

S.C.C. FILE NO. 34308

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

BETWEEN:

SUN INDALEX FINANCE LLC

APPELLANT

- and -

**UNITED STEEL WORKERS - CARRUTHERS, KEITH - 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**

RESPONDENTS

(style of cause continued at p. 2)

INTERVENER MOTION

(Canadian Association of Insolvency and Restructuring Professionals)
(Pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada*)

Éric Vallières
Yoine Goldstein
Alexandre Forest
McMillan LLP
1000 Sherbrooke St. West
Montreal QC H3A 3G4
Telephone: 514.987.5068
Fax: 514.987.1213
Email: eric.vallieres@mcmillan.ca
**Counsel for the Canadian Association of
Insolvency and Restructuring Professionals**

Jeffrey Beedell
McMillan LLP
Suite 300 – 50 O'Connor Street
Ottawa ON K1P 6L2
Telephone: 613.232.7171
Fax: 613.231.3191
Email: jeff.beedell@mcmillan.ca
Agent

AND BETWEEN:

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

APPELLANT

- and -

**UNITED STEEL WORKERS - CARRUTHERS, KEITH - LEON KOZIEROK,
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BERTRAM MCBRIDE, MAX DEGEN, EUGENE D'IORIO, NEIL FRASER, RICHARD
SMITH, ROBERT LECKIE AND FRED GRANVILLE**

RESPONDENTS

AND BETWEEN:

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

APPELLANT

- and -

**UNITED STEEL WORKERS - CARRUTHERS, KEITH - LEON KOZIEROK,
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BERTRAM MCBRIDE, MAX DEGEN, EUGENE D'IORIO, NEIL FRASER, RICHARD
SMITH, ROBERT LECKIE AND FRED GRANVILLE**

RESPONDENTS

AND BETWEEN:

UNITED STEELWORKERS

APPELLANT

- and -

**MORNEAU SHEPELL LTD. (FORMERLY KNOWN AS MORNEAU SOBECO
LIMITED PARTNERSHIP) - SUPERINTENDENT OF FINANCIAL SERVICES**

RESPONDENTS

- 3 -

**Counsel for the Appellant and Respondent,
FTI Consulting Canada ULC, in its capacity
as Court-Appointed Monitor of Indalex
Limited, on behalf of Indalex Limited:**

**Ashley John Taylor
David R. Byers
Dan Murdoch
Lesley Mercer
STIKEMAN ELLIOTT LLP
5300 Commerce Court West
199 Bay St.
Toronto, Ontario
M5L 1B9
Telephone: (416) 869-5236
FAX: (416) 947-0866
E-mail: ataylor@stikeman.com**

Agent:

**Nicholas Peter McHaffie
STIKEMAN ELLIOTT LLP
1600 - 50 O'Connor Street
Ottawa, Ontario
K1P 6L2
Telephone: (613) 566-0546
FAX: (613) 230-8877
E-mail: nmchaffie@stikeman.com**

**Counsel for the Appellant, Sun Indalex
Finance LLC:**

**Benjamin Zarnett
Fred Myers
Brian Empey
GOODMANS LLP
3400 - 333 Bay Street
Toronto, Ontario
M5H 2S7
Telephone: (416) 597-4204
FAX: (416) 979-1234
E-mail: bzarnett@goodmans.ca**

Agent:

**Dougald E. Brown
NELLIGAN O'BRIEN PAYNE LLP
1500 - 50 O'Connor St.
Ottawa, Ontario
K1P 6L2
Telephone: (613) 231-8210
FAX: (613) 788-3661
E-mail: dougald.brown@nelligan.ca**

**Counsel for the Appellant, George L. Miller,
The Chapter 7 Trustee of the Bankruptcy
Estates of the US Indalex Debtors:**

**Harvey G. Chaiton
George Benchetrit
CHAITONS LLP
185 Sheppard Avenue West
Toronto, Ontario
M2N 1M9
Telephone: (416) 218-1129
FAX: (416) 222-8402
E-mail: harvey@chaitons.com**

Agent:

