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Facsimile Transmittal Sheet

Wednesday, January 11, 2012

OUR MATTER: 111101

Total number of pages being transmitted, including this page 19

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FROM: Peter Kolla

MESSAGE: Please see attached.

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January 11, 2012

Our File No.: 111101

Via Facsimile

TO: SEE SERVICE LIST ATTACHED

Dear Counsel:

**Re: Sun Indalex Finance, LLC and United Steelworkers, et al.
S.C.C. File No.: 34308**

Please find along with this letter the Reply Memorandum of Argument of the Appellant, Sun Indalex Finance, LLC, regarding its motion to state constitutional questions, which is hereby served upon you pursuant to the *Rules of the Supreme Court of Canada*.

Yours very truly,

Goodmans LLP



Peter Kolla
Encl.

cc: Fred Myers (Goodmans LLP)



**SCHEDULE "A"
SERVICE LIST**

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S.C.C. File No. 34308

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

B E T W E E N :

SUN INDALEX FINANCE, LLC

**APPELLANT
(Respondent)**

- and -

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

**RESPONDENTS
(Appellants)**

**REPLY MEMORANDUM OF ARGUMENT
OF THE APPELLANT, SUN INDALEX FINANCE, LLC
(Motion to State Constitutional Questions)**

(pursuant to Rules 47 and 60 of the *Rules of Supreme Court of Canada*, SOR/2002-156)

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Lawyers for George L. Miller, the Chapter 7 Trustee of the Bankruptcy
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1. This reply addresses errors in the joint response of the Respondents to Sun Indalex's motion to state constitutional questions.¹
2. First, the Respondents' repeated assertion that Sun Indalex is attempting to state constitutional questions that were not raised below, is incorrect. The Respondents neglect to mention that a Notice of Constitutional Question was delivered in the Court of Appeal that specifically raised the issue of paramountcy on notice to the federal and Ontario attorneys general.² The Court of Appeal clearly addressed the issue of paramountcy that was raised by the parties with respect to whether a super-priority charge granted in a CCAA order that was stated to rank in priority to trusts "statutory or otherwise" had priority over deemed trusts under the *Pension Benefits Act*, R.S.O. 1990, c. P-8 (the "PBA"). The first constitutional question that Sun Indalex seeks to have stated is an issue raised and argued below.

Reasons of the Court of Appeal for Ontario, dated April 7, 2011 at paras. 172-76 ("Appeal Reasons"); Motion Record of the Appellant, Sun Indalex Finance, LLC (Motion to State Constitutional Questions) ("Motion Record"), Tab 4, pp. 78-79

3. The Court of Appeal held that paramountcy did not apply in favour of the DIP Charge in this case because it was not "invoked" when the Initial Order was granted. While the specific issue of whether paramountcy was "invoked" in the Initial Order was not argued below, that is only because the concept of "invoking" paramountcy in the sense the Court of Appeal uses it was unknown in the jurisprudence prior to the Court of Appeal's decision and the Court of Appeal did not ask the parties to address it.

Appeal Reasons at para. 178; Motion Record, Tab 4, p. 79

4. A party asserting paramountcy has the onus of demonstrating that there is an operational or policy incompatibility between the federal and provincial laws at issue, as set out in cases such as *Canadian Western Bank v. Alberta*. The Court of Appeal declined to render inoperative a provincial law notwithstanding that it was in conflict with orders

¹ Unless otherwise stated, all capitalized terms not otherwise defined herein shall have the meaning ascribed thereto in Sun Indalex's Memorandum of Argument (Motion to State Constitutional Questions).

