

Court File No.

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N :

GEORGE L. MILLER, THE CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATES OF THE US
INDALEX DEBTORS

APPLICANT
(Respondent)

- and -

SUN INDALEX FINANCE, LLC, UNITED STEELWORKERS, KEITH CARRUTHERS, LEON
KOZIEROK, RICHARD BENSON, JOHN FAVERI, KEN WLADRON, JOHN (JACK) W. ROONEY,
BERTRAM MCBRIDE, MAX DEGEN, EUGENE D'IORIO, NEIL FRASER, RICHARD SMITH, ROBERT
LECKIE, FRED GRANVILLE and THE MONITOR, FTI CONSULTING CANADA ULC

RESPONDENTS
(Respondents)

- and -

MORNEAU SOBECO LIMITED PARTNERSHIP and THE SUPERINTENDENT OF FINANCIAL
SERVICES

INTERVENERS
(Interveners)

APPLICATION FOR LEAVE TO APPEAL
OF THE APPLICANT, GEORGE L. MILLER, THE CHAPTER 7 TRUSTEE OF THE
BANKRUPTCY ESTATES OF THE US INDALEX DEBTORS
(pursuant to Section 40 of the *Supreme Court Act*, R.S.C. 1985)

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BETWEEN:

**GEORGE L. MILLER, THE CHAPTER 7 TRUSTEE OF THE BANKRUPTCY
ESTATES OF THE US INDALEX DEBTORS**

**APPLICANT
(Respondent)**

- and -

**SUN INDALEX FINANCE, LLC, UNITED STEELWORKERS, KEITH CARRUTHERS,
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**RESPONDENTS
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- and -

**MORNEAU SOBECO LIMITED PARTNERSHIP and THE SUPERINTENDENT OF
FINANCIAL SERVICES**

**INTERVENERS
(Interveners)**

**NOTICE OF APPLICATION FOR LEAVE TO APPEAL
OF THE APPLICANT, GEORGE L. MILLER, THE CHAPTER 7 TRUSTEE OF THE
BANKRUPTCY ESTATES OF THE US INDALEX DEBTORS**

(pursuant to Rule 25 of the Rules of the Supreme Court of Canada)

TAKE NOTICE that the Applicant, George L. Miller, trustee of the bankruptcy estates of the parent company of Indalex Limited (“Indalex”) and certain US affiliates (collectively, the “US Debtors”) appointed under Chapter 7 of Title 11 of the United States Bankruptcy Code (the “US Chapter 7 Trustee”), hereby applies for leave to appeal to the Court, pursuant to sections 40 and 43 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, and Rule 25 of the *Rules of Supreme*

Court of Canada, SOR/2002-156, from the judgment of the Court of Appeal for Ontario in Court File Nos. C52187 and C52346 (the “CA Decision”) made on April 7, 2011, for an order granting leave to appeal from the CA Decision, along with costs of this application, or any further or other order that the Court may deem appropriate;

AND FURTHER TAKE NOTICE that this application for leave is made on the following grounds:

1. On March 20, 2009, the US Debtors commenced proceedings under Chapter 11 of Title 11 of the United States Bankruptcy Code.
2. On April 3, 2009, Indalex and related entities (collectively, the “Debtors”) sought and obtained an order from the Ontario Superior Court of Justice (Commercial List) (the “CCAA Court”) for a stay of proceedings and other relief pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36 (the “CCAA”). On April 8, 2009, the CCAA Court granted an order in favour of the Debtors which, *inter alia*, authorized Indalex to borrow funds (the “DIP Loan”) pursuant to a debtor-in-possession (“DIP”) credit agreement among the US Debtors, the Debtors and a syndicate of arm’s length lenders (the “DIP Lenders”).
3. The DIP credit agreement contemplated that the DIP Loan would be repaid from the proceeds derived from a going concern sale of Indalex’s assets. The Debtors’ obligation to repay the DIP Loan was guaranteed by the US Debtors. The DIP Loan was secured by a court-ordered charge in favour of the DIP Lenders ranking in priority to all liens and encumbrances, including deemed trusts and statutory liens (the “DIP Charge”).
4. The CCAA Court considered the financial circumstances of the Debtors before exercising its discretion under the CCAA to grant the DIP Charge on a super-priority basis. The CCAA Court specifically found that the DIP Loan was necessary in order to support operations while a going concern solution was sought to save jobs and maximize recovery for all stakeholders, that there was no other alternative available to the Debtors for a going concern solution, and that the benefit to stakeholders and creditors of the DIP Loan outweighed any potential prejudice that may arise as a result of the granting of super-priority secured financing against the assets of the Debtors.

