SCC 34308

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Ontario)

BETWEEN:

SUN INDALEX FINANCE, LLC

APPELLANT
(Respondent)

- and -

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

RESPONDENTS
(Appellants)

AND BETWEEN:

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

APPELLANTS
(Respondents)

- and –

UNITED STEELWORKERS, KEITH CARRUTHERS, LEON KOZIEROK, RICHARD BENSON, JOHN FAVERI, KEN WALDRON, JOHN (JACK) W. ROONEY, BERTRAM MCBRIDE, MAX DEGEN, EUGENE D'IORIO, NEIL FRASER, RICHARD SMITH, ROBERT LECKIE, FRED GRANVILLE, DOUGLAS WILLIAMS AND THE MONITOR, FTI CONSULTING CANADA ULC

RESPONDENTS
(Appellants/Respondents)

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AND BETWEEN:

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

APPELLANTS
(Respondents)

- and -

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

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(Appellants/Respondents)

AND BETWEEN:

UNITED STEELWORKERS

APPELLANT
(Appellant)

- and —

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RESPONDENT
(Intervener)

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FACTUM OF THE INTERVENER, INSOLVENCY INSTITUTE OF CANADA

PART I - Statement of Facts

1. The Insolvency Institute of Canada (the "IIC") takes no position on the facts as set out by the parties.

PART II - Statement of the Questions in Issue

2. The IIC's submissions focus solely on the impact to the underlying insolvency and restructuring regime in Canada of any decision rendered by this Court on:

(a) the scope of the deemed trust under s. 57(4) of Ontario's *Pension Benefits Act*, R.S.O. 1990, c. P. 8 (the "PBA" generally, and "Deemed Trust" with respect to s. 57(4) specifically) and the status of such Deemed Trust once the pension plan sponsor seeks protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"); and

(b) the circumstances in which an equitable remedy ought to be granted by a Court, including an appellate Court, when doing so has the effect of re-ordering the priority of creditors' claims in an insolvency proceeding.

PART III - Statement of Argument

Importance of a Robust Restructuring Regime

3. A fundamental objective of the Canadian insolvency regime is to ensure that conditions exist to permit insolvent companies to remain in business and be restructured for the benefit of all stakeholders, thereby "avoiding the social and economic losses resulting from liquidation" through bankruptcy.[1] A necessary component in maintaining a robust restructuring regime is to ensure that sufficient certainty exists to permit all creditors and other stakeholders to have a clear understanding of their respective rights and entitlements relative to other stakeholders when they extend credit or negotiate an

[1] *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 ["*Century Services*"], at paras. 66, 70: Book of Authorities of the Intervener, Insolvency Institute of Canada ["BOAI"], Tab 10.

arrangement. If the balance or symmetry between liquidation and restructuring is broken, then the benefits of successful rehabilitation and restructuring of Canadian businesses may be lost.

4. Prior to the Ontario Court of Appeal's decision in *Indalex*,[2] insolvency practitioners and stakeholders did not view s. 57(4) of the PBA as creating a deemed trust for the entire deficit in a defined benefit pension plan ("DB Plan") upon wind-up[3]. Prior court decisions did not recognize the Deemed Trust as covering the entire deficit in a wound-up DB Plan[4].

5. Recent amendments to the CCAA[5] and the *Bankruptcy and Insolvency Act* (Canada) (the "BIA")[6] did not grant protection or give priority to the entire deficit in a wound-up DB Plan upon the insolvency of the plan sponsor, whether in a bankruptcy or non-bankruptcy context. The amendments followed extensive public consultation and the interests of various stakeholders were considered by Parliament.[7] The recent statutory amendments did not change the law on this issue – they codified existing common law and practice as it had been applied and accepted in Canada.[8]

6. If this Court finds that the Deemed Trust under the PBA: (i) includes the entire deficit in a wound up DB Plan; and (ii) enjoys priority in a CCAA restructuring absent a determination and the "invoking" of paramountcy on a case by case basis (together, the "Deemed Trust Finding"), it will become considerably more difficult for insolvent

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[2] *Re Indalex Limited*, 2011 ONCA 265 [*Indalex*]: Record of the Appellant, Sun Indalex Finance [Appellant's Record], page 32.

