

**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:**

**SUN INDALEX FINANCE, LLC**

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

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

Appellants  
(Respondents)

- 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 ("RETIREEES")**

**UNITED STEELWORKERS**

**SUPERINTENDENT OF FINANCIAL SERVICES**

**MORNEAU SHEPELL LTD.**

Respondents  
(Appellants)

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**MOTION RECORD  
OF THE CANADIAN FEDERATION OF PENSIONERS  
(Application for Leave to Intervene)**

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## INDEX

	<b>Tab</b>	<b>Page</b>
Notice of Motion, dated February 16, 2012 .....	1 .....	1
Affidavit of Robert F. Hilton, sworn February 16, 2012.....	2 .....	7
Memorandum of Argument, dated February 16, 2012.....	3 .....	18

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**UNITED STEELWORKERS**

**SUPERINTENDENT OF FINANCIAL SERVICES**

**MORNEAU SHEPELL LTD.**

Respondents  
(Appellants)

**NOTICE OF MOTION TO A JUDGE  
(Application for Leave to Intervene)**

TAKE NOTICE that the Canadian Federation of Pensioners ("CFP"), hereby applies to a judge pursuant to Rule 55, for an order:

- (a) Granting the CFP leave to intervene in this appeal;
- (b) Permitting the CFP to file a Memorandum of Argument not exceeding 20 pages;

- (c) Permitting the CFP to present oral argument; and
- (d) For such further or other order as this Court may deem appropriate.

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

- (e) The CFP is a national organization representing approximately 165,000 Canadian pensioners;
- (f) The CFP works on behalf of its members, *inter alia*, to protect the rights of pensioners in the regulation and administration of pension plans, particularly in insolvencies;
- (g) The CFP has developed expertise through making submissions to regulatory agencies and legislative committees on issues of pension regulation, and through the participation of its members in restructurings under the *Companies' Creditor Arrangement Act* ("CCAA") and other processes;
- (h) The CFP has an interest in the issues that arise in this appeal;
- (i) The CFP proposes to advance submissions at the hearing of this appeal that will be relevant to the appeal, useful to the Court, and will present a different perspective from those of the parties;
- (j) The CFP will focus on the policy rationale for allowing provincial "deemed trusts" to be recognized unless they would frustrate the remedial purposes of the CCAA, the scope of the employer's fiduciary obligation, the particular importance of sufficient notice and procedural safeguards to ensure that pensioners' interests are considered, and the need for flexible and effective remedies when fiduciary obligations are breached;
- (k) Rules 47 and 55 of the *Rules of the Supreme Court of Canada*; and
- (l) Such further and other grounds as counsel may advise and this Court may permit.



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



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**NOTICE TO THE RESPONDENT TO THE MOTION:** A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.

If the motion is served and filed with the supporting documents of the application for leave to appeal, then the Respondent may serve and file the response to the motion together with the response to the application for leave.

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**MORNEAU SHEPELL LTD.**

Respondents  
(Appellants)

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**AFFIDAVIT OF ROBERT F. HILTON  
(Sworn February 16, 2012)**

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**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"). 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.

### **The Canadian Federation of Pensioners**

2. The CFP was formed in 2004 by retirees with the purpose of exploring pension plan issues from a pensioner point of view. The CFP was formed in response to concerns by the founding pensioner groups that provincial and federal legislation governing the rights of pensioners during insolvencies provided inadequate protection. The CFP believes that the legislative and regulatory situation today for retirees remains perilous.

3. The CFP currently represents approximately 165,000 retirees through its affiliated retiree associations 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 affiliate retiree groups from both provincial and federal jurisdictions, including:

- Stelco Salaried Pensioners Organization (SSPO);
- General Motors Salaried Pension Organization (GENMO);

- C.C. Retirees Organization (representing retirees from Chrysler Canada);
- DuPont/Invista Pensioners Association - Canada (DIPAC);
- Nortel Retiree Protection Canada (NRPC);
- Novartis/Ciba Retirees Organization;
- Society of Energy Professionals – Pensioners' Chapter;
- Association of Store and Catalogue Retirees (Sears);
- Slater Steel Pensioners (HSB);
- Rio Algom Pensioners; and
- Bell Pensioners' Group (BPG).

