Court File No: 34308

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

B E T W E E N :

SUN INDALEX FINANCE, LLC

Applicant
(Respondent)

- and -

UNITED STEELWORKERS, KEITH CARRUTHERS, LEON KOZIEROK, RICHARD BENSON, JOHN FAVERI, KEN WALDRON, JOHN (JACK) W. ROONEY, BERTRAM MCBRIDE, MAX DEGAN, EUGENE D'IORIO, NEIL FRASER, RICHARD SMITH, ROBERT LECKIE, FRED GRANVILLE, GEORGE L. MILLER, THE CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATES OF THE US INDALEX DEBTORS and THE MONITOR, FTI CONSULTING CANADA ULC

Respondents
(Appellants/Respondents)

- and -

MORNEAU SOBECO LIMITED PARTNERSHIP and THE SUPERINTENDENT OF FINANCIAL SERVICES

Interveners
(Interveners)

RESPONSE OF THE UNITED STEELWORKERS TO THE APPLICATION FOR LEAVE TO APPEAL

(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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Respondents
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- and -

MORNEAU SOBECO LIMITED PARTNERSHIP and THE SUPERINTENDENT OF FINANCIAL SERVICES

Interveners
(Interveners)

MEMORANDUM OF ARGUMENT OF THE RESPONDENT, UNITED STEELWORKERS

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PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The applicant, Sun Indalex Finance LLC ("Sun Indalex") seeks leave to appeal the decision of the Court of Appeal for Ontario dated April 7, 2011. Sun Indalex is the principal secured creditor of Indalex Limited ("Indalex"), an insolvent company sold as a going concern while under the protection of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended (*CCAA*). The Court of Appeal unanimously held, *inter alia,* that, in the unique circumstances of this case, the deficiencies in the pension plan covering Indalex's salaried employees[1] were subject to a deemed trust under the Ontario *Pension Benefits Act,* R.S.O. 1990, c. P.8 ("*PBA*") and were payable in priority to Sun Indalex's claim. The Court therefore ordered the monitor appointed under the *CCAA* to pay the full cost of deficiencies in Indalex's pension plans from the sale assets before paying Sun Indalex.

2. The Monitor (FTI Consulting Canada ULC) and George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the US Indalex Debtors ("US Trustee") have also brought applications for leave to appeal the Court of Appeal's decision.

3. The United Steelworkers ("USW") submits that, for the reasons set out below and in its Memoranda of Argument filed in the other applications, all three applications for leave to appeal should be dismissed. In reaching its decision, the Court of Appeal correctly applied well known principles of statutory interpretation and correctly determined and applied common law principles to the unusual facts of this case.

4. Further, as set out more fully below, the Court of Appeal merely enforced existing law. If a debtor company presents evidence in a *CCAA* proceeding that the *CCAA* restructuring effort cannot succeed if the provincially legislated deemed trust provisions are enforced, the doctrine of paramountcy will be invoked and the *CCAA* judge will preserve the super-priority normally accorded debtor-in-possession (DIP) financing. Third party secured creditors are not threatened by this decision. In the vast majority of cases, the deemed trust obligations will be set aside.

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[1] Retirement Plan for Salaried Employees of Indalex and Associated Companies (the "Salaried Plan")

B. The Facts

5. USW repeats and relies upon the facts as set out in its Memorandum of Argument filed in the Monitor's application for leave to appeal. USW also relies on the following additional facts.

6. At paragraph 8 of its Memorandum of Argument, Sun Indalex indicates that the USW was served with notice of the April 8, 2009 motion to amend and restate the Initial Order.[2] The notice was received the evening of April 7th after USW offices had closed and without the motion record. USW was not in attendance on April 8th.

7. Paragraph 14 of the Sun Indalex Memorandum excludes critical information. The Approval and Vesting Order dated July 20, 2009 renders any subrogated right arising from the Indalex US guarantee subject to the Monitor's reserve.[3]

8. At paragraph 15 of its Memorandum, Sun Indalex identifies itself as a secured creditor of the *CCAA* debtors. The US Trustee is currently challenging Sun Indalex's status as a secured creditor in the U.S. Chapter 7 proceedings asserting, *inter alia,* that Sun Indalex was the recipient of an improper dividend in the amount of $69.3 million US at a time when the Indalex group of companies was in distress, and further that claims characterized as secured are more appropriately characterized as equity infusions not subject to priority.[4] While the propriety of the U.S. transactions remains to be adjudicated and was not considered by the Court of Appeal, the implication is that Sun Indalex played a pivotal role in the undermining of the financial health of the Indalex group of companies and that related entities to Indalex received substantial sums of money from Indalex operations ahead of third party creditors. If the US Trustee succeeds in his Chapter 7 complaint, the "direct prejudice" asserted by Sun will be wholly refuted.

