applies and ought not be lifted.

Calculating Normal Cost under Section 81.6 of the BIA

50. Section 81.6 of the BIA grants a limited super-priority with respect to "normal cost" owed to a pension plan. Under section 81.6(2), claims for payment of normal cost rank ahead of the claims of secured creditors. Section 81.6 provides in relevant part as follows:

- (1) If a person who is subject to a receivership is an employer who participated or participates in a prescribed pension plan for the benefit of the person's employees, the following amounts that are unpaid immediately before the first day on which there was a receiver in relation to the person are secured by security on all the person's assets: ...

(c) in the case of any other prescribed pension plan,

(i) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament...

(2) A security under this section ranks above every other claim, right, charge or security against the person's assets, regardless of when that other claim, right, charge or security arose, except rights under sections 81.1 and 81.2 and securities under sections 81.3 and 81.4.

51. The Hourly Plan is registered under the PBA. The Salaried Plan's registration was revoked by order of the Superintendent with the result that the Salaried Plan is terminated as of a date specified by the Superintendent and must be wound up.⁴⁴ Both the Hourly Plan and Salaried Plan are regulated by the Ontario legislature and accordingly are prescribed pension plans for the purposes of section 81.6(1)(c) of the BIA.⁴⁵

52. Although the Plans were registered under the provincial pension legislation, a section 81.6 claim is based on the amount of normal cost that would have been owing if the Plans were registered under the federal pension legislation. The Receiver, therefore, has approached quantifying the section 81.6 claim on the basis of the federal pension legislation.

Section 81.6 Claim if the Hourly Plan Does Not Change: No Reserves

53. Morneau has confirmed that if the Wind Up Date remains the same, then there are no unpaid normal costs in relation to the Hourly Plan. As a result, no reserve is required for the Hourly Plan.

⁴⁴ Section 18(5) of the PBA.

⁴⁵ Section 59.1(b) of the General Rules under the BIA.

Section 81.6 Claim in if the Salaried Plan Does Not Change: Reserves of \$147,732

54. Normal cost (also commonly referred to as current service cost) is the cost of benefits that are to accrue during a plan year determined on the basis of a going-concern valuation. For pension plans governed by the PBA, a wind up of a pension plan involves the termination of the pension plan and the distribution of all the plan assets. If a plan is wound up, plan members do not accrue benefits after the effective date of the wind up such that there are no normal costs relating to the period after the effective date of the wind up.

55. Morneau alleges that there is a normal cost deficit of \$147,732 (which includes interest) in the Salaried Plan using a termination date of November 16, 2010. The Receiver does not have sufficient information to confirm this figure. The amount of the reserve depends on (1) the termination date the Superintendent specifies for the Salaried Plan, and (2) the allocation of the contributions Northern made to the Salaried Plan against normal cost obligations on the one hand and special payment obligations on the other.

56. With respect to the termination date, the Superintendent revoked the registration of the Salaried Plan by an order made under section 18(1)(b) of the PBA. That order operates to terminate the Salaried Plan as of a date specified by the Superintendent. The Superintendent has not yet specified a termination date for the Salaried Plan. Based on information provided by Morneau, it appears that the latest possible termination date is November 16, 2010 because that appears to be the last date of employment for an employee who participated in the Salaried Plan.⁴⁶ The Receiver proposes to use this date for the purposes of determining the amount of the reserve pending the Superintendent's specification of the date of termination of the Salaried Plan.

⁴⁶ Fifth Report, Receiver's Motion Record, Tab 2, para 31(i).

57. Second, based on the information the Receiver currently has, the Receiver submits that the \$124,740 in contributions Northern made to the Salaried Plan should be set off against the earliest obligations that were incurred.⁴⁷ The Receiver does not have sufficient information to determine what normal cost contributions and special payment obligations, if any, were payable at the time Northern contributed to the Salaried Plan.

Interest Is Not Included As Part of a s. 81.6 Claim

58. Morneau claims interest that accrued on the normal cost deficit before the Receiver was appointed as part of its section 81.6 claim.⁴⁸ If there is a normal cost deficit that is subject to section 81.6, interest on such a normal cost deficit is not granted priority by section 81.6 based on the plain language of the section.