4. The CFP's members have experienced some of Canada's most extensive and highest profile restructurings over the last two decades. In some cases, they have seen their pension income drastically reduced. The CFP also liaises with a number of other retiree groups as well as individual pensioners. As such, the CFP represents the voice of retirees who have been or may be adversely affected by restructurings.

5. The CFP seeks to ensure that the full value of the defined benefit pension benefits that have been earned by employees during their working lives, and promised to be paid to them during their retirement years, will be delivered to them. These pension benefits are the cornerstone of the financial plans that retirees have made to support themselves when they retire. For this reason, CFP advocates with governments for a legal framework that reduces the risk that defined benefit pension plans will be inadequately funded.

6. 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 security for pensioners; 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 face reductions to their pension benefits.

7. The CFP has made submissions to a number of expert bodies, regulatory agencies, and legislative committees on issues of pension regulation. These include Ontario's Expert Commission on Pensions (the Arthurs Commission), the Alberta/British Columbia Joint Expert Panel on Pension Standards, the Financial Services Commission of Ontario, the Office of the Superintendent of Financial Institutions, the Canadian Association of Pension Supervisory Authorities, and the House of Commons Standing Committee on Industry, Science and Technology (with respect to amendments to the *Bankruptcy and Insolvency Act* ("BIA")).

8. The CFP's affiliated associations have also participated as parties in a number of court-supervised restructurings under the *Companies' Creditors Arrangement Act*



("CCAA"), as well as restructurings outside of the CCAA. These include the Stelco, General Motors, Chrysler, Slater Steel, and Nortel restructurings.

9. Through these activities, the CFP has accumulated expertise in the law, policy, and dynamics of CCAA proceedings, and in the manner in which compromises are fashioned between the various stakeholders in such proceedings. I believe that this expertise can assist the Court in this appeal, if leave to intervene is granted.

### **The CFP's Interest in This Appeal**

10. The CFP believes that it is a serious problem for retirees when their former employer becomes insolvent when 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 cuts to each member's monthly pension benefit. Retirees have earned their full pension benefits throughout their working lives, and have a legitimate expectation that these promised benefits will be paid.

11. Typically, many retirees are elderly, and are often in poor health. Many are confined to retirement homes and hospitals. They have little or no recourse to make up a reduction to their pension benefits in other ways. Such cuts can be devastating to retirees and their surviving spouses. They can have a very harmful impact on their quality of life. It is widely appreciated that employees suffer when they lose their jobs. For retirees, the harm of lost income through unanticipated reductions to their pension benefits can be even worse.

12. Many of the CFP's members have experienced first-hand the devastating effects of cuts to pension benefits arising from insolvencies, including situations where the proceeds of sale of a company's assets in a bankruptcy are insufficient to cover pension liabilities. The CFP has a real and tangible interest in ensuring that pension benefits are protected as far as possible when companies with underfunded pension plans go through a restructuring.

13. Many of the CFP's members have also experienced first-hand the procedural challenges of responding to company filings and short-notice hearings under the CCAA. Typically, retirees are not in day-to-day contact with their former employer. They receive a monthly cheque or deposit of their pension benefit, and the minimum statutorily-prescribed information in annual statements. In some cases, the first that they hear of a threat to their pensions is a newspaper or media account reporting that their former company has already filed for protection from its creditors. Even more than active employees, who are present in the workplace and who may be represented by a union or association, retirees often face significant challenges in simply finding out what is going on and in organizing themselves to respond effectively. The court below observed that the plan beneficiaries "had no real knowledge of what was transpiring and had no power to ensure that their interests were even considered". This is unfortunately not an uncommon situation in restructurings.

14. The CFP therefore also has a real and tangible interest in ensuring transparency and fairness in the treatment of pension obligations. This includes ensuring that employers that act as administrators of pension plans are cognizant of their fiduciary obligations, that they avoid conflicts, that proper notice is provided before pensioners'

interests are affected (in a manner that allows pensioners to have meaningful input to the process), and that effective remedies may be granted when such steps are not taken.