² A copy of the Notice of Constitutional Question dated October 12, 2010 (excluding exhibit) is appended hereto.

made under the federal CCAA. The Court of Appeal held that the doctrine of paramountcy did not apply because it had not been sufficiently “invoked” at the time that the Initial Order was made. Sun Indalex submits that the Court of Appeal erred in so holding for several reasons which will be dealt with in its main factum on the appeal. The point on this motion is that an error as to the content of the doctrine of paramountcy is itself an issue of constitutional law. Sun Indalex submits that if paramountcy properly interpreted applies, then subsection 57(4) of the PBA and any provincial law that would require payment of the funds held by the Monitor to anyone other than the DIP Lender and its subrogee, are rendered inoperative by the orders made under the federal CCAA. Hence the second constitutional question that Sun Indalex seeks to have stated addresses the correctness of the Court of Appeal’s new test for paramountcy; but it ultimately resolves to a submission that subsection 57(4) of the PBA is rendered inoperative under the doctrine of paramountcy by the CCAA orders made in this case. That submission fulfills the conditions of Rule 60(1)(b) of the *Rules of the Supreme Court of Canada* and requires that a constitutional question be stated.

Canadian Western Bank v. Alberta, 2007 SCC 22 at para. 75; Joint Response of the Respondent Retirees and the Respondent United Steelworkers, Tab 1(B)

Appeal Reasons at paras. 177-79; Motion Record, Tab 4, p. 79

5. Accordingly, the Respondents’ further assertion at paragraphs 23 to 25 of their memorandum of argument, that there is no law at risk of being rendered inoperative on this appeal, is incorrect. As noted above, the laws to be rendered inoperative include subsection 57(4) of the PBA as interpreted by the Court of Appeal to create a deemed trust for wind-up and solvency deficiencies in one of the Plans to the extent it conflicts with the priority of the DIP Charge. In other words, the question is whether subsection 57(4) of the PBA is inoperative under the doctrine of paramountcy because of the provisions of the DIP Charge contained in the Initial Order granted under the federal CCAA, the subrogation provision in the Sale Approval and Vesting Order dated July 20, 2009 and the operation of federal priorities in CCAA proceedings generally.

Appeal Reasons at paras. 101, 109 and 177-79; Motion Record, Tab 4, pp. 69-70 and 79

6. The final error is the Respondents’ assertion at paragraph 7 of their memorandum of argument that Sun Indalex does not have a claim against Indalex in Canada. In fact, in

addition to being a creditor in the US bankruptcy proceedings of Indalex US, Sun Indalex has filed a secured claim over Indalex's assets in these CCAA proceedings. That claim has been recognized by the Monitor. Sun Indalex also asserts that this Canadian security interest takes priority over any deemed trust by operation of paramountcy.³

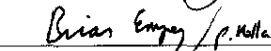
7. Sun Indalex accepts that there are a number of issues in the case of which the doctrine of paramountcy is but one. Nevertheless, where the constitutional invalidity or inoperability of a law is one of the issues to be raised in an appeal, as it is in this case, Sun Indalex understands that an appellant is required to move to state a constitutional question. There is no prejudice to the Respondents. Sun Indalex does not wish to be taken to have abandoned the constitutional arguments on which it relies and submits that it should not be deprived of those arguments in establishing the errors in the decision of the Court of Appeal which this Court has determined ought to be reviewed on appeal.

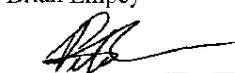
January 11, 2012

**ALL OF WHICH IS RESPECTFULLY
SUBMITTED**


Benjamin Zarnett


Fred Myers


Brian Empey


Peter Kolla

Counsel to Sun Indalex Finance, LLC

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³ As a result of the decision that it made to impose constructive trusts, the Court of Appeal did not need to deal with the priority contest between Sun Indalex's Canadian security and the claims of the pensioners.