5. On June 12, 2010, the CCAA Court granted an order approving an amendment to the DIP credit agreement to increase the Debtors' borrowings from US\$24.36 million to US\$29.5 million. Counsel for certain retired executives of Indalex (the "Retirees") initially sought to reserve certain rights in connection with the motion, but subsequently withdrew their reservation of rights. The CCAA Court specifically noted that any reservation of rights would create uncertainty as it could cause the DIP Lenders to withhold advances.

6. On July 20, 2009, the CCAA Court granted an order approving the sale of substantially all of the assets and business of the Debtors and the US Debtors on a going concern basis. The CCAA Court also ordered that to the extent that any obligations of the Debtors to the DIP Lenders were satisfied by the US Debtors under their guarantee, the US Debtors were fully subrogated to the rights of the DIP Lenders under the DIP Charge.

7. None of the aforesaid orders of the CCAA Court (the "CCAA Court Orders") were ever appealed, nor did any party ever seek to have them set aside or varied.

8. The Canadian sale proceeds available for distribution were insufficient to re-pay the DIP Loan in full. In reliance upon the CCAA Court Orders, the US Debtors paid US\$10,751,247.22 into the estate of the Debtors to satisfy the obligations of the Debtors to the DIP Lenders.

9. The Retirees and certain members of the United Steelworkers (the "USW") subsequently brought motions in the CCAA Court seeking priority over all creditors of Indalex, including the DIP Lenders, for the amounts of any deficiencies arising from the wind-up of their pension plans, arguing that the wind-up deficiencies are subject to deemed trusts under the *Pension Benefits Act*, RSO 1990, c. P.8 (the "PBA").

10. The CCAA Court dismissed those motions, rejecting (*inter alia*) the argument that the PBA established deemed trusts for pension plan wind-up deficiencies.

11. In the CA Decision, the Court of Appeal for Ontario allowed the appeals from those motions and declared that the claims of the Retirees and the USW take priority over the DIP Lenders (now asserted by the US Chapter 7 Trustee by subrogation of the US Debtors to the rights of the DIP Lenders). In doing so, the Court of Appeal for Ontario held (*inter alia*) that:

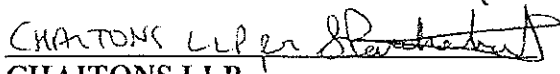
- a. the PBA provides for a deemed trust in respect of pension plan wind-up deficiencies, contrary to prior appellate authority;
- b. the claims by the Retirees and the USW have priority over the DIP Charge, despite the clear and explicit priority of the DIP Charge pursuant to the CCAA Court Orders which were never appealed, set aside or varied; and
- c. the statutory scheme of distribution under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") does not apply in a liquidating CCAA proceeding, contrary to the recent decision of this Court in *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 and of the Court of Appeal for Ontario in *Ivaco Inc. Re.* (2006), 83 O.R. (3d) 108.

12. The CA Decision raises the following crucial issues of public and national importance that warrant consideration by this Court:

- a. Can a super-priority charge, granted by a supervising judge under the CCAA pursuant to an order that has not been appealed, be retroactively revoked to the detriment of parties who have advanced funds in reliance thereon?
- b. Does the PBA create a deemed trust for a pension plan wind-up deficiency?
- c. In the absence of an approved plan of arrangement, does the distribution scheme established by Parliament under the BIA apply in the case of a liquidating CCAA proceeding, as was decided by this Court in *Ted Leroy Trucking [Century Services] Ltd., Re*, or do courts have a discretion on a case-by-case basis to circumvent those priorities based on a subjective determination of whether or not a reorganization has been "successful" or otherwise?