9. At paragraph 19 of its Memorandum, Sun Indalex implies that the wind-up deficit of the Salaried Plan is not known. The wind-up liability of the Salaried Plan crystallized at December 31, 2006 the amount of which is known, subject only to normal and predictable adjustments not

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[2] Initial Order, Sun Indalex Application Record, Vol. II, Tab 5-E, pp. 346- 367.
[3] Approval and Vesting Order dated July 20, 2009 at para. 14 ("Approval and Vesting Order"), Sun Indalex Record, Vol. II, Tab 5-J, pp. 395-96.
[4] Complaint brought by George L. Miller against Sun Capital Partners Inc., paras. 19 – 24, 178, 223 – 232, USW Response, Tab 2-A, pp. 8, 20, 25 .

unlike any liability (for example, a loan) where payments may vary with changes in interest rates.[5]

PART II - QUESTIONS IN ISSUE

10. Sun Indalex raises the following issues in its motion for leave to appeal:

a. Did the Court of Appeal err in its interpretation or application of s. 57(4) of the *PBA*?

b. Did the Court of Appeal err in its interpretation or application of Indalex's fiduciary obligations in the context of the *CCAA* proceedings or in granting a constructive trust in the circumstances?

c. Did the Court of Appeal err in its interpretation or application of the doctrine of paramountcy?

d. Did the Court of Appeal err in failing to apply the scheme of priorities set out in the *Bankruptcy and Insolvency Act* in this case?

PART III -STATEMENT OF ARGUMENT

A. The Court of Appeal did not err in its interpretation or application of s. 57(4) of the *PBA*

11. USW maintains that the Court of Appeal did not err in its interpretation or application of s. 57(4) of the *PBA* and, in this respect, repeats and relies on the submissions made in paragraphs 50 to 64 of its Memorandum of Argument filed in response to the Monitor's application for leave to appeal. In addition, USW makes the following submissions.

12. At paragraph 26 of its argument, Sun Indalex states that holding a wind-up deficit subject to a deemed trust is inconsistent with prior authority and fails to accord with the language of the *PBA*. However, prior cases did not deal with the deemed trust issue in this factual context and, moreover, decision of the Court of Appeal is wholly consistent with the language and intent of the *PBA*.

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[5] Affidavit of Bob Kavanaugh, para. 10, Sun Indalex Record, Vol. II, Tab 5-K, pp. 400.

13. Prior to the Court of Appeal's decision in this case, only one other case dealt with a ss. 57(4) deemed trust claim in a wind-up context outside of bankruptcy. In *Usarco*, Farley J. ruled that s. 57(4) did not include the wind-up liability.[6] However, Farley J. subsequently reversed his holding stating in *Ivaco* that the deemed trust includes the wind-up liability.[7]

14. Most cases have considered the status of the deemed trusts in the context of a bankruptcy proceeding.[8] The *General Chemical, Re Ivaco* and *Usarco* decisions, while instructive on general principles, do not engage the same provisions under the *PBA* and do not involve the same facts as the instant case. This is the first instance in which the Court was asked to consider the interaction of the *PBA* and *CCAA* when the employer under *CCAA* proceedings had already wound up the pension plan, crystallized the wind-up liability and was not subject to either a voluntary assignment or petition into bankruptcy during the *CCAA* proceeding. Consequently, the Court of Appeal's decision is not inconsistent with prior authority, rather it considered the statutory provisions in the context of significantly different factual circumstances.

15. The purpose of the *PBA* is to protect members and pensioners of pension plans. The Supreme Court of Canada recently re-affirmed this purpose:

> The purpose of the *PBA* was explained at para. 13 of *Monsanto*, citing *GenCorp Canada Inc.* v. *Ontario (Superintendent, Pensions)* (1998), 158 D.L.R. (4th) 497 (Ont. C.A.), at para. 16:
>
> > [T]he *Pension Benefits Act* is clearly public policy legislation establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Ontario. It is intended to benefit and protect the interests of members and former members of pension plans, and "evinces a special solicitude for employees affected by plant closures".[9]

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[6] *Toronto-Dominion Bank v. Usarco Ltd.* (1991), 42 E.T.R 235 (Gen. Div.), para. 26, Sun Indalex Record, Vol. 3, Tab 7.
[7] *Ivaco Inc. (Re)*, 2005 CanLII 27605 (Ont. S.C.), para. 11.
[8] *Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd.*, 2007 ONCA 600 (CanLII), para. 1; *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, 2006 CanLII 34551 (C.A.) affirming *Ivaco Inc. (Re)*, 2005, *supra* note 7, para. 41; *Toronto-Dominion Bank v. Usarco Ltd.*, *supra* note 6, para. 23.
[9] *Nolan v. Kerry (Canada) Inc.*, [2009] 2 S.C.R. 678, para. 28.

16. This overriding purpose has been stated in numerous cases and is well summarized in the unanimous decision in *Huus* v. *Ontario Superintendent of Pensions*:

> I start with this observation: pension plans are for the benefit of the employees, not the companies which create them. They are a particularly important component of the compensation employees receive in return for their labour. They are not a gift from the employer; they are earned by the employees. Indeed, in addition to their labour, employees usually agree to other trade-offs in order to obtain a pension. As explained by Cory . in *Schmidt* v. *Air Products Canada Ltd.*, [1994] 2 S.C.R. 611 at 646:
>
> > In the case of pension plans, employees not only contribute to the fund, in addition they almost invariably agree to accept lower wages and fewer employment benefits in exchange for the employer's agreeing to set up the pension trust in their favour.
>
> Similar statements have been expressed by this court in several cases. In *Gencorp Canada Inc. v. Ontario (Superintendent of Pensions)* (1998), 39 O.R. (3d) 38 at 43 (C.A.), Robins J.A. said:
>
> > [T]he Pension Benefit Act is clearly public policy legislation establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Ontario. It is intended to benefit and protect the interests of members and former members of pension plans....
>
> In *Firestone Canada Inc. v. Ontario (Pension Commission)* (1990), 1 O.R. (3d) 122 at 127 (C.A.) ... Blair J.A. stated that the *PBA* "is clearly intended to benefit employees" and "[i]n. particular. . . evinces a special solicitude for employees affected by plant closures".[10]

17. Insofar as the Court of Appeal decision serves to protect the interests of Salaried Plan beneficiaries, it would appear to be wholly in accord with the stated purposes of the *PBA*.