**Dougald E. Brown
NELLIGAN O'BRIEN PAYNE LLP
1500 - 50 O'Connor St.
Ottawa, Ontario
K1P 6L2
Telephone: (613) 231-8210
FAX: (613) 788-3661
E-mail: dougald.brown@nelligan.ca**

- 4 -

**Counsel for the Appellant and Respondent,
United Steelworkers:**

Darrell L. Brown
SACK GOLDBLATT MITCHELL LLP
20 Dundas Street West
Suite 1100
Toronto, Ontario
M5G 2G8
Telephone: (416) 979-4050
FAX: (416) 591-7333
E-mail: dbrown@sgmlaw.com

**Counsel for the Respondents, 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:**

Andrew J. Hatnay
KOSKIE MINSKY LLP
900-20 Queen St. West
Box 52
Toronto, Ontario
M5H 3R3
Telephone: (416) 595-2083
FAX: (416) 204-2872

Agent:

Colleen Bauman
**SACK GOLDBLATT MITCHELL
LLP**
500 - 30 Metcalfe St.
Ottawa, Ontario
K1P 5L4
Telephone: (613) 235-5327
FAX: (613) 235-3041
E-mail: cbauman@sgmlaw.com

Agent:

Henry S. Brown, Q.C.
**GOWLING LAFLEUR HENDERSON
LLP**
2600 - 160 Elgin St
P.O. Box 466, Stn "D"
Ottawa, Ontario
K1P 1C3
Telephone: (613) 233-1781
FAX: (613) 788-3433
E-mail: henry.brown@gowlings.com

- 5 -

Counsel for the Respondent, Keith Carruthers:

Andrew J. Hatnay
Demetrios Yiokaris
KOSKIE MINSKY LLP
 900-20 Queen St. West
 Box 52
 Toronto, Ontario
 M5H 3R3
 Telephone: (416) 595-2083
 FAX: (416) 204-2872

Counsel for the Respondent, Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership)

Hugh O'Reilly
Amanda Darrach
CAVALLUZZO HAYES SHILTON
McINTYRE & CORNISH LLP
 474 Bathurst Street
 Suite 300
 Toronto, Ontario
 M5T 2S6
 Telephone: (416) 964-5514
 Fax: (416) 964-5895
 Email: horeilly@cavalluzzo.com

Counsel for the Respondent, Superintendent of Financial Services:

Mark Bailey
Financial Services Commission of Ontario
Legal Services Branch
 5160 Yonge Street
 17th floor, Box 85
 Toronto, Ontario
 M2N 6L9
 Telephone: (416) 590-7555
 FAX: (416) 590-7556
 E-mail: mark.bailey@fscso.gov.on.ca

Agent:

Henry S. Brown, Q.C.
GOWLING LAFLEUR HENDERSON
LLP
 2600 - 160 Elgin St
 P.O. Box 466, Stn "D"
 Ottawa, Ontario
 K1P 1C3
 Telephone: (613) 233-1781
 FAX: (613) 788-3433
 E-mail: henry.brown@gowlings.com

Agent:

Marie-France Major
Supreme Advocacy LLP
 397 Gladstone Avenue
 Suite 100
 Ottawa, Ontario
 Telephone: (613) 695-8855
 Fax: (613) 695-8580
 Email: mfmajor@supremeadvocacy.ca

Agent:

Robert E. Houston, Q.C.
Burke-Robertson
 70 Gloucester Street
 Ottawa, ON K2P 0A2
 Telephone: (613) 236-9665
 Fax: (613) 235-4430
 Email: rhouston@burkerobertson.com

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(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

SUN INDALEX FINANCE LLC

APPELLANT

- and -

**UNITED STEEL WORKERS - CARRUTHERS, KEITH - LEON KOZIEROK,
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RESPONDENTS

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MONITOR OF INDALEX LIMITED, ON BEHALF OF INDALEX LIMITED**

APPELLANT

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- and -

**MORNEAU SHEPELL LTD. (FORMERLY KNOWN AS MORNEAU SOBECO
LIMITED PARTNERSHIP) - SUPERINTENDENT OF FINANCIAL SERVICES**

RESPONDENTS

NOTICE OF MOTION FOR INTERVENTION TO A JUDGE
(Canadian Association of Insolvency and Restructuring Professionals)
(Pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada*)

TAKE NOTICE that the Canadian Association of Insolvency and Restructuring Professionals ("CAIRP") hereby applies to a Judge pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156, as amended, for the following order(s):

1. leave to intervene in this Appeal;
2. leave to file a factum not exceeding 20 pages in length;
3. leave to make oral argument not exceeding 20 minutes in length at the hearing; and
4. such further or other Order as the Judge may deem appropriate.

