

the impact of *Century Services*, if any, on these appeals. I am grateful for the excellence of those submissions, which mirrors the quality of the original submissions.

[186] *Century Services* deals with conflicting provisions in two pieces of federal legislation: s. 222(3) of the *Excise Tax Act*, R.S.C. 1985, c. E-15, which gives the federal Crown a deemed trust for unpaid GST, and s. 18.3(1) (now s. 37) of the *CCAA*, which expressly excludes deemed trusts in favour of the Crown from applying in *CCAA* proceedings. Deschamps J., for the majority, conducted a comprehensive analysis of the two conflicting sections and held that s. 18.3(1) of the *CCAA* prevails. In sum, *Century Services* stands for the proposition that s. 18.3(1) of the *CCAA* excludes the deemed trust for unpaid GST created by s. 222 of the *Excise Tax Act* from applying in a *CCAA* proceeding.

[187] It will be readily apparent that *Century Services* is distinguishable from the present case in a number of ways. Three significant differences between it and the present appeals are worthy of note.

[188] First, in *Century Services*, reorganization efforts had failed and the company sought leave to make an assignment into bankruptcy. Liquidation on a piecemeal basis through bankruptcy was inevitable. The *CCAA* proceedings in the present case, on the other hand, were successful – they resulted in the sale of Indalex's assets and the continuation of the business, albeit through another entity. It is not a situation in which

transition to the bankruptcy regime was inevitable because efforts under the *CCAA* had failed.

[189] Second, *Century Services* deals with competing provisions in two federal statutes. The conflict between the two provisions was patent: one or the other had to prevail. They could not be read together. Section 18.3(1) was found to prevail, in part because of its wording, which expressly excludes a deemed trust in favour of the Crown. The present appeals involve a consideration of the doctrine of federal paramountcy and whether a deemed trust under provincial legislation applies to a charge granted in a *CCAA* proceeding. Significantly, unlike the situation in *Century Services*, there is nothing in the *CCAA* that expressly excludes the provincial deemed trust for unpaid pension contributions from applying in *CCAA* proceedings. In these appeals, exclusion of the provincial deemed trust is dependent on the *CCAA* judge engaging in a factual examination and a determination that preservation of pension rights through the deemed trust would frustrate the purpose of the *CCAA* proceeding. Moreover, it is difficult to see how a finding of paramountcy would have been made on the record at the time the super-priority charge was made, given the evidence that Indalex intended to comply with all regulatory deemed trust requirements.<sup>17</sup>

[190] Third, no issue of fiduciary duty arose in *Century Services*. In the present case, as discussed previously and again below, the impact of fiduciary duties during the *CCAA* proceeding plays a significant role.

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<sup>17</sup> See para. 178 of these reasons.

[191] The respondents contend that *Century Services* is crucial in the disposition of these appeals because it stands for the proposition that federal priorities under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*) apply in *CCAA* proceedings. If *Century Services* stood for that proposition, I would agree. In a series of cases, the Supreme Court of Canada has repeatedly said that a province cannot, by legislating a deemed trust, alter the scheme of priorities under the *BIA*: see, for example, *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24.

[192] However, in my view, *Century Services* does not stand for that unqualified proposition. In *Century Services*, Deschamps J. explains that the *CCAA* and *BIA* are to be read in an integrated fashion but she is at pains to say that the *BIA* scheme of liquidation and distribution is the backdrop for what happens *if a CCAA reorganization is unsuccessful*.<sup>18</sup> Here, as I have noted, the *CCAA* proceedings were successful.

[193] Moreover, Deschamps J. repeatedly distinguishes the two regimes on the basis that the *BIA* is “characterized by a rules-based approach”<sup>19</sup> whereas the *CCAA* “offers a more flexible mechanism with greater judicial discretion”.<sup>20</sup> Permitting the *PBA* deemed trust to survive, absent an express finding of paramountcy, is consistent with both those key features of the *CCAA* proceedings – greater flexibility and greater judicial discretion on the part of the *CCAA* court. This flexibility and discretion on the part of the *CCAA* court

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<sup>18</sup> See, for example, para. 23.

<sup>19</sup> At para. 13, for example.

<sup>20</sup> See, for example, para. 14.

enables it to meaningfully assess the baseline considerations of appropriateness, good faith and due diligence, referred to by Deschamps J. at para. 70 of *Century Services*.

[194] The respondents point to paras. 47, 48 and 76 of *Century Services*, in which Deschamps J. notes the “strange asymmetry” that would occur if the *ETA* Crown priority were interpreted differently in *CCAA* proceedings than in *BIA* proceedings. She says this would encourage forum shopping in cases where the debtor’s assets cannot satisfy both the secured creditors’ and the Crown’s claims. No “strange asymmetry” would occur in cases such as the present appeals. If the *CCAA* judge found that recognition of the *PBA* deemed trust would frustrate the purpose of the *CCAA* proceeding and paramountcy had been invoked, the *CCAA* judge would be free to make a super-priority charge that overrode the deemed trust. This approach leaves the *CCAA* court with greater flexibility and the ability to be “cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees”.<sup>21</sup>

[195] In para. 70 of her reasons, Deschamps J. exhorts the *CCAA* courts to be “mindful that chances for successful reorganizations are enhanced where participants achieve common ground and *all stakeholders are treated as advantageously and fairly as the circumstances permit*” [emphasis added]. The Plans’ beneficiaries are stakeholders. And, once the deemed trust claims are recognized, they are not to be treated as mere unsecured creditors. If, as the respondents contend based on *Century Services*, the deemed trusts are automatically overridden, there will be no incentive for companies that

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<sup>21</sup> *Century Services*, at para. 60.

Page: 59

are similarly situated to Indalex to attempt to deal with their underfunded pension plans. There will be no incentive to treat pension plan beneficiaries “as advantageously and fairly as the circumstances permit”. The incentive will be to do as Indalex did – go to court without notice to the affected pension plan beneficiaries and negotiate as if the pension obligations did not exist.

