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
(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 AND FRED GRANVILLE

Respondents
(Appellants)

MOTION RECORD OF CANADIAN BANKERS ASSOCIATION FOR LEAVE TO INTERVENE

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AND BETWEEN:

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

Appellant
(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 AND FRED GRANVILLE

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AND BETWEEN:

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

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AND BETWEEN:

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- and -

MORNEAU SHEPELL LTD. (formerly known as MORNEAU SOBECO LIMITED PARTNERSHIP) AND SUPERINTENDANT OF FINANCIAL SERVICES

Respondents
(Appellants)

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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
(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 AND FRED GRANVILLE

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AND BETWEEN:

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

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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

Respondents
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NOTICE OF MOTION OF
CANADIAN BANKERS ASSOCIATION
FOR LEAVE TO INTERVENE
Rules 47 and 55 of the *Rules of the Supreme Court of Canada*

AND BETWEEN:

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

Appellant
(Respondent)

- and -

KEITH CARRUTHERS, LEON KOZIEROK, RICHARD BENSON, JOHN FAVERI, KEN WLADRON, JOHN (JACK) W. ROONEY, BERTRAM MCBRIDE, MAX DEGAN, EUGENE D'IORIO, NEIL FRASER, RICHARD SMITH, ROBERT LECKIE, FRED GRANVILLE AND UNITED STEELWORKERS

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AND BETWEEN:

UNITED STEELWORKERS

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(Respondent)

- and -

MORNEAU SHEPELL LTD. (formerly known as MORNEAU SOBECO LIMITED PARTNERSHIP) AND SUPERINTENDANT OF FINANCIAL SERVICES

Respondents
(Appellants)

TAKE NOTICE that a motion is hereby made to a Justice of this Honourable Court, pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada*, for an Order granting the Canadian Bankers Association ("CBA") leave to intervene in this appeal, to file a factum not exceeding 10 pages, and to make oral submissions of up to 10 minutes at the hearing of this appeal, and such further and other Order as this Honourable Court deems just.

AND FURTHER TAKE NOTICE that in support of this motion will be read the affidavit of Nathalie Clark, sworn on February 10, 2012, and such further and other materials as counsel may advise and this Honourable Court permit.

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

1. ***The CBA.*** Created in 1891, the CBA is the national voice of the Canadian banking industry. The CBA advocates for public policies that contribute to a sound, successful banking system benefitting Canadians and the Canadian economy. Its members are 53 domestic chartered banks, foreign bank subsidiaries, and foreign bank branches operating in Canada, together with their 267,000 employees. Collectively, Canada's banks manage $3.1 trillion in assets and serve millions of businesses and consumers.

2. ***The CBA seeks to intervene in this appeal.*** This appeal raises critical issues involving the law and practice of commercial lending at the intersection of pension law, insolvency law, and constitutional law. The main issue concerns a priority dispute between: (1) a claimed statutory deemed trust under Ontario's *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), in connection with a defined benefit pension plan; and (2) a court ordered super-priority charge granted to a lender pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

3. In this case, the Ontario Court of Appeal (1) extended the scope of the statutory deemed trust under provincial pension legislation and (2) ruled that it takes priority over a court ordered super-priority charge granted to a lender under federal insolvency legislation. The federal super-priority charge was granted to help an insolvent company, Indalex Limited, obtain debtor-in-possession ("DIP") financing to allow it to restructure its obligations in an orderly manner without falling into bankruptcy. The result of the Court of Appeal's decision is that a DIP lender (such as a bank) may now rank behind a statutory deemed trust under provincial pension legislation, even if the DIP lender obtains a court order under the *CCAA* that expressly provides that it will have priority over that provincial statutory deemed trust.

4. ***The CBA has an interest.*** The CBA wishes to intervene because the outcome of this appeal will directly affect the lending businesses of many of Canada's banks, both in respect of "ordinary course" lending when banks lend to healthy, solvent companies, and in respect of lending to insolvent companies. The Court of Appeal's decision has introduced great uncertainty into the business of bank lending to companies with defined benefit pension plans and will affect the availability and pricing of bank credit to them. The CBA therefore wishes to ensure that this Court is fully apprised of the broader implications of its ruling and the consequences for bank lending to companies in Canada.

5. ***The CBA has a distinct perspective.*** The CBA would bring a useful and distinct perspective to this appeal. From the CBA's perspective, at its core this appeal concerns the need for commercial certainty in the bank lending market, yet currently there is no bank or other commercial lender before the Court (the DIP lender in this case had already called on a guarantee provided by Indalex's U.S. parent company). Because the CBA's members provide credit to borrowers across the country and would be the only voice of the Canadian credit-granting community before the Court, the CBA would provide a critically important, national lender's perspective on the issues raised in this appeal.

6. ***The CBA has a long history of responsible intervention.*** The CBA has a long history of intervening responsibly to provide assistance to courts across Canada on issues affecting the banking industry. The CBA has intervened in cases before this Court and other appellate courts on issues involving constitutional law, criminal law, taxation, commercial law, bank lending and other *Bank Act* issues, amongst others.

7. An overview of the CBA's proposed submissions appears at ¶¶16-24 of the CBA's memorandum of argument.

DATED at Toronto, Ontario this 16th day of February, 2012.