AND FURTHER TAKE NOTICE that the motion shall be made on the following grounds:

CAIRP Mandate and Interest in this Appeal

1. CAIRP is Canada's national professional association representing bankruptcy trustees, monitors, court-appointed receivers, insolvency advisers and turn-around consultants. It is a not-for-profit and non-partisan corporation designed to advance the practice of insolvency administration in Canada, as well as the public interest in connection with insolvency matters.
2. CAIRP's membership includes virtually all chartered accountants who act as insolvency professionals in Canada. Members of CAIRP are involved in every significant corporate restructuring in Canada whether as trustee, receiver, agent, monitor or consultant or all of these capacities and they handle almost all restructurings and bankruptcies in Canada, no matter how big or small.
3. Since its inception in 1979, CAIRP has been at the forefront of the development and the growth of the restructuring industry in Canada. As the voice of the Canadian bankruptcy trustees community regarding insolvency legislative policy issues, CAIRP's stated mission specifically includes to "*advocate for a fair, transparent and effective system of insolvency and restructuring administration throughout Canada*".
4. As part of its mission to be the voice of the industry in major insolvency policy issues, CAIRP has also in the past sought intervener status in cases of public importance or of national interest for the insolvency community, in particular where it believed that the Court could benefit from CAIRP's unique expertise and day-to-day practical experience with insolvency matters. For example, CAIRP intervened before this Court in 2009 in *Quebec (Revenu) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286, a case which dealt with the priorities associated with QST-GST deemed trusts in bankruptcies and thereby called into play major practical considerations for bankruptcy trustees across the country.
5. CAIRP is constantly involved with the government in the various reforms of bankruptcy and insolvency laws. One of CAIRP's top priorities in recent years has been the legislative reform of the federal insolvency and restructuring regimes which came into

force in 2007 through 2009, and in which the association was heavily involved at each and every stage.

6. CAIRP has a clear and direct interest in the outcome of this appeal of the decision of the Ontario Court of Appeal issued April 7, 2011 ("Appeal Decision") and, in particular, an interest in the potentially far-reaching adverse consequences of the decision and the legal uncertainty created thereby, primarily in the areas of:

- (a) priorities among creditors generally, not only between Debtor-In-Possession lenders and other stakeholders but also the priority of court order charges covering fees and costs of the restructuring professionals involved;
- (b) the recent 2007-2009 legislative reform;
- (c) risk of increased litigation in restructuring processes; and
- (d) credit granting and risk assessment, both within restructuring proceedings and in the ordinary course of lending in Canada;

CAIRP's Intended Position and Proposed Submissions

7. This appeal flows from four leave applications granted in SCC File No. 34308. CAIRP intends to make no submissions concerning the United Steelworkers' appeal of the costs endorsement issued September 7, 2011 by the Ontario Court of Appeal. It seeks only to make submissions on the appeals brought by the Sun Indalex, the Chapter 7 Trustee and the Monitor (herein called the "Appellants")
8. If allowed to intervene in the present matter, CAIRP will support the Appellants' position by providing CAIRP's professional perspective on the issues arising from the Appeal Decision.

9. More specifically and as outlined in the supporting affidavit of Mark Yakabuski, CAIRP is of the view and proposes to make submissions that the Appeal Decision:
- (a) instills uncertainty in the conduct of restructuring processes and the rights and duties of insolvency professionals (including, for example, the risk of court ordered charges, such as administrative charges, being later varied or retracted thereby casting doubt on whether CAIRP members can rely on the protection of the court order to be paid);
 - (b) defeats major policy decisions taken by Parliament in the course of the 2007-2009 legislative reform;
 - (c) exposes restructuring processes to an increased risk of litigation; and
 - (d) casts some uncertainty over the credit-granting and risk assessment by lenders, both within restructuring proceedings and in the ordinary course of lending in Canada.