[196] Justice Deschamps also says that no “gap” should exist between the *BIA* and the *CCAA* and approves of Laskin J.A.’s reasoning to that effect at paras. 62-63 of *Ivaco*.<sup>22</sup> She explains that the gap is a situation “which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy”. When the facts of the present case are considered carefully, it can be seen that a gap of this sort will not occur should the appeals be allowed. As I see it, the deemed trusts continued to exist during the *CCAA* proceedings although no steps could be taken to enforce them during the proceedings because of the stay. By the time of the Sale Approval Order, the *CCAA* court had become aware of the deemed trust claims. It dealt with the deemed trust claims as part of the *CCAA* proceedings, by deciding whether the undistributed sales proceeds held by the Monitor should go to Indalex U.S. or to the Plans’ beneficiaries. Thus, rather than being a situation in which property interests that would be lost in bankruptcy were enforced at the conclusion of the *CCAA* proceedings, the property interests were dealt with as part of the *CCAA* proceedings.

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<sup>22</sup> At para. 78.

Page: 60

[197] However, even if I am wrong in concluding that the deemed trust has priority over the secured creditor in this case, I would make the order on the basis that it is the appropriate remedy for the breaches of fiduciary obligation.

[198] It is important to keep in mind that the contest over the Reserve Fund is not a fight between the DIP lenders and the pensioners. The DIP lenders have been paid in full. The dispute is between the pensioners and Sun Indalex, the principal secured creditor of Indalex U.S. It is in that context that the court must consider the competing equities.

[199] The *CCAA* was not designed to allow a company to avoid its pension obligations. To give effect to Indalex U.S.'s claim would be to sanction Indalex's breaches of fiduciary obligation. In the circumstances of this case, such a result would work an injustice. The equities are not equal. The Plans' beneficiaries were vulnerable to the exercise of power by Indalex. They were not part of the negotiations for the DIP financing nor were they involved in the sale negotiations. They had no opportunity to protect their interests and, as a result of Indalex's actions, there was no one who fulfilled the administrator's role. Indalex, on the other hand, was fully aware of the Plans' underfunding and the result to the pensioners of a failure to inject additional funds. It was Indalex who advised the *CCAA* court that it intended to comply with "regulatory deemed trust requirements". To permit Sun Indalex to recover on behalf of Indalex U.S. would be to effectively permit the party who breached its fiduciary obligations to take the benefit of those breaches, to the detriment of those to whom the fiduciary obligations were owed.

[200] I do not accept the respondents' argument that a finding that Indalex breached its fiduciary obligation is irrelevant because it would merely give rise to an unsecured claim and there is no basis for conferring a priority for such a claim. This view fundamentally misunderstands the rights of the pension plan beneficiaries. Even if there is no deemed trust, the Plans' beneficiaries are not mere unsecured creditors. They are unsecured creditors to whom Indalex owed a fiduciary duty by virtue of its role as the Plans' administrator. There is a significant difference, in my view, between being a mere unsecured creditor and being an unsecured creditor to whom a fiduciary duty is owed.

[201] Further, the Supreme Court has repeatedly stated that equitable remedies are sufficiently flexible that they can be molded to meet the requirements of fairness and justice: see, for example, *Canson Enterprises v. Boughton & Co.*, [1991] 3 S.C.R. 534, at para. 86 and *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, at para. 34.

[202] In *Soulos*, at para. 36, McLachlin J. (as she then was) writing for the majority, held that constructive trusts may be imposed where "good conscience requires" it. She went on to identify two different types of cases in which constructive trusts may be ordered: 1) those in which property is obtained by a wrongful act of the defendant, notably breach of fiduciary duty or breach of the duty of loyalty; and, 2) those in which there may not have been a wrongful act, but where there has been unjust enrichment. While the second type of case – one in which there is unjust enrichment – is not relevant to these appeals, the first is.

[203] At para. 45 of *Soulos*, McLachin J. sets out four conditions that should “generally be satisfied” if a constructive trust based on wrongful conduct is to be ordered:

- (1) the defendant must have been under an equitable obligation in relation to the activities giving rise to the assets in his or her hands;
- (2) the assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his or her equitable obligation to the plaintiff;
- (3) the plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and
- (4) there must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

[204] As I have already explained, in the circumstances of this case, Indalex’s fiduciary obligations as administrator were engaged in relation to the *CCAA* proceedings and it is those proceedings that gave rise to the asset (*i.e.* the Reserve Fund) (condition 1). The assets that would flow to Indalex U.S., absent the constructive trust, are directly connected to the process in which Indalex committed its breaches of fiduciary obligation (condition 2). Without the proprietary remedy, the Plans’ beneficiaries have no meaningful remedy. Moreover, there must be some incentive to require employers who



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are also the administrators of their pension plans to remain faithful to their duties (condition 3). And, because Indalex U.S. is not an arm's length innocent third party, imposing a constructive trust in favour of the Plans' beneficiaries is not unjust (condition 4).

*The Executive Plan*

[205] As I explained above, it is not clear to me that a deemed trust arose in respect of the underfunded amounts in the Executive Plan because it had not been wound up at the time of sale. However, based on the breaches of fiduciary duty, the court is entitled to consider the equities of the parties competing for the Reserve Fund. For the reasons given in respect of the Salaried Plan in respect of those equities, I would make the same order in respect of the Executive Plan, namely, that the Monitor pay the deficiency from the Reserve Fund to the Executive Plan in priority to those entitled under the super-priority charge.

[206] In light of this conclusion, I find it unnecessary to deal with the Former Executives' submission that the doctrine of equitable subordination applies to remedy Indalex's breaches of fiduciary duty. In any event, I would decline to decide that issue as it was not argued below. It offends the general rule that appellate courts are not to entertain new issues on appeal.

Page: 64

**DISPOSITION**

[207] Accordingly, I would allow the appeals and declare that the claims of the USW and the Former Executives take priority over the claim asserted by Indalex U.S./Sun Indalex. I would order the Monitor to pay from the Reserve Fund into each of the Salaried Plan and the Executive Plan an amount sufficient to satisfy the deficiencies in each plan. I understand that the Reserve Fund is sufficient to satisfy the Deficiencies but if this proves problematic, the parties may return to the court for direction on that matter.

[208] If the parties are unable to agree on costs, they may make brief written submissions on that matter. The appellants, Morneau and the Superintendent shall file their submissions within fifteen days of the date of release of these reasons. The respondents shall have a further seven days within which to file their submissions.