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Court of Appeal File No. M38582
Court of Appeal File No. M38599
Superior Court File No. 09-CV-8122-00CL

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.**

APPLICANTS

**KEITH CARRUTHERS, LEON KOZIEROK, RICHARD BENSON, JOHN
FAVERI, KEN WALDRON, JOHN (JACK) W. ROONEY, BERTRAM McBRIDE,
MAX DEGEN, EUGENE D'ORIO, RICHARD SMITH, ROBERT LECKIE, NEIL
FRASER AND FRED GRANVILLE, MEMBERS OF THE RETIREMENT PLAN
FOR EXECUTIVE EMPLOYEES OF INDALEX CANADA AND ASSOCIATED
COMPANIES AND THE UNITED STEELWORKERS**

APPELLANTS

- and -

**SUN INDALEX FINANCE, LLC AND FTI CONSULTING CANADA ULC, IN ITS
CAPACITY AS THE MONITOR OF INDALEX LIMITED, INDALEX HOLDINGS
(B.C.) LTD., 6326765 CANADA INC. AND NOVAR INC., ON BEHALF OF
INDALEX LIMITED**

RESPONDENTS ON APPEAL

NOTICE OF CONSTITUTIONAL QUESTION

A constitutional issue concerning the intersection of provisions of Ontario's
Personal Property Security Act, R.S.O. 1990, c. P.10 (the "PPSA") and *Pension Benefits
Act*, R.S.O. 1990, c. P.8 (the "PBA"), in particular subsection 30(7) of the PPSA and

subsection 57(4) of the PBA, and the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"), in particular section 11, has arisen in the within appeal.

If necessary, the question is to be argued on November 23 and 24, 2010, at 10:30 am, at Osgoode Hall, 130 Queen Street West, Toronto, Ontario M5H 2N5.

The following are the material facts giving rise to the constitutional question:

1. On April 3, 2009, Indalex Limited ("**Indalex**"), Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc. (collectively, the "**Applicants**") made an *ex parte* application under the CCAA and an Initial Order was made by the Ontario Superior Court of Justice (Commercial List) (the "**Court**") granting, *inter alia*, a stay of proceedings against the Applicants and appointing FTI Consulting Canada ULC as monitor (the "**Monitor**").
2. On April 8, 2009, an Amended and Restated Initial Order was granted by the Court which, *inter alia*, authorized Indalex to borrow funds (the "**DIP Loan**") pursuant to a debtor-in-possession credit agreement among the Applicants, Indalex's parent company and certain US affiliates who were in Chapter 11 proceedings in the United States (the "**US Debtors**"), and a syndicate of lenders (the "**DIP Lenders**"). The Initial Order and all amendments and restatements thereto shall collectively be referred to as the "**Initial Order**"). A copy of the Initial Order is attached hereto as **Exhibit "A"**.

3. The Initial Order grants the DIP Lenders the benefit of a Court-ordered charge on the property of the Applicants which ranks in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise in favour of any Person, other than certain other Court-ordered charges

4. The credit agreement pursuant to which the DIP Loan was advanced contemplated that it would be repaid from the proceeds derived from a going concern sale of Indalex's assets on or before August 1, 2009. The Applicants' obligation to repay the DIP Loan was guaranteed by the US Debtors.

5. By order dated July 20, 2009 (the "**Approval and Vesting Order**"), the Court approved the sale of substantially all of the assets and business of the Applicants and US Debtors to SAPA Holdings AB, and directed the Monitor to make a distribution to the DIP Lenders from the sale proceeds in satisfaction of the Applicants' obligations under the DIP Loan, subject to a reserve that the Monitor considered to be appropriate in the circumstances.

6. At the sale approval hearing, certain retirees (the "**Retirees**") who are beneficiaries of the Retirement Plan for Executive Employees of Indalex and Associated Companies (the "**Executive Plan**") objected to the sale and asserted a deemed trust over the sale proceeds pursuant to subsection 57(4) of the PBA. The United Steelworkers (the "**USW**") supported the sale, but reserved their rights with respect to any deemed trust claim it might have with respect to the Retirement Plan for Salaried Employees of Indalex and associated companies (the "**Salaried Plan**").

