

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

B E T W E E N :

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

**Applicant
(Respondent)**

- and -

**SUN INDALEX FINANCE, LLC, 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, and
THE MONITOR, FTI CONSULTING CANADA ULC**

**Respondents
(Appellants/Respondents)**

- and -

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

**Intervenors
(Intervenors)**

**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
(Appellants/Respondents)**

- and -

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

**Interveners
(Interveners)**

**MEMORANDUM OF ARGUMENT OF
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PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The applicant, George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the US Indalex Debtors ("US Trustee") seeks leave to appeal the decision of the Court of Appeal for Ontario dated April 7, 2011.

2. Indalex Limited ("Indalex") was 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*). In its decision, 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 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 other claims. 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 Indalex's secured creditor, Sun Indalex Finance, LLC.

3. Sun Indalex Finance, LLC and FTI Consulting Canada ULC (the "Monitor") have also brought applications for leave to appeal the Court's decision.

4. The United Steelworkers ("USW") submits that 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.

5. 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.

B. The Facts

6. USW repeats and relies upon the facts as set out in its Memorandum of Argument filed in response to the application for leave to appeal brought by the Monitor and the supplementary facts set out in its Memorandum of Argument filed in response to the application for leave to appeal brought by Sun Indalex.

PART II - QUESTIONS IN ISSUE

7. The US Trustee raises the following issues in its motion for leave to appeal, which are the same as those raised by Sun Indalex and FTI Consulting Canada ULC:

- a. Did the Court of Appeal err in its interpretation or application of the rule against collateral attacks?
- b. Did the Court of Appeal err in its interpretation or application of s. 57(4) of the *PBA*?
- c. Did the Court of Appeal err in failing to apply the scheme of priorities set out in the *Bankruptcy and Insolvency Act (BIA)* in this case?

PART III - STATEMENT OF ARGUMENT

8. USW repeats and relies on the submissions made in its Memoranda of Argument filed in the applications for leave to appeal brought by Sun Indalex and the Monitor. In this Memorandum of Argument, USW makes submissions with respect to the application of *Century Services Inc. v. Canada (Attorney General)* to the Indalex CCAA proceeding.¹

9. USW submits that the *Century Services* case is of limited assistance in dealing with the issues raised by USW on behalf of the members of the Retirement Plan for Salaried Employees of Indalex and Associated Companies (the "Salaried Plan") for the following reasons:

¹ *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379.

- a. The *Century Services* case was a liquidation; the Indalex case involves a “stalking horse bid” which has resulted in the sale of all or substantially all of Indalex’s assets and the continuation of the business, albeit through another entity. In the *Century Services* case, the remedial purposes embraced under the *CCAA* could not be fulfilled, whereas in the Indalex proceeding, continued business operations were facilitated.²
- b. Unlike in *Century Services*, there is no bankruptcy in the Indalex proceeding. The order dismissing Indalex’s application for voluntary assignment in bankruptcy was not appealed. No petition for bankruptcy has been filed.³
- c. *Century Services* deals with two competing federal acts and assesses which provision should prevail. The Indalex appeal addressed whether provincial legislation can continue to apply during and at the end of a *CCAA* proceeding while still allowing the underlying remedial purposes of the *CCAA* to be achieved. The statutory interpretation of the two competing federal statutes is a distinct issue, unrelated to the issue of paramountcy of federal over provincial legislation.
- d. *Century Services* does not address the fiduciary duties that arise when an employer sponsors a registered pension plan, or the fiduciary obligations that continue to apply during a *CCAA* proceeding. In the instant case, a fundamental element of the Court of Appeal decision was its determination that the employer breached its fiduciary obligations as Plan administrator during the *CCAA* proceeding.

² See paragraphs 49, 50, 52, and 53 of the USW Memorandum of Argument in response to Sun Indalex’s application for leave to appeal.

³ See paragraph 49 of the USW Memorandum of Argument in response to Sun Indalex’s application for leave to appeal.

PART IV - SUBMISSIONS

A. *Century Services did not involve a stalking horse bid*

10. Unlike the *Century Services* case, which involved a liquidation, the instant case involved a stalking horse bid. A stalking horse bid ensures that a baseline price can be obtained through an initial bid for the purchase of substantially all of a company's assets, so that the company's operations can continue. SAPA's bid was selected as the stalking horse bid and was ultimately accepted as the successful bid. After the sale's close, SAPA continued to operate the business.