RELEASED: *JGM* APR 07 2011*J. A. MacPherson J.A.**I agree. J. A. MacPherson J.A.**I agree. R. J. A.*

## Schedule "A"

*Pension Benefits Act*, R.S.O. 1990, c. P.8, ss. 1(1), 8, 14(1), 22, 57(1) – (5), 70(1), 74(1), 75(1), (2), 76

### Definitions

1. (1) In this Act, ...

“administrator” means the person or persons that administer the pension plan; ...

“wind up” means the termination of a pension plan and the distribution of the assets of the pension fund;

### Administrator

#### Requirement

8. (0.1) A pension plan must be administered by a person or entity described in subsection (1).

#### Prohibition

(0.2) No person or entity other than a person or entity described in subsection (1) shall administer a pension plan.

### Administrator

(1) A pension plan is not eligible for registration unless it is administered by an administrator who is,

(a) the employer or, if there is more than one employer, one or more of the employers;

(b) a pension committee composed of one or more representatives of,

(i) the employer or employers, or any person, other than the employer or employers, required to make contributions under the pension plan, and

(ii) members of the pension plan;

(c) a pension committee composed of representatives of members of the pension plan;

Page: 2

(d) the insurance company that provides the pension benefits under the pension plan, if all the pension benefits under the pension plan are guaranteed by the insurance company;

(e) if the pension plan is a multi-employer pension plan established pursuant to a collective agreement or a trust agreement, a board of trustees appointed pursuant to the pension plan or a trust agreement establishing the pension plan of whom at least one-half are representatives of members of the multi-employer pension plan, and a majority of such representatives of the members shall be Canadian citizens or landed immigrants;

(f) a corporation, board, agency or commission made responsible by an Act of the Legislature for the administration of the pension plan;

(g) a person appointed as administrator by the Superintendent under section 71; or

(h) such other person or entity as may be prescribed.

#### **Additional members**

(2) A pension committee, or a board of trustees, that is the administrator of a pension plan may include a representative or representatives of persons who are receiving pensions under the pension plan.

#### **Interpretation**

(3) For the purposes of clause (1) (b), "employer" includes the following persons and entities:

1. Affiliates within the meaning of the *Business Corporations Act* of the employer.
2. Such other persons or entities, or classes of persons or entities, as may be prescribed.

#### **Reduction of benefits**

14. (1) An amendment to a pension plan is void if the amendment purports to reduce,

(a) the amount or the commuted value of a pension benefit accrued under the pension plan with respect to employment before the effective date of the amendment;

(b) the amount or the commuted value of a pension or a deferred pension accrued under the pension plan; or

Page: 3

(c) the amount or the commuted value of an ancillary benefit for which a member or former member has met all eligibility requirements under the pension plan necessary to exercise the right to receive payment of the benefit.

### **Care, diligence and skill**

22. (1)The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

### **Special knowledge and skill**

(2)The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.

### **Member of pension committee, etc.**

(3)Subsection (2) applies with necessary modifications to a member of a pension committee or board of trustees that is the administrator of a pension plan and to a member of a board, agency or commission made responsible by an Act of the Legislature for the administration of a pension plan.

### **Conflict of interest**

(4)An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

### **Employment of agent**

(5)Where it is reasonable and prudent in the circumstances so to do, the administrator of a pension plan may employ one or more agents to carry out any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund.

Page: 5

(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.

#### **Lien and charge**

(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).

#### **Wind up report**

70. (1) The administrator of a pension plan that is to be wound up in whole or in part shall file a wind up report that sets out,

- (a) the assets and liabilities of the pension plan;
- (b) the benefits to be provided under the pension plan to members, former members and other persons;
- (c) the methods of allocating and distributing the assets of the pension plan and determining the priorities for payment of benefits; and
- (d) such other information as is prescribed.

#### **Combination of age and years of employment**

74. (1) A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least fifty-five, at the effective date of the wind up of the pension plan in whole or in part, has the right to receive,

- (a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;
- (b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,

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**Tab 8:**

**Exhibit F**

**Pgs. 162-165**

This is *Exhibit "F"* referred to in the  
affidavit of  
ANDREA McKINNON  
sworn before me, this 8<sup>TH</sup>  
day of FEBRUARY, 2012



.....  
Demetrios Yiokaris  
A Commissioner for taking affidavits, etc.



Supreme Court of Canada



Cour suprême du Canada

January 27, 2012

Le 27 janvier 2012

ORDER  
MOTION

ORDONNANCE  
REQUÊTE

**SUN INDALEX FINANCE, LLC v. 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 AND FRED GRANVILLE**

- and between -

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

- and between -

**FTI CONSULTING CANADA ULC, IN ITS CAPACITY AS COURT-APPOINTED MONITOR OF INDALEX LIMITED, ON BEHALF OF INDALEX LIMITED v. 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 UNITED STEELWORKERS**

- and -

**UNITED STEELWORKERS v. MORNEAU SHEPELL LTD. (formerly known as MORNEAU SOBECO LIMITED PARTNERSHIP) AND SUPERINTENDENT OF FINANCIAL SERVICES  
(No. 34308) (Ont.)**

-2-

**THE CHIEF JUSTICE:**

**UPON APPLICATION** by the appellant Sun Indalex Finance, LLC, for an order stating constitutional questions in the main appeal;

**AND UPON APPLICATION** by the respondents Retirees Keith Carruthers, et al., to expedite the motion to expedite and the main appeal;

**AND THE MATERIAL FILED** having been read;

**IT IS HEREBY ORDERED THAT:**

1. The motion to state constitutional questions is dismissed with costs to the respondents on the main appeal.
2. The motion to expedite is granted without costs and the schedule for serving and filing the material in both the main appeal and the appeal on costs is set as follows:
  - a. The facts, records and book of authorities of the appellants on the main appeal to be served and filed by February 10, 2012;
  - b. The facts, records and book of authorities of the appellant on the appeal on costs to be served and filed by February 17, 2012;
  - c. Any application for leave to intervene to be served and filed by February 17, 2012;
  - d. The responses to any application for leave to intervene to be served and filed by February 27, 2012;
  - e. The replies on any application for leave to intervene to be served and filed by March 5, 2012;
  - f. The facts, record and authorities of the respondents on both appeals to be served and filed by March 30, 2012;
  - g. The intervener's factums to be served and filed in accordance with the date set in the order granting leave to intervene; and,
  - h. The appeal is to be heard on June 5, 2012.
3. Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership) is added as a full party in the main appeal.



