## PART I – Introduction

1) The response of the Retirees to Sun Indalex's application for leave to appeal attempts to minimize the important issues raised by the Court of Appeal's decision; but that attempt is unsuccessful. The rights of a creditor who is granted, and advances money to insolvent CCAA debtors in reliance upon, a Court-ordered super-priority DIP Charge is critical to restructurings of Canadian companies. The issues raised by the Court of Appeal's denial of that priority in favour of the Retirees' claims are equally critical because of their effects on restructurings, and because they include a novel "two-hats" theory of fiduciary duty for companies which are restructuring and a novel approach to the remedy of constructive trust to avoid the federal scheme of priorities that is inconsistent with the paramountcy of federal law. It is respectfully submitted that the Court of Appeal did not simply apply settled law, but fundamentally altered the law in a way that will have profound effects on insolvency proceedings and commercial lending. The issues require review and clarification by this Honourable Court.[1]

## PART II – The Facts

2) Sun Indalex disagrees with the Retirees' assertions of mischaracterization and inaccuracies in its application for leave to appeal. Two will be specifically addressed. First, contrary to paragraph 19 of the Retirees' Memorandum, the Retirees clearly attempted at the June 12, 2009 motion to reserve their rights to challenge the super-priority of further advances under the DIP Loan. The reasons of the CCAA Court in rejecting such a reservation and granting the additional super-priority DIP financing leave no doubt about the matter:

> [5] I had difficulty in dealing with **the request to reserve rights** for two reasons. First, the relief sought is inconsistent with the ability for a party, on a practical level, to reserve rights. **If the DIP Facility was to be increased with a reservation of rights, uncertainty would prevail if such a reservation was also granted.** Would it cause the DIP Lender to withhold advances? or, if advances were made – **would they have priority**?[2] (emphasis added)

---

[1] Capitalized terms in this Reply have the meaning given them in Sun Indalex's Memorandum of Argument on its leave to appeal application.

[2] Endorsement of Morawetz J. dated June 15, 2009, at para. 5, Application Record, Vol. II, Tab 5(H), p. 383

3) Second, the Retirees state at paragraphs 3, 9-11 and 39 in their Memorandum that the Executive Plan was "underfunded" as if that term denoted wrongdoing. The CCAA Debtors had made all required contributions to the Executive Plan to the date of insolvency, including all current service and special payments.[3] The plans were "underfunded" only in the sense that even though all contributions lawfully required had been made, they may not yield sufficient funds to meet the pension plan's liabilities upon it being wound-up. No underfunding resulted from wrongdoing, the CCAA proceeding, or the granting of the DIP Charge. The Executive Plan was affected as a creditor when the CCAA Debtors became insolvent and unable to meet their obligations. It shared this situation with all the other creditors of the CCAA Debtors.

**PART III – Argument**

4) In paragraph 5 of their Memorandum, the Retirees create a false dichotomy between the rights of the original DIP Lender to assert the super-priority DIP Charge and the rights being asserted by Sun Indalex as the lead creditor of the US Debtors. The original DIP Lenders were not repaid by the CCAA Debtors. The US Debtors advanced funds under a guarantee to pay the original DIP Lenders and by court order were subrogated to the rights of the original DIP Lenders. Accordingly, denial of the paramountcy of the DIP super-priority charge in this case raises the very same issues of importance as would arise if the original DIP Lenders were claiming.

5) Contrary to paragraphs 8 and 13 of the Retirees' Memorandum, the Court of Appeal's decision does not rest on well-settled law of fiduciary duty. The Court of Appeal's finding of a breach of fiduciary duty instead rests on a novel "two-hats" theory - previously, the law had been understood to provide that when an employer is carrying out functions that do not involve the actual administration of the pension plan, it was not functioning as administrator and so did not owe fiduciary duties to pensioners.[4] By contrast, here the Court of Appeal held that decisions

---

[3] Reasons of the Court of Appeal for Ontario, dated April 7, 2011 at para. 39 ("Appeal Reasons"), Application Record for Leave to Appeal of the Applicant, Sun Indalex Finance, LLC ("Application Record"), Vol. I, Tab 3(B), p. 27

[4] *Imperial Oil Ltd. v. Ontario (Supt. of Pensions)* (1995), 18 C.C.P.B. 198 (Ont. Pension Comm.), Reply Record of the Applicant, Sun Indalex Finance, LLC ("Reply Record"), Tab 2; *OMERS Sponsors Corp. v . OMERS Administration Corp.* (2008), 65 C.C.P.B. 187 (Ont. S.C.J.), Reply Record, Tab 3

concerning the insolvency of the CCAA Debtors, although not decisions in the administration of the Plans, nevertheless "**had the potential to affect the Plans beneficiaries' rights**", and therefore the employer wore "two hats" and thus had to fulfill fiduciary duties to pensioners in carrying out corporate finance functions required to deal with the insolvency.[5]