18. At paragraph 27 of its argument, Sun Indalex describes at length the meaning of solvency deficiency and its "notional" character. However, the Salaried Plan was wound up on December 31, 2006, long before commencement of *CCAA* proceedings. As such, the "solvency deficiency" is no longer relevant. It is the wind-up deficit that determines Indalex's liability. Gillese J. clearly explained the difference between a solvency valuation and a wind-up deficit in her reasons:

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[10] *Huus v. Ontario (Superintendent of Pensions)* (2002), 58 O.R. (3d) 380, 2002 CanLII 23593 (ON C.A.), paras. 25-27.

> It is important to understand that the solvency valuation is not the same thing as a wind up report. To repeat, the solvency valuation is prepared while the pension plan is ongoing. A solvency valuation is required while the plan is ongoing because it is crucial that there be adequate funds with which to pay pensions if the company becomes insolvent and the plan is wound up.
>
> ...
>
> It will be recalled that when a pension plan is wound up, an actuarial calculation is made of the assets and liabilities, as of the wind up date. Because the plan liabilities relate to service that was provided up to the wind up date and not beyond, it is clear that all plan liabilities are accrued as of the wind up date. Put another way, no additional liability can accrue following the wind up because all events crystallize on the windup date – all pension benefit accruals by members cease and all amounts that an employer is required to pay into a pension plan are calculated as of the wind up date. For the same reason, the amounts that s. 75 requires an employer to contribute to the pension fund, on wind up, are accrued to the date of wind up. The required contributions are the amounts that an employer must make to the pension fund so that the accrued pension benefits of the plan members can be paid.[11]

19. At paragraph 28 of its argument, Sun Indalex attempts to distinguish "contributions" from "payments" implying that a wind-up liability payment is not a contribution and therefore cannot be caught by s. 57(4) of the *PBA*, which falls under the *PBA* subheading "Contributions". Farley J. addressed the use of "contribution" and "payment" in Ontario pension standards legislation and regulation in *Usarco*:

> The Regulations to the *PBA* are not particularly helpful in distinguishing on the basis of "contributions" versus "special payments". While it is true that s. 4(2)(*c*) of the Regulations refers to "special payments" without, as in subss. 4(2)(*a*) and (*b*), indicating these are contributions, it is also true that s. 4(3)4 refers to "employer contributions for a special payment." I also note that s. 4(1) refers to a contribution "both in respect of the normal cost [that is, a regular payment] and any going concern unfunded actuarial liabilities" [i.e., special payments]. I conclude that, as is the case with so much technical legislation, particularly if it has been patchworked, the language of intent has simply not been fully coordinated. The *PBA* and Regulations thereunder are legislation which is not designed for persons not actively working in the field to tread in with any comfort.[12]

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[11] Court of Appeal Reasons, paras. 84, 97, Sun Indalex Record, Vol. I, Tab 3-B, pp. 31, 33.

[12] *Toronto-Dominion Bank v. Usarco Ltd.*, *supra* note 6, para. 24.

"Contribution" is not defined in the *PBA*. The terms "contribution" and "payment" are used interchangeably in the Act and Regulations. Consequently, reference must be had to the language and purpose of s. 57(4).

20. At paragraphs 29 and 30 of its argument, Sun Indalex references s. 58(1) of the *PBA*, which requires that contributions that an employer is required to pay into a pension plan accrue on a daily basis. Sun Indalex asserts that prior court decisions have interpreted the daily accrual requirement as necessarily precluding inclusion of a wind-up liability as part of the s. 57(4) deemed trust. In essence, Sun Indalex argues that the wind-up liability occurs only as of the wind-up date, is determined thereafter and has therefore not accrued "to the date of wind-up". The USW disputes this assertion both in its technical interpretation and the statement that prior court decisions support this characterization.

21. Special payments (whether made to on ongoing pension plan or in respect of a wind up deficit) are accrued obligations. As such, they have been treated in numerous *CCAA* decisions as "pre-filing debts" that an employer may seek to have suspended while under *CCAA* protection.[13] The basis for these rulings is that special payments are in respect of past services performed prior to the *CCAA* filing date and, therefore, are appropriately characterized as pre-filing debts. Sun Indalex's assertion that the wind-up liability has not accrued for the Salaried Plan cannot be reconciled with the position that these payments can be suspended during *CCAA* proceedings on the basis that these are pre-filing debts.

22. Generally, the scheme of the *PBA* deals with the accrual of pension benefits, not the accrual of contributions. For example, s. 14(1)(a) of the *PBA* prohibits reductions in accrued pension benefits. Pension benefits, in turn, accrue as a pension plan member's accumulated pensionable service with the employer accrues. In this context, accrued employer contributions can be understood as contributions for benefits which have accrued under the pension plan. As benefit entitlements accrue, so does an associated employer obligation to make contributions to fund those benefits. Accordingly, the accrual of employer contribution obligations is inextricably

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[13] *Fraser Papers Inc. (Re)* (2009), 55 C.B.R. (5th) 217, 2009 CanLII 39776 (ON SC), para. 20; *AbitibiBowater Inc.(Re)* (2009), 74 C.C.P.B. 254, paras. 37 to 54; *Collins & Aikman Automotive Canada Inc. (Re)*, 2007 CanLII 45908, paras. 64, 103.

linked to the accumulation of pensionable service by pension plan members. Quite simply, employer contributions accrue as pension plan members work and the issue of whether or not an employer contribution has accrued is simply a matter of determining whether or not the related employee service has occurred. This analysis is consistent with the suspension of special payments in *CCAA* proceedings. In the present case, for Salaried Plan members, benefit accrual ceased as of the date of the Plan wind-up, December 31, 2006, well over two years prior to the *CCAA* application.