15. At the same time, the CFP is keenly aware of the need for efficient and flexible restructuring processes that are responsive to the interests of all stakeholders. A functional restructuring regime, that allows troubled companies to keep operating and to recover their financial health, is itself a key component of the protection of pension benefits. Companies that are able to find their way back to solvency and financial health can support the funding of pension obligations; bankrupt companies often cannot. More generally, the CFP (many of whose members have a background in management and/or financial services) appreciates the need for efficient capital markets, in which pensioners' funds are invested. For these reasons, the CFP also has an interest in ensuring that the legal regime finds the right balance between pension funding and fiduciary obligations on the one hand, and the countervailing interests of other stakeholders on the other hand.

#### **Position to be Taken if Leave to Intervene is Granted**

16. If granted leave to intervene, the CFP will take the position that the appeal should be dismissed.

#### **Submissions to be Advanced if Leave to Intervene is Granted**

17. The CFP will focus its submissions on the following:
- The policy rationale for allowing provisions such as the "deemed trust" provisions of Ontario's *Pension Benefits Act* to continue to operate unless

they are found, on a proper analysis and sufficient record, to frustrate the remedial purposes of the CCAA;

- The scope of the employer's fiduciary obligation, when acting as plan administrator, to ensure that it maintains transparency and does not take actions that are detrimental to the interests of plan beneficiaries;
- Appropriate methods of addressing conflicts of interest that may arise when an employer/administrator's corporate interests diverge from its fiduciary obligation towards plan beneficiaries;
- The particular importance of providing sufficient and timely notice, adequate disclosure, and procedural safeguards to ensure that pensioners are able to respond effectively to company conduct that affects the interests of pensioners; and
- The need for flexible and effective remedies when fiduciary obligations are breached.

18. I understand that the Appellants argue that the result in the court below, while it may be seen as favouring plan members in this instance, will do long-term damage to the interests of stakeholders (including pensioners) because it will make it more difficult for insolvent companies to obtain debtor-in-possession financing, and will therefore drive them towards liquidation under the BIA and away from restructuring under the CCAA. As the national voice for pensioners affected by insolvencies, the CFP does not share this view.

19. The CFP will submit that the decision below is consistent with the policy of the CCAA to favour negotiations and compromise over all-or-nothing results. Proper notice and procedural safeguards are a precondition for meaningful negotiations and compromise. The conduct that was cited in the court below as constituting a breach of fiduciary duties included filing for CCAA protection without notice to the retirees, moving for an order approving super-priority for the DIP financing without providing notice to the retirees, the lack of any steps to avoid a conflict of interest, and seeking to defeat the

rights of plan members by a voluntary assignment into bankruptcy. Throughout the proceedings, the company appears to have taken a hard approach and to have done nothing to address funding deficiencies that were relatively modest compared to the amounts at issue. This appears to be inimical to a regime of encouraging the compromise of claims and negotiations to allow the insolvent company to continue.

20. Conversely, the decision below gives useful guidance on how companies in CCAA proceedings can avoid such a result in future. Providing sufficient notice to all stakeholders, encouraging negotiation, and satisfying the court on a proper record that priorities based upon provincial legislation must give way to ensure that the purposes of the CCAA are not frustrated, are all procedural steps that can readily be undertaken by companies in CCAA proceedings. These steps strengthen the process, rather than undermining it. These procedural safeguards have particular significance for pensioners who are uniquely vulnerable in such proceedings. The CFP will make submissions on how the rights of stakeholders can be balanced through the use of appropriate procedural safeguards.

#### **The CFP's Submissions will be Useful and Different from Those of Other Parties**

21. The CFP offers a unique perspective as the national voice of pensioners who are concerned with the proper administration of pension plans, and who are affected by insolvencies and restructurings. This perspective is different from that of the existing parties and other potential interveners in the following ways:

- The CFP is concerned with the impact of the decision on the system as a whole. If granted leave to intervene, the CFP will not take a position on the factual record. Rather, the CFP will focus on the policy implications of the case.
- The CFP, as the national voice of pensioners affected by insolvencies, has a perspective which is different from that of unions who represent active employees. In some circumstances, the interests of active employees may diverge from those of pensioners. For example, active employees may be

prepared to trade off cuts to pension entitlements against ongoing employment prospects, not least because active employees (unlike pensioners) are able to rebuild their savings.

