S.C.C. File No. 34308

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

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, 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.

B E T W E E N :

SUN INDALEX FINANCE, LLC

APPLICANT
(Respondent)

- and -

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, GEORGE L. MILLER, THE CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATES OF THE US INDALEX DEBTORS, and THE MONITOR, FTI CONSULTING CANADA ULC

RESPONDENTS
(Appellants/Respondents)

- and -

MORNEAU SOBECO LIMITED PARTNERSHIP and THE SUPERINTENDENT OF FINANCIAL SERVICES

INTERVENERS
(Interveners)

REPLY OF THE APPLICANT, SUN INDALEX FINANCE, LLC TO THE RESPONSE OF THE UNITED STEELWORKERS TO THE APPLICATION FOR LEAVE TO APPEAL
(pursuant to Sections 40 and 43 of the *Supreme Court Act*, R.S.C. 1985, c. S-26 and Rule 28 of the *Rules of Supreme Court of Canada*, SOR/2002-156)

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PART I – Introduction

1) In its Memorandum of Argument, the USW has failed to refute in any substantial way the principal submission of Sun Indalex Finance, LLC ("Sun Indalex") that the Court of Appeal's decision raises issues of national importance that merit consideration by this Honourable Court. Instead, the USW predominantly argues that on the merits the decision below is correct. While Sun Indalex disagrees with the USW's arguments on the merits, Sun Indalex respectfully submits that the very arguments made by the USW about the merits underscore the importance of the issues and the need for guidance by this Honourable Court as to the state of the law on the important issues raised by the case across Canada.[1]

PART II – The Facts

2) There are two important factual assertions by the USW that need to be addressed. The first is the USW's assertion, at paragraph 9 of its Memorandum, that the wind-up deficit of the Salaried Plan is known. The USW admits that wind-up deficit is subject to "normal and predictable adjustments", but this nomenclature disguises the fact that such "adjustments" - including for interest rate volatility and future annuity market pricing - necessarily mean that the amount of the deficit cannot be known with certainty on the date of the wind-up of the plan and may fluctuate significantly thereafter. In any event, the USW has not cited any evidence of there being a finalized, known amount for the wind-up deficit in this case even several years after the winding-up of the relevant pension plan.

3) The second factual matter of note is the USW's assertion, at paragraphs 38, 41 and 45 of its Memorandum, that paramountcy was not raised before the CCAA Court when the DIP Loan was granted. This is clearly incorrect. First, there is no reading of the plain wording of the DIP priority provisions of the Initial Order of Morawetz J. other than that the DIP Charge was to have priority under the CCAA over "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise".[2] This is a reference to the potential for conflicting

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[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] Amended and Restated Initial Order dated April 8, 2009, at para. 45, Application Record for Leave to Appeal of the Applicant, Sun Indalex Finance, LLC ("Application Record"), Vol. II, Tab 5(E), p.363

priorities and it resolves those priorities in favour of the paramountcy of the DIP Loan under the federal CCAA. Super-priority is only required where other charges would conflict and provide a higher priority claim for other creditors. Second, in his Endorsement dated June 15, 2009 regarding the motion to increase the amount of the DIP Loan, the issue of whether the Retirees and others could reserve their rights (whether under provincial legislation or otherwise) to later challenge the super-priority status of the DIP Loan was squarely before the Court and was rejected. Justice Morawetz held:

> [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?**
>
> [...]
>
> [7] In the face of no alternative suggestions or proposal – uncertainty would again prevail. At this stage of the CCAA proceedings additional uncertainty does not represent a positive development.[3] (emphasis added)

PART III – Arguments

4) Between paragraphs 11 and 26 of its Memorandum, the USW presents arguments on the interpretation of s. 57(4) of the PBA, and advocates for the correctness of the Court of Appeal's interpretation of the central interpretive question – does s. 57(4) of the PBA provide for a provincial deemed trust over the entire wind-up deficit of a pension plan or only over pension contributions that have been left unpaid as of the date of the winding-up? The USW's arguments demonstrate both the novelty of the Court of Appeal's decision and the uncertainty created by its decision.