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TAB 2

S.C.C. File No. 34308

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(Respondent)

- and -

MORNEAU SHEPELL LTD. (formerly known as MORNEAU SOBECO LIMITED PARTNERSHIP) AND SUPERINTENDANT OF FINANCIAL SERVICES

Respondents
(Appellants)

AFFIDAVIT OF NATHALIE CLARK
sworn February 10th, 2012

I, Nathalie Clark, of the City of Toronto, Ontario, MAKE OATH AND SAY:

1. I am General Counsel and Corporate Secretary of the Canadian Bankers Association ("CBA") and a member of the Ontario and Quebec bars. I have personal knowledge of the matters described below.

Overview

2. This appeal raises important issues involving the law and practice of commercial lending at the intersection of pension law, insolvency law, and constitutional law. The main issue concerns a priority dispute between: (1) a claimed deemed statutory trust under Ontario's *Pension Benefits Act* in connection with a defined benefit pension plan; and (2) a court ordered super-priority charge granted to a lender pursuant to the federal *Companies' Creditors Arrangement Act* ("CCAA"). In this case, the Ontario Court of Appeal extended the scope of the deemed statutory trust under provincial pension legislation and ruled that it takes priority over a court ordered super-priority charge granted to a lender under federal insolvency legislation. The federal super-priority charge was granted by court order in a CCAA restructuring proceeding to help an insolvent company, Indalex Limited, obtain debtor-in-possession ("DIP") financing to allow the company to restructure without falling into bankruptcy. The result of the Court of Appeal's decision is that a DIP lender (such as a bank) may now rank behind a deemed statutory trust under provincial pension legislation, even if the DIP lender obtains a court order under the CCAA that expressly provides that it will have priority over that provincial deemed statutory trust.

3. The Court of Appeal also found that Indalex had breached its fiduciary duty as the pension plan administrator by virtue of steps the company had taken during the CCAA proceeding. As a remedy, the Court imposed a constructive trust for the full amount of the pension plan deficit that jumped ahead of the court ordered super-priority charge and ahead of all other secured and unsecured creditors of the company.

4. The CBA wishes to intervene because the outcome of this appeal will directly affect the lending businesses of many of Canada's banks, both in respect of "ordinary course" lending when banks lend to healthy, solvent companies, and in respect of lending to insolvent companies. By extending the scope of the deemed statutory trust under provincial pension legislation and by imposing a constructive trust in this case, the Court of Appeal's decision has introduced great uncertainty into the business of bank lending to all companies with defined benefit pension plans. The result of this case will affect the availability and pricing of bank loans in Canada to the many companies with defined benefit pension plans. The CBA wishes to intervene to ensure

that this Court is fully apprised of the broader implications of its ruling and the consequences for bank lending to companies in Canada.

The CBA

5. The CBA is the national voice of the Canadian banking industry. Its members consist of 53 domestic chartered banks, foreign bank subsidiaries, and foreign bank branches operating in Canada, together with their 267,000 employees. Collectively, Canada's banks manage approximately $3.1 trillion in assets and on a daily basis serve millions of business and consumer customers. The CBA's current members include the following:

Schedule I banks (Domestic banks authorized under the *Bank Act* to accept deposits)	**Schedule II banks** (Foreign bank subsidiaries authorized under the *Bank Act* to accept deposits)	**Schedule III banks** (Foreign bank branches of foreign institutions authorized under the *Bank Act* to do business in Canada)
Bank of Montreal Bank West Bridgewater Bank Canadian Imperial Bank of Commerce Canadian Tire Bank Canadian Western Bank Citizens Bank of Canada Dundee Bank of Canada Laurentian Bank of Canada Manulife Bank of Canada National Bank of Canada The Bank of Nova Scotia Pacific & Western Bank of Canada President's Choice Bank Royal Bank of Canada The Toronto-Dominion Bank	Amex Bank of Canada Bank of America Canada Bank of China (Canada) Bank of Tokyo-Mitsubishi UFJ (Canada) BNP Paribas (Canada) Citibank Canada Habib Canadian Bank HSBC Bank Canada ICICI Bank Canada Industrial and Commercial Bank of China (Canada) ING Bank of Canada J.P. Morgan Bank Canada Korea Exchange Bank of Canada Mega International Commercial Bank (Canada) Société Général (Canada) State Bank of India (Canada) Sumitomo Mitsui Banking Corporation of Canada The Royal Bank of Scotland (Canada) UBS Bank (Canada) Wal-Mart Canada Bank	Bank of America, National Association The Bank of New York Mellon Barclays Bank PLC Citibank, N.A. Comerica Bank Credit Suisse AG Deutsche Bank A.G. HSBC Bank USA, N.A. JPMorgan Chase Bank, National Association Maple Bank GmbH Mizuho Corporate Bank Ltd. Société Général (Canada Branch) The Royal Bank of Scotland, N.V. State Street Bank and Trust Company UBS AG PNC Bank, National Association

6. The CBA was established in 1891 and subsequently constituted by an Act of Parliament in 1900. It serves its members in matters of concern to the banking industry as a whole. Its main activities are in the fields of advocacy on behalf of the banking industry, legislation, publications, public relations, information, and research. The CBA's mandate includes

advocating for public policies that contribute to a sound, successful banking system that benefits Canadians and the Canadian economy.

The CBA's member banks will be affected by this appeal

7. This appeal will have significant implications for the Canadian banking industry and for the law and practice of bank lending to the many companies across Canada with defined benefit pension plans. The Court of Appeal's decision has created substantial uncertainty for bank lending, both for ordinary course lending and for lending during insolvency.

