Court File No. CV-09-8122-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N :

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 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

FACTUM OF THE RETIREES
a) Sun Indalex's res judicata argument, and
b) U.S. Trustee's claim for interest and costs
(Returnable July 24, 2013)

July 10, 2013

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PART I - OVERVIEW

1. On February 1, 2013, the Supreme Court of Canada released its decision in *Re Indalex*.

2. The majority of the Supreme Court held, *inter alia*, that the *Pension Benefits Act* (**"PBA"**) deemed trust continues to apply in CCAA proceedings and covers the entire wind up deficit owing by an employer to a pension plan, subject to the doctrine of paramountcy. The Supreme Court found that paramountcy applied to give priority to Indalex U.S., the guarantor of the DIP Loan who was subrogated to the rights of the DIP Lender, over the PBA deemed trust.[1]

3. This factum is filed in relation to two issues that have arisen following the Supreme Court of Canada's decision. First, whether the U.S. Trustee of Indalex U.S. is entitled to interest and costs in the amount of $5,366,577.23 on top of the amount it has been paid under the DIP Guarantee, and second, an argument raised by Sun Indalex as to whether the Executive Pension Plan Members (the **"Retirees"**) are precluded from asserting the PBA deemed trust against the funds remaining in Indalex as a result of the doctrine of *res judicata.*

Chronology following the release of the Supreme Court decision:

March 12, 2013: Counsel to the Monitor sends an email to the parties indicating that as a result of the Supreme Court decision, it intends to pay $10,751,247.22 to the U.S. Trustee of Indalex U.S.

March 12, 2013: Counsel to the Retirees sends an email to counsel to the Monitor inquiring about the amount of funds remaining in Indalex after the payment to the U.S. Trustee is made.

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[1] *Sun Indalex Finance, LLC v United Steelworkers,* 2013 SCC 6 at paras. 52, 60, 242, and 265.

March 12, 2013: The Monitor responds that after paying the U.S. Trustee, it will hold approximately $5.2 million cash (comprised of US$917,621.20 and C$4,272,538.60) (the "**Estate Funds**") (which came into the accounts of Indalex in July, 2010), and which are available for distribution to creditors of Indalex, (subject to the Administrative Charge and the Directors' Charge).

March 14, 2013: Counsel to the USW writes to the Monitor requesting a distribution of the Estate Funds to the Salaried Plan and the Executive Plan.

March 15, 2013: The Monitor pays $10,751,247.22 to the U.S. Trustee.

March 22, 2013: Counsel to the Retirees similarly writes to the Monitor requesting a distribution of the Estate Funds to the Salaried Plan and Executive Plan.

March 26, 2013: Counsel to the Monitor responds in correspondence that it is unable to distribute the Estate Funds until a number of legal issues have been determined.

April 1, 2013: Counsel to the U.S. Trustee announces that it is advancing a new claim for interest and costs on the amount of the guarantee payment paid by Indalex U.S. to the DIP Lender, which the U.S. Trustee was paid approximately two weeks earlier. The U.S. Trustee quantifies this new claim in the amount of $5,366,577.23.

May, 2013: Sun Indalex raises an argument that the Retirees cannot advance a PBA deemed trust claim against the Estate Funds based on the doctrine of *res judicata* from the Supreme Court case.

> Affidavit of Jenny Correia sworn July 9, 2013, Retirees' Responding Record, Tab 1, Exhibits A-G.

May 31, 2013: Following a series of case conferences, this Court issues an order that two issues will be determined first: the *res judicata* argument and the U.S. Trustee's claim for interest and costs.

4. The two issues before the Court in this motion are:

a) whether the doctrine of *res judicata* bars the Retirees from asserting a deemed trust claim over the Estate Funds; and

b) whether the U.S. Trustee of the U.S. Debtors is entitled to an additional priority payment for interest and costs on the guarantee amount paid by Indalex U.S. to the DIP Lender in 2009.

5. If the U.S. Trustee's claim for interest and costs in the amount of $5,366,577.23 is allowed, it will wipe out all of the Estate Funds, rendering all other issues, including Sun Indalex's *res judicata* argument against the Retirees, moot. If the U.S. Trustee's claim fails, then the *res judicata* argument appears to be an issue only between the Retirees and Sun Indalex.