7. The sale closed on July 31, 2009 and the sale proceeds were distributed to the DIP Lender less a reserve held by the Monitor which included amounts in respect of estimated deficiencies in the Executive Plan and the Salaried Plan.
8. All of the directors of Indalex resigned effective July 31, 2009.
9. On August 28, 2009, the Retirees and the USW brought motions seeking, *inter alia*, declarations that amounts representing the wind-up deficiencies of the Executive Plan and the Salaried Plan are subject to deemed trusts under section 57(4) of the PBA (the "Deemed Trust Motions"). On the same date, the Applicants brought a motion seeking leave to lift the stay of proceedings for the purpose of allowing one or more of the Applicants to file an assignment in bankruptcy.
10. On October 27, 2009, the Court issued an order increasing the Monitor's powers and authorizing the Monitor to take all necessary steps to complete the CCAA Proceedings, including, *inter alia*, authorizing the Monitor to respond to the within Appeal on behalf of the Applicants.
11. In a decision released February 18, 2010, the Honourable Justice Campbell, dismissed the Deemed Trust Motions, holding, *inter alia*, that no deemed trusts arose with respect to the Salaried Plan and the Executive Plan. Based on his decision on the Deemed Trust Motion, Campbell J. concluded that it was unnecessary to deal with the Applicants' application to lift the stay in order to allow them to file a voluntary assignment in bankruptcy.

12. On May 20, 2010, the Court of Appeal granted leave to appeal the decision of Campbell J. dated February 18, 2010. The appeal of the Deemed Trusts Motions is scheduled to be heard on November 23 and 24, 2010.

The following is the legal basis for the constitutional question:

1. Section 57 of the PBA provides for a deemed trust to secure the periodic contributions required to be paid into a pension plan by an employer. Pursuant to subsection 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.

2. Section 30(7) of the PPSA provides that a security interest in an account or inventory and its proceeds is subordinate to the interests of a person who is the beneficiary of a deemed trust arising under the PBA.

3. Section 42 and 45 of the Initial Order grants the DIP Lenders the benefit of a Court-ordered charge on the property of the Applicants which ranks in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise in favour of any Person, other than certain other Court-ordered charges.

4. Justice Campbell found that no deemed trust existed in favour of the Executive Plan or the Salaried Plan. In the event that a deemed trust is found to exist, the terms of the Initial Order are in conflict with subsection 30(7) of the PPSA.

5. The appellants take the position that subsection 57(4) of the PBA and section 30(7) of the PPSA require that the Court order that any wind-up deficiencies in the Executive Plan and/or the Salaried Plan be paid in priority to and in advance of the DIP Lenders.

6. The Monitor, on behalf of the Applicants, and Sun Indalex Finance, LLC take the position, *inter alia*, that Parliament has the exclusive constitutional authority to regulate insolvency proceedings, that the CCAA and specifically section 11 thereof provides the Court with the jurisdiction to grant an order in a CCAA proceeding that has the effect of overriding provincial legislation, including the provincially created deemed trusts provided for in section 57(4) of the PBA and the provincially created priorities provided for in section 30(7) of the PPSA, and that section 30(7) of the PPSA and section 57(4) of the PBA are rendered inoperative under the doctrine of paramountcy.

October 12, 2010

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Court of Appeal File No. M38582
Court of Appeal File No. M38599
Superior Court File No. 09-CV-8122-00CL

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,
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RESPONDENTS ON APPEAL

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S.C.C. File No.: 34308

**IN THE SUPREME COURT OF CANADA
(APPEAL FROM THE COURT OF APPEAL
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B E T W E E N :

SUN INDALEX FINANCE, LLC

**APPELLANT
(Respondent)**

- and -

UNITED STEELWORKERS *et al.*

**RESPONDENTS
(Appellants)**

**REPLY MEMORANDUM OF ARGUMENT
OF THE APPELLANT,
SUN INDALEX FINANCE, LLC
(Motion to State Constitutional Questions)**

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