Useful and Different Assistance offered by CAIRP

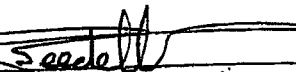
10. CAIRP will provide a unique perspective and expertise in this appeal because CAIRP:
- (a) represents diverse categories of stakeholders, all involved in the insolvency and bankruptcy proceedings and in restructurings;
 - (b) has particular experience and insights in respect of practice and procedures in insolvency and restructuring matters, including, inter alia, questions of priorities, as it advocates for a fair, transparent and effective system of insolvency and restructuring administration throughout Canada;
 - (c) has expertise with respect to financing in general, particularly within restructuring proceedings; and
 - (d) has members that stand to be directly and professionally affected by the decision of this Court.

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11. Accordingly the wealth of experience and practical knowledge of CAIRP makes it a highly qualified intervener to usefully inform this Honourable Court on how the Appeal Decision's interpretation of the *CCAA* will have a direct impact on the daily practice of insolvency professionals and affect the ability of corporations to restructure and to survive insolvency in Canada.
12. CAIRP's proposed submissions and perspective on the legal issues will be broader and more non-partisan than those of the main parties – seeking to assist this Court by highlighting the adverse consequences of the Appeal Decision on insolvency and restructuring proceedings.
13. The proposed intervention will not cause delay or any prejudice to the main parties.
14. Such further and other grounds as counsel may advise and this Honourable Court may permit.

Dated at the City of Montreal, Province of Quebec, this 17th day of February, 2012.

SIGNED BY:


 as agent for

Counsel for the Applicant
Éric Vallières
Yoine Goldstein
Alexandre Forest
McMillan LLP
 1000 Sherbrooke St. West
 Montreal QC H3A 3G4
 Telephone: 514.987.5068
 Fax: 514.987.1213
 Email: eric.vallieres@mcmillan.ca

Agent
Jeffrey Beedell
McMillan LLP
 Suite 300 – 50 O'Connor Street
 Ottawa ON K1P 6L2
 Telephone: 613.232.7171
 Fax: 613.231.3191
 Email: jeff.beedell@mcmillan.ca
<mailto:jbeedell@mcmillan.ca>

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COPIES TO:

**Counsel for the Appellant and Respondent,
FTI Consulting Canada ULC, in its
capacity as Court-Appointed Monitor of
Indalex Limited, on behalf of Indalex
Limited:**

**Ashley John Taylor
David R. Byers
Dan Murdoch
Lesley Mercer
STIKEMAN ELLIOTT LLP
5300 Commerce Court West
199 Bay St.
Toronto, Ontario
M5L 1B9
Telephone: (416) 869-5236
FAX: (416) 947-0866
E-mail: ataylor@stikeman.com**

**Counsel for the Appellant, Sun Indalex
Finance LLC:**

**Benjamin Zarnett
Fred Myers
Brian Empey
GOODMANS LLP
3400 - 333 Bay Street
Toronto, Ontario
M5H 2S7
Telephone: (416) 597-4204
FAX: (416) 979-1234
E-mail: bzarnett@goodmans.ca**

Agent:

**Nicholas Peter McHaffie
STIKEMAN ELLIOTT LLP
1600 - 50 O'Connor Street
Ottawa, Ontario
K1P 6L2
Telephone: (613) 566-0546
FAX: (613) 230-8877
E-mail: nmchaffie@stikeman.com**

Agent:

**Dougald E. Brown
NELLIGAN O'BRIEN PAYNE LLP
1500 - 50 O'Connor St.
Ottawa, Ontario
K1P 6L2
Telephone: (613) 231-8210
FAX: (613) 788-3661
E-mail: dougald.brown@nelligan.ca**

Counsel for the Appellant, George L. Miller, The Chapter 7 Trustee of the Bankruptcy Estates of the US Indalex Debtors:

Harvey G. Chaiton
George Benchetrit
CHAITONS LLP
185 Sheppard Avenue West
Toronto, Ontario
M2N 1M9
Telephone: (416) 218-1129
FAX: (416) 222-8402
E-mail: harvey@chaitons.com