6. The Supreme Court of Canada held that in the priority dispute between the DIP Lender and the Retirees, the DIP Lenders had priority ahead of the Retirees' PBA deemed trust claim due to the application of the doctrine of paramountcy.

7. Indalex abandoned the Executive Plan. On December 9, 2009, the Ontario Superintendent of Financial Services appointed Morneau Shepell as the administrator of the Executive Plan. On March 10, 2010, the Superintendent ordered that the Executive Plan be wound up effective as of September 30, 2009. The Retirees' deemed trust claim is a valid priority claim with priority under section 30(7) of the PPSA which states:

> **Deemed trusts**
>
> (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.

8. The priority contest now ripe between the Retirees and Sun Indalex over the Estate Funds involves the Retirees' deemed trust claim as against Sun Indalex's secured claim. This is a different priority contest that has not yet been determined. The Retirees are not re-litigating the issue decided by the Supreme Court, which involved a different pot of money and a different priority contest between different creditors.

b) The U.S. Trustee's Claim for interest and costs should be denied

9. The U.S. Trustee's Claim is invalid as the DIP Charge is no longer operative. The DIP Lender was paid out from the Sale Proceeds and demanded on the Guarantors, Indalex U.S., for the remaining deficit – being $10,751,247.22 (the "**Guarantee Payment**"). The Guarantors paid that amount to the DIP Lenders. Pursuant to the terms of the Approval and Vesting Order, the Guarantors were subrogated *for that amount* to the DIP Lenders' Charge. The Guarantors were then paid out by the Monitor, who reimbursed the Guarantors for the Guarantee Payment and the Guarantors' claim was settled.

10. Accordingly, the DIP Lenders' Charge is spent. The Guarantors' subrogation rights have been exhausted as they have been repaid the amount they guaranteed. They are not entitled to anything further. Nevertheless, four years after the Guarantee Payment, the U.S.Trustee seeks additional priority interest and cost payments on behalf of the Guarantors (the "**U.S. Trustee's Claim**"). The claim is without merit and should be denied. First, paragraph 14 the Approval and

Vesting Order that limits recovery to the amount actually paid by the guarantor and not any amount for interest and costs. Second, the claim is far too late to meet the *Blue Range* test for admission of late claims. Finally, the claim should be denied as it is precluded by the doctrines of collateral attack, cause of action estoppel, issue estoppel and abuse of process.

PART A – RES JUDICATA

Issue # 1: Does the doctrine of res judicata bar the Retirees from asserting a deemed trust claim over the Estate Funds?

Answer: No

FACTS

11. Sun Indalex, a subsidiary of the hedge fund (Sun Capital Partners) that purchased the Indalex Group of companies in 2006, argues that the Retirees are precluded from advancing a PBA deemed trust claim against the Estate Funds on the basis that the Retirees deemed trust claim is "*res judicata*" as a result of the litigation over the Reserve Fund that culminated in the appeal before the Supreme Court of Canada.

12. The Retirees' deemed trust claim against the Estate Funds is not *res judicata*. The issue before the Supreme Court was a priority contest between Indalex U.S., (the guarantor of the DIP Loan), and the Retirees over the funds in a Reserve Fund, created pursuant to the July 20, 2009 endorsement of this court.

13. The Supreme Court decision did not deal with the priority contest over the Estate Funds which has now arisen between the Retirees and Sun Indalex following the Supreme Court's decision.

14. In Reasons for Decision dated February 18, 2010 (hereinafter referred to as the **"DIP Priority Case"**), this Court summarized the facts as follows:

> [7] By Order dated July 20, 2009 (the "Approval and Vesting Order"), this Court approved the sale of the Applicants' assets as a going concern to SAPA Holding AB (including any assignees, "SAPA"), and ordered that upon closing of the SAPA transaction, the proceeds of sale (the "Canadian Sale Proceeds") were to be paid to the Monitor.
>
> [8] Pursuant to the Approval and Vesting order, the Monitor was ordered and directed to make a distribution to the DIP Lenders, from the Canadian Sale Proceeds, in satisfaction of the Applicants' obligations to the DIP Lenders, subject to a reserve that the Monitor considered to be appropriate in the circumstances (the "Undistributed Proceeds").
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> [9] At the sale approval hearing, both the Former Executives and the United Steel Workers (USW) asserted deemed trust claims over the Canadian Sale Proceeds in respect of underfunded pension liabilities in connection with certain pension plans administered by Indalex Limited, and requested that an amount representing their estimate of the under-funded deficiencies be included in the amount retained by the Monitor as Undistributed Proceeds, pending further order of the Court.
>
> [10] As a result of the Former Executive and USW's reservation of rights, the Monitor has retained the amount of $6.75 million as Undistributed proceeds, in addition to other amounts reserved by the Monitor.
>
> [11] On July 31, 2009, the sale of Indalex's assets to SAPA closed. A total payment of US$17,041,391.80 was made from the Canadian Sale Proceeds by the Monitor, on behalf of the Applicants, to the DIP Agent. As this resulted in a deficiency of US$10,751,247.22 in respect of the DIP Borrowings, the DIP Agent called on the guarantee granted to the DIP Lenders by Indalex US for the amount of the deficiency (the "Guarantee Payment") and Indalex US has satisfied the obligations of the Applicants.
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> ...
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> [16] Following the submissions of counsel, it was agreed that an expedited hearing process on the retirees' and employees' positions would be undertaken promptly, and that the funds on hand with the Monitor would be sufficient if

required to satisfy retirees' alleged trust claims.[2]

15. All of the courts (this Court, Court of Appeal and Supreme Court of Canada) in the DIP Priority Case consistently identified the issue as being the priority contest between the DIP Lender (i.e., the DIP guarantor) and the Retirees' deemed trust claim over the amount held in reserve by the Monitor.

16. The Retirees' notice of motion before this Court sought the following relief:

> 1. A Declaration that the amount of $3.2 million representing the wind up liability owing to the Executive Plan by the Applicants ***that is currently held in reserve by the Monitor*** is subject to a deemed trust for the benefit of the beneficiaries of the Executive Plan under section 57(4) of the PBA to be paid into the fund of the Executive Plan in accordance with the PBA, and that such amounts are not distributable to other creditors of the Applicants and that such declarations survive any bankruptcy of the Applicants;
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> ...
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> 2. In the alternative, ***an Order directing the Monitor to pay the $3.2 million it is holding in reserve to the fund of the Executive Plan***;
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> Monitor's 21st Report, June 21, 2013

17. This Court stated the issue as follows:

> **The Issues**
>
> 1. Do the deemed trust provisions of s. 57 and s. 75 of the PBA apply to the funds currently held in reserve by the Monitor in respect of:
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> a) The Executive Plan;
>
> b) The Salaried Plan?[3]

18. This Court decided that the DIP Lender is entitled to priority ahead of the Retirees' deemed trust claim:

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[2] Reasons for Decision, paras. 7-11, 16.
[3] Reasons for Decision, para. 20.

> [51] Since under the initial order priority was given to the DIP Lenders, ***they are entitled to be repaid the amounts currently held in escrow***. Those entitled to wind up deficiency remain as of that date unsecured creditors.[4] [emphasis added]

19. On appeal, the Ontario Court of Appeal stated the issue as follows:

> **THE ISSUES**
>
> [76] The central issue raised on these appeals is whether the CCAA judge erred in his interpretation of s. 57(4) of the PBA and, specifically, in finding that no deemed trust existed with respect to the Deficiencies as at July 20, 2009.
>
> ....
>
> [79] The final issue that arises is that of remedy: how is the Reserve Fund to be distributed?

20. On further appeal, the Supreme Court stated the issue as follows:

> [25] The appeals raise four issues:
>
> 1. Does the deemed trust provided for in s. 57(4) of the PBA apply to wind-up deficiencies?
>
> 2. ***If so, does the deemed trust supersede the DIP charge?*** [emphasis added]
>
> ...

Res Judicata does not apply to the priority contest now ripe between the Retirees and Sun Indalex

21. Res judicata is a legal doctrine whose purpose is to prevent a party from re-litigating the same issue that has already been decided by a court:

> Underlying *res judicata* and its concerns about re-litigation is the balancing of two public policy concerns: first, access to justice, that the courts should be reluctant to deprive a litigant of the opportunity to have his or her case adjudicated on the merits; and, second, finality of adjudication, that a party should not, to use the language of some of the older authorities, be twice vexed

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[4] Reasons for Decision, para. 51.