(i) ***Implications for banks' ordinary course lending***

8. The result of the Court of Appeal's decision is that a deemed trust under provincial pension legislation can have priority over a lender's secured or unsecured rights to a borrower's assets. This means that a bank secured lender will need to consider any wind-up deficiency in the borrower's pension plans when determining how much credit to make available to the borrower and/or the cost of making that credit available. This raises significant risks for banks as lenders, including the following:

- Many existing bank loans to companies with defined benefit pension plans have been extended on the basis of the settled law before the Court of Appeal's decision, namely, that the provincial deemed statutory trust does ***not*** include to any wind-up deficiency in a defined benefit pension plan. The Court of Appeal's decision unsettles this understanding and undercuts a key basis upon which such bank loans were extended;

- It is often difficult or impossible to estimate accurately the present or future wind-up deficiency in a defined benefit pension plan at the time a loan is advanced. The wind-up deficiency is not a static amount, but rather is an actuarial estimate that fluctuates (often significantly) over time, due to a variety of factors such as changes in interest rates and the investment performance of the assets;

- A pension plan wind-up deficiency may arise only after the loan has been made, or an existing estimated deficiency may deteriorate significantly after the loan is made;

- As a practical matter, even with aggressive monitoring, a bank lender may not become aware of a deterioration in the funded position of the borrower's pension plans until long after that deterioration occurs, long after credit has been extended, and only after the borrower's assets are no longer sufficient to cover the loan granted plus the entire amount of the pension plan deficiency.

9. Banks as lenders will also face considerable uncertainty if the court imposes a retroactive constructive trust for the amount of any pension plan deficit for the borrower's breach of fiduciary obligations because of steps the borrower has taken in the restructuring proceeding. Such a constructive trust would, through no fault of the lender, jump ahead of the lender's secured and/or unsecured claims to the borrower's assets.

(ii) *Implications for bank lending in the insolvency context*

10. This appeal also raises significant concerns for bank lending in the insolvency context. If banks cannot rely on the effectiveness of a super-priority charge granted by a court order in the context of a CCAA, inevitably, some banks may be unwilling to lend to help insolvent companies restructure, or will do so only for a significant risk premium. This will have significant implications not only for bank lending in Canada, but also potentially for cross-border lending. Many companies will as a result likely seek financing in the United States of America, where DIP lending priority is assured under the U.S. *Bankruptcy Code*, or may simply seek to manage any cross-border restructuring primarily under before U.S. bankruptcy courts. Again, this would potentially have negative implications for the bank lending business in Canada and for both the availability and cost of credit for insolvent companies seeking to restructure in Canada.

The CBA has a long history of responsible intervention in cases affecting Canada's banking industry

11. The CBA has a long history of intervening responsibly to provide assistance to courts on many different legal issues affecting the banking industry. The CBA has intervened in cases involving constitutional law, criminal law, taxation, commercial law, bank lending, and other *Bank Act* issues. For example, the CBA has been a party or intervener before the Supreme Court

of Canada, Federal Court of Appeal, and provincial appellate courts in the following cases, amongst others:

- *Reference re Securities Act*, 2011 SCC 66 (federal reference to determine constitutionality of federal *Securities Act*);
- *Québec (Procureure générale) v. Canada (Procureure générale)*, 2011 QCCA 591 (Quebec reference to determine constitutionality of federal *Securities Act*);
- *Reference Re Securities Act (Canada)*, 2011 ABCA 77 (Alberta reference to determine constitutionality of federal *Securities Act*);
- *Tele-Mobile Co. v. Ontario*, [2008] 1 S.C.R. 305 (production orders under the *Criminal Code*);
- *Royal Bank of Canada v. Canada*, 2007 FCA 72 (*Excise Tax Act* issues);
- *Rezek v. Canada*, 2005 FCA 227 (taxation of convertible hedging);
- *Gifford v. Canada*, [2004] 1 S.C.R. 411 (interest deductibility under the *Income Tax Act*);
- *Bank of Nova Scotia v. British Columbia (Superintendent of Financial Institutions)*, 2003 BCCA 29 (constitutional application of provincial insurance regulations to banks);
- *Continental Bank Leasing Corp. v. Canada*, [1998] 2 S.C.R. 298 (partnership tax issues);
- *Bank of Nova Scotia v. Dunphy Leasing Enterprises Ltd.*, [1994] 1 S.C.R. 552 (interest rate on non-mortgage loans);
- *National Bank of Canada v. Atomic Slipper Co.*, [1991] 1 S.C.R. 1059 (security issues under the *Bank Act*).
- *Canadian Bankers Association v. Saskatchewan (Attorney General)*, [1956] S.C.R. 31 (constitutionality of Saskatchewan's *Moratorium Act* under s. 91(21) of the *Constitution Act, 1867*).

The CBA would bring a useful and distinct perspective to this appeal

12. The CBA would bring a useful and distinct perspective to this appeal. This case will affect the banking and insolvency regimes across Canada. At its core, the appeal concerns the

need for commercial certainty in the bank lending market, yet currently there is no bank or other commercial lender before the Court (the DIP lender in this case had already called on a guarantee provided by Indalex's U.S. parent company). Because the CBA's members provide credit to borrowers across the country and would be the only voice of the credit-granting community before the Court, the CBA would provide a critically important, national lender's perspective on the issues raised in this appeal.

13. The CBA undertakes to avoid overlap between its submissions and those of any other party or intervener. The CBA also undertakes not to raise any new issues or new evidence on the appeal.