23. Contrary to Sun Indalex's assertion at paragraph 32 of its Memorandum, s. 75(1)(b) of the *PBA* does not create a separate funding obligation distinct from the amounts covered by s. 75(1)(a) and s. 57(4) for the following reasons:

a. The preamble to s. 75 uses the same wording as in s. 57(4) - "where a pension plan is wound up in whole or in part." This implies that s. 75(1) in its entirety is intended to cover the windup liability and, through the use of the same phrase as in s. 57(4), is intended to be subject to the windup deemed trust.

b. The word "and" is used to connect s. 75(1)(a) and s. 75(1)(b) clearly making the two subsections conjunctive and subject to the s. 75(1) preamble.

c. The requirement to accrue the liability for contributions on a daily basis (*PBA,* s. 58(1)) is inextricably linked to the liability for "the value of benefits accrued" under s. 75(1)(b). In other words, the accrual runs with service and since service ceased on December 31, 2006 under the Salaried Plan and s. 75(1)(b) requires any liability related to that service to be paid on windup, the only interpretation that can be placed on s. 75(1)(b) is that the liability accrued to the date of the windup mirroring the s. 57(4) criterion.

d. Both ss. 75(1)(a) and (b) define amounts to be paid (i.e. the accrued debt). The preamble defines the triggering event – the windup. There is no differential treatment as to the timing of the payment obligation as between the two subsections. This is further reinforced by referencing s. 75(2) which states that

> "the employer shall pay the money due under s. 75(1) in the prescribed manner and at the prescribed times. There is no distinction drawn in s. 75(2) between s. 75(1)(a) and s. 75(1)(b). Furthermore, even if there were a distinction drawn as to timing of the payment, this would relate only as to when the liability is due to be paid, not when the liability accrued.

24. At paragraph 33 of its Memorandum, Sun Indalex refers to "numerous commentators" recognizing the lack of protection in respect of a wind-up liability under the *PBA*. As noted in paragraph 63 of the USW Memorandum of Argument in response to the Monitor's Application, the "numerous commentators" cited previously amount to Ari Kaplan and Gregory Winfield, each of whom cite Justice Farley in *Usarco* as their sole basis for concluding that the s. 57(4) deemed trust does not cover the wind-up liability. Further, the quote from the Arthur's Commission at paragraph 2 of the Sun Indalex Memorandum describes federal amendments to the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 ("*BIA*"), not changes to provincial legislation. The Ontario Legislature did not amend s. 57(4) in its last round of reforms, since s. 57(4) already encompassed coverage of the wind-up liability as part of the deemed trust.

25. The Court of Appeal's interpretation is supported by longstanding policy at the Financial Services Commission of Ontario ("FSCO"), the Commission authorized to regulate the *PBA*. FSCO Policy W100-101 describes the scope of the wind-up liability:

> The wind up liability must reflect all benefits provided under the plan and the applicable legislation on wind up and should be separately summarized for each major category of membership.
> ...
> If the wind up report reveals that the plan does not have sufficient assets to pay the liabilities on wind up, the employer must pay into the pension fund amounts required under s. 75 of the *PBA*.[14]

26. The decision of the Court of Appeal does not create new law enhancing the protection for pensioners in insolvencies as alleged by Sun Indalex; rather, it applies existing law and policy in the context of the specific facts of this case.

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[14] Financial Services Commission of Ontario, *Filing Requirements and Procedure on Full and Partial Wind Up of a Pension* Plan, Index No. W100-101 (December 9, 2004) ["FSCO Policy"], pp. 10-11.

B. Court of Appeal did not err in its interpretation or application of Indalex's fiduciary obligations in the context of the *CCAA* proceedings or in granting a constructive trust in the circumstances

27. USW submits that the Court of Appeal did not err in its interpretation or application of Indalex's fiduciary obligations in the context of *CCAA* proceedings and, in that regard, repeats and relies on the submissions made in paragraphs 65 to 72 of its Memorandum of Argument filed in response to the Monitor's application for leave to appeal.

28. As the Court of Appeal noted, even in the absence of a deemed trust under the *PBA*, the Plans' beneficiaries were not mere unsecured creditors. Rather, they were unsecured creditors to whom a fiduciary duty was owed.[15] Further, as the Court of Appeal held, the unusual facts of this case demanded equitable relief:[16]

> The *CCAA* was not designed to allow a company to avoid its pension obligations. To give effect to Indalex U.S.'s claim would be to sanction Indalex's breaches of fiduciary obligation. In the circumstances of this case, such a result would work an injustice. The equities are not equal. The Plans' beneficiaries were vulnerable to the exercise of power by Indalex. They were not part of the negotiations for the DIP financing nor were they involved in the sale negotiations. They had no opportunity to protect their interests and, as a result of Indalex's actions, there was no one who fulfilled the administrator's role. Indalex, on the other hand, was fully aware of the Plans' underfunding and the result to the pensioners of a failure to inject additional funds. It was Indalex who advised the *CCAA* court that it intended to comply with "regulatory deemed trust requirements". To permit Sun Indalex to recover on behalf of Indalex U.S. would be to effectively permit the party who breached its fiduciary obligations to take the benefit of those breaches, to the detriment of those to whom the fiduciary obligations were owed.