[3] Sean Dunphy & Andrea Boctor, "*Indalex* – Do Hard Cases Make Bad Law?", *Annual Review of Insolvency Law* (Carswell: 2012) [Dunphy & Boctor]: BOAI, Tab 19.

[4] *Ivaco Inc., Re* (2006), 83 O.R. (3d) 108 at para. 69 (C.A.), leave to appeal to S.C.C granted, (2007), 370 N.R. 395 (note) (S.C.C.) ["*Ivaco*"]: BOAI, Tab 8; *Toronto-Dominion Bank v. Usarco Ltd.* (1991), 42 E.T.R. 235 (Ont. Gen. Div.): BOAI, Tab 11; Dunphy & Boctor, *supra* note 3 at pp. 80-81: BOAI, Tab 19; The Honourable James M. Farley, Q.C., "*Indalex* – Is it the New Bible or merely Apocrypha?" (Paper delivered at the Ontario Bar Association, February 9-11, 2011) [unpublished]: BOAI, Tab 21.

[5] CCAA, s. 6(6) (current version): BOAI, Tab 13.

[6] BIA, ss. 60(1.5), 81.5(1) and 81.6(1): BOAI, Tab 12.

[7] Senate, Standing Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (November 2003) at 96-99 (Chair: Hon. Richard Kroft): BOAI, Tab 20.

[8] Dunphy & Boctor, *supra* note 3 at pp. 86-87: BOAI, Tab 19; House of Commons Debates, Vol. 140, No. 128 (1st Session, 38th Parliament), September 29, 2005, p. 8199 (last para.): Book of Authorities of the Appellant, FTI Consulting ["BOAF"], Tab 23.

companies to successfully restructure under the CCAA. Bankruptcy will emerge as the preferred result, because the reversal of the priority which is mandated under the BIA will be to the direct advantage of all secured and unsecured creditors. This would be counter to the rehabilitative and societal benefits of restructuring under the CCAA.

7. Uncertainty undermines an effective insolvency regime. Stakeholders must have confidence that the rules relating to priority of claims are known and consistently applied. Parties must be able to act in good faith in reliance upon an Order issued by the Court, unless and until such time as the Order is varied, set aside or overturned on appeal. Orders granting equitable relief such as remedial constructive trusts that have the effect of altering priorities under federal insolvency legislation should only be made following a rigorous application of the legal tests for such relief.[9]

Consequences if the Deemed Trust Finding is Upheld

8. Canada's two federal insolvency statutes are complementary and operate in tandem. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes, CCAA and BIA, to the extent possible.[10] Parallel CCAA and BIA restructuring schemes are now an accepted feature of the insolvency law landscape.[11]

9. When an insolvent company files for protection under the BIA or the CCAA, the federal insolvency statutes occupy the field with respect to the entitlement and priority of claims of creditors. Any priority granted pursuant to a provincial statute, including a Deemed Trust under the PBA, that purports to alter the priority of creditor claims under federal insolvency legislation, is ineffective.[12]

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[9] *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 at para. 45 ["*Soulos*"]: BOAI, Tab 9; *Barnabee v. Touhey* (1995), 26 O.R. (3d) 477 at para. 4 (C.A.): Book of Authorities of the Appellant, Sun Indalex Finance ["BOAS"], Tab 26.

[10] *Century Services, supra* note 1 at paras. 22-24: BOAI, Tab 10.

[11] *Century Services, supra* note 1 at para. 24: BOAI, Tab 10.

[12] *Husky Oil Operations Ltd. v. Canada (Min. National Revenue)*, [1995] 3 S.C.R. 453 ["*Husky Oil*"] at para. 32-39: BOAF, Tab 9; *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 at paras. 14-16 ["*Henfrey Samson*"]: BOAI, Tab 2; *Deloitte Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board)*, [1985] 1 S.C.R. 785 at p. 806: BOAF, Tab 8.