11. Amendments were made to the *CCAA* in September 2009 to expressly authorize a *CCAA* court to approve asset sales. However, even before the amendments, Ontario courts had taken the view that there was sufficient authority under the *CCAA* to authorize a sale and distribution of debtor assets. In *Nortel Networks Corp. (Re)*, Justice Morawetz stated that one of the *CCAA*'s purposes is to preserve the going concern value of debtor companies. In authorizing an asset sale on a going concern basis, he stated:

The *CCAA* is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and a sale by the debtor which preserves its business as a going concern is, in my view, consistent with those objectives. I therefore concluded that the court does have the jurisdiction to authorize a sale under the *CCAA* in the absence of a plan.⁴

12. Since the 2009 amendments, Ontario *CCAA* courts have continued to exercise their discretion to authorize the sale and distribution of assets within the *CCAA* proceedings in accordance with s. 36 of the *CCAA*.⁵ Nothing in the *CCAA* requires that the distribution of the proceeds of a sale be conducted under the *BIA*. Asset sales structured to maintain a business as a going concern are routinely dealt with under the *CCAA*, as are the claims administration process and the distribution of proceeds resulting from the sale. Resort to the *BIA* is necessary only in piecemeal liquidations in which a company has no viable future. USW submits that it is only

⁴ *Nortel Networks Corp. (Re)*, 2009 CanLII 39492 (Ont. SC), paras. 47-48.

⁵ *Canwest Global Communications Corp.*, 2010 ONSC 2870 (CanLII); *White Birch Paper Holding Company (Arrangement relatif à)*, 2010 QCCS 4915 (CanLII); *Nortel Networks Corp. (Re)*, 2009 CarswellOnt 4838 (ONSC) [Commercial List].

where a company is liquidated on a piecemeal basis, and bankruptcy is inevitable, that the proceeds of an asset sale must be distributed in accordance with the *BIA*.

13. In this respect, when a sale of substantially all of the assets of a company will result in the continued operation of the business under a new owner, it accomplishes the objectives of the *CCAA*, namely a successful restructuring albeit under a new entity. The Court of Appeal properly concluded that the Indalex sale was not a piecemeal liquidation that necessitates resort to the *BIA*:

... [I]n *Century Services*, reorganization efforts had failed and the company sought leave to make an assignment into bankruptcy. Liquidation on a piecemeal basis through bankruptcy was inevitable. The *CCAA* proceedings in the present case, on the other hand, were successful – they resulted in the sale of Indalex’s assets and the continuation of the business, albeit through another entity. It is not a situation in which transition to the bankruptcy regime was inevitable because efforts under the *CCAA* had failed.⁶

B. There was no bankruptcy in the instant case

14. As set out in paragraphs 51 to 53 of USW’s Memorandum of Argument filed in response to the Sun Indalex application for leave to appeal, it was evident in *Century Services* that a viable re-organization under the *CCAA* was not possible and that liquidation under the *BIA* was the only option. That was not true in the Indalex proceedings.

C. Century Services dealt with two competing federal statutes, not paramountcy

15. *Century Services* dealt with two competing federal acts, the *CCAA* and the *Excise Tax Act (ETA)*⁷ to determine whether the Crown had an enforceable deemed trust over GST remittances that were withheld by the debtor. The case centred on the interpretation of s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*.

16. In contrast, the deemed trust at issue in the instant case emanates from provincial legislation aimed at protecting the rights of pension plan beneficiaries and is unrelated to the

⁶ Court of Appeal Reasons, para. 188, Sun Indalex Record, Vol. I, Tab 3-B, p. 45.

⁷ R.S.C. 1985, c. E-15.

preservation of Crown priorities. The relationship between the *CCAA* and the *ETA* has no bearing on the relationship between a legislated provincial deemed trust and the *CCAA*. Consequently, the instant case necessitated an analysis of the scope of the deemed trust under the *PBA*, the application of section 30(7) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 (*PPSA*) and an interpretation of the doctrine of paramountcy with respect to the interplay between the *PBA*, *PPSA* and the *CCAA*, in light of the particular facts of the case.

17. The Court of Appeal correctly concluded that the *Century Services* decision did not assist in assessing the role of provincial legislation in a *CCAA* proceeding:

... *Century Services* deals with competing provisions in two federal statutes. The conflict between the two provisions was patent: one or the other had to prevail. They could not be read together. Section 18.3(1) was found to prevail, in part because of its wording, which expressly excludes a deemed trust in favour of the Crown. The present appeals involve a consideration of the doctrine of federal paramountcy and whether a deemed trust under provincial legislation applies to a charge granted in a *CCAA* proceeding. Significantly, unlike the situation in *Century Services*, there is nothing in the *CCAA* that expressly excludes the provincial deemed trust for unpaid pension contributions from applying in *CCAA* proceedings. In these appeals, exclusion of the provincial deemed trust is dependent on the *CCAA* judge engaging in a factual examination and a determination that preservation of pension rights through the deemed trust would frustrate the purpose of the *CCAA* proceeding. Moreover, it is difficult to see how a finding of paramountcy would have been made on the record at the time the super-priority charge was made, given the evidence that Indalex intended to comply with all regulatory deemed trust requirements.⁸