- Likewise, the position of pensioners in restructurings is often more vulnerable than that of active employees and the unions that represent them. The company does not need the pensioners to keep operating, and pensioners are typically out of touch with the day-to-day happenings at the company.
- The CFP brings to bear a broad, national perspective drawn from a range of experiences in multiple jurisdictions. This perspective is broader than that of the existing respondents.
- The CFP will make submissions that address the need to balance the interests of different stakeholders in restructurings so that the overall process is fair and effective. Unlike the existing parties, the CFP has no direct interest in the financial outcome of this particular dispute.

## **Conclusion**

22. The CFP will expand upon these submissions if leave to intervene is granted. The CFP respectfully submits that it will make a useful contribution and offer a perspective that differs from that of any other party. The CFP will endeavour to avoid duplicating the submissions of other parties.

23. The CFP therefore requests that leave to intervene be granted. The CFP seeks leave to file a factum of no more than 20 pages, and seeks leave to make oral submissions at the hearing. The CFP does not seek costs, and asks that it not be liable for costs from any other party.

24. I swear this Affidavit in support of the CFP's motion for leave to intervene, and for no improper purpose.

SWORN BEFORE ME at the City of Toronto, in  
the Province of Ontario, on February 16, 2012.



A Commissioner for taking affidavits, etc.

814531\_1.DOC



Robert F. Hilton

**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:**

**SUN INDALEX FINANCE, LLC**

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

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

Appellants  
(Respondents)

- 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 ("RETIREEES")**

**UNITED STEELWORKERS**

**SUPERINTENDENT OF FINANCIAL SERVICES**

**MORNEAU SHEPELL LTD.**

Respondents  
(Appellants)

**MEMORANDUM OF ARGUMENT  
OF THE CANADIAN FEDERATION OF PENSIONERS  
(Application for Leave to Intervene)**

1. In this motion the Canadian Federation of Pensioners ("CFP") seeks leave to intervene in this appeal. The CFP seeks leave to file a factum of up to 20 pages and to present oral submissions at the hearing of the appeal.



2. In accordance with Rule 57, this Memorandum addresses the following issues:

- (a) The CFP's interest in the appeal;
- (b) The position to be taken if leave is granted; and
- (c) Submissions to be advanced if leave is granted.

**(a) The CFP and its Interest in This Appeal**

3. The CFP was formed in 2004 by retirees with the purpose of exploring pension plan issues from a pensioner point of view. The CFP was formed in response to concerns by the founding pensioner groups that provincial and federal legislation governing the rights of pensioners during insolvencies provided inadequate protection. The CFP believes that the legislative and regulatory situation for retirees today remains perilous.<sup>1</sup>

4. The CFP represents approximately 165,000 retirees through its affiliated retiree associations. The CFP currently has 14 affiliate retiree groups from both provincial and federal jurisdictions. The CFP's members have experienced some of Canada's most extensive and highest profile restructurings over the last two decades, including some cases where pension incomes have been drastically reduced. As such, the CFP represents the voice of retirees who have been or may be adversely affected by restructurings.<sup>2</sup>

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<sup>1</sup> Affidavit of Robert Hilton, sworn February 16, 2012 ["Hilton Affidavit"], para. 2.

<sup>2</sup> Hilton Affidavit paras. 3, 4.

5. The CFP seeks to ensure that the full value of the defined benefit pension benefits that have been earned by employees during their working lives is delivered to them. The CFP advocates for a legal framework that reduces the risk that defined benefit pension plans will be inadequately funded. Currently, the CFP is focusing on the need to improve the long term security of single employer defined benefit 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 security for pensioners; 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 face reductions to their pension benefits.<sup>3</sup>

6. The CFP has made submissions to a number of expert bodies, regulatory agencies, and legislative committees on issues of pension regulation. Its members have participated as parties in a number of restructurings, both within and outside of the *Companies' Creditors Arrangement Act* ("CCAA"), including the Stelco, General Motors, Chrysler, Slater Steel and Nortel restructurings.