10. If the Deemed Trust Finding is upheld, it will create two separate and distinct schemes for dealing with an insolvent company, rather than one insolvency regime encompassing two statutes operating within a harmonized framework. This would be counter to the "single proceeding" model endorsed by this Court.[13]

11. The IIC submits that when an insolvent company (pension plan sponsor) files for protection under the CCAA, deemed trusts created by a Province are ineffective to alter priorities established under the federal insolvency regime. As stated by Fish J. of this Court in his concurring reasons in *Century Services*, unless Parliament has expressly confirmed through federal insolvency legislation that a deemed trust created by a Province will continue to enjoy priority upon insolvency, it must be taken as reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.[14] The only deemed trusts that Parliament has statutorily confirmed will have priority under the CCAA are for specific amounts owing to Her Majesty[15].

12. The most recent amendments to the CCAA did not create or confirm any priority for the deemed trusts in favour of third parties with respect to a deficit that may exist under a private pension plan.[16] Parliament has had further opportunities to amend the federal insolvency statutes to provide increased protection and priority for pensioners as it relates to deficits in underfunded DB Plans, and has chosen not to do so.[17]

13. The IIC submits that a determination of the issues before this Court does not turn on the interpretation of section 57(4) of the PBA. Even if the Province chose to amend the PBA to expressly provide that the deemed trust extends to the entire deficit in a wound-up DB Plan, such deemed trust would be ineffective upon the insolvency of the

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[13] *Century Services, supra* note 1 at para. 22: BOAI, Tab 10.

[14] *Century Services, supra* note 1 at paras. 104, 105 per Fish, J.: BOAI, Tab 10.

[15] CCAA, ss. 37 (current version): BOAI, Tab 13. Those amounts are limited to source deductions.

[16] CCAA (current version): BOAI, Tab 13.

[17] Bill C-501, *An Act to Amend the Bankruptcy and Insolvency Act and other Acts (pension protection)*, 3rd Sess., 40th Parl., (2010) ["*Bill C-501*"]: BOAS, Tab J and House of Commons, Standing Committee on Industry, Science and Technology, *Fourteenth Report* (February 2011): BOAI, Tab 17; Phillips, Hager & North Investment Management Ltd,. "*Bill C-501: Analysis of Potential Impact on Canadian Credit Markets*": BOAI, Tab 16; Towers Watson, "Granting Higher Priority to DB Plan Deficits: Solving problems or Creating Them?": BOAI, Tab 22.

pension plan sponsor, whether in a BIA or CCAA proceeding, based on existing federal insolvency legislation. Federal legislation governs the priority of creditors' claims upon insolvency and recognizes only "true trusts" and limited deemed trusts in favour of the federal Crown.[18]

14. Giving effect to provincially-created deemed trusts upon insolvency would permit the Provinces to create their own priorities and invite a different scheme of distribution among creditors from Province to Province.[19] This Court has previously refused to permit such a result.[20] A creditor who holds a privilege under a provincial statute cannot claim the status of a secured creditor in order to avoid the federal scheme of distribution.[21]

15. If the Deemed Trust Finding is upheld it would have a material effect on the ability of insolvent companies to restructure as an alternative to liquidation in bankruptcy. Restructuring under the CCAA would result in unsecured creditors not receiving any distribution until *after* the claim in respect of the Deemed Trust has been paid in full. This would decrease the likelihood that creditors would vote in favour of acceptance of a Plan of Arrangement to facilitate the restructuring, when other options exist that would produce a greater recovery for them. Unsecured creditors would be incentivized to "level the playing field" by bankrupting the company to reverse the Deemed Trust priority for the DB Plan's claim, thereby ensuring that the deemed trust claim is unsecured and not paid in priority to the other unsecured claims.[22]

16. If an insolvent company has very large deficits in its DB Plans, which is often the case, secured creditors would also have a significant economic incentive to bankrupt the company rather than facilitate a restructuring. Bankruptcy provides a clear and certain result: reversal of any priority for the Deemed Trust, with the claim being unsecured and

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[18] *Henfrey Samson*, *supra* note 12 at para. 35: BOAI, Tab 2; *Ivaco*, *supra* note 4 at para. 39: BOAI, Tab 8; BIA, ss. 67(1)(a) and 67(2): BOAI, Tab 12; CCAA, ss. 37-40 (current version): BOAI, Tab 13.