18. This Court has recognized that there is an intricate balance between federal and provincial legislation with respect to the establishment of priorities within the insolvency regime. The *PPSA* plays a critical role in the establishing of priorities within the *BIA*. The *BIA* is contingent on the provincial law of property for its operation.⁹ The establishment of priorities via provincial legislation is a legitimate exercise of the province's authority to legislate over

⁸ Court of Appeal Reasons, para. 189, Sun Indalex Record, Vol. I, Tab 3-B, pp. 45-46.

⁹ *Husky Oil Operations v. Minister of National Revenue*, [1995] 3 S.C.R. 453, paras. 30-31.

property rights. The pension deemed trust and its priority established through the PPSA is a proper exercise of that authority provided no conflict with the federal legislation is proven.¹⁰

19. The Court of Appeal correctly rejected the assertions of the applicants that upholding the deemed trust would lead to a “strange asymmetry” in the insolvency regime that would promote forum shopping:

The respondents point to paras. 47, 48 and 76 of *Century Services*, in which Deschamps J. notes the “strange asymmetry” that would occur if the *ETA* Crown priority were interpreted differently in *CCAA* proceedings than in *BIA* proceedings. She says this would encourage forum shopping in cases where the debtor’s assets cannot satisfy both the secured creditors’ and the Crown’s claims. No “strange asymmetry” would occur in cases such as the present appeals. If the *CCAA* judge found that recognition of the *PBA* deemed trust would frustrate the purpose of the *CCAA* proceeding and paramountcy had been invoked, the *CCAA* judge would be free to make a super-priority charge that overrode the deemed trust. This approach leaves the *CCAA* court with greater flexibility and the ability to be “cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees”.¹¹

20. Consistent with this flexibility, pension contribution obligations have been suspended in some insolvency decisions, while the obligation to contribute in respect of special payments has been required in others.¹² Moreover, the deemed trust has been previously enforced outside of bankruptcy.¹³ The particular facts of each case must be weighed in making these determinations.

D. Fiduciary duties were not considered in *Century Services*

21. Finally, the fiduciary duties of pension plan administrators were not considered by this Court in the *Century Services* decision. However, the Court addressed the baseline factors to be weighed when a Court exercises its *CCAA* authority:

¹⁰ *Hannah (Re)*, 1988 CarswellOnt 148, paras. 33, 38, 41 which together result in a finding that the *PPSA* is *intra vires* the *BIA* thereby a proper exercise of provincial legislative powers.

¹¹ Court of Appeal Reasons, para. 194, Sun Indalex Record, Vol. I, Tab 3-B, p. 46.

¹² *Fraser Papers Inc. (Re)* (2009), 55 C.B.R. (5th) 217, 2009 CanLII 39776 (Ont. 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 (C.A.), paras. 64, 103; *United Air Lines Inc. (Bankruptcy) (Re)*, 2005 CanLII 7258 (Ont. SC), paras. 5, 8.

¹³ *Toronto-Dominion Bank v. Usarco Ltd.* (1991), 42 E.T.R. 235 (Ont. Gen. Div.).

The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of **appropriateness, good faith, and due diligence** are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, **but also to the means it employs**. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated **as advantageously and fairly as the circumstances permit**.¹⁴ [emphasis added]

22. The Court of Appeal emphasized the flexibility and discretion available under *CCAA* proceedings that enable it to apply the requirements of “appropriateness, good faith and due diligence”:

Moreover, Deschamps J. repeatedly distinguishes the two regimes on the basis that the *BIA* is “characterized by a rules-based approach” whereas the *CCAA* “offers a more flexible mechanism with greater judicial discretion”. Permitting the *PBA* deemed trust to survive, absent an express finding of paramountcy, is consistent with both those key features of the *CCAA* proceedings – greater flexibility and greater judicial discretion on the part of the *CCAA* court. This flexibility and discretion on the part of the *CCAA* court enables it to meaningfully assess the baseline considerations of appropriateness, good faith and due diligence, referred to by Deschamps J. at para. 70 of *Century Services*.¹⁵

23. *Century Services* and *Ivaco* involved third party competing claims. Unlike the instant case, neither of those cases involved a situation in which a plan sponsor actively chose to thwart the claim of pension beneficiaries for its or a related party’s benefit. It cannot be said that the Salaried Plan beneficiaries or the Former Executives were treated as “advantageously and fairly as the circumstances permit[ted]” in this case.