C.J.C.  
J.C.C.

---

**Tab 9:**

**Exhibit G**

**Pgs. 166-168**

This is ***Exhibit "G"*** referred to in the  
affidavit of  
ANDREA McKINNON  
sworn before me, this 8<sup>TH</sup>  
day of FEBRUARY, 2012



.....  
Demetrios Yiokaris  
A Commissioner for taking affidavits, etc.



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INDEX.0002

April 5, 2010

Mr. Bertram McBride  
 568 Khyber Lane  
 Venice FL 34293  
 USA

Dear Mr. McBride:

**Re: Retirement Plan for Executive Employees of Indalex Limited and Associated Companies (the "Plan"), Registration No 0455626**

Further to our letter, dated February 4, 2010, advising you of the appointment of Morneau Sobeco Limited Partnership ("Morneau Sobeco") as Administrator of the Plan, we have received the Notice of Proposal to wind up the Plan, effective September 30, 2009, from the Superintendent of the Financial Services (the "Superintendent"). We are now writing to advise you of an important issue regarding your pension from the Plan.

As you may be aware, the Plan has been underfunded for several years. Based on the most recent actuarial valuation as at January 1, 2008, prepared by the prior actuary for the Plan, there were insufficient assets to fully satisfy the benefit entitlements of all members and pensioners. We have reviewed the current funded status of the Plan and have determined that there are only sufficient assets to pay out approximately 65% of the benefits for Plan members, pensioners and beneficiaries.

In order to protect the pension benefits of all Plan members and pensioners, the Administrator must reduce payments from the Plan to all pensioners. We have reviewed the Plan records for all retired members who were put into pay prior to our appointment and have recalculated these monthly pension entitlements to reflect the estimated funded ratio of 65%.

Based on our review, your current monthly pension payment will be revised as follows, effective on the **June 1, 2010** payment:

	Total Monthly Pension
Current Monthly Pension	\$5,833.33
Revised Monthly Pension	\$3,791.66

Since benefits to retirees have been paid at 100% since the proposed wind up date of September 30, 2009, all pensioners have received more pension than they are entitled to due to the underfunded position of the Plan. Any overpayment will be taken into account when pension benefits are settled upon completion of the wind up process.

We regret that pension reductions are necessary. However, as a result of the Plan's underfunding, the Administrator is responsible for ensuring that the pensions of all members and pensioners of the Plan are dealt with in a fair and equitable manner and in accordance with applicable legislation. The pension regulatory authority, which appointed the Administrator, has been notified of this issue and is aware of the underfunded position of the Plan and the required reduction in pension payments.

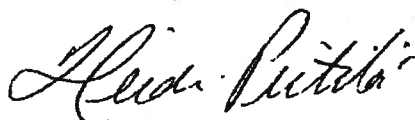
We will be preparing a Wind Up Report that will be filed with the Superintendent. At the settlement date, your pension will be readjusted to reflect the actual amount payable to you, based on the final funded ratio of the Plan. If a revision is necessary to the actual amount payable to you as a result of any underpayments or overpayments, we will notify you in writing and an adjustment will be made.

Should you have any questions regarding this matter, please contact Heidi Pietila at (416) 445-2700 extension 3438 or Ntumba Tshiteya at extension 3312. We also provide a toll-free telephone number of 1-888-667-6328 for members/former members in Canada, but outside the Metropolitan Toronto area.

Yours truly,

**MORNEAU SOBECO LIMITED PARTNERSHIP**

In its capacity as Administrator for the  
Retirement Plan for Executive Employees of  
Indalex Limited and Associated Companies  
and not in its personal capacity.



per: Heidi Pietila  
Senior Regulatory Analyst

**Tab 10:**

**Exhibit H**

**Pgs. 169-182**

This is *Exhibit "H"* referred to in the  
affidavit of  
ANDREA McKINNON  
sworn before me, this 8<sup>TH</sup>  
day of FEBRUARY, 2012



.....  
Demetrios Yiokaris  
A Commissioner for taking affidavits, etc.



Court File No.

CU. '09-388836

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**KEITH CARRUTHERS, LEON KOZIEROK, RICHARD BENSON, JOHN FAVERI,  
KEN WALDRON, JOHN (JACK) W. ROONEY, BERTRAM McBRIDE, MAX DEGEN,  
EUGENE D'IORIO, RICHARD SMITH, ROBERT LECKIE, NEIL FRASER and  
FRED GRANVILLE**

Plaintiffs

- and -

**DAVID J. MCCALLEN, TIMOTHY STUBBS also known as TIM STUBBS,  
PATRICK LAWLOR, WESLEY ROSS, KEITH F. COOPER, INDALEX LIMITED,  
6326765 CANADA INC., NOVAR INC., and INDALEX HOLDINGS (B.C.) LTD.**

Defendants

**STATEMENT OF CLAIM**

**TO THE DEFENDANTS**

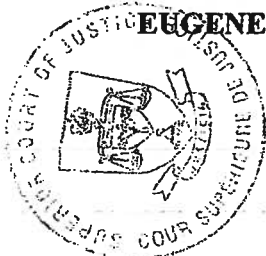
A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU



WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$1,000 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$400.00 for costs and have the costs assessed by the court.

Date October 9, 2009

Issued by

  
Local registrar of Justice

Address of court office 393 University Avenue  
10<sup>th</sup> Floor  
Toronto, Ontario M5G 1E6

TO: **DAVID J. MCCALLEN**  
615 Nashville Road  
Kleinburg, Ontario  
Canada L0J 1C0

AND TO: **TIMOTHY STUBBS also known as TIM STUBBS**  
75 Tri State International  
Lincolnshire, Illinois  
United States of America 60069

AND TO: **PATRICK LAWLOR**  
75 Tri State International  
Lincolnshire, Illinois  
United States of America 60069

AND TO: **WESLEY ROSS**  
706 South State Street  
Girard, Ohio  
United States of America 44420

AND TO: **KEITH F. COOPER**  
1201 W. Peachtree Street, NW  
Suite 500  
Atlanta, Georgia  
United States of America 30309

AND TO: **INDALEX LIMITED**  
199 Bay Street, Suite 2800  
Toronto, Ontario  
M5L 1A9

**AND TO: 6326765 CANADA INC.**  
c/o Borden Ladner Gervais LLP  
40 King Street West, Suite 4400 (FSC)  
Toronto, Ontario  
M5H 3Y4