[19] *Henfrey Samson*, *supra* note 12 at para. 30: BOAI, Tab 2.

[20] *Husky Oil*, *supra* note 12 at paras. 11 to 46 in providing an overview of the "quartet of cases" from the SCC: BOAF, Tab 9.

[21] *Federal Business Development Bank v. Quebec*, [1988] 1 S.C.R. 1061 at para. 13: BOAI, Tab 5.

[22] CCAA, s. 11.2(1) (current version): BOAI, Tab 13; *Century Services*, *supra* note 1 at paras. 23, 47-48: BOAI, Tab 10.

therefore subordinate to payment of secured claims which would be paid first from the company's assets.[23]

17. The IIC submits that this Court has previously determined that it is not desirable that companies be deprived of the option to restructure under the more flexible and responsive CCAA regime as the statute of choice for complex reorganizations.[24] They would be so deprived if the Deemed Trust is held to have priority under the CCAA, where it does not under the BIA:

> ... a strange asymmetry would arise if the interpretation giving the *ETA* priority over the CCAA urged by the Crown is adopted here: the Crown would retain priority over GST claims during CCAA proceedings but not in bankruptcy.... If creditors' claims were better protected by liquidation under the BIA, creditors' incentives would lie overwhelmingly with avoiding proceedings under the CCAA and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the CCAA can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.[25]

18. Court-ordered charges for interim financing ("DIP Financing") under the CCAA can only secure *post-filing* advances made by a lender to an insolvent company.[26] If the Deemed Trust Finding is upheld, existing secured lenders to an insolvent company, who are often the most likely source of DIP Financing, would have an incentive to favour bankruptcy in order to ensure the secured priority of their *pre-filing* loans, rather than make new advances to facilitate a restructuring.

19. Without the continuing support of its lenders, an insolvent company often has little or no prospect of securing sufficient funding from alternate sources to facilitate a restructuring. If a secured creditor could only be assured of the priority of its claims in a bankruptcy, it would have little motivation to facilitate a restructuring.[27]

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[23] *Ivaco, supra* note 4 at para. 39: BOAI, Tab 8.

[24] *Century Services, supra* note 1 at para. 48: BOAI, Tab 10.

[25] *Century Services, supra* note 1 at para. 47: BOAI, Tab 10.

[26] CCAA, s. 11.2(1) (current); BOAI, Tab 13.

[27] *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp*., 2008 ONCA 587, leave to appeal to S.C.C. refused (2008), 390 N.R. 393 ["Metcalfe & Mansfield"], at paras. 44-49: BOAI, Tab 1; *Elan Corp. v. Cominsky*, [1990] O.J. 2180 (C.A.) ["*Elan*"], at paras. 22 and 56-60 (per Doherty J.A. in dissent, although not on this point): BOAI, Tab 4; *Ivaco, supra* note 4 at paras. 3 and 64: BOAI, Tab 8.

20. Unlike the BIA, which is quasi-criminal in nature,[28] the CCAA has long been recognized as a rehabilitative statute.[29] Where the BIA employs a rules-based approach to proceedings, the CCAA provides a more flexible mechanism with greater judicial discretion.[30] Insolvency practitioners need to have as many "tools in the insolvency tool box" as possible to determine what options may exist for restructuring. If restructuring under the CCAA is unavailable due to a lack of DIP Financing or a desire on the part of key stakeholders to reverse significant priority payments, the options for the insolvent company and its stakeholders become significantly narrowed, and liquidation becomes the most likely outcome.[31]

21. The Deemed Trust Finding by the Ontario Court of Appeal has created disharmony between the CCAA and the BIA, contrary to the harmonized approach endorsed by this Court.[32]