14. If granted leave to intervene, the CBA would not seek costs, and asks that it not be liable to pay costs of any other party or intervener.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario, on February 10th, 2012.

Commissioner for Taking Affidavits
MAHMUD JAMAL

NATHALIE CLARK

TAB 3

CBA's MEMORANDUM OF ARGUMENT

Part I – Overview and Statement of Facts

A. Overview

1. This appeal raises critical issues involving the law and practice of commercial lending at the intersection of pension law, insolvency law, and constitutional law. The main issue concerns a priority dispute between: (1) a claimed statutory deemed trust under Ontario's *Pension Benefits Act*[1] in connection with a defined benefit pension plan; and (2) a court ordered super-priority charge granted to a lender pursuant to the *Companies' Creditors Arrangement Act.*[2]

2. In this case, the Ontario Court of Appeal (1) extended the scope of the statutory deemed trust under provincial pension legislation and (2) ruled that it takes priority over a court ordered super-priority charge granted to a lender under federal insolvency legislation.[3] The federal super-priority charge was granted to help an insolvent company, Indalex Limited, obtain debtor-in-possession ("DIP") financing to allow it to restructure its obligations in an orderly manner without falling into bankruptcy. The result of the Court of Appeal's decision is that a DIP lender (such as a bank) may now rank behind a statutory deemed trust under provincial pension legislation, even if the DIP lender obtains a court order under the *CCAA* that expressly provides that it will have priority over that provincial statutory deemed trust.[4]

3. The CBA wishes to intervene because the outcome of this appeal will directly affect the lending businesses of many of Canada's banks, both in respect of "ordinary course" lending when banks lend to healthy, solvent companies, and in respect of lending to insolvent companies. By extending the scope of the statutory deemed trust under provincial pension legislation, the Court of Appeal's decision has introduced great uncertainty into the business of bank lending to

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1 R.S.O. 1990, c. P.8 ("*PBA*").

2 R.S.C. 1985, c. C-36 ("*CCAA*").

3 *Re Indalex Limited*, 2011 ONCA 265.

4 The Court of Appeal also found (*id.*, ¶¶139-143) that Indalex had breached its fiduciary duty as the pension plan administrator by virtue of steps the company had taken during the *CCAA* proceeding. As a remedy, the Court imposed a constructive trust for the full amount of the pension plan deficit that jumped ahead of the court ordered super-priority charge and ahead of all other secured and unsecured creditors of the company. While concerned with the ramifications of the Court's decision on this point, the CBA does not propose to address this issue.

all companies with defined benefit pension plans and will affect the availability and pricing of bank credit to them. The CBA therefore wishes to ensure that this Court is fully apprised of the broader implications of its ruling and the consequences for bank lending in Canada. Paragraphs 16-24 below outline the CBA's proposed submissions if granted leave to intervene.

B. The CBA

4. Created in 1891, the CBA is the national voice of the Canadian banking industry. It advocates for public policies that contribute to a sound, successful banking system benefitting Canadians and the Canadian economy. Its members are 53 domestic chartered banks, foreign bank subsidiaries, and foreign bank branches operating in Canada, together with their 267,000 employees. Collectively, Canada's banks manage $3.1 trillion in assets and serve millions of businesses and consumers. The CBA's current members include:[5]

Schedule I banks (Domestic banks)	**Schedule II banks** (Foreign bank subsidiaries)	**Schedule III banks** (Foreign bank branches)
Bank of Montreal Bank West Bridgewater Bank Canadian Imperial Bank of Commerce Canadian Tire Bank Canadian Western Bank Citizens Bank of Canada Dundee Bank of Canada Laurentian Bank of Canada Manulife Bank of Canada National Bank of Canada The Bank of Nova Scotia Pacific & Western Bank of Canada President's Choice Bank Royal Bank of Canada The Toronto-Dominion Bank	Amex Bank of Canada Bank of America Canada Bank of China (Canada) Bank of Tokyo-Mitsubishi UFJ (Canada) BNP Paribas (Canada) Citibank Canada Habib Canadian Bank HSBC Bank Canada ICICI Bank Canada Industrial and Commercial Bank of China (Canada) ING Bank of Canada J.P. Morgan Bank Canada Korea Exchange Bank of Canada Mega International Commercial Bank (Canada) Société Général (Canada) State Bank of India (Canada) Sumitomo Mitsui Banking Corporation of Canada The Royal Bank of Scotland (Can.) UBS Bank (Canada) Wal-Mart Canada Bank	Bank of America, National Association The Bank of New York Mellon Barclays Bank PLC Citibank, N.A. Comerica Bank Credit Suisse AG Deutsche Bank A.G. HSBC Bank USA, N.A. JPMorgan Chase Bank, National Association Maple Bank GmbH Mizuho Corporate Bank Ltd. Société Général (Canada Branch) The Royal Bank of Scotland, N.V. State Street Bank and Trust UBS AG PNC Bank, National Association

5 Clark Affidavit, ¶6.

Part II – Question In Issue

5. Should the CBA be granted leave to intervene in this appeal?

Part III – Argument

A. The Test For Leave to Intervene

6. A prospective intervener must show: (1) a real interest; and (2) useful submissions that will be argued from a perspective different than the other parties.[6]

7. Under this test, this Court has welcomed interveners in constitutional cases, which "affect people far beyond the immediate dispute," allowing interveners to play "an important role in presenting the court with the perspectives it needs in order to make fully-informed decisions."[7] The same is true in certain commercial cases (such as this one) that have ramifications for commercial activity across Canada. For example, this Court has welcomed interveners in recent pension cases,[8] corporate governance cases,[9] and tax cases impacting bank lending.[10]

B. The CBA Is Interested In This Appeal

8. The standard for an "interest" is flexible. Any interest in an appeal is sufficient, subject always to the Court's discretion.[11]

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6 *Reference re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 2 S.C.R. 335, p. 339, Sopinka J.