In this regard, as the Court noted, it is important not to lose sight of the fact that the dispute in this case is between the Plans' beneficiaries and Sun Indalex, a related party and the principal secured creditor of Indalex U.S. This differs dramatically from a situation, such as that in *Ivaco*, where the secured creditors were in significant number and at arm's length to the debtor.[17]

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[15] Court of Appeal Reasons, para. 200, Sun Indalex Record, Vol. 1, Tab 3-B, p. 47.
[16] Court of Appeal Reasons, para. 199, Sun Indalex Record, Vol. 1, Tab 3-B, p. 47.
[17] Court of Appeal Reasons, para. 198, Sun Indalex Record, Vol. 1, Tab 3-B, p. 47; *Ivaco Inc. (Re)* (2006), *supra* note 8, affirming *Ivaco Inc. (Re)*, 2005, *supra* note 7, paras. 28-31.

29. In paragraphs 35 and 39 of its argument, Sun Indalex mischaracterizes the Court of Appeal's findings in respect to its conclusion that a fiduciary breach had occurred. The Court of Appeal did not state that the breach occurred because a DIP loan was negotiated and the sale of assets occurred without making provision for pension payments. To the contrary, the Court relied on the procedural flaws (eg. lack of proper notice to Plan beneficiaries), the fact that no attempt was made to negotiate coverage of pension liabilities as part of the DIP loan and sales process, the conflicts of interest that arose due to Mr. Cooper wearing several hats while invariably choosing to support the interests of Indalex US and the evidence that Indalex made no provision to honour its ongoing Plan administrator obligations while under *CCAA* protection to find that a breach had occurred.[18] In addition, the Court also relied on the fact that Indalex had undertaken to the *CCAA* Court that it would honour its "regulatory deemed trust obligations", leaving the impression that Plan obligations would be fulfilled.[19]

30. Contrary to Sun Indalex's suggestion at paragraph 37 of its argument, the Court of Appeal does not hold, in paragraph 132 of its decision, that whenever an employer makes decisions that have "the potential to affect the Plans' beneficiaries' rights" it takes those decisions both as employer and as administrator/fiduciary. Rather, the Court merely acknowledges the vulnerability of Plan beneficiaries in this case who received no notice of the *CCAA* proceedings, had no real knowledge of what was transpiring and had no power to ensure that their rights were even considered.

31. The critical point emphasized by the Court of Appeal was that Plan administration obligations continue during a *CCAA* proceeding. The obligations don't simply disappear as was argued by the Monitor, Sun Indalex and the US Trustee. The evidence on the record pointed to confusion on the part of Indalex as to who even bore the obligation to perform administration functions during the *CCAA* proceeding let alone actually perform such functions.[20]

32. Contrary to the assertion in paragraph 38 of Sun Indalex's argument, the Court of Appeal did not hold that "an employer is a fiduciary when not acting to administer a pension plan but

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[18] Court of Appeal Reasons, paras. 139 – 144, Sun Indalex Record, Tab 3-B, pp. 39-40.
[19] Court of Appeal Reasons, para. 178, Sun Indalex Record, Tab 3-B, p. 44.
[20] Court of Appeal Reasons, paras. 134, 136, Sun Indalex Record, Tab 3-B, pp. 38-39

rather in making a business decision to restructure". To the contrary, the Court held that an employer can have both corporate and fiduciary obligations that run concurrently and it is incumbent on the employer to deal with a conflict if a conflict arises. In this case, Indalex not only ignored its fiduciary obligations, it actively sought to extinguish the deemed trust claim so that assets would revert to Indalex US.[21] Moreover, contrary to Sun Indalex's assertion, when evidence of a conflict is put before the *CCAA* court demonstrating that the remedial objectives of the *CCAA* cannot be fulfilled if the provincially legislated fiduciary obligations are enforced, the doctrine of paramountcy will be available to enforce the *CCAA* provisions.[22]

33. At paragraph 40 of its argument, Sun Indalex asserts that, had there been no DIP Charge or going concern sale, "the pensioners would have been no better off". While the USW certainly did not advocate a piecemeal liquidation, the Monitor estimated the liquidation value of the assets at substantially higher than the purchase price obtained from SAPA.[23] It is not clear whether pensioners would have been better off or not. Sun Indalex has presented no evidence to support the statement that the pensioners would have been no better off.

34. At paragraph 41 of its Memorandum, Sun Indalex argues that there is no evidence as to what proceeds held by the Monitor were proceeds of inventory or accounts in Ontario. This is not the test. As emphasized by the Court of Appeal, s. 30(7) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10, provides that the **security interest** in accounts or inventory is **subordinate** to the deemed trust entitlement. The Monitor holds money in an account on behalf of Indalex. That money is allegedly subject to Sun Indalex's security interest. Section 30(7) subordinates that interest to the deemed trust entitlement. There is no requirement to trace the source of the funds held in the "account". Section 30(7) does not stipulate that the "accounts" are limited to accounts receivable within a geographic region. A bank account holding the funds is all that is required to satisfy the meaning of "accounts" as used in s. 30(7).