**AND TO: NOVAR INC.**  
3333 Unity Drive  
Mississauga, Ontario  
L5L 3S6

**AND TO: INDALEX HOLDINGS (B.C.) LTD.**  
19<sup>th</sup> Floor  
885 West Georgia Street  
Vancouver, British Columbia  
V6C 3H4

**CLAIM**

1. The Plaintiffs, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Richard Smith, Robert Leckie, Neil Fraser and Fred Granville (the "Pensioners") claim as against the Defendants for:

- (a) damages in the sum of \$6,000,000 in respect of amounts owing to the Pensioners for amounts owing and will be owed under the Retirement Plan for the Executive Employees of Indalex Limited and Associated Companies (the "Registered Plan"), the Supplemental Executive Retirement Plan (the "SERP"), employment contracts and agreements;
- (b) a declaration that the Defendants, David J. McCallen, Timothy Stubbs also known as Tim Stubbs and Patrick Lawlor or a combination thereof continue to be directors of Indalex Limited, Novar Inc., Indalex Holdings (B.C.) Ltd. and 6326765 Canada Inc. and/or one of their affiliated or predecessor companies (said companies hereinafter referred to collectively as "Indalex");
- (c) a declaration that the Defendants, Wesley Ross, Timothy Stubbs also known as Tim Stubbs and Patrick Lawlor or a combination thereof continue to be officers of Indalex Holdings (B.C.) Ltd. and/or one of its affiliated or predecessor companies;
- (d) a declaration that the Defendant, Keith Cooper is deemed to be and/or became a director of Indalex Limited, Novar Inc., Indalex Holdings (B.C.) Ltd. and 6326765 Canada Inc. and/or Indalex on or about July 31, 2009;
- (e) prejudgment interest and postjudgment interest on the above sums in accordance with the *Courts of Justice Act*, R.S.O., c.C.43, as amended;
- (f) costs of this action on a substantial indemnity basis;
- (g) any Goods and Services Tax which may be payable on any amount pursuant to the *Excise Tax Act*, R.S.C., 1995, c.E-15, as amended, or any other legislation enacted by the Government of Canada and any transaction levy which may be payable; and

(h) such further and other relief as to this Honourable Court may deem just.

### **The Parties**

2. The Plaintiffs are former executive employees of the Defendant companies. The Plaintiffs are members of the Registered Plan and the SERP.

3. The Defendants, Indalex Limited and 6326765 Canada Inc. are federally incorporated companies. The Defendant, Novar Inc. is a company incorporated pursuant to the laws of Ontario. The Defendant, Indalex Holdings (B.C.) Ltd. is a company incorporated pursuant to the laws of British Columbia.

4. The Defendants, David J. McCallen, Timothy Stubbs also known as Tim Stubbs, and Patrick Lawlor were at all material times directors of Indalex Limited, Novar Inc., 6326765 Canada Inc., Indalex Holdings (B.C.) Ltd. and Indalex.

5. The Defendants, Ross Wesley, Timothy Stubbs and Patrick Lawlor were at all material times officers of Indalex Holdings (B.C.) Ltd.

6. The Defendant, Keith Cooper was at all material times a director of Indalex Limited, Indalex Holdings (B.C.) Ltd., Novar Inc., 6326765 Canada Inc. and Indalex. Additionally, or alternatively, as of July 31, 2009, Keith Cooper was a director or is deemed to be a director of Indalex Limited, Indalex Holdings (B.C.) Ltd., Novar Inc., 6326765 Canada Inc. and Indalex.

7. At all material times, the individual Defendants directed, controlled, and operated Indalex, which is involved in the aluminium extrusion industry.

### **The Pension Plans**

8. The Pensioners worked at Indalex for many years and in some cases, over thirty years. Through their years of service and employment with Indalex, the Pensioners earned an entitlement to Pension Benefits through the Registered Plan and the SERP on their retirement to be paid to them for their lifetime.

20, 2009 in the United States Bankruptcy Court for the District of Delaware (the "Chapter 11 Proceedings").

**Indalex terminates SERP benefits for all Pensioners**

16. In a letter dated April 9, 2009, received sometime thereafter, and without any prior notice, Indalex wrote to all or most of the Pensioners indicating that it will stop paying the SERP benefits to the Pensioners. Prior to this time, the SERP benefits were paid to the payable Pensioners.

**The Registered Plan will be wound up**

17. Indalex is now an insolvent shell company. The Registered Plan will be wound up. The expectation of this wind up was first communicated to the Pensioners on or about July 13, 2009 by the Monitor in the CCAA proceedings.

18. The Superintendent of the Financial Services Commission of Ontario indicated in or around August 2009 that it will wind up the Registered Plan.

19. The Registered Plan is underfunded. There is approximately \$3.25 million owing to the plan on its wind up. If wound up in its current underfunded state, the Pensioners' Pension Benefits will be reduced by 30%-40%.

**Indalex is Sold**

20. The sale of Indalex to SAPA Holdings was approved by the Court on July 20, 2009. One of the terms of the sale was that SAPA would not take on any of Indalex's liabilities under the Registered Plan nor the SERP.

**The Directors Resign**

21. On or about July 31, 2009, the Defendants, David J. McCallen, Tim Stubbs and Patrick Lawlor executed or purported to execute resignations with respect to being directors of Indalex Limited, Novar Inc., 6326765 Canada Inc., Indalex Holdings (B.C.) Ltd. and Indalex.

30. It is unfair and unjust that the parties responsible for Indalex's success are now being severely prejudiced and without justification.
31. The Pensioners have unsuccessfully tried to and continue to try to execute against and/or obtain against Indalex all or part of the expected deficiency in the Registered Pension Plan and the unpaid amounts owing under the SERP.
32. The Pensioners plead and rely upon the *Business Corporations Act*, R.S.O. 1990, c. B. 16., including but not limited to, sections 115 and 131, which provide:

**Directors**

115. (1) Subject to any unanimous shareholder agreement, the directors shall manage or supervise the management of the business and affairs of a corporation. R.S.O. 1990, c. B.16, s. 115 (1).

**Board of directors**

- (2) A corporation shall have a board of directors which shall consist of,
- (a) in the case of a corporation that is not an offering corporation, at least one individual; and
  - (b) in the case of a corporation that is an offering corporation, not fewer than three individuals. R.S.O. 1990, c. B.16, s. 115 (2); 1994, c. 27, s. 71 (11).