7 John Sopinka and Mark A. Gelowitz, *The Conduct of an Appeal* (2nd ed., 2000), p. 255.

8 *E.g.*, *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152 (interventions from Attorney General of Canada, National Trust Company, Nicole Lacroix, R. M. Smallhorn, D. G. Halsall, S. J. Galbraith, S. W. (Bud) Wesley, Canadian Labour Congress and Ontario Federation of Labour); *Nolan v. Kerry (Canada) Inc.*, [2009] 2 S.C.R. 678 (interventions from Association of Canadian Pension Management and Canadian Labour Congress).

9 *E.g.*, *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560 (interventions from Director Appointed Pursuant to the CBCA, Catalyst Asset Management Inc. and Matthew Stewart).

10 *E.g.*, *Gifford v. Canada*, [2004] 1 S.C.R. 411 (intervention from Canadian Bankers Association); *Continental Bank Leasing Corp. v. Canada*, [1998] 2 S.C.R. 298 (intervention from Canadian Bankers Association).

11 *Norcan Limited v. Lebrock*, [1969] S.C.R. 665, p. 666, Pigeon J.; *Reference re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 2 S.C.R. 335, p. 339, Sopinka J.; *R. v. Finta*, [1993] 1 S.C.R. 1138, p. 1142, McLachlin J. (as she then was).

9. The CBA is interested in this appeal because it will have significant implications for the Canadian banking industry and for the law and practice of bank lending to the many companies across Canada with defined benefit pension plans. The Court of Appeal's decision has created substantial uncertainty for bank lending, both for ordinary course lending and during insolvency.

(i) *Implications for ordinary course bank lending*

10. The result of the Court of Appeal's decision is that a deemed trust under provincial pension legislation can have priority over a lender's secured or unsecured rights to a borrower's assets. This means that a bank lender will need to consider any wind-up deficiency in the borrower's pension plans when determining how much credit to make available to the borrower and/or the cost of making that credit available. This raises significant risks for banks as lenders:

- Many existing bank loans to companies with defined benefit pension plans have been extended on the basis of the settled law before the Court of Appeal's decision, namely, that the provincial statutory deemed trust does ***not*** extend to any wind-up deficiency in a defined benefit pension plan. The Court of Appeal's decision unsettles this understanding and undercuts a key basis upon which such bank loans were extended;

- It is often difficult and sometimes impossible to estimate accurately the present or future wind-up deficiency in a defined benefit pension plan at the time a loan is advanced. The wind-up deficiency is not a static amount, but rather is an actuarial estimate that fluctuates (often significantly) over time, due to a variety of factors such as changes in interest rates and the investment performance of the assets;

- A pension plan wind-up deficiency may arise only after the loan has been made, or an existing estimated deficiency may deteriorate significantly after the loan is made; and

- As a practical matter, even with aggressive monitoring, a bank lender may not become aware of a deterioration in the funded position of the borrower's pension plans until long after that deterioration occurs, long after credit has been extended, and only after the

borrower's assets are no longer sufficient to cover the loan granted plus the entire amount of the pension plan deficiency.[12]

(ii) *Implications for bank lending in insolvency*

11. This appeal also raises significant concerns for bank lending in insolvency. If banks cannot rely on the effectiveness of a super-priority charge granted by a court order in a *CCAA* proceeding, inevitably, some banks will be unwilling to lend to help insolvent companies restructure, or will do so only for a significant risk premium. This will impact bank lending in Canada and cross-border lending. Many companies will as a result likely seek financing in the United States of America, where DIP lending priority is assured under the U.S. *Bankruptcy Code* and manage any cross-border restructuring primarily under U.S. bankruptcy law before U.S. bankruptcy courts. Again, this would have negative implications for bank lending and the availability and cost of credit for restructuring insolvent companies in Canada.[13]

C. The CBA Brings A Useful and Different Perspective To This Appeal

(a) The CBA has a fresh perspective

12. Intervener status is granted where an applicant can "present argument from a different perspective with respect to some of the issues" raised in an appeal.[14] An intervention "is welcomed if the intervener will provide the Court with fresh information or a fresh perspective on an important constitutional or public issue."[15]

13. The CBA would bring a useful and different perspective to this appeal. At its core, the appeal concerns the need for commercial certainty in the bank lending market, yet currently there is no bank or other commercial lender before the Court (the DIP lender in this case had already called on a guarantee provided by Indalex's U.S. parent company, and hence is not before the Court). Because the CBA's members provide credit to borrowers across the country and would

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[12] Clark Affidavit, ¶8.

[13] Clark Affidavit, ¶10.

[14] *Norberg v. Wynrib*, [1992] 2 S.C.R. 224, p. 225, Sopinka J.

