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**FAX TRANSMISSION**

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**DATE:** January 12, 2012

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**FROM:** Andrew J. Hatnay • Direct Phone 416-595-2083  
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**SUBJECT:** **Indalex Limited**  
Supreme Court File No. 34308

**FILE #:** 11/2079

Total No. of Pages, including this page: 3

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Urgent

For Review

Please Reply

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**KOSKIE  
MINSKY<sub>LLP</sub>**

BARRISTERS &amp; SOLICITORS

January 12, 2012

**Via Facsimile**

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Ottawa, ON K1A 0J1

**Andrew J. Hatnay**  
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Direct Fax:416-204-2872  
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**Attention: Michel Jobidon**

Dear Sir:

**Re: Indalex**  
**Re: Supreme Court File No. 34308**  
**Re: Motion by Sun Indalex, LLC to state constitutional questions**

We represent the Retirees who are Respondents in the above-noted appeal.

We write with respect to the motion by Sun Indalex to state constitutional questions. On January 6, 2012, we served and filed our Response to Sun Indalex's motion. We received a Reply from Sun Indalex on January 11, 2012.

Because the Reply raises new and incomplete information, we ask to be afforded a brief response and that this letter be provided to the Chief Justice or her designate deciding the motion.

**Paragraph 2 of the Reply:** Paragraph 2 of the Reply is missing information and is misleading. While a Notice of Constitutional Question was served by counsel to the Monitor prior to the hearing before the Ontario Court of Appeal, Sun Indalex fails to mention that the Attorney General of Canada responded that it would not participate in the appeal (see letter attached dated November 25, 2010). Counsel to the Monitor advised us that the Ontario Attorney General did not respond to the Notice at all. Neither the federal nor Ontario Attorneys General participated in the appeal below. The Notice is irrelevant. No constitutional issue was addressed in the courts below.

**Paragraph 3 of the Reply:** This paragraph misstates the state of jurisprudence where it states:

... While the specific issue of whether paramountcy was "invoked" in the Initial Order was not argued below, that is only because the concept of "invoking" paramountcy in the sense the Court of Appeal uses it was unknown in the jurisprudence prior to the Court of Appeal's decision and the Court of Appeal did not ask the parties to address it.

In addition to Sun Indalex's admission in this paragraph that paramountcy was not argued in the courts below, the obligation on a party who seeks to render a provincial law inoperative was not "unknown in the jurisprudence prior to the Court of Appeal decision". The principles were made clear by this Court in *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, paras. 69-75, (which was followed by the Ontario Court of Appeal in this case), as well as *GMAC v. T.C.T. Logistics Inc.*, [2006] 2 S.C.R. 123 (paras. 50-52) and *Crystalline Developments v. Domgroup Ltd.*, [2004] 1 S.C.R. 60, (para. 43).

**Paragraph 6 of the Reply:** At paragraph 6, Sun-Indalex refers to its claim against Indalex in Canada. Again, information is missing. In the Monitor's 12th Report dated April 28, 2010 (paras. 23-29) it is reported that Sun Indalex filed a Proof of Claim regarding its secured claim on August 28, 2009 (the same day as the motion hearing by the Retirees and the USW before the CCAA Judge, which is subject to the appeal in this Court). The Monitor reports (at para. 23) that Sun Indalex's secured claim is based on "an alleged cross-guarantee from Indalex" and that the quantum of Sun Indalex's claim is "yet to be determined" (at para. 29, as well as in the Monitor's 14<sup>th</sup> Report dated January 20, 2011, para. 17).

Should you have any questions with respect to the above, please do not hesitate to contact the undersigned.

Yours truly,

**KOSKIE MINSKY LLP**



Andrew J. Hatnay

AJH:jc

Enclosure

cc: Fred Myers - Goodmans LLP  
Harvey G. Chaiton - Chaitons LLP  
Ashley Taylor and David Byers - Stikeman Elliott LLP  
Darrell Brown - Sack Goldblatt Mitchell LLP  
Hugh O'Reilly and Amanda Darrach - Cavalluzzo Hayes Shilton McIntyre & Cornish LLP  
Mark Bailey - Financial Services Commission of Ontario  
Henry Brown, Q.C. - Gowling Lafleur Henderson LLP  
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Our File: 2-450704

Notre dossier:

Your File:

Votre dossier:

November 25, 2010

VIA FACSIMILE: 416-947-0866

Stikeman Elliot LLP  
Barristers & Solicitors  
5300 Commerce Court West  
199 Bay Street  
Toronto, ON M5L 1B9

Attention: Ashley John Taylor

**Re: Keith Cararuthers, et al. v. Sun Indalex Finance, LCC et al**

We acknowledge receipt of your Notice of Constitutional Question received on October 12, 2010, in the above-noted matter.

Please be advised that the Attorney General of Canada **will not be** intervening at this stage of the proceedings and **there is no need to serve this office with anything further related to this matter at this stage.**

However, please note the obligation imposed by s.109 of the Ontario *Courts of Justice Act* which prescribes that you must advise the Attorneys General of Canada and Ontario of any appeal or review of this matter in which the constitutional issue is raised.

Yours truly,

Gillian Patterson  
Counsel

cc: Attorney General of Ontario, Constitutional Law Division, Fax: 416-326-4015

Canada