6) None of the acts that the Court of Appeal found to amount to a breach of the administrator's fiduciary duties involved the administration of the pension plans. All of them occurred after the CCAA Debtors were insolvent, and after the Executive Plan was already underfunded. Paragraphs 9 and 10 of the Retirees' Memorandum list the breaches of fiduciary duty allegedly committed by Indalex during the CCAA proceedings, namely: commencing CCAA proceedings knowing the Executive Plan was "underfunded"; not funding the deficit in the Executive Plan; not acting to ensure the Retirees would receive their full pension entitlements; obtaining a CCAA order with the DIP Charge without specific notice to Retirees; selling assets without making specific provisions for funding the Executive Plan deficit; and, attempting to distribute sale proceeds in accordance with lawful priorities under bankruptcy law. But what the Court of Appeal overlooked is that the Executive Plan was underfunded due to the insolvency of Indalex and not due to the alleged breaches or any act in the administration of the Executive Plan. Like all unsecured creditors of an insolvent company, pensioners faced losses upon the insolvency of their debtor. Upon the insolvency, the CCAA Debtors could not have paid funds into the Executive Plan (other than future normal contributions which they paid) without committing: (i) an obvious and unlawful preference for Retirees to the detriment of other creditors; (ii) a breach of the requirement articulated in *BCE Inc.* to act in the best interests of the corporation as a whole; and (iii) a breach of the stay provisions of the Initial Order that precluded payment of creditors except for the provision of new goods and services.[6]

7) Contrary to the Retirees' assertions at paragraphs 39 through 44 of their Memorandum, Sun Indalex did not misstate the case law regarding remedies for breach of fiduciary duties. *Hodgkinson v. Simms* does indeed say that proof of prejudice or loss is required as a basis for

---

[5] Appeal Reasons at para. 119, 129 and 132 (quote to para. 132, emphasis added), Application Record, Vol. I, Tab 3(B), pp. 36-38;

[6] Initial Order at paras. 7(a), 9(b) and 11(a), Application Record, Vol. II, Tab 5(E), pp. 349-51; *BCE Inc., Re*, 2008 SCC 69 at paras. 83-88, Book of Authorities of the Applicant, Sun Indalex Finance, LLC ("Authorities"), Tab 13.

recovery for breach of fiduciary duty, citing the "long-standing equitable principle that where the plaintiff has made out a case of non-disclosure **and the loss occasioned thereby is established**, the onus is on the defendant to prove that the innocent victim would have suffered the same loss regardless of the breach".[7] The only loss the Retirees point to is "the loss of one-half and two-thirds (sic) of their monthly pension benefits due to the underfunding" of the Executive Plan (para. 39). Yet, as noted above "underfunding" arose from the insolvency and was not occasioned or even alleged to be occasioned by the alleged breaches of fiduciary duty.

8) There can be no doubt as to the applicability of the cases of *Barnaby v. Touhey* and *Canada (Attorney General) v. Confederation Life* that Sun Indalex correctly cited at paragraph 41 of its Memorandum of Argument. Both cases note the appropriateness of limits on the imposition of constructive trusts to alter priorities in insolvency proceedings. Unjust enrichment is the doctrinal underpinning of a constructive trust. There was no unjust enrichment here. Pensioners' losses arose from the inability of Indalex to meet its obligations to all of its creditors and not from anything done or not done during the CCAA process that enriched the DIP Lender, to whose rights the US Debtors were subrogated, or deprived pensioners of funds to which they were entitled. The very acts of the Indalex board complained of allowed the business to be sold as a going concern, saved jobs, and provided at least an opportunity to have the pensions assumed by the buyer (and hence was supported by the USW). The Court of Appeal did not consider the harm of re-ordering priorities with a constructive trust absent unjust enrichment, and the precedent set will likely harm lending, limit the availability of DIP financing generally, and may impair the credibility and assumed reliability of Canadian Court Orders which grant super priority.

9) Finally, the Retirees point to amendments to the CCAA to say that notice is now required to all trust beneficiaries before a super-priority DIP charge can be granted. But this highlights the importance of the issues herein, because it is necessary to determine what trust claims can exist before a determination can be made as to whom to give notice. The Retirees repeat several times that they were **not** held to be beneficiaries of a deemed trust but, rather, received a remedial constructive trust at the very end of the proceedings. The requirement of notice to trust

---

[7] *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 440-41 and 444 (quote to 441) ("*Hodgkinson*"), Authorities, Tab 14.

beneficiaries at the outset of the proceeding can hardly be complied with if *ex post facto* constructive trusts can be imposed at the end of the proceedings in the manner suggested by the Court of Appeal.

10) Sun Indalex respectfully submits that leave to appeal be granted with costs.

September 14, 2011

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

Benjamin Zarnett

Fred Myers

Brian Empey

Counsel to Sun Indalex Finance, LLC

\6004093.8