59. Section 81.6 applies to “an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament”.

60. Subsection 2(1) of the *Pension Benefits Standards Regulations, 1985* (the “PBSR”) defines normal cost as “the ***cost of benefits***, excluding special payments, ***that are to accrue during a plan year***, as determined on the basis of a going concern valuation”. On its face, this definition does not include interest: It contemplates benefits accruing in the future, the cost of which is determined on the basis of an existing going concern valuation. Such existing

⁴⁷ *General Chemical Canada* (2006), 22 C.B.R. (5th) 298 at para 81-82, aff'd 2007 ONCA 600, leave to appeal to SCC refused [2008] 252 O.A.C. 396, Receiver's Book of Authorities, Tab 5.

⁴⁸ The Receiver has not yet verified the calculations.

valuation does not contemplate that future normal cost contributions will be missed and hence does not include any interest component in the cost of benefits to be accrued in the future.

61. In addition, as is set out below, the PBSR specifically address the obligation to pay interest separately from the obligation to pay normal cost. Had Parliament intended to permit a plan administrator to claim interest under section 81.6 of the BIA, Parliament would have specifically said so, just as it explicitly addressed interest in the PBSR.⁴⁹

62. The obligation to pay normal cost arises under section 9(4) of the PBSR, which explains that a pension plan shall be funded in each plan year:

- (a) by a contribution equal to the normal cost of the plan,
- (b) by going concern special payments;
- (c) if there is a solvency deficiency, by annual solvency special payments equal to the amount by which the solvency deficiency divided by 5 exceeds the amount of going concern special payments that are payable during the plan year;
- (d) if there is an additional solvency deficiency referred to in subsection (12), by additional annual solvency special payments payable from the effective date of the amendment and equal to the amount by which the additional solvency deficiency divided by 5 exceeds the going concern special payment in respect of the unfunded liability emerging from the amendment to the plan; and
- (e) by an amount required to be paid by an employer under a defined contribution provision.

Section 9(4) of the PBSR does not mention interest. Section 10(2), however, explains that:

If an employer fails to make payments to the plan at the times set out in subsection 9(14)..., the interest rate shall be

- (a) in respect of a going concern special payment, the one used to determine the going concern liabilities;...
- (c) in respect of a normal cost, the one applicable in paragraph (a).

⁴⁹ *Expressio unius est exclusio alterius*: See the discussion in Ruth Sullivan, *Sullivan on the Construction of Statutes* (Markham: LexisNexis, 2008), at p. 243-244, Receiver's Book of Authorities, Tab 11.

If Parliament intended to grant a super-priority for interest owing on the normal cost—the cost of benefits that are to accrue in the plan year—then Parliament would have explicitly said so.

63. Finally, the federal pension scheme—and the definitions of normal cost and special payment—should be read as a coherent whole.⁵⁰ The definition of “special payment” does not allow for any possibility that interest on unpaid special payments becomes a part of the special payment. Similarly interest on unpaid normal cost contributions does not become a part of the normal cost. It is something else. It is an “other amount” owed by the employer to the pension plan. This “other amount” is recognized in the PBSR – see, for example, section 29(6), which explains an employer’s obligations on termination of a pension plan. It requires payments in relation to normal cost, special payments and “other amounts”. These “other amounts” include interest that as accumulated with respect to missed payments.⁵¹

64. By contrast, a deemed trust under section 57(4) of the PBA applies to “contributions” an employer is “required to pay” and that have “accrued to the date of the wind up”. This broader language permits a plan administrator to allege that the deemed trust applies in respect of interest that accrues but is not yet due. Section 81.6 does not use such broad language and does not grant a priority in relation to interest. For these reasons, the Receiver submits that Morneau is not entitled to advance a section 81.6 claim with respect to interest that might be owed in relation to missed normal cost payments.

⁵⁰ Elmer A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974), at p. 67, Receiver’s Book of Authorities, Tab 10: “Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”

⁵¹ See also section 8 of the *Pension Benefits Standards Act*.