35. At paragraph 42 of its Memorandum, Sun Indalex again misstates the Court of Appeal's basis for the finding of a breach of fiduciary duty. For the reasons stated in paragraphs 30 to 33

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[21] Court of Appeal Reasons, paras. 139, 144, Sun Indalex Record, Tab 3-B, pp. 39-40.
[22] Court of Appeal Reasons, paras. 177, 181, Sun Indalex Record, Tab 3-B, p. 44; see also the USW Memorandum of Argument in response to the Monitor's application, at paragraph 68.
[23] Seventh Report of the Monitor, July 15, 2009, paras. 24-29 and Appendix C, USW Response, Tab 3, pp. 43-45.

above, the *CCAA* debtors were not required, when making restructuring decisions, to act solely in the interests of pensioners. The board of directors was entitled to seek the maximum recovery for creditors and protect the jobs of employees, customers and suppliers. However, Indalex was not entitled to totally ignore its Plan administrator obligations nor was it entitled to mislead the Court and Salaried Plan beneficiaries by indicating that it intended to honour its "regulatory deemed trust obligations" when it had no intention to do so.

36. At paragraph 44 of its Memorandum. Sun Indalex asserts that a voluntary assignment into bankruptcy to distribute the proceeds of the liquidation in accordance with the *BIA* would be consistent with public policy. This question relates closely to the fourth issue Sun Indalex raises in this application for leave to appeal and is therefore discussed at paragraphs 46 to 54 below, and in USW's response to the application for leave to appeal brought by the US Trustees.

C. The Court of Appeal did not err in its interpretation or application of the doctrine of paramountcy

37. USW submits that the Court of Appeal did not err in its interpretation or application of the doctrine of paramountcy and, consequently, the s. 57(4) deemed trust must be applied.

38. Contrary to Sun Indalex's claim, the Court of Appeal did not retroactively interpret or vary the super-priority charge. Rather, the Court of Appeal held that the onus was on Indalex to demonstrate **in fact** that a conflict between federally regulated bankruptcy and insolvency legislation (in this instance, the *CCAA*) and provincial laws (the *PBA* and the *Personal Property Security Act*, R.S.O. 1990, c. P.10) exists. There was nothing in the record to indicate that Indalex had done so.[24]

39. Sun Indalex is also incorrect in asserting that the Court of Appeal's approach to applying the doctrine of paramountcy is not consistent with any case law. That a factual examination must be undertaken to demonstrate a conflict is supported by decisions of both the Ontario Court of Appeal and this Court:

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[24] Court of Appeal Reasons, paras. 177-178, Sun Indalex record, Tab 3-B, p. 44.

> An incompatible federal legislative intent must be established by the party relying on it, and the courts must never lose sight of the fundamental rule of constitutional interpretation that, "[w]hen a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes" (*Attorney General of Canada v. Law Society of British Columbia*, at p. 356). To sum up, the onus is on the party relying on the doctrine of federal paramountcy to demonstrate that the federal and provincial laws are **in fact** incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law.[25] [emphasis added]

40. The issue of paramountcy of federal legislation was not raised by Indalex in response to the USW motion to enforce the deemed trust. Rather, Indalex simply argued that the deemed trust provision under the *PBA* did not include the wind-up deficiency. Indalex did not address the application of the *PPSA* super-priority. As a result, there was no basis to find, and the *CCAA* Judge did not find, a conflict between the applicable provincial legislation and the *CCAA*.[26]

41. At paragraph 46 of its Memorandum, Sun Indalex asserts that the Court of Appeal relied on two facts to determine the paramountcy issue: (1) lack of notice; and (2) Indalex's stated intent to honour deemed trust obligations. In fact, the Court of Appeal solely focused on whether evidence had been adduced to demonstrate a factual conflict between the *CCAA*, the *PBA* and the PBSA so as to render the s. 57(4) provision inoperative.[27] The Court of Appeal considered, *inter alia*, the lack of notice in its assessment of Indalex's fiduciary obligations, an issue separate and apart from the question of paramountcy. With respect to Indalex's statement that it intended to honour regulatory deemed trust requirements, that statement supports the USW's contention that no evidence was put before the *CCAA* judge to support invoking paramountcy. Rather, as the Court of Appeal concluded, it suggests that the deemed trust matter was not put in issue.

42. Sun Indalex argues at paragraph 47 of its Memorandum that the s. 57(4) deemed trust did not extend to wind-up liabilities prior to the Court of Appeal's decision in this case. Therefore, it

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[25] *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, para. 75, Sun Indalex Record, Vol. 3, Tab 19; see also *Nortel Networks Corp. (Re)*, 2009 ONCA 833 (CanLII), para. 38.
[26] Reasons of the *CCAA* judge, Sun Indalex Record, Vol. 1, Tab 3-A, pp. 12-22.
[27] Court of Appeal Reasons, para. 179, Sun Indalex Record, Vol. 1, Tab 3-B, p. 44.

says, Indalex's undertaking to fulfill its pension plan funding obligations,[28] made in seeking *CCAA* protection, should be interpreted as committing only to pay current service costs (which, in the context of the Salaried Plan, would mean committing to make no payments). Yet the clear language of the s. 57(4) deemed trust includes the wind-up liability and FSCO, Ontario's pension regulator, has had a clear and longstanding policy that the s. 75 liability requires payment in full to cover the windup deficit. Essentially, Sun Indalex is stating that, because it misinterpreted the law, it should not be held accountable to fulfill its undertaking and the legal obligations flowing from it.