[15] *Reference re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 2 S.C.R. 335, p. 340, Sopinka J.

be the only voice of the Canadian credit-granting community before the Court, the CBA would provide an important, national lender's perspective on the appeal.[16]

(b) The CBA has a long history of responsible, helpful intervention before the courts

14. The criterion of useful submissions is "easily satisfied by an applicant who has a history of involvement in the issue giving the applicant an expertise which can shed fresh light or provide new information on the matter."[17] The "submissions of responsible organizations" with "a past history of helpful intervention" are appropriate for intervention in this Court.[18]

15. The CBA has a long history of intervening responsibly to inform courts across Canada (including this Court) on issues affecting the banking industry, such as constitutional law, criminal law, taxation, commercial law, bank lending and other *Bank Act* issues.[19]

D. An Outline of the CBA's Proposed Submissions

16. The CBA proposes to address two principal points: (1) s. 57(4) of the *PBA* does not create a deemed trust for the entire amount of a wind-up deficiency, an issue that has national implications for bank lenders because similar pension legislation exists across Canada; and (2) in any event, the scope and effectiveness of a court ordered super-priority charge granted under the *CCAA* must be interpreted having regard to this Court's recent guidance in *Century Services Inc.*

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16 Clark Affidavit, ¶12.

17 *Reference re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 2 S.C.R. 335, p. 340, Sopinka J.

18 *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1990] S.C.B. No. 2140, Cory J., cited in Sopinka and Gelowitz, *The Conduct of an Appeal*, above, note 7, p. 266.

19 *Reference re Securities Act*, 2011 SCC 66 (federal reference to determine constitutionality of federal *Securities Act*); *Québec (Procureure générale) v. Canada (Procureure générale)*, 2011 QCCA 591 (Quebec reference to determine constitutionality of federal *Securities Act*); *Reference Re Securities Act (Canada)*, 2011 ABCA 77 (Alberta reference to determine constitutionality of federal *Securities Act*); *Tele-Mobile Co. v. Ontario*, [2008] 1 S.C.R. 305 (production orders under the *Criminal Code*); *Royal Bank of Canada v. Canada*, 2007 FCA 72 (*Excise Tax Act* issues); *Rezek v. Canada*, 2005 FCA 227 (taxation of convertible hedging); *Gifford v. Canada*, [2004] 1 S.C.R. 411 (interest deductibility under the *Income Tax Act*); *Bank of Nova Scotia v. British Columbia (Superintendent of Financial Institutions)*, 2003 BCCA 29 (constitutional application of provincial insurance regulations to banks); *Continental Bank Leasing Corp. v. Canada*, [1998] 2 S.C.R. 298 (partnership tax issues); *Bank of Nova Scotia v. Dunphy Leasing Enterprises Ltd.*, [1994] 1 S.C.R. 552 (interest rate on non-mortgage loans); *National Bank of Canada v. Atomic Slipper Co.*, [1991] 1 S.C.R. 1059 (security issues under the *Bank Act*); *Canadian Bankers Association v. Saskatchewan (Attorney General)*, [1956] S.C.R. 31 (constitutionality of Saskatchewan's *Moratorium Act* under s. 91(21) of the *Constitution Act, 1867*).

v. Canada (Attorney General)[20] and the principles from this Court's earlier quintet of cases on the relationship between bankruptcy and provincial law.[21]

(1) Section 57(4) of the *PBA* does not create a deemed trust over the wind-up deficit. This issue has implications for bank lenders nationwide

17. First, the CBA will submit that s. 57(4) of the *PBA* does not create a deemed trust over the entire wind-up deficiency of a defined benefit pension plan. The contrary view of the Court of Appeal has created substantial uncertainty for banks lending inside and outside insolvency and is inconsistent with: (a) the wording of s. 57(4) ("accrued to the date of wind up but not yet due"), read in the context of the scheme governing pension plan contributions and deemed trusts and the *PBA* as a whole; (b) earlier jurisprudence;[22] and (c) doctrinal commentary and weight of professional opinion.[23] The CBA will inform the Court of corresponding employer contribution and deemed trust provisions in pension legislation across Canada,[24] and a decision of the New

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20 *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379.

21 *Husky Oil Operations v. Minister of National Revenue*, [1995] 3 S.C.R. 454; *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24; *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061; *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, [1985] 1 S.C.R. 785; and *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35.

22 *Toronto-Dominion Bank v. Usarco* (1991), 42 E.T.R. 236 (Ont. S.C.J.), Farley J.; *Re Ivaco* (2006), 83 O.R. (3d) 108 (C.A.), p. 120, Laskin J.A.

23 *E.g.* Robert I. Thornton and Kirsten Thompson, "The Implications of Indalex on Restructuring in Canada", *Annual Review of Insolvency Law* (Carswell: 2012), pp. 47-65 (*Indalex* "departed significantly from existing case law"); Sean Dunphy and Andrea Boctor, "*Indalex* – Do Hard Cases Make Bad Law?", *Annual Review of Insolvency Law* (Carswell: 2012), pp. 66-111 ("it is generally agreed that *Indalex* marks a significant departure from established principles of pensions, insolvency, and commercial lending law and practice"); Andrew Kent, "A Comment on *Indalex*", *Annual Review of Insolvency Law* (Carswell: 2012), pp. 113-117; *Cf.* Ari Kaplan, *Pension Law* (Irwin Law: 2006), pp. 395-396: "The PBA does not expressly state whether a funding deficiency on the wind up of a pension plan is secured by the payment of a deemed trust, but it appears that the deemed trust is intended to apply to the deficiency to the extent it relates to employer contributions and remittances due and owing to the pension fund on wind up, but which have not been paid."

