

**IN THE SUPREME COURT OF CANADA
(ON 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.**

BETWEEN:

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

**APPLICANT
(Respondent)**

AND

**KEITH CARRUTHERS, LEON KOZIEROK, RICHARD BENSON, JOHN FAVERI, KEN
WALDRON, JOHN (JACK) W. ROONEY, BERTRAM MCBRIDE, MAX DEGEN,
EUGENE D'IORIO, RICHARD SMITH, ROBERT LECKIE, NEIL FRASER, and FRED
GRANVILLE ("RETIRES") and UNITED STEELWORKERS**

**RESPONDENTS
(Appellants/Respondents)**

AND

**MORNEAU SOBECO LIMITED PARTNERSHIP and
THE SUPERINTENDENT OF FINANCIAL SERVICES OF ONTARIO**

**PROPOSED INTERVENERS
(Interveners)**

**AFFIDAVIT OF ROBERT F. HILTON
(Sworn September 1, 2011)**

**I, ROBERT F. HILTON, of the City of Burlington, in the Province of Ontario, MAKE
OATH AND SAY AS FOLLOWS:**

1. I am the President of the Canadian Federation of Pensioners ("CFP").

2. The CFP is an organization of retirees formed in 2004. The main purpose of the CFP is to explore pension plan issues from a pensioner point of view. The CFP was formed at a time of concern by retirees about company bankruptcies and restructurings that impacted the pension plans of such companies. For this reason, the CFP makes submissions to governments for a legal framework that reduces the risk that defined benefit pension plans will be inadequately funded in order to prevent cuts to retirees' pension benefits. The CFP believes that the legislative and regulatory situation today for retirees remains perilous.

3. The CFP currently represents approximately 165,000 retirees through affiliated retiree organizations and is constantly growing. CFP members are comprised of the full spectrum of retired employees, including former corporate officers, senior executives, management, non-management, union and professional employees. The CFP currently has fourteen affiliated retiree organizations, all of whom support the filing of this affidavit:

- Nortel Retiree Protection Canada;
- DuPont/Invista Pensioners Association - Canada;
- Stelco Salaried Pensioners Organization;
- General Motors Salaried Pension Organization;
- Chrysler Canada Retirees Organization;
- Novartis/CIBA Retirees Organization;
- Society of Energy Professionals – Pensioners' Chapter;
- International Air Transport Association Retirees;
- Association of Store and Catalogue Retirees (Sears);
- Slater Steel Pensioners;
- Rio Algom Pensioners;

- **Municipal Retirees Organization Ontario;**
- **Air Canada Pionairs; and**
- **Bell Pensioners' Group.**

4. In addition to the above groups, the CFP also liaises with a number of other retiree groups as well as individual pensioners.

5. I was formerly an employee of Slater Steel Industries (Hamilton Specialty Bar Division) from October 1963 to November 2000 holding the following management positions at various times during my employment: Supervisor Inside Sales, Supervisor Production Control, Senior Industrial Engineer, Superintendent Production Planning, Manager of Production Planning and Manager Customer Service. I have a Certificate in Industrial Management from the Canadian Institute of Management.

6. In 2005, my registered pension benefits from the Slater Steel pension plan were cut by 23% due to the underfunding of the plan by Slater Steel and the subsequent insolvency of Slater Steel.

7. It is CFP's position that the full value of the defined benefit pension benefits that have been earned by employees during their working years and which have been promised to be paid during their retirement must be delivered to them. These pension benefits are the cornerstone of the financial plans that retirees have made to support themselves and their surviving beneficiaries during their retirement.

8. The CFP is currently focusing on the need to improve the long-term security of single employer defined benefit pension plans by:

- (a) consulting with government and participating in other forums to review issues and challenges associated with defined benefit pension plans;
- (b) proposing legislative and regulatory measures to strengthen pensioner security; and
- (c) identifying pensioner issues in Canadian legislation when an employer's business is sold or merged, declared insolvent, bankrupt or forced to wind up, and the pension plan is underfunded and pensioners are facing reductions to their pension benefits.