...

**Deemed directors**

- (4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the corporation shall be deemed to be a director for the purposes of this Act. 1994, c. 27, s. 71 (12).  
Directors' liability to employees for wages

....

131. (1) The directors of a corporation are jointly and severally liable to the employees of the corporation for all debts not exceeding six months' wages that become payable while they are directors for services performed for the corporation and for the vacation pay accrued while they are directors for not more than twelve months under the Employment Standards Act, and the regulations thereunder, or under any collective agreement made by the corporation. R.S.O. 1990, c. B.16, s. 131 (1).

**Limitation of liability**

- (2) A director is liable under subsection (1) only if,
- (a) the corporation is sued in the action against the director and execution against the corporation is returned unsatisfied in whole or in part; or
  - (b) before or after the action is commenced, the corporation goes into liquidation, is ordered to be wound up or makes an authorized assignment under the Bankruptcy and Insolvency Act (Canada), or a receiving order under that Act is made against it, and, in any such case, the claim for the debt has been proved. 2002, c. 24, Sched. B, s. 27 (1).

**Idem**

- (3) Where execution referred to in clause (2) (b) has issued, the amount recoverable from a director is the amount remaining unsatisfied after execution. R.S.O. 1990, c. B.16, s. 131 (3).

**Rights of director who pays debt**

(4) Where a director pays a debt under subsection (1) that is proved in liquidation and dissolution or bankruptcy proceedings, the director is entitled to any preference that the employee would have been entitled to, and where a judgment has been obtained the director is entitled to an assignment of the judgment. R.S.O. 1990, c. B.16, s. 131 (4).

**Idem**

(5) A director who has satisfied a claim under this section is entitled to contribution from the other directors who were liable for the claim. R.S.O. 1990, c. B.16, s. 131 (5).

33. The Pensioners plead and rely upon the *Canada Business Corporations Act*, R.S.C. 1985, c. C. 44., including but not limited to, sections 102, 109, and 119 which provide:

**Duty to manage or supervise management**

102. (1) Subject to any unanimous shareholder agreement, the directors shall manage, or supervise the management of, the business and affairs of a corporation.

**Number of directors**

(2) A corporation shall have one or more directors but a distributing corporation, any of the issued securities of which remain outstanding and are held by more than one person, shall have not fewer than three directors, at least two of whom are not officers or employees of the corporation or its affiliates.

...

**Removal of directors**

109...

**Resignation (or removal)**

(4) If all of the directors have resigned or have been removed without replacement, a person who manages or supervises the management of the business and affairs of the corporation is deemed to be a director for the purposes of this Act.

...

**Liability of directors for wages**

119. (1) Directors of a corporation are jointly and severally, or solidarily, liable to employees of the corporation for all debts not exceeding six months wages payable to each such employee for services performed for the corporation while they are such directors respectively.

**Conditions precedent to liability**

(2) A director is not liable under subsection (1) unless

- (a) the corporation has been sued for the debt within six months after it has become due and execution has been returned unsatisfied in whole or in part;
- (b) the corporation has commenced liquidation and dissolution proceedings or has been dissolved and a claim for the debt has been proved within six months after the earlier of the date of commencement of the liquidation and dissolution proceedings and the date of dissolution; or
- (c) the corporation has made an assignment or a bankruptcy order has been made against it under the Bankruptcy and Insolvency Act and a claim for the debt has been proved within six months after the date of the assignment or bankruptcy order.

**Limitation**

(3) A director, unless sued for a debt referred to in subsection (1) while a director or within two years after ceasing to be a director, is not liable under this section.



**Amount due after execution**

(4) Where execution referred to in paragraph (2)(a) has issued, the amount recoverable from a director is the amount remaining unsatisfied after execution.

**Subrogation of director**

(5) Where a director pays a debt referred to in subsection (1) that is proved in liquidation and dissolution or bankruptcy proceedings, the director is entitled to any preference that the employee would have been entitled to, and where a judgment has been obtained, the director is entitled to an assignment of the judgment.

**Contribution**

(6) A director who has satisfied a claim under this section is entitled to contribution from the other directors who were liable for the claim.  
R.S., 1985, c. C-44, s. 119; 1992, c. 27, s. 90; 2001, c. 14, ss. 47, 135(E); 2004, c. 25, s. 187.

34. Additionally or alternatively, the Pensioners plead and rely upon:
- (a) the *Employment Standards Act*, 2000, S.O. 2000, c. 41, including but not limited to section 81;
  - (b) the *Canada Labour Code*, R.S.C. 1985, c. L-2, including but not limited to section 251.18;
  - (c) the *Business Corporations Act*, S.B.C. 2002, c. 57, including but not limited to sections 120 and 138; and
  - (d) the *Employment Standards Act* R.S.B.C. 1996, c. 113, including but not limited to section 96.
35. The Defendants and Indalex failed to pay Wages and/or Pension Benefits to the Pensioners. Additionally, or in the further alternative, one or more of the Defendants and Indalex failed to make all payments regarding Wages and/or Pension Benefits owing under the (Ontario) *Business Corporations Act*, R.S.O. 1990, c. B. 16, the (Ontario) *Employment Standards Act 2000* S.O. 2000 c. 41, the *Canada Business Corporations Act*, R.S.C. 1985, c. C. 44, the *Canada Labour Code*, R.S.C. 1985, c. L-2, the (British Columbia) *Business Corporations Act*, S.B.C. 2002, c. 57, and the (British Columbia) *Employment Standards Act* R.S.B.C. 1996, c. 113, contract, common law or any other applicable statute.
36. Further particulars of the damages will be provided closer to the date of trial.

37. The Plaintiffs propose that this Action be tried in the City of Toronto.

October 9, 2008

**KOSKIE MINSKY LLP**  
20 Queen Street West, Suite 900, Box 52  
Toronto, ON M5H 3R3

**Andrew J. Hatnay** LSUC#: 31885W  
Tel: 416-595-2083  
Fax: 416-204-2872

**Demetrios Yiokaris** LSUC#: 45852L  
Tel: 416-595-2130  
Fax: 416-204-2810

Lawyers for the Plaintiffs

KEITH CARRUTHERS et al.