ISSUE C: THE MORNEAU RECOMMENDATION IS STAYED BY THE RECEIVERSHIP ORDER

65. The Receivership Order contains a stay of proceedings (the “Stay of Proceedings”) as follows:

NO PROCEEDINGS AGAINST THE RECEIVER

7. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a “**Proceeding**”), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY

8. THIS COURT ORDERS that no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

9. THIS COURT ORDERS that all rights and remedies against the Debtor, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any “eligible financial contract” as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.⁵²

66. Despite the existence of this Stay of Proceedings, Morneau did not seek leave of this Court before asking the Superintendent to change the Wind Up Date for the Hourly Plan and to merge the Salaried Plan into the Hourly Plan. If this change is approved, the effect would be to increase the amount of normal cost owing to the combined pension plan and to increase Morneau’s super-priority claim pursuant to section 81.6 of the BIA.

⁵² Receivership Order, Compendium, Tab 1, p 13-14.

67. The Receiver is of the view that the process of the Superintendent considering the Morneau Recommendation is a “proceeding” within the meaning of the Receivership Order such that the parties are stayed by the Stay of Proceedings from taking further steps without leave of the Court.

68. The word “proceeding” has a broad meaning,⁵³ and the Receiver submits it encompasses the Superintendent’s process for reconsidering the Wind Up Date of the Hourly Plan and considering approving the merger of the Salaried Plan into the Hourly Plan.

69. The Receiver is guided by the decision in *Re Nortel Networks*, which had similar facts. The stay of proceedings in *Re Nortel Networks* was virtually identical to the one in place in the Northern Receivership Order and the Court held it prevented U.K. pension regulators from issuing a warning notice that might start a process leading to financial consequences for the debtor.⁵⁴ The Court noted: “‘if a step must be taken vis-a-vis the insolvent company’ for a creditor to enforce its rights, that step was a proceeding” and “‘proceeding’ may refer not only to a complete remedy but also to a mere procedural step that is part of a larger action or special proceeding”.⁵⁵

70. Similarly, the process of the Superintendent considering changing the Wind Up Date of the Hourly Plan may have financial consequences for the debtor. If the wind-up date for the Hourly Plan, for example, is changed, the normal cost will increase. Using the current Wind

⁵³ *I.W.A., Local 1-324 v. Wescana Inn Ltd.* (1977), 82 DLR (3d) 368 (Man. CA) at para 22, Receiver’s Book of Authorities, Tab 6.

⁵⁴ *Re Nortel Networks*, 2010 ONSC 1304 (Ont. S.C.J. [Comm. List]) aff’d 2010 ONCA 464, Receiver’s Book of Authorities, Tab 7.

⁵⁵ *Re Nortel Networks*, 2010 ONSC 1304 (Ont. S.C.J. [Comm. List]) aff’d 2010 ONCA 464 at para 37, Receiver’s Book of Authorities, Tab 7.

Up Date, no normal cost is owing in relation to the Hourly Plan. If the Morneau Recommendation is granted, the amount of normal cost would be increased by accumulations over an almost three-year period.

71. In a similar vein, in *Re Nortel Networks Corp.*, Mr. Justice Morawetz held that orders issued by the Ministry of Environment were stayed in a CCAA proceeding. Mr. Justice Morawetz rejected the MOE's contention that the MOE was acting in a regulatory capacity and was not seeking to enforce a monetary liability. He stated that:

If the result of the issuance of the MOE Orders is that Nortel is required to react in a certain way, it follows, in the present circumstances, that Nortel will be required to incur a financial obligation to comply. It is not a question of altering its operational activities in order to comply with the EPA on a going forward basis. There is no going forward business.⁵⁶

72. Based on the language in the Receivership Order and the cases discussed above, the Receiver asks this Honourable Court to declare that the process by which the Superintendent is considering changing the Wind Up Date of the Hourly Plan and merging the Salaried Plan into the Hourly Plan is a Proceeding within the meaning of the Receivership Order and is stayed by the Receivership Order.

The Stay Should Not Be Lifted in the Circumstances of this Case

73. Whether relief from a stay in a receivership order should be granted depends on balancing the interests of all affected parties.⁵⁷ The chronology in this case establishes that it would not be equitable to lift the stay because the Receiver and other parties relied on the Superintendent's September 2010 orders in conducting this receivership.

⁵⁶ 2012 ONSC 1213 (Ont. S.C.J. [Comm. List]) at para 105, Receiver's Book of Authorities, Tab 8.