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<sup>3</sup> Hilton Affidavit, paras. 5, 6.

Through these activities, the CFP has accumulated expertise in the law, policy, and dynamics of CCAA proceedings, and in the manner in which compromises are fashioned between the various stakeholders in such proceedings.<sup>4</sup>

7. The CFP, as the national voice for pensioners affected by restructurings, has an interest in ensuring that pension benefits are properly funded and remain secure in retirement. Many retirees are elderly, and are often in poor health. They have little or no recourse to make up a reduction to their pension benefits in other ways. Such cuts can be devastating to retirees and their surviving spouses, and can have an even greater impact than the loss of employment on active employees.<sup>5</sup>

8. Many of the CFP's members have experienced first-hand the devastating effects of cuts to pension benefits arising from insolvencies, including situations where the proceeds of sale of a company's assets in a bankruptcy are insufficient to cover pension liabilities. The CFP has a real and tangible interest in ensuring that pension benefits are protected as far as possible when companies with underfunded pension plans go through a restructuring.<sup>6</sup>

9. The CFP also has an interest in ensuring the proper administration and

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<sup>4</sup> Hilton Affidavit, paras. 7-9.

<sup>5</sup> Hilton Affidavit, para. 11.

<sup>6</sup> Hilton Affidavit, para. 12.

oversight of pension plans. This includes ensuring that employers that undertake the duties of administrator are held to appropriate standards in the discharge of their obligations, and in avoiding situations of conflict of interest. These matters are directly placed in issue by the within appeal.

10. The Court below found that the employer had breached its fiduciary obligations in part by seeking CCAA protection without notice to the retirees, by seeking approval of superpriority for debtor-in-possession financing without notice to retirees, and by taking other steps without consultation. The Court below concluded that plan beneficiaries “had no real knowledge of what was transpiring and had no power to ensure that their interests were even considered”.<sup>7</sup>

11. Many of the CFP’s members have also experienced first hand the procedural challenges of responding to company filings and short notice hearings under the CCAA. Typically, retirees are not in day-to-day contact with their former employer. Even more than active employees, who are present in the workplace and may be represented by a union or association, retirees often face significant challenges in simply finding out what is going on and in organizing themselves to respond effectively.<sup>8</sup>

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<sup>7</sup> *Re Indalex Ltd.*, 2011 ONCA 265, at paras. 139-140, 132.

<sup>8</sup> Hilton Affidavit, para. 13.

12. The CFP, therefore, also has a real and tangible interest in ensuring transparency and fairness in the treatment of pension obligations in a restructuring. This includes ensuring that employers that act as administrators of pension plans are cognizant of their fiduciary obligations, that they avoid conflicts, that proper notice is provided before pensioners' interests are affected, and that effective remedies may be granted when such steps are not taken.<sup>9</sup>

13. At the same time, the CFP also has an interest in ensuring that restructuring processes are efficient and flexible, and are responsive to the interests of all stakeholders. A functional restructuring regime that allows troubled companies to keep operating and to recover their financial health, is itself a key component of the protection of pension benefits. For these reasons, the CFP has an interest in ensuring that the legal regime finds the right balance between pension funding and fiduciary obligations, and the countervailing interests of other stakeholders.<sup>10</sup>

**(b) Position to be Taken if Leave to Intervene is Granted**

14. If granted leave to intervene, the CFP will take the position that the appeal should be dismissed.

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<sup>9</sup> Hilton Affidavit, para. 14.

<sup>10</sup> Hilton Affidavit, para. 15.

(c) **Submissions to be Advanced if Leave to Intervene is Granted**

15. The CFP will focus its submissions on the following:

- The policy rationale for allowing provisions such as the “deemed trust” provisions of Ontario’s *Pension Benefits Act* to continue to operate unless they are found, on a proper analysis and sufficient record, to frustrate the remedial purposes of the CCAA;
- The scope of the employer’s fiduciary obligation, when acting as plan administrator, to ensure that it maintains transparency and does not take actions that are detrimental to the interests of plan beneficiaries;
- Appropriate methods of addressing conflicts of interest that may arise when an employer/administrator’s corporate interests diverge from its fiduciary obligation towards plan beneficiaries;
- The particular importance of providing sufficient and timely notice, adequate disclosure, and procedural safeguards to ensure that pensioners are able to respond effectively to company conduct that affects the interests of pensioners; and
- The need for flexible and effective remedies when fiduciary obligations are breached.