Dated at Toronto, Ontario, this 3rd day of June, 2011.

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NOTICE TO THE RESPONDENTS: A respondent may serve and file a memorandum in response to this application for leave to appeal within 30 days after service of the application. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration pursuant to section 43 of the *Supreme Court Act*.

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**MORNEAU SOBECO LIMITED PARTNERSHIP and THE SUPERINTENDENT OF
FINANCIAL SERVICES**

**INTERVENERS
(Interveners)**

**CERTIFICATE
(pursuant to Rule 25(1)(c))**

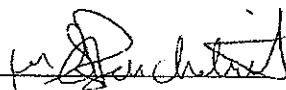
I, George Benchetrit, a partner of Chaitons LLP, counsel for the Applicant, George L. Miller, trustee of the bankruptcy estates of the parent company of Indalex Limited and certain US affiliates (collectively, the “US Debtors”) appointed under Chapter 7 of Title 11 of the United States Bankruptcy Code (the “US Chapter 7 Trustee”), hereby certify that

- (a) there is no sealing or confidentiality order in effect in the file from a lower court or this Court and no document filed includes information that is subject to a sealing or confidentiality order or that is classified as confidential by legislation;

- (b) there is no ban (by order or legislation) on the publication of evidence or the names or identity of a party or witness and no document filed includes information that is subject to such a ban; and
- (c) there is no information that, pursuant to legislation, is subject to limitations on public access and no document filed includes information that is subject to such limitations.

Dated at Toronto, Ontario this 3rd day of June, 2011.

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FINANCIAL SERVICES**

**INTERVENERS
(Interveners)**

**MEMORANDUM OF ARGUMENT
OF THE APPLICANT, GEORGE L. MILLER, THE CHAPTER 7 TRUSTEE OF THE
BANKRUPTCY ESTATES OF THE US INDALEX DEBTORS**

PART I – ISSUES OF PUBLIC IMPORTANCE AND STATEMENT OF FACTS

A. Overview

1. This application for leave to appeal raises the issues (among others) of whether the *Pension Benefits Act*, RSO 1990, c. P.8 (the “PBA”) creates a deemed trust on the proceeds of sale of the property of a company in respect of any wind-up deficiencies under its employee pension plans, and if so, whether any such deemed trust has priority over a court-ordered charge securing advances made by an arm’s length lender to allow the company to restructure its affairs, contrary to:

- a. orders made in a proceeding under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the “CCAA”) granting, *inter alia*, super-priority status to the aforesaid charge, which orders were never appealed, set aside or varied; and
- b. the scheme of priorities and intent under federal legislation (the *Bankruptcy and Insolvency Act* (the “BIA”) and the CCAA and established jurisprudence.

2. This application is submitted on behalf of George L. Miller, the trustee of the bankruptcy estates of the parent company of Indalex Limited (“Indalex”) and certain US affiliates (collectively, the “US Debtors”) appointed under Chapter 7 of Title 11 of the United States Bankruptcy Code (the “US Chapter 7 Trustee”).

3. On March 20, 2009, the US Debtors commenced proceedings under Chapter 11 of Title 11 of the United States Bankruptcy Code.

4. On April 3, 2009, Indalex and related entities (collectively, the “Debtors”) sought and obtained an order from the Ontario Superior Court of Justice (Commercial List) (the “CCAA Court”) for a stay of proceedings and other relief pursuant to the CCAA. On April 8, 2009, the CCAA Court granted an order in favour of the Debtors which, *inter alia*, authorized Indalex to borrow funds (the “DIP Loan”) pursuant to a debtor-in-possession (“DIP”) credit agreement among the US Debtors, the Debtors and a syndicate of arm’s length lenders (the “DIP Lenders”).

5. The DIP credit agreement contemplated that the DIP Loan would be repaid from the proceeds derived from a going concern sale of Indalex's assets. The Debtors' obligation to repay the DIP Loan was guaranteed by the US Debtors. The DIP Loan was secured by a court-ordered charge in favour of the DIP Lenders ranking in priority to all liens and encumbrances, including deemed trusts and statutory liens (the "DIP Charge").