5) Although the USW makes numerous assertions, at paragraphs 12, 14, 20, 24 and 42 of its Memorandum, that the Court of Appeal's interpretation of the PBA was not the radical shift in the interpretation of s. 57(4) that it actually is, the USW argument does not bear this out. Although the USW purports to state that the Court of Appeal "merely enforced existing law"

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[3] Endorsement of Morawetz J. dated June 15, 2009, at paras. 5 & 7, Application Record, Vol. II, Tab 5(H), p. 383

(para. 4), the USW then states that this case "is the first instance in which the Court was asked to consider the interaction of the *PBA* and *CCAA* when the employer under *CCAA* proceedings had already wound up the pension plan, crystallized the wind-up liability and was not subject to either a voluntary assignment or petition into bankruptcy during the CCAA proceeding" (para. 14), and it, among other things, attempts to distinguish prior case law reaching contrary conclusions to those the Court of Appeal reached. But the distinctions are more apparent than real, and the USW argument does not address the point that the Court of Appeal's decision has overturned the longstanding understanding of the insolvency bar and the pension industry that s. 57(4) did not include a provincial deemed trust for the wind-up deficit in a pension plan.[4]

6) Although the USW suggest that Sun Indalex mischaracterizes or misstates the Court of Appeal's findings on the constructive trust issue, there is no merit to these allegations.

7) Indeed, it is the USW that has misunderstood important aspects of this case. For example, at paragraph 34 of its Memorandum, it argues that Ontario's PPSA subordinates secured claims against the cash resulting from the sale of assets that is now held by the Monitor to the priority of deemed trusts. However, this ignores para. 11 of the Approval and Vesting Order, which specifically preserved against the cash proceeds from the sale all priorities that existed prior to the assets being sold, converted to cash and placed with the Monitor.[5] The purpose of the Approval and Vesting Order was to facilitate the sale of the debtors' assets to maximize recovery while preserving the *status quo* among creditors.

8) With respect to its arguments about the doctrine of paramountcy, and especially in light of the lack of merit in the USW's assertions that the CCAA Court did not specifically address the priority of the DIP Loan in case of conflict, the USW's arguments clearly demonstrate the need for guidance by this Honourable Court on the applicability of the paramountcy doctrine. The Court of Appeal's finding that the CCAA Debtors failed to demonstrate that a conflict exists between a DIP charge granted under federal law and a deemed trust created by provincial law is

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[4] Kevin Marron, "Pension Time Bomb" *Lexpert* 12:9 (July/August 2011) 62 at 63, Reply Record of the Applicant, Sun Indalex Finance, LLC ("Reply Record"), Tab 2, p. 63; Jeff Gray, "Pension tension and the fight over Indalex" *The Globe and Mail* (8 June 2011) B10, Reply Record, Tab 3, p. 1

[5] Approval and Vesting Order dated July 20, 2009 at para. 14 ("Approval and Vesting Order"), Application Record, Vol. II, Tab 5(J), pp. 394-95

especially problematic since the CCAA Court Orders grant the DIP Lender a super-priority right to receive funds while the Court of Appeal purports give the same funds to pensioners on the basis of a provincial deemed trust. Two regimes provide that the same money goes to two different people - they are in conflict.

9) Finally, the USW submits that the Court of Appeal did not err when it refused to apply the scheme of priorities under the BIA in this case. In paragraph 55 of its factum, the USW sets out a false dichotomy between cases where a debtor's assets are sold on a going concern basis and cases where a piecemeal liquidation arises. There is no support for a different outcome depending on the type of sale that occurred. In *Century Services*, this Honourable Court ruled that once assets are sold and converted to cash, absent a viable CCAA plan, the scheme of distribution set out in the BIA must be applied to distribute the proceeds.[6] As noted in *Ivaco* (a case involving a going concern sale) as adopted and approved in *Century Services*, once a CCAA debtor's assets are sold and all that remains of the debtor's business is a pool of cash, absent a plan of arrangement among creditors, the CCAA is spent and the distribution of the cash must occur under the BIA.[7] Whether the cash was generated by a going concern sale or a piecemeal liquidation has no bearing on the key point that only the BIA has provisions that govern the distribution of cash proceeds of an insolvent debtor's assets.

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[6] *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 at para. 80 ("*Century Services*"), Book of Authorities of the Applicant, Sun Indalex Finance, LLC ("Authorities"), Tab 1

[7] *Ivaco Inc., Re* (2006), 83 O.R. (3d) 108 at paras. 76-77 (C.A.), leave to appeal to S.C.C. granted, (2007), 370 N.R. 395 (note) (S.C.C.), Reply Record, Tab 3 and Authorities, Tab 5; *Century Services* at para. 78, Authorities, Tab 1

PART IV – Conclusion

10) The Court of Appeal's decision has created uncertainty in the law and has significant ramifications across the nation on important issues, and should be reviewed by this Honourable Court.

September 14, 2011

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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