> for the same cause. Or, in words of American civil procedure scholars, *res judicata* exists to protect the "moral force of court judgments".
>
> The general idea behind res judicata is that as a matter of justice and good sense, if a claim defense or issue has been adjudicated, then the adjudication is binding on the parties to the proceeding and their "privies" (those interest or affected by the adjudication), and, therefore, the claim, defence or issues should not be re-adjudicated in a second proceeding. There should be an end to litigation, proceedings. These ideas are linked to Latin maxims such as: "*interest reipublicae un sit finis litium*" ("it is in the public interest that there should be an end to litigation"); and *nemo debet bis vexari si constet curiae quot sid pro una et eadem causa* ("no man ought to be twice troubled or harassed if it appears to the court that it is for one and the same cause").[5]

22. The doctrine of *res judicata* that Sun Indalex appears to raise is issue estoppel. The priority contest between the Retirees and Sun Indalex was not determined by the Supreme Court. Issue estoppel does not apply.

23. The Supreme Court held in *Danyluk v. Ainsworth Technologies Inc.* that the preconditions to the operation of issue estoppel are:

a) that the same question has been decided;

b) that the judicial decision which is said to create the estoppel was final; and,

c) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.[6]

The current priority contest involves different issues, different creditors and a different point in time than the Supreme Court case

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[5] Paul Perell and John Morden, *The Law of Civil Procedure in Ontario* 1st ed (Toronto: LexisNexist, 2010) at p. 79.
[6] *Danyluk v. Ainsworth Technologies Inc*, [2001] 2 S.C.R. 460 at para. 25.

24. A priority contest in an insolvency proceeding occurs when two or more creditors assert a claim at the same time against property (usually cash), the amount of which is not sufficient to repay the claims of the creditors in full. Typically, the funds are being held by a third party such as a trustee in bankruptcy, receiver or, in this case, the CCAA monitor. The entity holding the funds takes the position that it cannot distribute the funds until a legal determination is made (i.e., the priority contest) as to which creditor's claim is to be paid first.

25. The Supreme Court case only determined the priority dispute between the DIP Guarantor and the Retirees over the funds held in reserve as of the date of the Approval and Vesting Order, i.e. when those two claims came into direct conflict. The priority contest now arising between Sun Indalex's claim and the Retirees is not the same issue that was decided by the Supreme Court.

26. The determination of the first priority contest (DIP Lender v. Retirees) did not determine the issue that arises in the current priority contest (Sun Indalex v. Retirees). The Supreme Court dealt with the priority of the court-ordered DIP charge and the doctrine of paramountcy versus the priority of the PBA deemed trust and its priority under section 30(7) of the *Personal Property Security Act*. That is clearly not the same issue between Sun Indalex and the Retirees where the dispute involves different creditors with different legal bases to a different pot of money. The doctrine of issue estoppel is not engaged. Issue estoppel will only apply where the issue has previously been "distinctly put in issue and directly determined".[7] This is not the case here.

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[7] *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 SCR 460, at para. 24.

27. The Ontario Court of Appeal has held that priority contests between creditors should be resolved *as of the time* when their respective security interests come into conflict.[8] Based on the direction from the Court of Appeal, the current priority contest should be decided either when Indalex's CCAA proceeding are over or as of the time that the motion to determine priority is heard. Neither of these events have yet occurred.

28. The Estate Funds currently in dispute between the Retirees and Sun Indalex were not paid to Indalex until July 2010,[9] a year after the Reserve Fund was created, and 11 months after the priority dispute between the DIP Guarantor and the Retirees was argued before this Court.

29. Further, the nature of the priority dispute is completely different. The DIP Priority Contest involved a party, Indalex U.S., which benefitted from a court-ordered super-priority charge. The submissions that the Retirees made in relation to that priority were fundamentally different than the submissions that they will make in relation to the alleged pre-filing security of Sun Indalex. As it did not appear that there would be money to pay any party other than the DIP Lender or the pension plan members, submissions were not made as to the relative priority between the Retirees and Sun Indalex.

Priorities continue to evolve during Indalex's CCAA proceedings – they do not crystalize on the date of Indalex's sale of assets to SAPA

30. In relation to the current priority contest between the Retirees and Sun Indalex, the relevant time for determining the priority will arise either when the CCAA is completed or when a motion is filed to determine their respective priority. Prior to that point in time, the structure of

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[8] *Ontario Dairy Cow Leasing Ltd. v. Ontario Milk Marketing Board,* [1993] O.J. No. 4634 (C.A.), at para 4.