⁵⁷ *General Motors Corp. v. Tiercon Industries* (2005), O.J. No. 3750, Receiver's Book of Authorities, Tab 9.

74. First, on December 24, 2010, GE served an application record on various parties, including counsel for the union, seeking the appointment of the Receiver. The affidavit of Christopher Rankin sworn December 23, 2010 and included in the application record, set out the factual context of GE's application, including GE's understanding that Northern had two pension plans and that only two non-unionized employees continued to work for Northern. The affidavit notes that GE had been provided with current valuations for the Pension Plans for the period ending May 31, 2009. On the basis of these facts, GE asked the Court to appoint the Receiver.

75. The Receiver was appointed on January 4, 2011. The Superintendent was notified about the Receivership Order on January 7, 2011 and was added to the service list. Neither the union nor the Superintendent raised any concern with GE's statement of facts.

76. After its appointment, the Receiver engaged in two sales processes. The first sales process solicited going concern sale bids and resulted in a conditional agreement with EACOM. EACOM terminated that agreement on May 20, 2011 as it was not satisfied with the results of its due diligence review.

77. On July 6, 2011, Morneau advised that as of January 2008, it appeared that there were no normal cost arrears in the Hourly Plan but special payments had been underpaid by \$125,000. It also advised that the assets in the Salaried Plan should be transferred to the Hourly Plan. It did not suggest that the Wind Up Date should be changed. Morneau's position and statements became part of the factual matrix in which the Receiver performed its duties.

78. In a motion returnable August 3, 2011, the Receiver sought approval for the Agency Sale Agreement with Maynards pursuant to which Maynards would run a liquidating auction. The Receiver also sought approval to make a distribution to RBC. Both counsel for

FSCO and Morneau were included on the service list for this motion. Morneau appeared and the endorsement reflects Morneau's statement that Morneau intended to rely on *Re Indalex* with respect to its priority argument.

79. On August 12, 2011, the Agency Sale Agreement was approved. The Auction was completed in September 2011. By the time the Auction was complete, the majority of the costs associated with the receivership had been incurred. As is set out above, GE is the senior secured creditor with respect to most of the Northern Property. Since the Receiver's appointment, the majority of professional fees of the Receiver and its legal counsel have been paid directly by GE.

80. On November 7, 2011, after the vast majority of the costs associated with this receivership were incurred and paid out of the proceeds or directly by GE, Morneau alleged that the Wind Up Date should be changed and alleged a more than \$375,000 normal cost deficiency. Morneau also alleged a wind-up deficiency of more than \$12 million and sought to claim priority over all of the Northern Property (except, eventually, for the Receiver's Charge and Receiver's Borrowings Charge). As is set out in the Receiver's submissions to the Superintendent in relation to the Morneau Recommendation, the Morneau Recommendation is beyond the Superintendent's jurisdiction, is unjustified and would create uncertainty.

81. In these circumstances, given the fact that GE relied on the status quo in seeking to appoint the Receiver and the fact that Morneau raised and quantified its claims after the Receiver had incurred the majority of the expenses associated with the estate, it is not equitable to lift the stay and permit Morneau to seek priority over the other secured creditors or to permit the Superintendent to revise his final order in a manner that increases Morneau's claim at the direct expense of the other secured creditors.

PART V – ORDER REQUESTED

82. The Receiver therefore requests the Order sought in the Notice of Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

November 12, 2012



Tracy C. Sandler



Mary Paterson

SCHEDULE "A": CASE LAW

1. *Re Indalex*, 2011 ONCA 265, on appeal to the Supreme Court of Canada
2. *Toronto-Dominion Bank v. Usarco Ltd.* [1991] O.J. No. 1314
3. *Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.* (2007), 12 P.P.S.A.C. (3d) 46, 37 C.B.R. (5th) 107
4. *Re Ivaco Inc.* (2005), 83 O.R. (3d) 108 (Ont. C.A.)
5. *General Chemical Canada* (2006), 22 C.B.R. (5th) 298, aff'd 2007 ONCA 600, leave to appeal to SCC refused [2008] 252 O.A.C. 396.
6. *I.W.A., Local 1-324 v. Wescana Inn Ltd.* (1977), 82 DLR (3d) 368 (Man. CA)
7. *Re Nortel Networks*, 2010 ONSC 1304, (Ont. S.C.J. [Comm. List]), aff'd 2010 ONCA 464
8. *Re Nortel Networks Corp.* 2012 ONSC 1213, (Ont. S.C.J. [Comm. List])
9. *General Motors Corp. v. Tiercon Industries* (2005), O.J. No. 3750