22. If the Deemed Trust Finding is upheld, it will create a more difficult environment in which to build the necessary consensus of creditor support around a Plan of Arrangement. In such case, the Deemed Trust would remain in priority (and therefore receive payment) ahead of all other secured creditors and unsecured creditors. Creditors would not be inclined to support a Plan of Arrangement that reflected this priority if the deficit in the DB Plan was sizeable, as it is in many cases. They would have an economic incentive to reject the Plan of Arrangement. Pension claimants, on the other hand, would be disinclined to support any Plan of Arrangement that offered less than their full legal entitlement and priority.

23. Upholding the Deemed Trust Finding could create unnecessary tension and additional classes of creditors for voting purposes under a Plan of Arrangement as compared to the claims of DB Plans registered in other jurisdictions. To the extent that

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[28] BIA, ss. 198-208; prior to the amendments to the BIA on September 18, 2009, s. 21 of the BIA allowed a trustee to initiate criminal proceedings in respect of the bankrupt. That power rests with the Court under the (current) BIA: BOAI, Tab 12.

[29] *Century Services, supra* note 1 at para. 56: BOAI, Tab 10.

[30] *Century Services, supra* note 1 at paras. 13-15: BOAI, Tab 10.

[31] *Ivaco, supra* note 4: BOAI, Tab 8; *Century Services, supra* note 1 at paras. 15, 19, 58-59 and 64: BOAI, Tab 10.

[32] *Ivaco, supra* note 4 at para. 69: BOAI, Tab 8; *Century Services, supra* note 1 at paras. 23-24: BOAI, Tab 10.

the classes of creditors for voting purposes become more fragmented, more claimants will hold a potential veto and that will further decrease the likelihood of a sufficient level of support being reached among stakeholders. Such a finding would make it particularly difficult to present a Plan of Arrangement on a substantively consolidated basis in a cross-border proceeding involving U.S. entities, thereby potentially adding considerable cost and delay to any multi-jurisdictional restructuring.

24. If the Deemed Trust Finding is upheld and this causes an increase in the use of bankruptcies to revert such priority, all stakeholders suffer.

> [The CCAA] provides a means whereby the devastating social and economic effects of bankruptcy or creditor-initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.[33]

25. The Ontario Court of Appeal's finding that the super-priority granted pursuant to a court-ordered charge can only be effective if the CCAA court makes an express finding of paramountcy, or if paramountcy is otherwise "invoked", does not reflect the current law in Canada.[34] The IIC submits that this finding by the Ontario Court of Appeal creates unnecessary confusion in the intersection of federal and provincial jurisdiction in an insolvency proceeding.[35] The issue was recently considered in the CCAA restructuring involving *First Leaside***:**

> ... At the risk of gross over-simplification, Canadian constitutional law places the issue of priorities of secured creditors in different legislative bailiwicks depending on the health of the debtor company. When a company is healthy, secured creditor priorities usually are determined under provincial laws, such as personal property security legislation and related statutes, which result from provincial legislatures exercising their powers with respect to "property and civil rights in the province". However, when a company gets sick - becomes insolvent - our Constitution vests in Parliament the power to craft the legislative regimes which will govern in those circumstances. Exercising its power in respect of "bankruptcy and insolvency", Parliament has established legal frameworks under the BIA and CCAA to administer sick companies. Priority determinations under

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[33] *Elan*, *supra* note 15 at paras. 22 and 56-60 (per Doherty J.A. in dissent, although not on this point): BOAI, Tab 4; see also *Metcalfe & Mansfield*, *supra* note 15 at paras. 50-51: BOAI, Tab 1.

[34] *Century Services*, *supra* note 1at paras. 66 and 70: BOAI, Tab 10.

[35] *Indalex*, *supra* note 2 at para. 177: Appellant's Record, page 32.