[9] Monitor's 21st Report dated July 21, 2013, para. 12(b)

the CCAA contemplates that parties' rights continue to evolve during the course of the proceeding. Indeed, paragraph 16 of the Initial CCAA Order contemplates that priorities can continue to change during the CCAA proceedings by providing, for example, that nothing in the Order shall "prevent the filing of any registration to preserve or perfect a security interest".

31. The date of the sale of Indalex's assets cannot be the date that crystalizes the Retirees' deemed trust claim as against all other creditors of Indalex. The rights and priority position of creditors do not automatically crystallize during CCAA proceedings. In *Re Ivaco,* the Ontario Superintendent of Financial Services attempted to force payment of the amount of the PBA deemed trust in priority to the claims of financial and trade creditors which had previously filed bankruptcy applications. The Court of Appeal made clear that it is not until the end of CCAA proceedings that rights crystallize:

> [63] For the Superintendent's position to be correct, there would have to be a gap between the end of the CCAA period and bankruptcy proceedings, in which the pension beneficiaries' rights under the deemed trusts crystallize before the rights of all other creditors, including their right to bring a bankruptcy petition. That position is illogical. **All rights must crystallize simultaneously at the end of the CCAA period.**[10] [emphasis added]

32. The argument by Sun Indalex to stop the Retirees' deemed trust claim over the Estate Proceeds would allow its own priority to crystallize during CCAA proceedings, while denying the same entitlement to the Retirees. As noted by Justice Laskin in *Ivaco,* that position is illogical. As long as the "CCAA period" is ongoing, creditors' rights can continue to evolve.

33. There are also strong policy arguments that buttress this conclusion. One of the purposes of the CCAA is to allow a company to negotiate a Plan of Compromise with its creditors and

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10 *Re Ivaco* (2006), 83 O.R. (3d) 108 (C.A.), at para. 63.

emerge from CCAA as a going concern. Thus, in contrast to the BIA, there is no certainty under the CCAA that there will ever be a priority contest among creditors.

34. The argument that the date of the Approval and Vesting Order is the proper date for assessing priorities between the Retirees and Sun Indalex must be rejected. The Approval and Vesting Order states that the fact of the sale will not be used to change or crystallize creditor priorities, particularly for priority contests over funds that do not yet even exist for distribution to creditors such as the Estate Funds. Paragraph 11 of the Order states:

> 11. [the Sale Proceeds] shall stand in the place and stead for the Canadian Acquired Assets, and that from and after the delivery of the Monitor's Certificate all claims and Encumbrances ... shall attach to the Sale Proceeds with the same priority as they had with respect to the Canadian Acquired Assets immediately prior to the sale, ***as if the Canadian Acquired Assets had not been sold*** and remained in the possession or control of the person having that possession or control immediately prior to the sale. [emphasis added]

35. The fact that Indalex's assets have been sold do not have any impact on the legal determination of the priority of creditors. Indeed, the Approval and Vesting Order makes clear that Indalex's assets are deemed not to have been sold for the purposes of determining priority among creditors.

36. Furthermore, paragraph 14 of the Approval and Vesting Order states that the DIP be repaid, and that Indalex U.S., as guarantor of any shortfall to the DIP loan be repaid "up to" the amount that it paid under the guarantee. No other distribution is contemplated, and no other priority contest is created or contemplated by the Approval and Vesting Order.

37. Any other priority contest, such as the current contest between the Retirees and Sun Indalex are left open for determination to the time such claims arise and come into conflict. The Retirees' deemed trust claims against the Estate Funds are not *res judicata*.

PART B – THE U.S. TRUSTEE'S CLAIM FOR INTEREST AND COSTS

Issue #2: Is the U.S. Trustee is entitled to claim interest and costs in respect of the DIP Loan and is such claim entitled to priority over all claims, other than any claims secured by the Directors' Charge (up to a maximum of US$1.0 million)?

Answer: No.

FACTS

38. On July 20, 2009, substantially all of the assets and business of Indalex were sold to SAPA Holding AB and approved by the court pursuant to the Approval and Vesting Order of the same date. The Approval and Vesting Order states that the proceeds of sale be paid to the Monitor who is then directed to make a distribution to the DIP Lender to re-pay the DIP loan, subject to a reserve to be held back until the conclusion of the litigation by the Retirees and Salaried Plan members to determine the priority of the PBA deemed trust versus the priority of the DIP loan. The SAPA transaction closed in Canada (and in the U.S.) on July 31, 2009.