Counsel for the Appellant and Respondent, United Steelworkers:

Darrell L. Brown
SACK GOLDBLATT MITCHELL LLP
20 Dundas Street West
Suite 1100
Toronto, Ontario
M5G 2G8
Telephone: (416) 979-4050
FAX: (416) 591-7333
E-mail: dbrown@sgmlaw.com

Agent:

Dougald E. Brown
NELLIGAN O'BRIEN PAYNE LLP
1500 - 50 O'Connor St.
Ottawa, Ontario
K1P 6L2
Telephone: (613) 231-8210
FAX: (613) 788-3661
E-mail: dougald.brown@nelligan.ca

Agent:

Colleen Bauman
SACK GOLDBLATT MITCHELL LLP
500 - 30 Metcalfe St.
Ottawa, Ontario
K1P 5L4
Telephone: (613) 235-5327
FAX: (613) 235-3041
E-mail: cbauman@sgmlaw.com

9

- 9 -

**Counsel for the Respondents, 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:**

Agent:

**Andrew J. Hatnay
KOSKIE MINSKY LLP
900-20 Queen St. West
Box 52
Toronto, Ontario
M5H 3R3
Telephone: (416) 595-2083
FAX: (416) 204-2872**

**Henry S. Brown, Q.C.
GOWLING LAFLEUR HENDERSON
LLP
2600 - 160 Elgin St
P.O. Box 466, Stn "D"
Ottawa, Ontario
K1P 1C3
Telephone: (613) 233-1781
FAX: (613) 788-3433
E-mail: henry.brown@gowlings.com**

**Counsel for the Respondent, Keith
Carruthers:**

Agent:

**Andrew J. Hatnay
Demetrios Yiokaris
KOSKIE MINSKY LLP
900-20 Queen St. West
Box 52
Toronto, Ontario
M5H 3R3
Telephone: (416) 595-2083
FAX: (416) 204-2872**

**Henry S. Brown, Q.C.
GOWLING LAFLEUR HENDERSON
LLP
2600 - 160 Elgin St
P.O. Box 466, Stn "D"
Ottawa, Ontario
K1P 1C3
Telephone: (613) 233-1781
FAX: (613) 788-3433
E-mail: henry.brown@gowlings.com**

10

- 10 -

**Counsel for the Respondent, Morneau
Shepell Ltd. (formerly known as Morneau
Sobeco Limited Partnership)**

Agent:

**Hugh O'Reilly
Amanda Darrach
CAVALLUZZO HAYES SHILTON
McINTYRE & CORNISH LLP
474 Bathurst Street
Suite 300
Toronto, Ontario
M5T 2S6
Telephone: (416) 964-5514
Fax: (416) 964-5895
Email: horeilly@cavalluzzo.com**

**Marie-France Major
Supreme Advocacy LLP
397 Gladstone Avenue
Suite 100
Ottawa, Ontario
Telephone: (613) 695-8855
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca**

**Counsel for the Respondent,
Superintendent of Financial Services:**

Agent

**Mark Bailey
Financial Services Commission of Ontario
Legal Services Branch
5160 Yonge Street
17th floor, Box 85
Toronto, Ontario
M2N 6L9
Telephone: (416) 590-7555
FAX: (416) 590-7556
E-mail: mark.bailey@fsc.gov.on.ca**

**Robert E. Houston, Q.C.
Burke-Robertson
70 Gloucester Street
Ottawa, ON K2P 0A2
Telephone: (613) 236-9665
Fax: (613) 235-4430
Email: rhouston@burkerobertson.com**

NOTICE TO THE RESPONDENT TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.