43. While there has not been extensive jurisprudence on the interpretation of s. 57(4) of the *PBA*, there is case law holding that a company subject to insolvency proceedings should not assume that its pension funding obligations will be suspended when it is in financial difficulties:

> In other situations where a company has been in dire circumstances, it is not uncommon for a union to consent to a deferral of pension funding in order to facilitate the *bona fide* restructuring efforts of an employer (eg. the USWA in Ivaco). However, this is achieved on a consensual basis after negotiation; **it is not a "given right" of the company**. In the present case, the CAW and IAMAW have attempted to engage UAL in such discussions, but while UAL attended a meeting, it said it could not make any commitment.
> ...
>
> In the end result on the basis of fairness and equity, I find no reason to excuse UAL from its obligation to fund its pension funding commitments in Canada and I therefore direct it to resume such funding.[29] [emphasis added]

There was no basis for Indalex to assume, as alleged by Sun Indalex in paragraph 47 of its Memorandum, that "deemed trusts did not extend to solvency deficits or wind-up liabilities".

44. Contrary to the submissions in paragraph 48 of Sun Indalex's argument, the *ABCP* case does not provide a basis to override the s. 57(4) deemed trust. The sweeping releases provided in the *ABCP* case were part of an approval of a compromise or arrangement and were directed at preventing subsequent civil litigation in respect of the offering of, selling and investing in asset-backed commercial paper including litigation regarding allegations of fraud. The releases

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[28] Affidavit of Timothy Stubbs, para. 74, Sun Indalex Record, Vol. II, Tab 5-A, p. 218.
[29] *United Air Lines Inc. (Bankruptcy) (Re)*, 2005 CanLII 7258 (ON S.C.), paras. 5, 8.

protected certain third party creditors who would subsequently benefit from the compromise or arrangement. They did not relate to nullifying pre-existing deemed trust statutory rights that can co-exist concurrent with a *CCAA* proceeding. Further, to obtain approval it was necessary to demonstrate that there was a nexus between the releases and the compromise or arrangement: [30]

> The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan. This nexus exists here, in my view.
>
> In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:
>
> a) The parties to be released are necessary and essential to the restructuring of the debtor;
>
> b) *The claims to be released are rationally related to the purpose of the Plan and necessary for it*;
>
> c) The Plan cannot succeed without the releases;
>
> d) *The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan*; and
>
> e) The Plan will benefit not only the debtor companies but creditor Noteholders generally. [emphasis original]

Unlike the *ABCP* case, there was no evidence put on the record by Indalex to nullify the obligations attaching to the statutory deemed trust.

45. Contrary to the suggestion at paragraph 49 of Sun Indalex's Memorandum that the June 8, 2009 motion dealt definitively and finally with competing priorities, there was no substantive analysis of the rights of Retirees at the hearing of that motion (see paras. 47 and 48 of the USW's response to the Monitor's application for leave to appeal). Further, and in any event, on July 2, 2009 the *CCAA* judge directed the Retirees to address concerns respecting the underfunding of the Executive Plan "on any application to approve a transaction". This direction indicates that a substantive challenge on June 8 would have been viewed as premature.

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[30] *Metcalfe & Mansfield Alternative Investments II Corp. (Re),*, 2008 ONCA 587 (CanLII), paras. 70-71.

D. The Court of Appeal did not err in failing to apply the scheme of priorities set out in the *Bankruptcy and Insolvency Act* in the circumstances of this case

46. The question of whether the scheme of priorities set out in the *BIA* must be applied in the circumstances of this case is addressed in USW's response to the application for leave to appeal brought by the US Trustee. USW repeats and relies upon those submissions in this application, In addition, USW makes the following submissions.

47. Sun Indalex maintains that the Court of Appeal erred in failing to apply the scheme of distribution under the *BIA* in this case. In its submission, the *BIA* scheme must always be applied to the distribution of proceeds of the liquidation of a debtor's assets under the *CCAA* or insolvent companies will "race to bankruptcy" and the purpose of the *CCAA* will be defeated.

48. The same argument was made before the Court of Appeal, which correctly rejected it. As the Court of Appeal noted, the argument assumes that employers will act based on a desire to avoid pension obligations, which would contradict the obligations directors owe to the corporation.[31] As both the *CCAA* judge and the Court of Appeal held, an assignment into bankruptcy should not be used **solely** to defeat a secured claim under valid provincial legislation; indeed, as the Court of Appeal held, it would be "inappropriate for a *CCAA* applicant with a fiduciary duty to pension plan beneficiaries to seek to avoid those obligations to the benefit of a related party by invoking bankruptcy proceedings when no other creditor seeks to do so."[32]

49. Sun Indalex asserts that *Century Services, Ivaco,* and Indalex share like facts in that leave has been sought in each case to proceed to bankruptcy. In *Century Services* a voluntary assignment was permitted by the Chambers Judge.[33] In *Ivaco* a petition in bankruptcy preceded the *CCAA* filing and, during the *CCAA* proceeding, the Bank of Nova Scotia and the National Bank brought motions for an order lifting the stay under the *CCAA* to petition the companies into bankruptcy.[34] In Indalex, there is no pending bankruptcy.

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[31] Court of Appeal Reasons, para. 182, Sun Indalex Record, Vol. 1, Tab 3-B, p. 44-45.
[32] Court of Appeal Reasons, para. 183, Sun Indalex Record, Vol. 1, Tab 3-B, p. 45.
[33] *Century Services Inc. v. Canada (Attorney General),*[2010] 3 S.C.R. 379, para. 5.
[34] *Ivaco Inc. (Re)* (2006), *supra* note 8, paras. 4, 9.