39. Following the closing of the SAPA transaction, the DIP loan was not repaid in full. The DIP Lender called on the guarantee granted by Indalex U.S. for the amount of the shortfall. The guarantor, Indalex U.S., paid US$10,751,247.22 to the DIP Lender, who were then paid in full. The Supreme Court of Canada held that the DIP loan (and the DIP guarantor) has priority over the Retirees' deemed trust claim.

40. In March, 2013, the Monitor paid $10,751,247.22 to the U.S. Trustee. The U.S. Trustee's involvement in this proceeding should have ended at that point. Instead, in April, 2013, the U.S. Trustee announced that it is advancing a new priority claim in the amount of $5,366,577.23 for interest and costs on the guarantee amount.

LAW AND ARGUMENT

41. The U.S. Trustee's Claim for interest and costs should fail for each of the following reasons:

a) The Approval and Vesting Order dated July 20, 2009 expressly limits subrogation to the DIP Charge by Indalex U.S. to the amount paid out by Indalex U.S. and not for interest or costs;

b) The U.S. Trustee has acknowledged in all of its materials filed with the Court of Appeal, the Supreme Court of Canada and in correspondence to the parties that its claim is limited to the amount paid by Indalex U.S. and not for interest and costs;

c) The claim is an impermissible collateral attack on the Approval and Vesting Order;

d) The claim is barred as a late claim that does not meet the *Blue Range* test;

e) The claim is barred by the doctrine cause of action estoppel;

f) The claim is barred by the doctrine of issue estoppel; and

g) The claim is an abuse of process.

a) The Approval and Vesting Order limits recovery to the Guarantor (i.e., Indalex U.S.) only for the amount paid by Indalex U.S. to the DIP Lender and not for interest and costs

42. Pursuant to paragraph 14 of the Approval and Vesting Order, Indalex U.S., as guarantor of the DIP Loan, is subrogated to the rights of the DIP lender only for the amount it actually pays under the guarantee, which does not include interest and costs:

> [14] THIS COURT ORDERS AND DIRECTS ... ***To the extent that any Canadian Obligations are satisfied by any of the Canadian Sellers' affiliated entities resident in the United States*** (collectively, "Indalex U.S.") (the "Guarantee Payment") ***Indalex US shall be entitled to be subrogated to the rights of the Agent and the DIP Lenders under the DIP Lenders Charge*** (as defined in the Initial Order) ***to the extent of such Guaranteed Payment*** and following indefeasible payment in full of the Canadian Obligations, Indalex US shall be entitled to receive any Distributions, pursuant to Indalex US' subrogation rights under the DIP Lenders Charge, ***in an amount up to the Guarantee Payment*** subject to the Reserve. [emphasis added]

43. In *Afton Food Group Ltd. (Re),* Justice Spies held that the plain meaning rule applies to the interpretation of court orders:

> [23] ...it is only if a provision of the CCAA Order is ambiguous or there is a gap or omission, that the Court should adopt a liberal interpretation and consider the purpose of the CCAA, attempt to balance the interests of the parties and consider what would be a commercially reasonable interpretation of the order. In the first instance, I should assume that the parties carefully drafted the terms of the CCAA Order and to the extent that the order is clear and unambiguous, I should interpret the order in accordance with its plain meaning and not engage in a "broad judicial interpretation." In doing so ***I am entitled to assume that the terms of the CCAA Order reflect the agreement negotiated between the parties, within the legal parameters that the court will impose, and that the agreement was codified in the order approved by the court.*** [11] [emphasis added]

44. On a plain reading of paragraph 14 of the Approval and Vesting Order, Indalex U.S. is only entitled to subrogation of the DIP Lender's rights "to the extent of such Guaranteed Payment..." and "in an amount up to the Guarantee Payment ", being US $10,751,247.22.

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[11] *Afton Food Group Ltd. (Re),* (2006), 21 C.B.R. (5th) 102 (Ont. S.C.), para. 23.

45. A guarantor of a DIP Loan does not automatically acquire all the rights of a DIP Lender. Court orders can limit a guarantor's right to subrogation, as is the case here. [12] The Approval and Vesting Order expressly limits the guarantor's right to subrogation to the amount actually paid.