Plaintiffs

and

DAVID J. MCCALLEN et al.  
Defendants

Court File No.

CV-09-38826

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**STATEMENT OF CLAIM**

**KOSKIE MINSKY LLP**

20 Queen Street West, Suite 900, Box 52  
Toronto, ON M5H 3R3

**Andrew J. Hatnay** LSUC#: 31885W

Tel: 416-595-2083

Fax: 416-204-2872

**Demetrios Yiokaris** LSUC#: 45852L

Tel: 416-595-2130

Fax: 416-204-2810

Lawyers for the Plaintiffs

---

**Tab 11:**

**Exhibit I**

**Pgs. 183-185**

This is ***Exhibit "I"*** referred to in the  
affidavit of  
ANDREA McKINNON  
sworn before me, this 8<sup>TH</sup>  
day of FEBRUARY, 2012



.....  
Demetrios Yiokaris  
A Commissioner for taking affidavits, etc.

Court File No./N° du dossier du greffe: CV-09-00388836-0000

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COUR SUPÉRIEURE DE JUSTICE**

**BETWEEN:  
ENTRE:**

KEITH CARRUTHERS; LEON KOZIEROK; RICHARD BENSON; JOHN FAVERI; KEN WALDRON; JOHN  
(JACK) W. ROONEY; BERTRAM MCBRIDE; MAX DEGEN; EUGENE D'ORIO; RICHARD SMITH;  
ROBERT LECKIE; NEIL FRASER; FRED GRANVILLE

Plaintiff  
Demandeur

and / et

DAVID J. MCCALLEN; TIMOTHY STUBBS; PATRICK LAWLOR; WESLEY ROSS; KEITH F. COOPER;  
INDALEX LIMITED ; 6326765 CANADA INC. ; NOVAR INC. ; INDALEX HOLDINGS (B.C.) LTD.

Defendant  
Défendeur

**NOTICE THAT ACTION WILL BE DISMISSED  
AVIS PORTANT QUE L'ACTION SERA REJETÉE**

**TO THE PARTIES AND THEIR LAWYERS  
AUX PARTIES ET À LEURS AVOCATS**

According to the records in the court office:

*D'après le dossier du greffe du tribunal, les conditions suivantes sont réunies :*

- (a) 180 days have passed since the originating process was issued,  
a) 180 jours se sont écoulés depuis la délivrance de l'acte introductif d'instance;
- (b) no defence has been filed,  
b) aucune défense n'a été déposée;
- (c) the action has not been disposed of by final order or judgment, and  
c) l'action n'a pas fait l'objet d'une ordonnance définitive ou d'un jugement;
- (d) the action has not been set down for trial.  
d) l'action n'a pas été inscrite pour instruction.

Pursuant to subrule 48.15(1), THIS ACTION WILL BE DISMISSED AS ABANDONED unless, within 45 days of being served with this notice:

*Conformément au paragraphe 48.15 (1), LA PRÉSENTE ACTION SERA REJETÉE POUR CAUSE DE DÉSISTEMENT à moins que, dans les 45 jours de la signification du présent avis, l'une ou l'autre des conditions suivantes ne soit remplie :*

- (a) a defence is filed,  
a) une défense est déposée;
- (b) it is disposed of by final order or judgment, or  
b) l'action fait l'objet d'une ordonnance définitive ou d'un jugement;
- (c) it is set down for trial.  
c) l'action est inscrite pour instruction.

**NOTE:** A "defence" means a statement of defence, a notice of intent to defend, or a notice of motion in response to a proceeding, other than a motion challenging the court's jurisdiction.

**REMARQUE :** Une «défense» s'entend d'une défense visée à la Règle 18, d'un avis d'intention de présenter une défense ou d'un avis de motion en réponse à une instance, autre qu'une motion en

ONTARIO  
SUPERIOR COURT OF JUSTICE  
COUR SUPÉRIEURE DE JUSTICE

Page 2  
NOTICE THAT ACTION WILL BE DISMISSED  
AVIS PORTANT QUE L'ACTION SERA REJETÉE

CV-09-00388836-0000

Court File No./N° du dossier du greffe

*contestation de la compétence du tribunal.*

Date: 11-OCT-2011

Date:

Signed by: \_\_\_\_\_

signature: Local registrar / greffier local

Address of court office: Toronto  
adresse du greffe: 393 University Av 10th fl  
Toronto ON M5G 1E6

TO : ANDREW JOHN S HATNAY  
DESTINATAIRES : KOSKIE MINSKY  
20 QUEEN STREET WEST SUITE 900  
TORONTO ON CA M5H 3R3

Fax: (416)977-3316

**Tab 12:**

**Exhibit J**

**Pgs. 186-188**



This is *Exhibit "J"* referred to in the  
affidavit of  
ANDREA McKINNON  
sworn before me, this 8<sup>TH</sup>  
day of FEBRUARY, 2012



.....  
Demetrios Yiokaris  
A Commissioner for taking affidavits, etc.

**KOSKIE  
MINSKY** LLP  
BARRISTERS & SOLICITORS

November 14, 2011

**Demetrios Yiokaris**  
Direct Dial: 416-595-2130  
Direct Fax: 416-204-2810  
dyiokaris@kmlaw.ca

**Delivered Via Courier**

The Registrar  
Ontario Superior Court of Justice  
393 University Avenue  
Toronto, Ontario M5G 1E6

Dear Sir/Madam:

**Re: Keith Carruthers, et al v. David J. McCallen, et al**  
**Court File No.: CV-09-00388836-0000**  
**Our File No.: 09/0776**

We are counsel for the Plaintiffs in the above referenced action. We confirm receipt of the Notice that Action will be Dismissed dated October 11, 2011.

Attached please find:

- (a) the Amended Amended and Restated Initial CCAA Order of May 12, 2009 of the Honourable Mr. Justice Morawetz;
- (b) the July 30, 2009 Claims Order of the Honourable Mr. Justice Morawetz; and
- (c) the September 26, 2011 stay extension Order of the Honourable Mr. Justice Newbould extending the stay to January 13, 2012.

Further to the above Orders, in particular paragraphs 15 and 20 of the Amended Amended and Restated Initial Order, this action is stayed. Pursuant to the September 26, 2011 Order, the stay is currently in effect until January 13, 2012. We expect that a request will be made by the monitor to further extend the stay prior to January 13, 2012.