50. The only *CCAA* case that has dealt with a deemed trust claim respecting pension assets in the absence of a pending bankruptcy proceeding, *Toronto-Dominion Bank v. Usarco Ltd.*[35], upheld the provincial deemed trust. In *Ivaco,* Laskin J. distinguished the facts from those in *Usarco* on this basis:[36]

> [I]n Usarco the petitioning creditor was not proceeding with its bankruptcy petition because its principal had died, and no other creditor took steps to advance the petition. Thus, unlike in this case, in Usarco it was unclear whether bankruptcy proceedings would ever take place.

51. In *Century Services,* the majority of this Court assumed that the liquidation in that case would proceed under the *BIA* given the voluntary assignment and, in such an instance, the *CCAA* and *BIA* must work in tandem.[37] However, the Court did not stipulate that *BIA* priorities always apply within a *CCAA* proceeding.

52. During the *CCAA* proceedings in *Century Services*, it became evident that the applicant, LeRoy, could not arrange a viable re-organization under the *CCAA*. LeRoy sought to file a voluntary assignment in bankruptcy. Justice Deschamps, speaking for the majority of this Court, concluded that liquidation under the *BIA* was the only option. In her words:[38]

> ... the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* **where a proposal is rejected by creditors**. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. [emphasis added]

53. Indalex sold substantially all of its assets in one sales transaction. It is not an instance "where a proposal has been rejected" leading to a piecemeal liquidation that requires the intervention of the *BIA.* In effect, the business has continued but under another legal entity, SAPA Canada Inc. In contrast to *Century Services,* the purpose of the *CCAA* was fulfilled in that the Indalex assets continue to be deployed in a productive, ongoing business, tantamount to an effective reorganization.

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[35] *Toronto-Dominion Bank v. Usarco Ltd.*, *supra* note 6.
[36] *Ivaco Inc. (Re)* (2006), *supra* note 8, para. 67.
[37] *Century Services Inc.*, *supra* note 33, para. 76.
[38] *Century Services Inc. supra* note 33, par. 80.

54. When a *CCAA* court authorizes a sale of assets to preserve a business as a going concern, it cannot be equated with a piecemeal liquidation of assets nor does it necessitate *BIA* intervention. The *CCAA* judge has authority to distribute assets arising from the proceeds of the sale, if that sale accords with the underlying *CCAA* objectives. The Indalex sale accords with these objectives.

E. Do these applications raise issues of national importance?

55. The parties seeking leave to appeal in these applications submit that the decision of the Court of Appeal will harm commercial lending in Canada. Yet, no evidence has been presented that the availability of DIP loans has been negatively affected. The Applicants have generalized the application of the decision ignoring the unique combination of facts relied upon by the Court. The Court focused on procedural flaws, conflicts of interest, overt acts by Indalex to override Plan beneficiary statutory protections and the failure of Indalex to protect beneficiary interests through avenues provided under the *PBA*. At the same time, the Court emphasized that, in general, DIP lending super-priorities would and should prevail in *CCAA* proceedings.[39]

PART IV - SUBMISSION ON COSTS AND ORDER REQUESTED

56. USW requests that the Court dismiss this application for leave to appeal and order Sun Indalex to pay USW's costs of this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

August 8, 2011

Darrell Brown
SACK GOLDBLATT MITCHELL LLP
Solicitors for the Respondent,
United Steelworkers

[39] Court of Appeal Reasons, para. 175, Sun Indalex Record, Vol. I, Tab 3-B, p. 43.

PART V - TABLE OF AUTHORITIES

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PART VI - STATUTES AND REGULATIONS

***Pension Benefits Act*, R.S.O. 1990 c. P.8, ss. 57(4), 75(1).**

57 (4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

(4) Si un régime de retraite est liquidé en totalité ou en partie, l'employeur qui est tenu de cotiser à la caisse de retraite est réputé détenir en fiducie pour le compte des bénéficiaires du régime de retraite un montant égal aux cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements.

75(1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the

75. (1) Si un régime de retraite est liquidé en totalité ou en partie, l'employeur verse à la caisse de retraite :

a) d'une part, un montant égal au total de tous les paiements qui, en vertu de la présente loi, des règlements et du régime de retraite, sont dus ou accumulés, et qui n'ont pas été versés à la caisse de retraite;

b) d'autre part, un montant égal au montant dont :

(i) la valeur des prestations de retraite aux termes du régime de retraite qui seraient garanties par le Fonds de garantie en vertu de la présente loi et des règlements si le surintendant déclare que le Fonds de garantie

pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

s'applique au régime de retraite,

(ii) la valeur des prestations de retraite accumulées à l'égard de l'emploi en Ontario et acquises aux termes du régime de retraite,

(iii) la valeur des prestations accumulées à l'égard de l'emploi en Ontario et qui résultent de l'application du paragraphe 39 (3) (règle des 50 pour cent) et de l'article 74,

dépassent la valeur de l'actif de la caisse de retraite attribué, comme cela est prescrit, pour le paiement de prestations de retraite accumulées à l'égard de l'emploi en Ontario.

***Personal Property Security Act*, R.S.O. 1990, c. P.10, s. 30(7):**

30(7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the Employment Standards Act or under the Pension Benefits Act.

(7) La sûreté sur un compte ou un stock et le produit de ceux-ci est subordonnée à l'intérêt du bénéficiaire d'une fiducie réputée telle aux termes de la Loi sur les normes d'emploi ou de la Loi sur les régimes de retraite.