24. USW submits that Indalex had an obligation to seek to protect the interests of the Salaried Plan beneficiaries to the extent that this obligation did not conflict with the objectives

¹⁴ *Century Services*, *supra* note 1, para. 70

¹⁵ Court of Appeal Reasons, para. 193, Sun Indalex Record, Vol. 1, Tab 3-B, p. 46.

underlying the *CCAA*. The evidence presented in support of its motion before the Superior Court indicated that Indalex took no steps whatsoever to preserve the rights of the Salaried Plan beneficiaries. The Court of Appeal correctly emphasized the fiduciary obligations as an issue that distinguishes the *Century Services* case from Indalex:

... [N]o issue of fiduciary duty arose in *Century Services*. In the present case, as discussed previously and again below, the impact of fiduciary duties during the *CCAA* proceeding plays a significant role.¹⁶

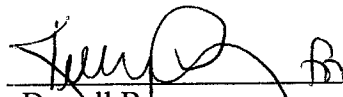
25. For all these reasons, and for the reasons set out in USW's Memoranda of Argument in response to the Monitor's and Sun Indalex's applications, the USW submits that the Court of Appeal correctly concluded that the *BIA* scheme of priorities does not apply, the deemed trust applies and takes priority over the Indalex US secured creditor claim (and any other party holding a security interest) and Indalex breached its common law and statutory fiduciary duties.

PART V - SUBMISSION ON COSTS AND ORDER REQUESTED

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED

August 8, 2011



Darrell Brown

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Solicitors for the Respondent,
United Steelworkers

¹⁶ Court of Appeal Reasons, para. 190, Sun Indalex Record, Vol. I, Tab 3-B, p. 46.

PART VI - TABLE OF AUTHORITIES

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PART VII - STATUTES AND REGULATIONS

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or

36. (1) Il est interdit à la compagnie débitrice à l'égard de laquelle une ordonnance a été rendue sous le régime de la présente loi de disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires sans l'autorisation du tribunal. Le tribunal peut accorder l'autorisation sans qu'il soit nécessaire d'obtenir l'acquiescement des actionnaires, et ce malgré toute exigence à cet effet, notamment en vertu d'une règle de droit fédérale ou provinciale.

(2) La compagnie qui demande l'autorisation au tribunal en avise les créanciers garantis qui peuvent vraisemblablement être touchés par le projet de disposition.

(3) Pour décider s'il accorde l'autorisation, le tribunal prend en considération, entre autres, les facteurs suivants :

- a) la justification des circonstances ayant mené au projet de disposition;
- b) l'acquiescement du contrôleur au processus ayant mené au projet de disposition, le cas échéant;
- c) le dépôt par celui-ci d'un rapport précisant que, à son avis, la disposition sera plus avantageuse pour les créanciers que si elle était faite dans le cadre de la faillite;
- d) la suffisance des consultations menées auprès des créanciers;
- e) les effets du projet de disposition sur les droits de tout intéressé, notamment

disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose

les créanciers;

f) le caractère juste et raisonnable de la contrepartie reçue pour les actifs compte tenu de leur valeur marchande.

(4) Si la compagnie projette de disposer d'actifs en faveur d'une personne à laquelle elle est liée, le tribunal, après avoir pris ces facteurs en considération, ne peut accorder l'autorisation que s'il est convaincu :

a) d'une part, que les efforts voulus ont été faits pour disposer des actifs en faveur d'une personne qui n'est pas liée à la compagnie;

b) d'autre part, que la contrepartie offerte pour les actifs est plus avantageuse que celle qui découlerait de toute autre offre reçue dans le cadre du projet de disposition.

(5) Pour l'application du paragraphe (4), les personnes ci-après sont considérées comme liées à la compagnie :

a) le dirigeant ou l'administrateur de celle-ci;

b) la personne qui, directement ou indirectement, en a ou en a eu le contrôle de fait;

c) la personne liée à toute personne visée aux alinéas a) ou b).

(6) Le tribunal peut autoriser la disposition d'actifs de la compagnie, purgés de toute charge, sûreté ou autre restriction, et, le cas échéant, est tenu d'assujettir le produit de la disposition ou d'autres de ses actifs à une charge, sûreté ou autre restriction en faveur des créanciers touchés par la purge.

security, charge or other restriction is to be affected by the order.

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

(7) Il ne peut autoriser la disposition que s'il est convaincu que la compagnie est en mesure d'effectuer et effectuera les paiements qui auraient été exigés en vertu des alinéas 6(4)a) et (5)a) s'il avait homologué la transaction ou l'arrangement.

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.