Accordingly, lawsuit CV-09-00388836-00 is currently stayed and should not be dismissed.

**KOSKIE  
MINSKY LLP**  
BARRISTERS & SOLICITORS

If you have any questions, please do not hesitate to contact the writer.

Yours truly,

**KOSKIE MINSKY LLP**



Demetrios Yiokaris

DY:je

Enclosures

- c Ashley Taylor - Stikeman Elliott LLP
- Edmond F.B. Lamek - Basken Martineau Dumoulin LLP
- Andrew Hatnay - Koskie Minsky LLP

(via Facsimile - w/o enclosure)

(via Facsimile - w/o enclosure)

K:\2009\090776\Correspondence\Sent 2011\Registrar - Nov 14 11.docx

**Tab 13:**

**Exhibit K**

**Pgs. 189-193**

This is *Exhibit "K"* referred to in the  
affidavit of  
ANDREA McKINNON  
sworn before me, this 8<sup>TH</sup>  
day of FEBRUARY, 2012



.....  
Demetrios Yfokaris  
A Commissioner for taking affidavits, etc.

**Demetrios Yiokaris**

---

**From:** Ashley Taylor <ATAYLOR@stikeman.com>  
**Sent:** November-28-11 1:23 PM  
**To:** Demetrios Yiokaris  
**Subject:** RE: Keith Carruthers, et al v. David J. McCallen, et al - Court File No.: CV-09-00388836-00000

Okay. Thanks.

Ashley John Taylor  
Tel : (416) 869-5236  
[ataylor@stikeman.com](mailto:ataylor@stikeman.com)

---

**From:** Demetrios Yiokaris [mailto:[dyiokaris@kmlaw.ca](mailto:dyiokaris@kmlaw.ca)]  
**Sent:** Monday, November 28, 2011 1:12 PM  
**To:** Edmond Lamek; Ashley Taylor  
**Cc:** Andrew J. Hatnay  
**Subject:** FW: Keith Carruthers, et al v. David J. McCallen, et al - Court File No.: CV-09-00388836-00000

Hi Ashley and Edmond,

Attached please find our November 16, 2011 letter and recent motion requisition form.

Unfortunately, the November 16, 2011 letter is insufficient and the Registrar requires us to bring a formal motion to stop this action from being administratively dismissed. Accordingly, we are booking a motion to seek an order directing the Registrar to not dismiss the action; however, we confirm that under the CCAA order, that action is stayed. The motion return dates requested are for late January 2012. We understand from the court, that the filing of the motion request form stays the administrative dismissal until the disposition of that motion.

We will distribute a draft order over the next week. At that time, if you object, please advise. If either of you intend to appear and are not available on the proposed return dates, we would be happy to adjourn the motion to a mutually convenient date.

Regards,

<<Registrar - Nov 14 11.pdf>> <<Requisition to Schedule Motion.pdf>>

STIKEMAN ELLIOTT LLP Barristers & Solicitors  
5300 Commerce Court West, 199 Bay Street, Toronto, ON, Canada M5L 1B9  
[www.stikeman.com](http://www.stikeman.com)

---

TORONTO MONTREAL OTTAWA CALGARY VANCOUVER NEWYORK LONDON SYDNEY

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---

**From:** Jalo Edwards  
**Sent:** November-28-11 1:06 PM  
**To:** 'jus.g.mag.csd.civilmotionsscheduling@ontario.ca'  
**Cc:** Demetrios Yiokaris  
**Subject:** Keith Carruthers, et al v. David J. McCallen, et al - Court File No.: CV-09-00388836-00000

I attach a Requisition to Schedule Motion. Thank you,

*Jalo Edwards*

Legal Assistant to Demetrios Yiokaris and  
Jody Brown

**Koskie Minsky LLP**

Barristers and Solicitors

Direct Line: 416-595-2143

Fax: 416-977-3316

Email: [jedwards@kmlaw.ca](mailto:jedwards@kmlaw.ca)

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**Demetrios Yiokaris**

---

**From:** Lamek\_Edmond F.B. <elamek@fasken.com>  
**Sent:** November-28-11 1:43 PM  
**To:** Demetrios Yiokaris; ataylor@stikeman.com  
**Cc:** Andrew J. Hatnay  
**Subject:** RE: Keith Carruthers, et al v. David J. McCallen, et al - Court File No.: CV-09-00388836-00000

I was only counsel to the Indalex Directors in respect of the CCAA proceedings. I do not act for them generally or in respect of your Action. As such, I don't believe that: (a) serving me qualifies as service on the director defendants; or (b) that I have any instructions or authority to oppose/consent or the like.

Thanks, E.

---

**From:** Demetrios Yiokaris [mailto:dyiokaris@kmlaw.ca]  
**Sent:** Monday, November 28, 2011 1:12 PM  
**To:** Lamek\_Edmond F.B.; ataylor@stikeman.com  
**Cc:** Andrew J. Hatnay  
**Subject:** FW: Keith Carruthers, et al v. David J. McCallen, et al - Court File No.: CV-09-00388836-00000

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We will distribute a draft order over the next week. At that time, if you object, please advise. If either of you intend to appear and are not available on the proposed return dates, we would be happy to adjourn the motion to a mutually convenient date.

Regards,

<<Registrar - Nov 14 11.pdf>> <<Requisition to Schedule Motion.pdf>>

---

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**Cc:** Demetrios Yiokaris  
**Subject:** Keith Carruthers, et al v. David J. McCallen, et al - Court File No.: CV-09-00388836-00000

I attach a Requisition to Schedule Motion. Thank you,



**Jalo Edwards**

Legal Assistant to Demetrios Yiokaris and  
Jody Brown

**Koskie Minsky LLP**

Barristers and Solicitors

Direct Line: 416-595-2143

Fax: 416-977-3316

Email: [jedwards@kmlaw.ca](mailto:jedwards@kmlaw.ca)

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Vancouver Calgary Toronto Ottawa Montréal Québec London Paris Johannesburg

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IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,  
R.S.C. C. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF  
INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADA INC. and  
NOVAR INC.

Court File No: CV-09-8122-00CL

Applicants

**ONTARIO**

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

Proceeding commenced at **Toronto**

**MOTION RECORD  
(RETURNABLE FEBRUARY 21, 2012)**

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