SCHEDULE "B": STATUTES

Courts of Justice Act, R.R.O. 1990, c. 43

101(1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Bankruptcy and Insolvency Act (the "BIA"), R.S.C., 1985, c. B-3

81.6 (1) If a person who is subject to a receivership is an employer who participated or participates in a prescribed pension plan for the benefit of the person's employees, the following amounts that are unpaid immediately before the first day on which there was a receiver in relation to the person are secured by security on all the person's assets:

(a) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund;

(b) if the prescribed pension plan is regulated by an Act of Parliament,

(i) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund, and

(ii) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985; and

(c) in the case of any other prescribed pension plan,

(i) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(ii) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament.

(2) A security under this section ranks above every other claim, right, charge or security against the person's assets, regardless of when that other claim, right, charge or security arose, except rights under sections 81.1 and 81.2 and securities under sections 81.3 and 81.4.

(3) If the receiver disposes of assets covered by the security, the receiver is liable for the amounts referred to in subsection (1) to the extent of the amount realized on the disposition of the assets, and is subrogated in and to all rights of the fund established for the purpose of the pension plan in respect of those amounts.

(4) The following definitions apply in this section.

"person who is subject to a receivership" means a person any of whose property is in the possession or under the control of a receiver.

"receiver" means a receiver within the meaning of subsection 243(2) or an interim receiver appointed under subsection 46(1), 47(1) or 47.1(1).

243(1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable.

General Rules under the BIA

59.1 A pension plan regulated by an Act of Parliament or of the legislature of a province is prescribed for the purposes of

- (a) subsection 60(1.5) of the Act; and
- (b) sections 81.5 and 81.6 of the Act.

Personal Property Security Act (the "PPSA"), R.S.O. 1990, c. 8, S. 45

30(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.

30(8) Subsection (7) does not apply to a perfected purchase-money security interest in inventory or its proceeds.

Income Tax Act, R.S.C., 1985, c. 1

227(4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.

Pension Benefits Act (the “PBA”), R.S.O. 1990, c. P.8

2(1) “wind up” means the termination of a pension plan and the distribution of the assets of the pension fund.

18(1) The Superintendent may,

- (a) refuse to register a pension plan that does not comply with this Act and the regulations;
- (b) revoke the registration of a pension plan that does not comply with this Act and the regulations;
- (c) revoke the registration of a pension plan that is not being administered in accordance with this Act and the regulations;
- (d) refuse to register an amendment to a pension plan if the amendment is void or if the pension plan with the amendment would cease to comply with this Act and the regulations;
- (e) revoke the registration of an amendment that does not comply with this Act and the regulations;
- (f) refuse to register part of an amendment to a pension plan if the part is void or if the pension plan with that part of the amendment would cease to comply with this Act and the regulations;
- (g) revoke the registration of a part of an amendment that does not comply with this Act and the regulations

18(3) A refusal of registration of a pension plan or a revocation of registration of a pension plan operates to terminate the pension plan as of the date specified by the Superintendent.

18(5) Where registration of a pension plan is refused or revoked, the administrator shall wind up the pension plan in accordance with this Act and the regulations

57(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.

57(5) The administrator of the pension plan has a lien and charge on the assets of the employer in an amount equal to the amounts deemed to be held in trust under subsections (1), (3) and (4).

Pension Benefits Standards Act, R.S.C., 1985, c. 32,

29(6) If the whole of a pension plan is terminated, the employer shall, without delay, pay into the pension fund all amounts that would otherwise have been required to be paid to meet the prescribed tests and standards for solvency referred to in subsection 9(1) and, without limiting the generality of the foregoing, the employer shall pay into the pension fund

- (a) an amount equal to the normal cost that has accrued to the date of the termination;
- (b) the amounts of any prescribed special payments that are due on termination or would otherwise have become due between the date of the termination and the end of the plan year in which the pension plan is terminated; ...
- (d) all of the following amounts that have not been remitted to the pension fund at the date of the termination:
 - (i) the amounts deducted by the employer from members’ remuneration, and
 - (ii) other amounts due to the pension fund from the employer; and
- (e) the amounts of all of the payments that are required to be made under subsection 9.14(2).