6. The CCAA Court considered the financial circumstances of the Debtors before exercising its discretion under the CCAA to grant the DIP Charge on a super-priority basis. The CCAA Court specifically found that:

- a. the DIP Loan was necessary in order to support operations while a going concern solution was sought to save jobs and maximize recovery for all stakeholders;
- b. there was no other alternative available to the Debtors for a going concern solution; and
- c. the benefit to stakeholders and creditors of the DIP Loan outweighed any potential prejudice that may arise as a result of the granting of super-priority secured financing against the assets of the Debtors.

7. On June 12, 2010, the CCAA Court granted an order approving an amendment to the DIP credit agreement to increase the Debtors' borrowings from US\$24.36 million to US\$29.5 million. Counsel for certain retired executives of Indalex (the "Retirees") initially sought to reserve certain rights in connection with the motion, but subsequently withdrew their reservation of rights. The CCAA Court specifically noted that any reservation of rights would create uncertainty as it could cause the DIP Lenders to withhold advances.

8. On July 20, 2009, the CCAA Court granted an order approving the sale of substantially all of the assets and business of the Debtors and the US Debtors on a going concern basis. The CCAA Court also ordered that to the extent that any obligations of the Debtors to the DIP Lenders were satisfied by the US Debtors under their guarantee, the US Debtors were fully subrogated to the rights of the DIP Lenders under the DIP Charge.

9. None of the aforesaid orders of the CCAA Court (the “CCAA Court Orders”) were ever appealed, nor did any party ever seek to have them set aside or varied.

10. The Canadian sale proceeds available for distribution were insufficient to re-pay the DIP Loan in full. In reliance upon the CCAA Court Orders, the US Debtors paid US\$10,751,247.22 into the estate of the Debtors to satisfy the obligations of the Debtors to the DIP Lenders.

11. Despite not having sought to appeal, vary or set aside the CCAA Court Orders, the Retirees and certain members of the United Steelworkers (the “USW”) subsequently brought motions in the CCAA Court seeking priority over all creditors of Indalex, including the DIP Lenders, for the amounts of any deficiencies arising from the wind-up of their pension plans, arguing that the wind-up deficiencies are subject to deemed trusts under the PBA.

12. The CCAA Court dismissed those motions, rejecting (*inter alia*) the argument that the PBA established deemed trusts for pension plan wind-up deficiencies.

13. The Court of Appeal for Ontario allowed the appeals from those motions. In its decision (the “CA Decision”), the Court of Appeal declared that the claims of the Retirees and the USW take priority over the DIP Lenders (now asserted by the US Chapter 7 Trustee by subrogation of the US Debtors to the rights of the DIP Lenders). In doing so, the Court of Appeal for Ontario held (*inter alia*) that:

- a. the PBA provides for a deemed trust in respect of pension plan wind-up deficiencies, contrary to prior appellate authority;
- b. the claims by the Retirees and the USW have priority over the DIP Charge, despite the clear and explicit priority of the DIP Charge pursuant to the CCAA Court Orders which were never appealed, set aside or varied; and
- c. the statutory scheme of distribution under the BIA does not apply in a liquidating CCAA proceeding, contrary to the recent decision of this Court in *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 and of the Court of Appeal for Ontario in *Ivaco Inc. Re.* (2006), 83 O.R. (3d) 108.

14. The CA Decision is irreconcilable with the recent decision of this Court in *Ted Leroy Trucking [Century Services] Ltd., Re*, as well as the Court of Appeal's own prior decision in *Ivaco (Re)*, 2006 CanLII 34551. It also stands to seriously undermine the integrity and reputation of the Canadian insolvency system in the eyes of foreign lenders and courts.

15. The jurisdiction of Canadian courts to approve DIP financing and super-priority charges, even before the recent amendments to the BIA and CCAA which now expressly authorize such financing and priority, is well-established. Without DIP financing, companies operating under CCAA protection will be unable to survive while attempting to restructure or effect a going-concern sale solution for the benefit of their stakeholders, including employees. If the super-priority established for a DIP charge by court order can be altered after funds have been advanced in reliance on that priority, no DIP lender will be prepared to advance funds in reliance on a court order. This would run counter to the purpose and intent of the CCAA, which is to give an insolvent company an opportunity to find a way out of its financial difficulties short of bankruptcy, foreclosure or the seizure of assets through receivership proceedings.