9. The CFP believes that it is a serious problem for retirees when their former employer becomes bankrupt or insolvent and there is a funding deficiency in the pension plan. The typical scenario that will occur is that the pension plan will be wound up by an externally appointed administrator (usually an actuarial firm) who will have to impose pension benefit cuts to each member's monthly pension benefit due to the plan's underfunding. Retirees who have earned the value of their full pension benefits during their working lives have a legitimate expectation and reliance that the promised benefits will be paid.

10. The vast majority of retirees are elderly. Many are often in poor health and confined to retirement homes and hospitals. They have little or no recourse to make up for lost income caused by a reduction to their pension benefits. Such cuts can be devastating not only to retirees but also for their surviving spouses. The drop to their income can have a very harmful impact on a retiree's quality of life. It is widely acknowledged that employees suffer when they lose their jobs. For retirees, the harm of lost income by unexpected reductions to their pension benefits can be even worse.

11. I have reviewed the decision of the Ontario Court of Appeal in the *Indalex* matter which was released on April 7, 2011. On my reading of this comprehensive decision, the Ontario Court of Appeal dealt with two appeals heard together. One was an appeal by the United Steelworkers who represent certain members of the Indalex Salaried Plan. The other was an appeal by retirees of the Indalex Executive Plan. Both pension plans are underfunded. As a result, the members of the Executive Plan have had their monthly pension benefits cut by 35%.

12. For the Salaried Plan, the Ontario Court of Appeal held that on the facts of the case, the deemed trust in section 57(4) of the Ontario *Pension Benefits Act* applied to an amount being held in reserve by the Monitor of Indalex to generate a priority payment of the amount of the wind up deficit owing to the Salaried Plan.

13. Secondly, the Court of Appeal also found that on the facts of the case, Indalex breached its fiduciary duty to the pension plan members of both of the Salaried Plan and Executive Plan. The Court of Appeal, in the circumstances of the case, then imposed a constructive trust with a priority payment in the amount of the wind-up deficit owing to the Executive Plan, which was also payable from the amount being held in reserve by the Monitor. The Court of Appeal applied the same remedy to the Salaried Plan, in addition to the deemed trust.

14. I understand that the three respondents in *Indalex* (the Monitor (now acting in lieu of the company who did not participate in the appeal), Sun Indalex and the U.S. bankruptcy trustee) each filed applications for leave to appeal to this Court.

15. I believe that the decision of the Ontario Court of Appeal in *Indalex* is a positive development. By applying the existing law of the deemed trust the Ontario *Pension Benefits Act*

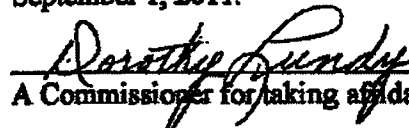
and the law of the fiduciary duty of a pension plan administrator to plan members to the facts of Indalex, the Court of Appeal's decision resulted in a just result in the circumstances of the case.

16. In addition, and most significantly for the CFP, the Court of Appeal's decision has the potential to assist retirees, where the facts so warrant, in situations where their employer has failed to fund their pension plan adequately and has engaged in conduct that is contrary to its fiduciary duty to plan members and which results in cuts to pension benefits.

17. The CFP therefore supports the Indalex Retirees in this matter and submits that the leave applications of the respondents to this Court should all be dismissed.

18. I swear this Affidavit for no improper purpose.

SWORN BEFORE ME at the City of
Burlington, in the Province of Ontario, on
September 1, 2011.


A Commissioner for taking affidavits, etc.

Dorothy Lundy, a Commissioner, etc.,
Regional Municipality of Halton, for the
Constituency Office of Mike Wallace, M.P.
Expires May 15, 2012.


ROBERT F. HILTON