Pensions Benefits Standards Regulations (the "PBSR"), 1985 (SOR/87-19)

2(1) "normal cost" means the cost of benefits, excluding special payments, that are to accrue during a plan year, as determined on the basis of a going concern valuation;

- (a) by a contribution equal to the normal cost of the plan,
- (b) by going concern special payments;
- (c) if there is a solvency deficiency, by annual solvency special payments equal to the amount by which the solvency deficiency divided by 5 exceeds the amount of going concern special payments that are payable during the plan year;
- (d) if there is an additional solvency deficiency referred to in subsection (12), by additional annual solvency special payments payable from the effective date of the amendment and equal to the amount by which the additional solvency deficiency divided by 5 exceeds the going concern special payment in respect of the unfunded liability emerging from the amendment to the plan; and
- (e) by an amount required to be paid by an employer under a defined contribution provision.

9(1) In this section "unfunded liability" means

- (a) the going concern deficit of a plan as determined on the date that the plan was established;
- (b) the amount by which an increase in the going concern liabilities of a plan resulting from an amendment to the plan exceeds the going concern excess of the plan as determined on the day before the effective date of the amendment; or
- (c) the amount by which the going concern deficit of a plan determined at the valuation date exceeds the present value of going concern special payments of the plan established in respect of periods after the valuation date.

9(2) For the purposes of this section

- (a) the date of emergence of an unfunded liability in respect of an occurrence described in
 - (i) paragraph (1)(a) is the effective date of the plan,
 - (ii) paragraph (1)(b) is the effective date of the amendment, and
 - (iii) paragraph (1)(c) is the valuation date;
- (b) the date of emergence of a solvency deficiency is the date of the valuation that identified the deficiency; and
- (c) the interest rate used to determine the present value of going concern special payments referred to in paragraph (1)(c) is the same as the interest rate used to determine the going concern liabilities of the plan at the valuation date.

9(3) An unfunded liability of a plan shall be funded by going concern special payments sufficient to liquidate the unfunded liability by equal annual payments over a period of 15 years from the date on which the unfunded liability emerged.

9(4) A plan shall be funded in each plan year as follows:

- (a) by a contribution equal to the normal cost of the plan,
- (b) by going concern special payments;
- (c) if there is a solvency deficiency, by annual solvency special payments equal to the amount by which the solvency deficiency divided by 5 exceeds the amount of going concern special payments that are payable during the plan year;
- (d) if there is an additional solvency deficiency referred to in subsection (12), by additional annual solvency special payments payable from the effective date of the amendment and equal to the amount by which the additional solvency deficiency divided by 5 exceeds the going concern special payment in respect of the unfunded liability emerging from the amendment to the plan; and
- (e) by an amount required to be paid by an employer under a defined contribution provision.

10(2) If an employer fails to make payments to the plan at the times set out in subsection 9(14) or fails to make payments in accordance with subsection 29(6) of the Act or if the administrator is liable under subsection (1), the interest rate shall be

- (a) in respect of a going concern special payment, the one used to determine the going concern liabilities;
- (b) in respect of a solvency special payment, the one used to determine the solvency liabilities;
- (c) in respect of a normal cost, the one applicable in paragraph (a);
- (d) in respect of any other payments, the one applicable in paragraph (b); and
- (e) in respect of an amount required to be paid under a defined contribution provision, the greater of the rate of return of the fund as at the date that the amount was required to be paid and 0%.

G.E. Financing Equipment Financing G.P.
Applicant

Northern Sawmills Inc.
Respondent

Court File No: CV10-9042-00CL

APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND
INSOLVENCY ACT* R.S.C. 1985, c. C-36, as amended, AND SECTION 101 OF THE
COURTS OF JUSTICE ACT, R.S.O., 1990, c. C-43 as amended.

Ontario
**SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

**FACTUM OF
PRICEWATERHOUSECOOPERS INC. IN
ITS CAPACITY AS RECEIVER OF
NORTHERN SAWMILLS INC.**

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