16. And by distinguishing this Court's recent decision in *Ted Leroy Trucking [Century Services] Ltd., Re* – which held that the scheme of distribution under the CCAA should be harmonized with the BIA – the Court of Appeal established a scheme of distribution for CCAA proceedings that differs from the BIA scheme enacted by Parliament. This would promote the exercise of judicial discretion on a case-by-case basis to circumvent priorities based on a subjective determination of whether or not a CCAA reorganization has been “successful”, and would give creditors an incentive to pursue bankruptcy rather than support an insolvent company's restructuring efforts.

PART II – STATEMENT OF QUESTIONS IN ISSUE

17. This application therefore raises the following issues of public and national importance that warrant consideration by this Court:

- a. Can a super-priority charge, granted by a supervising judge under the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36 (the “CCAA”) pursuant to an order

that has not been appealed, be retroactively revoked to the detriment of parties who have advanced funds in reliance thereon?

- b. Does the *Pension Benefits Act*, RSO 1990, c. P.8 (the “PBA”) create a deemed trust for a pension plan wind-up deficiency?
- c. In the absence of an approved plan of arrangement, does the distribution scheme established by Parliament under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the “BIA”) apply in the case of a liquidating CCAA proceeding, as was decided by this Court in *Ted Leroy Trucking [Century Services] Ltd., Re*, or do courts have a discretion on a case-by-case basis to circumvent those priorities based on a subjective determination of whether or not a reorganization has been “successful” or otherwise?

PART III – STATEMENT OF ARGUMENT

18. The US Chapter 7 Trustee agrees with and adopts the arguments advanced by Sun Indalex Finance LLC and FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex, on their applications for leave to appeal to this Court from the CA Decision.

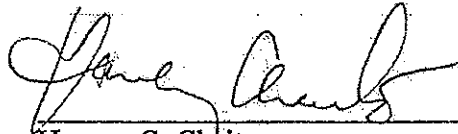
PART IV – SUBMISSIONS AS TO COSTS

19. The US Chapter 7 Trustee seeks its costs of this application from any opposing party.

PART V – ORDER SOUGHT

20. The US Chapter 7 Trustee respectfully seeks an order granting it leave to appeal to the Supreme Court of Canada from the CA Decision.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Harvey G. Chaiton



George Benchetrit

S.C.C. File No.

IN THE SUPREME COURT OF CANADA
(APPLICATION FOR LEAVE TO APPEAL
FROM COURT OF APPEAL FOR ONTARIO)

GEORGE L. MILLER, THE CHAPTER 7 TRUSTEE
OF THE BANKRUPTCY ESTATES OF THE US
INDALEX DEBTORS

APPLICANT
(Respondent)

- and -

SUN INDALEX FINANCE, LLC, UNITED
STEELWORKERS, KEITH CARRUTHERS, LEON
KOZIEROK, RICHARD BENSON, JOHN FAVERI,
KEN WLADRON, JOHN (JACK) W. ROONEY,
BERTRAM MCBRIDE, MAX DEGEN, EUGENE
D'IORIO, NEIL FRASER, RICHARD SMITH,
ROBERT LECKIE, FRED GRANVILLE and THE
MONITOR, FTI CONSULTING CANADA ULC

RESPONDENTS
(Respondents)

- and -

MORNEAU SOBECO LIMITED PARTNERSHIP and
THE SUPERINTENDENT OF FINANCIAL
SERVICES

INTERVENERS
(Interveners)

APPLICATION FOR LEAVE TO APPEAL OF THE
APPLICANT, GEORGE L. MILLER, THE CHAPTER
7 TRUSTEE OF THE BANKRUPTCY ESTATES OF
THE US INDALEX DEBTORS

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Trustee of the Bankruptcy Estates of the US
Indalex Debtors