> the CCAA draw on those set out in the BIA, as well as the provisions of the CCAA dealing with specific claims such as Crown trusts and other claims.[36]

Reliance Upon Court Orders

26. The IIC submits that factors which create uncertainty as to a party's ability to rely upon Orders issued by the Court in an insolvency proceeding that have not been varied, set aside or appealed is not conducive to a robust restructuring regime.

27. The ability of a lender to rely upon a super-priority charge granted pursuant to a court Order made in a CCAA proceeding and not subject to any appeal has been called into question as a result of the Ontario Court of Appeal's decision in *Indalex*. At a minimum, such reliance is now heavily qualified. The IIC submits that, to the extent restructurings are made more difficult or more costly, all stakeholders suffer.[37]

28. The IIC submits that a charge granted pursuant to a court Order under a federal statute is not a "consensual transaction" to which the *Personal Property Security Act* (Ontario) ("PPSA") applies[38], but is a "lien given by statute or rule of law" which is specifically excluded from the application of the PPSA.[39] The Ontario Court of Appeal did not need to make a determination as to priority between the PBA deemed trust referred to in section 30(7) of the PPSA and the priority for DIP Financing granted pursuant to an Order in a CCAA proceeding.[40] To do so creates unnecessary disharmony between court ordered charges granted in a federal insolvency proceeding, with the differing personal property security legislation that may exist in each Province.

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[36] *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299 at paras. 54 – 56, citations omitted: BOAI, Tab 6.

[37] *Metcalfe & Mansfield, supra* note 15: BOAI, Tab 1; *Elan, supra* note 15 at paras. 22 and 56-60 (per Doherty J.A. in dissent, although not on this point): BOAI, Tab 4; *Ivaco, supra*, at paras. 3 and 64: BOAI, Tab 8; *Collins & Aikman Automotive Canada Inc., Re* (2007), 37 C.B.R. (5th) 282 at para. 42 (Ont. S.C.J.): BOAI, Tab 3; *Courts of Justice Act* (Ontario), s. 142: BOAI, Tab 14.

[38] "In general the Act applies to consensual transactions. A lien arising by the operation of law is not consensual and thus is not within the scope of the Act. A lien by the operation of law may arise out of a court charging order..." Richard H. McLaren, *The 2012 Annotated Ontario Personal Property Security Act*, (Toronto: Thomson Canada Limited , 2011) at p. 82: BOAI, Tab 18.

[39] PPSA, ss. 2(a) and 4(1)(a): BOAI, Tab 15; *Bank of Montreal v. i Trade Finance*, 2011 SCC 26 at para. 30: BOAI, Tab 7.

[40] PPSA, s. 30(7): BOAI, Tab 15; *Indalex, supra* note 2 at paras. 172-175: Appellant's Record, page 32.

29. The granting of a remedial constructive trust to one stakeholder without strictly applying the accepted legal requirements for such relief also creates considerable uncertainty. Since the granting of an equitable remedy can have the effect of altering the priorities established under federal insolvency legislation, such circumstances need to be exceptional otherwise it could undermine the confidence of all stakeholders in Canada's restructuring regime. Equitable remedies such as a constructive trust should not be used for the purpose of avoiding the federal scheme of distribution.[41]

30. This Court has previously determined that equitable remedies should only be awarded where doing so is just in all of the circumstances of the case.[42] There must be no factors which would render imposition of the equitable remedy unjust, and the interest of intervening creditors must be protected.[43] A failure to do so will result in uncertainty as to the respective entitlement of various creditors of an insolvent company. Such uncertainty will hinder the prospects for a successful restructuring.

31. The IIC submits that it is not possible to limit the findings of the Ontario Court of Appeal in *Indalex* to its particular facts. The implications of the decision within the restructuring regime in Canada are far reaching. While priority may nonetheless be maintained for DIP Financing by following a procedural and declaratory roadmap suggested by the Court of Appeal in *Indalex*, it leads to a formalistic analysis and simply avoids the issue rather than resolves it.

PART IV - Submissions as to Costs

32. The IIC seeks no costs on this appeal and asks that no costs be awarded against it.

PART V - Order Sought

33. Given the importance of these issues to the integrity of the Canadian insolvency regime and to all stakeholders involved in restructurings, the IIC respectfully requests the right to make oral submissions not exceeding ten (10) minutes in length.