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APPELLANT

- and -

**MORNEAU SHEPELL LTD. (FORMERLY KNOWN AS MORNEAU SOBECO
LIMITED PARTNERSHIP) - SUPERINTENDENT OF FINANCIAL SERVICES**

RESPONDENTS

AFFIDAVIT OF MARK YAKABUSKI
(Sworn February 16, 2012)

I, Mark Yakabuski, of the Township of Madawaska Valley, in the Province of Ontario,
MAKE OATH AND SAY:

CAIRP Mandate, Experience, and Interest in the Appeal

1. I am the President of the Canadian Association of Insolvency and Restructuring Professionals ("CAIRP").
2. CAIRP (www.cairp.ca) is Canada's national professional association representing bankruptcy trustees, monitors, court-appointed receivers, insolvency advisers and turn-around consultants.
3. CAIRP, which was founded in 1979 as a not-for-profit and non-partisan corporation, is designed to advance the practice of insolvency administration in Canada, as well as the public interest in connection with insolvency matters.
4. CAIRP's membership includes virtually all chartered accountants who act as insolvency professionals in Canada. CAIRP's 916 general members handle virtually all restructurings and bankruptcies taking place in Canada, no matter how big or how small. CAIRP also has 596

associate members in the “articling”, “life” and “corporate” membership categories who also contribute to the breadth and unique expertise of CAIRP.

5. CAIRP respectfully submits that it is, and has been for many years, Canada’s leading association of insolvency and restructuring professionals. The association also has national coverage and representation, with a significant and meaningful presence in all regions of Canada.

6. Since its inception in 1979, CAIRP has witnessed and has been at the forefront of the development and the growth of the restructuring industry in Canada. Indeed one of the most fundamental elements of CAIRP’s role and mission is to be the voice of the Canadian bankruptcy trustees community regarding insolvency legislative policy issues. CAIRP’s stated mission specifically includes to “*advocate for a fair, transparent and effective system of insolvency and restructuring administration throughout Canada*”.

7. To this end, CAIRP’s representatives and members routinely draft submissions, testify at public hearings and meet with legislators and officials, including representatives of the Superintendent of Bankruptcy Canada, in order to provide informed recommendations on the complex provisions of Canada’s dual insolvency regime and how it should be reformed or further developed.

8. Not surprisingly, one of CAIRP’s top priorities in recent years has been the legislative reform of the federal insolvency and restructuring regimes which came into force in 2007 through 2009, and in which the association was heavily involved at each and every stage.

9. Ultimately, CAIRP was one of the main organizations permitted to testify before the Standing Senate Committee on Banking Trade and Commerce in connection with the adoption of the reform in December 2007.

10. As part of its mission to be the voice of the industry in major insolvency policy issues, CAIRP has also in the past sought intervener status in cases of public importance or of national interest for the insolvency community, in particular where it believed that the Court could possibly benefit from CAIRP’s unique expertise, hindsight and day-to-day practical experience with insolvency matters.

11. By way of example, CAIRP intervened before this Court in 2009 in *Quebec (Revenu) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286, a case which

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dealt with the priorities associated with QST-GST deemed trusts in bankruptcies and thereby called into play major practical considerations for bankruptcy trustees across the country.

12. The wealth of experience and practical knowledge of CAIRP makes it a unique intervener to help inform this Honourable Court regarding the practical outcomes of the various policy decisions that this Court will inevitably be called upon to consider in the present matter, and on how such decisions may (1) impact on the daily practices of hundreds of Canadian insolvency professionals and (2) affect the fluidity and availability of restructurings in Canada.

13. CAIRP and its members also have a clear interest in the pending proceedings since the decision of this Honourable Court will undoubtedly have a major impact on their professional activities and on the insolvency stakeholders that they serve, including lenders, creditors and insolvent debtors.

CAIRP's Intended Position and Proposed Submissions

14. If allowed to intervene in the present matter, CAIRP will support the Appellants' position by providing CAIRP's professional perspective on the issues arising from the Ontario Court of Appeal decision (the "**Appeal Decision**").

15. More specifically, CAIRP is of the view that the Appeal Decision (a) instills uncertainty in the conduct of restructuring processes and the rights and duties of insolvency professionals, (b) defeats major policy decisions taken by Parliament in the course of the 2007-2009 legislative reform, (c) exposes restructuring processes to an increased risk of litigation, and (d) casts some uncertainty over the credit-granting and risk assessment by lenders, both within restructuring proceedings and in the ordinary course of lending in Canada.

