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FEDERATION OF LAW SOCIETIES OF CANADA V. CANADA (ATTORNEY GENERAL) (BCCA)

 **IN A RULING** that certain regulations under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* infringed on the independence of the Bar, the British Columbia Court of Appeal reaffirmed the principle that lawyers act for clients and not as government enforcers.

"The decision, which protects clients' interests rather than lawyers' interests, gives clients confidence that their lawyer will not turn into state agents and write reports for the authorities on what clients are doing," says John Hunter of Hunter Litigation Chambers in Vancouver, who represented the Federation of Law Societies of Canada.

The impugned regulations gave the government power to examine lawyers' financial records to detect and investigate suspicious transfers. The regulations also required lawyers to report suspicious transactions.

The BCCA ruled that lawyers should be exempt from these regulations, as they compromised the confidentiality that is at the heart of the solicitor-client relationship.

extends to any deficiency that exists on the wind-up of a DB plan. "The deemed trust provision is a remedial one. Its purpose is to protect the interests of plan members. This purpose militates against adopting the limited scope proposed by Indalex and some of the interveners," the majority wrote.

"The court's confirmation of the existence of a constructive trust may have significant ramifications for lenders relying on security interests in accounts receivable and inventory because the *Ontario Personal Property Security Act* expressly makes such interests subordinate to deemed trusts under the PBA," says James Gage in McCarthy Tétrault LLP's Toronto office.

And it's not just Canadian lenders who will be struggling with *Indalex*. "The decision is highly relevant in the cross-border environment, because almost all of Can-



JAMES GAGE
 > MCCARTHY TÉTRAULT LLP

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ada's big companies borrow money from US lenders," says Gage's partner Kevin McElcheran. "So companies with large pension shortfalls could have difficulty getting financing from across the border."

Although some observers have expressed the view that lenders will adjust to this reality and that it will have only a small impact in terms of loan pricing, Gage does not share that view. "Some lenders took a very conservative approach in assessing their risk while

awaiting the *Indalex* decision," he says. "It's now clear that they will be facing a priority issue without any guarantee that they can reverse that priority as part of a restructuring. That makes it uncertain whether the issue will go away."


Additionally, because the deemed trust covers not only payments due to the pension fund but also to the shortfall between the value of benefits payable and the assets available to satisfy those benefits, lenders will find it difficult to assess their risk both qualitatively and quantitatively. Even where the risk of loss may be small, the extent of a potential loss can be huge because deficits can be enormous and extremely difficult to quantify. "The problem may be a mile deep because deficits can be enormous and extremely difficult to quantify," Gage says.

Pamela Huff in Blake, Cassels & Graydon LLP's Toronto office is of similar mind. "It's not uncommon for a pension claim, especially one relating to a legacy plan that has a deficiency, to be the largest claim in an insolvency or CCAA proceeding," she says.

What's not clear is whether *Indalex* would apply beyond Ontario. "Other provinces don't necessarily have similar provisions in relation to the creation of a statutory trust for pension benefits," Huff says.

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YANICK PAYETTE ET AL. AND GUAY INC. (SCC) (QUE.)

 **WITH ITS STATEMENT** that restrictive covenants negotiated as part of the sale of a business are governed by commercial law rather than employment law, the SCC struck a definitive blow in favour of freedom of contract.

"Often the key to a business sale is keeping on the vendor's key person," says Mario Welsh in Heenan Blaikie LLP's Quebec City office, who represented Guay. "So purchasers need to be free to negotiate a clause that ensures that, at the end of the process, that key person doesn't compete. By allowing purchasers to do so, the judgment is an important contribution to the stability of

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SUN INDALEX FINANCE, LLC V. UNITED STEELWORKERS (SCC) (ON)

 **AS IT TURNS OUT**, the sigh of relief from debtor-in-possession (DIP) lenders over the SCC's decision in *Indalex* was not necessarily a breath of fresh air for the entire lending community.

The SCC ruled that DIP lenders have priority over the deemed trust in favour of defined-benefit (DB) pensioners mandated by subs. 57(4) of the *Ontario Pensions Benefits Act (PBA)*. But the court also ruled that, when the deemed trust does apply, it

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CANADIAN NATIONAL RAILWAY CO. V. MCKERCHER LLP

CLIENTS > FIRMS > LAWYERS

Canadian National Railway Company > MacPherson, Leslie & Tyerman LLP > Douglas C. Hodson, Q.C., Vanessa Monar Enweani and C. Ryan Lepage
McKercher LLP and Gordon Wallace > Heenan Blaikie LLP > Gavin MacKenzie and Lauren Wihak
Canadian Bar Association > McCarthy Tétrault LLP > Malcolm M. Mercer, Eric S. Block and Brendan Brammall
Federation of Law Societies of Canada > Hunter Litigation Chambers (Hunter), Fasken Martineau Dumoulin LLP (Martin) > John J. L. Hunter, Q.C. and Stanley Martin

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FEDERATION OF LAW SOCIETIES OF CANADA V. CANADA (ATTORNEY GENERAL)

CLIENTS > FIRMS > LAWYERS

Attorney General of Canada > Justice Canada > Jan E. Brongers, Christopher M. Rugar, B.J. Wray
The Federation of Law Societies of Canada > Hunter Litigation Chambers (Hunter), Blake Cassels & Graydon LLP (Millen) > John J. L. Hunter, Q.C., Roy W. Millen
Canadian Bar Association > Lawson Lundell LLP > Ronald A. Skolrood, L.L. Bevan
Chambre des Notaires du Québec and Barreau du Québec > Lavery, de Billy, L.L.P. > Raymond Doray, Loïc Berdnikoff
Law Society of British Columbia > McCarthy Tétrault LLP > Leonard T. Doust Q.C., Michael Feder, Angela Juba

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SUN INDALEX FINANCE, LLC V. UNITED STEELWORKERS

CLIENTS > FIRMS > LAWYERS

Sun Indalex Finance, LLC > Goodmans LLP > Benjamin Zarnett, Frederick L. Myers, Brian F. Empey, Peter Kolla
George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors > Chaitons LLP > Harvey G. Chaiton and George Benchetrit
FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited > Stikeman Elliott LLP
> David R. Byers, Ashley John Taylor and Nicholas Peter McHaffie
United Steelworkers > Sack Goldblatt Mitchell LLP > Darrell L. Brown
Keith Carruthers, et al. > Koskie Minsky LLP > Andrew J. Hatnay and Demetrios Yiokaris
Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership) > Cavalluzzo Shilton McIntyre Cornish LLP > Hugh O'Reilly and Amanda Darrach
Superintendent of Financial Services > Ministry of the Attorney General (ON) > Mark E. Bailey, Leonard F. Marsello and William MacLarkey
Insolvency Institute of Canada > Thornton Grout Finnigan LLP > Robert I. Thornton and D. J. Miller
Canadian Labour Congress > Sack Goldblatt Mitchell LLP > Steven Barrett and Ethan Poskanzer
Canadian Federation of Pensioners > Paliare Roland Rosenberg Rothstein LLP > Kenneth T. Rosenberg, Andrew K. Lokan and Massimo (Max) Starnino
Canadian Association of Insolvency and Restructuring Professionals > McMillan LLP > Éric Vallières, Alexandre Forest and Yoine Goldstein
Canadian Bankers Association > Osler, Hoskin & Harcourt LLP > Mahmud Jamal, Jeremy Dacks and Tony Devir