16. The CFP will submit that the holding in the court below that a provincial deemed trust can be affected by a court order under the CCAA, but only where its continued operation would frustrate the purpose of the CCAA,<sup>11</sup> is supportable both in principle and as a matter of policy. This Court has applied the doctrine of paramountcy narrowly in recent years, and has sought to preserve the operation

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<sup>11</sup> *Re Indalex Ltd.*, 2011 ONCA 265, at paras. 176-77; 180-81.

of overlapping federal and provincial legislation except in cases of clear conflict.<sup>12</sup> Provincial deemed trusts do not necessarily prevent companies in CCAA proceedings from obtaining debtor-in-possession (“DIP”) financing, reorganizing their affairs, or selling their assets as a going concern. In the case at bar, the pension deficits were relatively small in relation to the sale proceeds, and the DIP lenders were paid in full.<sup>13</sup> While the need to give priority over a deemed trust may be established on a proper record in the appropriate case, on notice to all relevant parties,<sup>14</sup> the court below found that this had not occurred in this case.

17. The CFP will further submit that an employer that acts as administrator is under a duty to ensure that a plan’s funding requirements are met. As administrator, the employer must ensure that the plan is administered according to the legislation and the plan’s own terms, which include the provision of funding sufficient to provide the pension benefits under the plan.<sup>15</sup> That clear statutory duty is to be distinguished from the employer’s decisions to establish, amend, or terminate a plan, none of which are required or prohibited under pension legislation. Given this statutory duty *qua* administrator, the employer cannot take actions that are designed to defeat its funding obligations. Moreover, the

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<sup>12</sup> *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, at paras. 71-75.

<sup>13</sup> *Re Indalex Ltd.*, 2011 ONCA 265, at paras. 58, 63, 65.

<sup>14</sup> See eg. *Re Timminco Limited*, 2012 ONSC 948 (CanLii). While CFP takes no position on whether this decision is correct on its facts, it at least provides an example of a court following the *Indalex* analysis, but finding that superpriority for DIP financing was necessary to avoid frustrating the purposes of the CCAA proceeding on the facts of that case, in a hearing with a much higher level of notice.

<sup>15</sup> *Pension Benefits Act*, s.19, 55 and 75(1)(b).

employer must maintain transparency in its actions with respect to funding of the plan at all times.

18. The CFP will submit that in practical terms, this may require that the employer cease to act as administrator when it seeks to restructure its debts under the CCAA. For example, the employer could seek to have an independent administrator appointed by the regulator, or transfer the administration of the plan to an independent committee. In either case, increased transparency and the possibility of increased involvement by pensioners are likely outcomes.

19. The CFP will further submit that providing sufficient and timely notice, adequate disclosure, and procedural safeguards to ensure that pensioners are able to respond effectively to the company's conduct, are consistent with the policy of the CCAA to favour negotiations and compromise over all-or-nothing results. Providing such notice, encouraging negotiation, and ensuring that sufficient procedural safeguards are in place will go a long way towards ensuring that CCAA restructurings are balanced and fairly consider the interests of all stakeholders. It has been noted that Canada lags behind the U.S. in this regard.<sup>16</sup> These procedural safeguards have particular significance for pensioners, who are uniquely vulnerable in such proceedings.<sup>17</sup>

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<sup>16</sup> A. Kent, "A Comment on Indalex", (2011) *Annual Review of Insolvency Law*, 113-117, at 116: "Canadian insolvency practices about conflicts, disinterestedness and notice have always been looser than that of the U.S. system."