24 **Alberta**: *Employment Pension Plans Act*, R.S.A. 2000, c E-8, s. 51(3) ("accrued to the date of the termination or winding-up but not yet due"); **British Columbia**, *Pension Benefits Standards Act*, R.S.B.C. 1996, c. 352 s. 43.1(1)(a) and (2) ("all contributions that are due or owing to the pension plan by the employer"); **Manitoba**, *The Pension Benefits Act*, C.C.S.M. c. P32, s. 28(3) ("employer's contribution to the pension plan shall, when due under the pension plan"; **New Brunswick**: *Pension Benefits Act*, S.N.B. 1987, c P-5.1, s. 51(4) ("employer contributions accrued to the date of wind-up but not yet due"); **Newfoundland and Labrador**: *Pension Benefits Act, 1997*, S.N.L. 1996, c P-4.01, s. 32(1) (special payments "that have accrued to date"); **Nova Scotia**, *Pension Benefits Act*, R.S.N.S. 1989, c. 340, s. 80(1) ("due or have accrued"); **Quebec**: Supplemental Pension Plans Act, R.S.Q., c. R-15.1, s. 49 ("[u]ntil contributions and accrued interest are paid into the pension fund..."); **Saskatchewan**, *Pension Benefits Act, 1992*, S.S. 1992, c. P-6.001, s. 54(1) ("accrued to that date buy are not yet due"); see Thornton and Thompson, above, note 23, p. 58 (noting that "every province [except PEI] has similar deemed trust provisions").

Brunswick Labour and Employment Board which interpreted a similar phrase, "accrued to the date of wind-up", as covering only payments that fell due or became a present demand as at the wind-up date.[25] The CBA will explain how the Court of Appeal's interpretation will cause great confusion and potential inconsistencies on a national basis, creating uncertainty in the ordinary course lending market and negatively affecting the price and availability of credit to Canadian companies.

(2) The relationship between the *CCAA* and the *Pension Benefits Act* must be interpreted consistent with *Century Services* and this Court's prior bankruptcy jurisprudence. This issue also has implications for bank lenders nationwide

18. While the Court of Appeal accepted that a super-priority charge granted by a *CCAA* court pursuant to s. 11.2(2) of the *CCAA* could, in principle, take priority over a deemed trust under s. 57(4) of the *PBA*, the Court found that such priority would be effective only if the *CCAA* court makes "an express finding of federal paramountcy."[26] The Court concluded that the party seeking the super-priority must "invoke" paramountcy and explain to the court that the effect of the *CCAA* order would be to override a provincial statutory deemed trust.[27]

19. The CBA will submit that such an approach creates substantial uncertainty for bank lenders providing DIP financing, who are now left in limbo as to when a court ordered super-priority charge for bank loans advanced to a distressed company under *CCAA* protection or similar legislation will be respected. This approach misconstrues the powers of a *CCAA* court in making a super-priority charge pursuant to s. 11.2(2) of the *CCAA* and is inconsistent with the broad, flexible, and remedial approach to the *CCAA* and its relationship with bankruptcy law espoused by this Court in *Century Services*.

20. The CBA will submit that s. 11.2(2) of the *CCAA* expressly gives a court discretion to grant a super-priority charge that "rank[s] in priority over the claim of any secured creditor of the company." Parliament did not stipulate that the effectiveness of such an order depends on the *CCAA* court or a party expressly "invoking" paramountcy. Rather, s. 11.2(2) must be interpreted

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25 *Harvey's Travel Ltd. v. New Brunswick (Superintendent of Pensions)* (2010), 86 C.C.P.B. 254, ¶¶47-61, 2010 CanLII 67880 (NB LEB).

26 *Re Indalex Limited*, 2011 ONCA 265, ¶177.

27 *Id.*, 178.

under ordinary principles, having regard to its text, context, and purpose. *Century Services* emphasized that the *CCAA* warrants an "expansive interpretation" to advance its policy, namely, "avoiding the social and economic losses resulting from liquidation of an insolvent company."[28]

21. Section 11.2(2) necessarily provides a statutory power to override security claims arising under provincial law, including statutory deemed trust claims. The definition of "secured creditor" in the *CCAA* (like the definition in the *Bankruptcy and Insolvency Act*) relies on provincial law creating secured claims.[29] In *Husky*, Gonthier J. for the majority described the relationship between federal bankruptcy law and provincial security law as reflecting "an intrinsic constitutional limit to the application of provincial law in relation to property and civil rights." He noted that "the provinces are entitled to define secured creditors as they wish for their own purposes, but in bankruptcy those definitions which have the effect of reordering the priorities in the *Bankruptcy Act* are simply without application."[30] Put another way, as Lamer J. (as he then was) stated simply in *Federal Business Development Bank*, "in a bankruptcy matter, it is the *Bankruptcy Act* which must be applied."[31]

22. *Century Services* confirms that the same approach now applies under the *CCAA*, as both statutes share "the same approach to insolvency."[32] This Court has espoused a "single proceeding model" that recognizes that "the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible."[33] On its face, s. 11.2(2) contemplates a super-priority over provincial security interests; the latter cannot have the effect of reordering priorities under federal legislation, be they under the *BIA* or the *CCAA*. A creditor who would otherwise lose priority under the *BIA* (such as a deemed trust claimant) cannot retain it under the *CCAA*. Any other approach would encourage "statute shopping by secured creditors" and result in "skewed incentives against

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28 *Century Services*, above, note 20, ¶¶66, 70.