A. Uncertainty in the Conduct of Restructurings and in Relation to Restructuring Charges

16. In its decision, the Court of Appeal suggested that before any interim financing ("**DIP**") is approved in relation to a restructuring, a prior notice should be given to pension plan beneficiaries in order for them to have an input on the financing process and the Court's considerations. The Court stated that this needs to be assessed on a case-by-case basis. Technically, this reasoning could also apply to all other charges typically ordered in restructuring processes, such as for instance the charges relating to directors' indemnification and the charges

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covering the fees and costs of the restructuring professionals involved (the “**Administrative Charges**”).

17. Moreover, the Court of Appeal clearly opened the door to the very real possibility that this assessment can be revisited, and that orders that have previously approved DIP charges or Administrative Charges may be subsequently altered. This is in fact precisely what the Court did in the present case.

18. This is a very serious issue for the insolvency community and for CAIRP members. In practice, since DIP financing (and the issuance of Administrative Charges) is often an emergency matter, calling for emergency proceedings, Courts are frequently called upon to issue initial orders on a rush basis. Thus the Appeal Decision opens the door to revisiting the ranking (and perhaps even the existence) of the charges, if and when the issues relating to the pension beneficiaries materialize.

19. This creates significant uncertainty regarding the long term validity of DIP charges and Administrative Charges: Will the courts at times accept to reverse their earlier decisions and lower the quantum or relative priority, or retract altogether, DIP charges or Administrative Charges that were initially given full priority? For CAIRP members this raises the scary prospect of having to assess in each case whether they should accept to act in a file or decline, for fear of seeing an Administrative Charge later retracted.

20. Moreover, the risk associated with protracted litigation over whether the DIP financing and the Administrative Charges should (or should not) take precedence over the pension plan beneficiaries’ rights could seriously challenge the fluidity, if not the viability, of any restructuring process.

21. Finally, the case-by-case approach adopted by the Ontario Court of Appeal instills significant unpredictability in the process and triggers many other questions. When will the courts allow a DIP charge to take precedence over existing encumbrances despite their objections? How much weight will the court give to the possible collapse of the restructuring efforts if pension liabilities are assumed? In addition to the challenges that the above issues create for the restructuring processes, the unpredictability of the process also creates much unwelcome uncertainty regarding the duties and responsibilities of proposal trustees and monitors towards the various stakeholders, as well as towards the court.

22. CAIRP will argue that these issues are very significant for the future development of the restructuring industry in Canada and for the day-to-day practice of its members, and seeks the opportunity to address the Court accordingly.

B. The Court of Appeal Departed From Explicit Policy Decisions Taken by Parliament

23. Recently, Parliament enacted amendments to both the *Companies' Creditors Arrangement Act* and the *Bankruptcy and Insolvency Act* after a long and extensive consultation process in order to, *inter alia*, settle the priority to be granted in respect of pension plans upon the insolvency of the plan sponsor and clarify the situation of DIP lenders.

24. After having heard all interested parties (including CAIRP), the legislator explicitly decided to limit the priority for pension claims to unpaid normal cost contributions instead of extending same to pension plan solvency deficiencies occasioned upon a wind-up of the plan¹.

25. Either ruling that the entire unfunded deficit owing upon wind-up of a defined benefit pension plan may be protected by a deemed trust or giving a super-priority to the claim arising from such a deficiency claim, effectively defeats (or runs against) Parliament's express will undermining legislative amendments reached after a long and complete consultation process.

26. CAIRP does not believe that this reversal of the legislator's intent is appropriate, nor is it in the interest of Canadians, and seeks to explain its views in this regard to the Court.

27. In a separate but related point, the Appeal Decision also implies that a voluntary assignment into bankruptcy should not be used with a view to alter priorities between various secured claims, a routine practice that has long been held as perfectly legitimate by Canadian jurisprudence. CAIRP would also like to express concerns in connection with this *obiter* of the Court of Appeal.

¹ Senate, Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (November 2003) (Chair: Honourable Richard H. Kroft) at 96-99, http://www.cfs-fcee.ca/html/english/campaigns/Senate_Crmt_Report_2003_11-a.pdf. See also Section 6 *Companies' Creditors Arrangements Act* and Section 81.5 of the *Bankruptcy and Insolvency Act*.

