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• PENSION DEEMED TRUST OUTRANKS SECURED CREDITOR IN QUEBEC DECISION •

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On January 24, 2014, Justice Mongeon of the Quebec Superior Court released his decision¹ on pension deemed trusts in the context of the insolvency of Timminco Ltd. and Bécancour Silicon Inc. (together the “Timminco Entities”).

Overview

This case involves an insolvent company, a secured creditor, and two pension plans with significant deficits. The insolvent company was sold, and the secured creditor was reimbursed

from the proceeds of the sale, subject to being required to reimburse any other creditors who were subsequently determined to have prior ranking. The pension plans claimed priority over the secured lender, and the Quebec Superior Court agreed, at least in part.

The competing creditors are

- The secured creditor, Investissement Québec (a government entity), pursuant to a loan it had made to Bécancour

Silicon Inc. (“BSI”). It is important to note that Investissement Québec is a secured creditor and not the Debtor-in-Possession (“DIP”) lender.

- The Pension Committees, who are the administrators of the BSI Union Pension Plan and the BSI Non-Union Pension Plan in accordance with Quebec pension legislation (the “Pension Plan Administrators”).

A Brief History

The *Companies’ Creditors Arrangement Act*² restructuring of the Timminco Entities began on January 3, 2012, with an Initial Order issued by Justice Morawetz of the Ontario Superior Court of Justice (the “Ontario Court”).

That order was followed on January 16, 2012, by an order suspending the special payments owed to the pension plans during the stay period.

A few months later, the Timminco Entities succeeded in selling substantially all of their assets.

Creditors were then asked to file their claims in order for the proceeds of the sale to be distributed among them. The Pension Plan Administrators each filed a proof of claim for the amounts owed to fund the solvency deficits of the pension plans as well as for the special payments that had been suspended by the Ontario Court.

Immediately thereafter, the Timminco Entities came to an agreement with Investissement Québec to repay its loan to BSI so as to avoid paying the ongoing interest payments on the loan. This Reimbursement Agreement, which was approved by the Ontario Court, provides

that Investissement Québec’s loan would be repaid with partial interest. However, it also requires that any creditors who are subsequently determined to have priority ranking be reimbursed by Investissement Québec. The Pension Plan Administrators therefore filed priority claims in regards to Investissement Québec and were ultimately the only creditors to do so.

Since the questions raised by the Pension Plan Administrators concerned the interpretation and application of Quebec law, the parties agreed to an Adjudication Protocol, essentially transferring the issue to the Quebec courts and setting out the process and timelines to be followed. This protocol was approved by Morawetz J. on October 18, 2012.

The Pension Plan Administrators filed a motion with the Quebec Superior Court to have their claims declared Priority Claims, which was assigned to Mongeon J.S.C. It should be noted that Mongeon J.S.C. had previously rendered a decision regarding pension deemed trusts in the *White Birch CCAA* matter.³

The Decision

In the *Timminco* decision, Mongeon J.S.C. reconsidered his earlier decision in *White Birch* in which he held that s. 49 of Quebec’s *Supplemental Pension Plans Act* [*SPPA*]⁴ did not create a deemed trust. Following an analysis of arts. 1260–1262 of the *Civil Code of Québec* [*Civil Code*] and of various provisions of the *SPPA*, he concluded in *Timminco* that s. 49 of the *SPPA* does indeed create a valid deemed trust for pension contributions, including unpaid special payments.

However, Mongeon J.S.C. stated that in his view, a valid deemed trust on its own would not rank ahead of the universal movable hypothec⁵ held by the creditor (Investissement Québec in this case). In addition, he stated that s. 264 *SPPA* is also required, establishing that pension contributions are non-assignable and exempt from seizure. Justice Mongeon concluded that the combined effect of ss. 49 and 264 *SPPA* is to exclude the unpaid special payments from the assets of the company. Therefore, the amount of the unpaid special payments should not have been used to repay the creditor's secured loan.

Moreover, while other Canadian provinces have, unlike Quebec, a *Personal Property Security Act* [*PPSA*] expressly providing that deemed trusts have priority over security interests, Mongeon J.S.C. was of the view that s. 264 *SPPA* has essentially the same effect.

Relying on the reasons of Justice Deschamps in *Indalex*,⁶ Mongeon J.S.C. concluded that the existence of any priorities must be determined by provincial legislation and that they continue to have effect even in *CCAA* proceedings, subject only to the doctrine of paramountcy. However, in *Timminco*, there was no question of paramountcy because the secured creditor is not the DIP lender.

Finally, with respect to the actuarial deficit, Mongeon J.S.C. concluded that the deemed trust under s. 49 *SPPA* must be read restrictively and therefore cannot encompass the entire deficit.

It's Not Over

The *Timminco* case does not end here because the amounts to be reimbursed to the pension funds by Investissement Québec remain to be determined. Moreover, although neither the Pension Plan Administrators nor the secured creditor sought leave to appeal, on the last day of the appeal deadline, the Monitor (acting in the name of and on behalf of the Timminco Entities in light of super-powers granted by the Ontario Court in December 2013) filed a motion for leave to appeal Mongeon J.S.C.'s decision to the Quebec Court of Appeal.

A few weeks later, the Monitor also filed a Motion for Advice and Directions seeking permission from the Ontario Court to pursue and proceed with the motion for leave to appeal in Quebec. The Motion for Advice and Directions has now been scheduled to be heard before Morawetz J. on April 28, 2014. There will certainly be more to report in the coming weeks and months.

Impact

If Mongeon J.S.C.'s decision stands, it will represent a shift in Quebec law that will have an impact on the various stakeholders in pension plan matters.

Pension plan members and retirees appear to have gained some additional protection, while employers and lenders will likely need to pay increased attention to the funding of pension plans and ensure that pension contribution obligations are up to date.

[*Editor's note:* **Tina Hobday**, a Partner at Langlois Kronström Desjardins LLP since 2001, has developed considerable expertise in the field

of pension plan governance and litigation and is currently representing pension interests in several high-profile insolvency proceedings. She has appeared before administrative boards and tribunals, as well as before all levels of courts in Quebec in civil and commercial matters.]

¹ *Timminco ltée (Arrangement relatif à)*, [2014] J.Q. no 402, 2014 QCCS 174 [*Timminco*].

² *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

³ *White Birch Paper Holding Company (Arrangement relatif à)*, [2012] J.Q. no 3643, 2012 QCCS 1679 [*White Birch*].

⁴ CQLR c. R-15.1.

⁵ A type of security interest under the *Civil Code*, charging all property other than real estate.

⁶ *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] S.C.J. No. 6, 2013 SCC 6, paras. 51 and 52.