<sup>17</sup> Hilton Affidavit, paras. 19-20



20. Finally, the CFP will submit that these requirements do not impose an undue burden upon companies that seek CCAA protection. Conversely, where a company fails to adhere to these standards, the Court must have flexible and effective remedies at its disposal. The imposition of a constructive trust in such circumstances achieves the remedial purpose of ensuring that vulnerable pensioners are protected, while deterring companies from disregarding their fiduciary obligations towards plan beneficiaries in future.

### **Conclusion**

21. The CFP respectfully submits that it will make a useful contribution and offer a perspective that differs from that of any other party.<sup>18</sup> The CFP therefore respectfully requests that leave to intervene be granted. The CFP does not seek costs, and asks that it not be liable for costs to any other party.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: February 17, 2012

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**Counsel for the Proposed Intervenor,  
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<sup>18</sup> Hilton Affidavit, paras. 21-22; *Reference Re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 2 S.C.R. 335.

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Paragraph(s)</b>
A. Kent, "A Comment on Indalex", (2011) Annual Review of Insolvency Law, 113-117, at 116	19
<i>Canadian Western Bank v. Alberta</i> , [2007] 2 S.C.R. 3	16
<i>Reference Re Workers' Compensation Act, 1983 (Nfld.)</i> , [1989] 2 S.C.R. 335	21
<i>Re Indalex Ltd.</i> , 2011 ONCA 265	10, 16
<i>Re Timminco Limited</i> , 2012 ONSC 948 (CanLii)	16

**STATUTORY AUTHORITIES*****Pension Benefits Act, R.S.O. 1990, Chapter P.8, s.19, 55 and 75(1)(b)*****Duty of administrator**

19.(1)The administrator of a pension plan shall ensure that the pension plan and the pension fund are administered in accordance with this Act and the regulations.

**Application of subs. (1)**

(2)Subsection (1) applies whether or not the pension plan is amended to comply with this Act and the regulations.

**Idem**

(3)The administrator of a pension plan shall ensure that the pension plan and the pension fund are administered in accordance with,

- (a) the filed documents in respect of which the Superintendent has issued an acknowledgment of application for registration or a certificate of registration, whichever is issued later; and
- (b) the filed documents in respect of an application for registration of an amendment to the pension plan, if the application complies with this Act and the regulations and the amendment is not void under this Act.

**Application of subs. (3)**

(4)Subsection (3) does not apply to enable the administrator to administer the pension plan contrary to this Act and the regulations.

**Idem, amendment**

(5)The administrator of a pension plan may administer or permit administration of the pension plan and the pension fund in accordance with an amendment pending registration or refusal of registration of the amendment.

\* \* \*

**Funding**

55. (1) A pension plan must provide for funding sufficient to provide the pension benefits, ancillary benefits and other benefits under the pension plan in accordance with this Act and the regulations. R.S.O. 1990, c. P.8, s. 55 (1); 2010, c. 9, s. 39 (1).

**Payment by employers, etc.**

(2) An employer required to make contributions under a pension plan, or a person or entity required to make contributions under a pension plan on behalf of an employer, shall make the contributions in accordance with the prescribed requirements for funding and shall make the contributions in the prescribed manner and at the prescribed times,

- (a) to the pension fund; or
- (b) if pension benefits under the pension plan are paid by an insurance company, to the insurance company that is the administrator of the pension plan. R.S.O. 1990, c. P.8, s. 55 (2); 2005, c. 31, Sched. 18, s. 6 (1); 2010, c. 9, s. 39 (2).

#### **Payment by members**

(3) Members of a pension plan that provides contributory benefits shall make the contributions required under the plan in the prescribed manner and at the prescribed times. 2005, c. 31, Sched. 18, s. 6 (2).

#### **Same, jointly sponsored pension plans**

(4) Members of a jointly sponsored pension plan shall make the contributions required under the plan (including their obligations in respect of any going concern unfunded liability and, except in the case of plans described in subsection 1 (2.1), in respect of any solvency deficiency) in accordance with the prescribed requirements for funding and shall make the contributions in the prescribed manner and at the prescribed times.

\* \* \*

#### **Liability of employer on wind up**

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

[Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (1) is amended by striking out "in whole or in part" in the portion before clause (a). See: 2010, c. 9, ss. 58, 80 (2).]

- (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 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.