29 CCAA, s. 2(2), "secured creditor"; see also *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as am., s. 2, "secured creditor" ("*BIA*").

30 *Husky*, above, note 21, ¶60, Gonthier J.

31 *Federal Business Development Bank*, above, note 21, p. 1071, cited in *Husky*, above, note 21, ¶83.

32 *Century Services*, above, note 20, ¶54.

33 *Id.*, ¶¶22-24.

reorganizing under the *CCAA*," which ultimately would "only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert."[34]

23. Nor is there any need for a *CCAA* court or a party to expressly "invoke" paramountcy. The legal effect of a *CCAA* order flows from the words of s. 11.2(2) itself, by operation of law. Provided that the *CCAA* court has exercised its broad and flexible discretion by considering the factors identified in *Century Services* – appropriateness in the circumstances, good faith, and due diligence[35] – the order should be given its ordinary legal effect. Parliament did not see fit to stipulate the judicial gloss of expressly invoking paramountcy under s. 11.2(2). Such a requirement would only generate uncertainty for lenders and other stakeholders in *CCAA* proceedings.[36]

24. This Court should also have regard to the "general rule" stated in *Century Services* that "deemed trusts are ineffective in insolvency."[37] As Fish J. noted in concurring reasons in *Century Services*, "[i]n the context of the Canadian insolvency regime a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or [*BIA*] provision *confirming* – or explicitly preserving – its effective operation."[38] In this case, nothing in the *CCAA* or *BIA* preserves the effective operation of any applicable statutory deemed trust.

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34 *Id.*, ¶47.

35 *Id.*, ¶70.

36 Any requirement for the *CCAA* to expressly "invoke" paramountcy will also make *CCAA* proceedings more formalistic: see, for example, *Re Timminco Limited*, 2012 ONSC 506, where Morawetz J. "invoked" paramountcy to permit a *CCAA* super-priority charge to take priority over provincial statutory trusts, even though the Court in effect merely recognized that the order reflected the *CCAA*'s purposes of appropriateness, good faith, and due diligence.

37 *Century Services*, above, note 20, ¶45.

38 *Id.*, ¶96 (emphasis in original); see also ¶111.

Part IV – Order Sought

25. The CBA respectfully seeks an order granting it leave to: (i) intervene in this appeal and file a 10 page factum; and (ii) make oral submissions of up to 10 minutes at the appeal.

All of which is respectfully submitted,

February 16th, 2012

Mahmud Jamal
Tracy Sandler
Tony Devir
Jeremy Dacks

Osler, Hoskin & Harcourt LLP,
Counsel for the Canadian Bankers Association

Part V – Table of Authorities

Legislation and Rules	**Paragraph Referred to**
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 2	21, 22, 24
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 2(2), 11.2(2)	1, 2, 18, 19, 20, 21, 22, 23, 24
Employment Pension Plans Act, R.S.A. 2000, c E-8, s. 51(3)	17
Pension Benefits Act, S.N.B. 1987, c P-5.1, s. 51(4)	17
Pension Benefits Act, R.S.N.S. 1989, c. 340, s. 80(1)	17
Pension Benefits Act, R.S.O. 1990, c. P.8, s. 57(4)	1, 16, 17, 18
Pension Benefits Act, 1992, S.S. 1992, c. P-6.001, s. 54(1)	17
Pension Benefits Act, 1997, S.N.L. 1996, c P-4.01, s. 32(1)	17
Pension Benefits Standards Act, R.S.B.C. 1996, c. 352 s. 43.1(1)(a) and (2)	17
Supplemental Pension Plans Act, R.S.Q., c. R-15.1, s. 49	17
The Pension Benefits Act, C.C.S.M. c. P32, s. 28(3)	17

TAB 4

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
(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 AND FRED GRANVILLE

Respondents
(Appellants)

AND BETWEEN:

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

Appellant
(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 AND FRED GRANVILLE

Respondents
(Appellants)

AND BETWEEN:

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

Appellant
(Respondent)

- and -

KEITH CARRUTHERS, LEON KOZIEROK, RICHARD BENSON, JOHN FAVERI, KEN WLADRON, JOHN (JACK) W. ROONEY, BERTRAM MCBRIDE, MAX DEGAN, EUGENE D'IORIO, NEIL FRASER, RICHARD SMITH, ROBERT LECKIE, FRED GRANVILLE AND UNITED STEELWORKERS

Respondents
(Appellants)

AND BETWEEN:

UNITED STEELWORKERS

Appellant
(Respondent)

- and -

MORNEAU SHEPELL LTD. (formerly known as MORNEAU SOBECO LIMITED PARTNERSHIP) AND SUPERINTENDANT OF FINANCIAL SERVICES

Respondents
(Appellants)

ORDER

UPON APPLICATION by counsel for the Canadian Bankers Association ("CBA") for an Order granting the CBA: (i) leave to intervene in this appeal; (ii) to file a factum not exceeding 10 pages; (iii) leave to make oral submissions at the hearing of the appeal; and (v) such further or other Order that the Court may deem appropriate;

AND UPON the material filed having been read;

IT IS HEREBY ORDERED:

(i) that the CBA is granted leave to intervene in this appeal;

(ii) that the CBA is granted leave to file a factum not exceeding 10 pages; and

(iii) that the CBA may make oral submissions at the hearing of the appeal.

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J.S.C.C.