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[41] *Soulos, supra* note 9 at para. 4*:* BOAI, Tab 9.

[42] *Soulos, supra* note 9 at para. 34: BOAI, Tab 9.

[43] *Soulos, supra* note 9 at para. 45: BOAI, Tab 9.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

May , 2012

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Robert Thornton

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D.J. Miller

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Kirsten Thompson

Counsel to the Intervener, Insolvency Institute of Canada

PART VI - Table of Authorities

Authority (Jurisprudence)	**Paragraph Reference(s)**
ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp., 2008 ONCA 587, leave to appeal to S.C.C. refused (2008), 390 N.R. 39.	19, 24, 27
Bank of Montreal v. i Trade Finance, 2011 SCC 26.	28
Barnabee v. Touhey (1995), 26 O.R. (3d) 477.	7
British Columbia v. Henfrey Samson Belair Ltd., [1989] 2 S.C.R. 24.	9, 13, 14
Collins & Aikman Automotive Canada Inc., Re (2007), 37 C.B.R. (5th) 282 (Ont. S.C.J.).	27
Deloitte Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board), [1985] 1 S.C.R. 785.	9
Elan Corp. v. Cominsky, [1990] O.J. 2180 (C.A.).	19, 24, 27
Federal Business Development Bank v. Quebec, [1988] 1 S.C.R. 1061.	14
First Leaside Wealth Management Inc. (Re), 2012 ONSC 1299.	25
Husky Oil Operations Ltd. v. Canada (Min. National Revenue), [1995] 3 S.C.R. 453.	9, 14
Ivaco Inc., Re (2006), 83 O.R. (3d) 108 (C.A.), leave to appeal to S.C.C granted, (2007), 370 N.R. 395 (note) (S.C.C.).	4, 13, 16, 19, 20, 21, 27
Re Indalex Limited, 2011 ONCA 265.	4, 25, 28
Soulos v. Korkontzilas, [1997] 2 S.C.R. 217.	7, 29, 30
Ted Leroy Trucking [Century Services] Ltd., Re, 2010 SCC 60.	3, 8, 10, 11, 15, 17, 20, 21, 25
Toronto-Dominion Bank v. Usarco Ltd. (1991), 42 E.T.R. 235 (Ont. Gen. Div.).	4

Authority (Secondary Sources)	**Paragraph Reference(s)**
Bill C-501, *An Act to Amend the Bankruptcy and Insolvency Act and other Acts (pension protection)*, 3rd Sess., 40th Parl., (2010).	12
House of Commons Debates, Vol. 140, No. 128 (1st Session, 38th Parliament), September 29, 2005	5
House of Commons, Standing Committee on Industry, Science and Technology, *Fourteenth Report* (February 2011).	12
Phillips, Hager & North Investment Management Ltd,. "*Bill C-501: Analysis of Potential Impact on Canadian Credit Markets"*.	12
Richard H. McLaren, *The 2012 Annotated Ontario Personal Property Security Act*, (Toronto: Thomson Canada Limited , 2011).	28
Sean Dunphy & Andrea Boctor, "*Indalex* – Do Hard Cases Make Bad Law?", *Annual Review of Insolvency Law* (Carswell: 2012).	4, 5
Senate, Standing Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (November 2003) (Chair: Hon. Richard Kroft).	5
The Honourable James M. Farley, Q.C., "*Indalex* – Is it the New Bible or merely Apocrypha?" (Paper delivered at the Ontario Bar Association, February 9-11, 2011) [unpublished].	4
Towers Watson, "Granting Higher Priority to DB Plan Deficits: Solving Problems or Creating Them?".	12

PART VII - Statutes, Regulations, Rules
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	BOA TAB
Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, as am.	12
Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36	13
Courts of Justice Act, R.S.O. 1990, c. C.43	14
Personal Property Security Act, R.S.O. 1990, c. P.10	15