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C. *Constructive Trust Claims - Threat to Open the Floodgates*

28. By imposing a constructive trust for the benefit of a particular unsecured creditor group with the effect of giving a priority claim over other creditors, the Ontario Court of Appeal short-circuited the ordinary rule in insolvency proceedings that all unsecured creditors share rateably in any available proceeds.

29. An unintended but probable consequence of this remedy being available in an insolvency situation is the promotion of litigation by special interest groups of all kinds, not limited to executive plan beneficiaries, who hope to advance the cause of one particular creditor group in insolvency proceedings.

30. CAIRP seeks to alert the Court to the negative practical implications of this policy decision on the orderly, timely and cost-efficient conduct of future restructurings.

D. *A Cloud of Uncertainty Was Cast Over the DIP Lending Industry*

31. CAIRP will also submit that the Appeal Decision introduces uncertainty in both the legal practice related to the insolvency and bankruptcy domain (relating especially to restructuring) and the lending industry in general.

32. Indeed, lenders of existing loans who did not take into account this newly created potential constructive trust for pension claims will now bear a substantially higher and not readily measurable risk on their loans.

33. As a corollary, future credit grantors (banks and others) will now take into account the Appeal Decision and loans will definitely be less accessible for financially challenged businesses. This could potentially result in either or both of a reduction in immediately available funds and/or increased interest rates or additional fees.

34. On top of the abovementioned adverse consequences, credit assessment will most probably be negatively adjusted. Such adjustment will put even further pressure on the availability or cost of credit to businesses and will also increase the risk passed on to creditors and other stakeholders of such companies.

35. The Appeal Decision also creates uncertainty in the DIP lending industry, whose loan facilities are critical and often vital for insolvent companies trying to inject new funds in their

businesses and, ultimately, to save them from bankruptcy. As a result of the Appeal Decision, the ability of a lender to rely upon a super-priority charge granted pursuant to a court order has been called into question, potentially making DIP lenders more reluctant to provide new financing to distressed businesses.

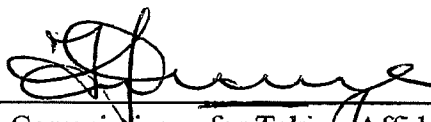
36. At best, the Appeal Decision will result in a higher cost of borrowing and/or a decrease of availability of financing during the restructuring process. This will not only affect the financially challenged businesses themselves, but all stakeholders of such businesses by precluding an orderly restructuring or worse, by forcing the debtor into bankruptcy.

Useful and Different Assistance Offered by CAIRP

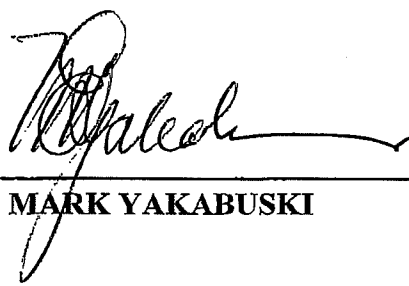
37. The abovementioned consequences will have major adverse effects on insolvency proceedings and insolvency practitioners, lead to more difficulties in adopting restructuring plans, will add to the costs and delays of restructuring proceedings, and, in certain cases, may even prevent restructuring from taking place altogether. CAIRP believes that it has a legitimate and demonstrated interest in this appeal and can offer highly practical and relevant submissions that will be useful to the Court and different from those of the main parties. As the national association representing professionals in the practice of insolvency administration, CAIRP is able to advance a broad and experienced perspective.

38. I swear this Affidavit on behalf of CAIRP's motion to intervene, and for no other or improper purpose.

SWORN before me at the City of Toronto,
in the Province of Ontario, this 16th day of
February, 2012.



Commissioner for Taking Affidavits
Tushara N. Weerasinghe

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MARK YAKABUSKI

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MCMILLAN LLP

1000, Sherbooke Street West, 27th floor
Montréal, QC H3A 3G4

Éric Vallières (Eric.vallieres@mcmillan.ca)

Yoine Goldstein (Yoine.goldstein@mcmillan.ca)

Alexandre Forest (Alexandre.forest@mcmillan.ca)

Tel: (514) 987-5068

Fax: (514) 987-1213

Counsel for the Canadian Association of Insolvency
and Restructuring Professionals