46. In *Pope & Talbot Ltd. (Re)*,[13] Brenner C.J. limited the receiver's right to have a subrogated post-filing claim from the carve out under the DIP to the extent of such payment that it makes at para. 2.

> [2] If the Receiver makes a payment to any person on account of any indebtedness of any of the Petitioners to such person, and such indebtedness would otherwise have constituted a Post-Filing Claim (as defined in the May 29, 2008 Order of this Court), the Receiver shall, without the need for any filing or other steps, ***be subrogated to the rights of such person*** such, and only to the extent, that the Receiver shall have a Post-Filing Claim payable from the carve-out in favour of the Post-Filing Creditors created under the DIP Loan Agreement (as those terms are defined in the May 29, 2008 Order of this Court) ***to the extent and in the amount of such payment.***

47. In *In re Point Blank Solutions Inc. et al.*[14], Justice Walsh limited the guarantors' subrogation rights to the amount advanced by the guarantors:

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[12] Courts often restrict a subrogee's subrogation rights to a DIP priority. For example, courts have: a) Postponed subrogated claims until DIP Lenders have been paid out (See e.g.: *AbitibiBowater Inc., (Re)* (2009), [2009] Q.J. No. 16097 (Q.C.C.S.) (Q.L) at para. 121 (sub para. 61.10) where Justice Gascon ordered that DIP lenders be paid prior to any exercise of subrogation rights); b) Deferred the determination of entitlement to subrogation (See e.g.: *AbitibiBowater Inc., (Re)* (2009), [2009] Q.J. No. 16097 (Q.C.C.S.) (QL) at paras. 41-42 where the Gascon J. noted that the entitlement amongst various subrogees could be left to later termination) or c) expressly provided for the payment of interest and costs where the Court considers it appropriate (See e.g.: *Re Shire International Real Estate Investments Ltd.* (11 January 2010), Calgary 0901-11866 (Alta. Q.B.) at para. 6, where, following a sale of substantially all of the business of the CCAA Applicants, secured creditors with a charge on certain properties were to "acquire an interest in the DIP Lender's Charge for the amount that it would have but did not receive (the "Shortfall Amount") and interest will accrue on the Shortfall Amount at the rate of interest in accordance with the terms of the DIP Facility."; See also: *AbitibiBowater Inc., (Re)* (2009), [2009] Q.J. No. 16097 (Q.C.CS.) (QL) at para. 121 (sub para. 61.10), in which Justice Gascon ordered that certain impaired secured creditors were subrogated to the rights of a DIP Charge to the extent of the lesser of proceeds of existing security including interest, principal and costs or unpaid amounts secured by the existing security.)

[13] *Pope & Talbot Ltd. (Re)*, (13 August 2008) Vancouver S077839 (B.C.S.C.),

[14] *In re Point Blank Solutions Inc. et al.*2010 Bankr. LEXIS 5846 (Bankr. D. Del. 2010)

> ***If and to the extent DuPont makes an actual payment to the DIP Lender*** under the DIP Guaranty, DuPont shall be correspondingly subrogated to the DIP Superpriority Claim ***in the amount of such payment***. [Emphasis added.]

48. In the case at bar, Indalex U.S.' right to subrogation is limited by the terms of the Approval and Vesting Order, which it consented to. The U.S. Trustee's claim is therefore limited to the actual amount of Guarantee Payment, being the $10,751,247.22, which it has been paid. There is no authority to be paid interest and costs.

49. The U.S. Trustee is in substance seeking greater rights than Indalex U.S. had under the Sale Approval and Vesting Order. This is impermissible. As stated by the Supreme Court:

> [37] ...the trustee has no more rights with respect to the debtor's property than did the debtor, of whom the trustee remains the successor in this regard. ... More recently, Iacobucci J. confirmed the validity of the principle in *Giffen*. In my view, the trustee has no greater interest in the property under his or her responsibility than that of the bankrupt, unless otherwise provided for by legislation (*Giffen*, at para. 50).[15]

b) The U.S. Trustee acknowledged its claim is limited to $10,751,247.22

50. The U.S. Trustee has repeatedly acknowledged in its court materials that its claim is limited to the $10,751,247.22.

> 10. The available Canadian sale proceeds (net of the Monitor's reserve) were insufficient to re-pay the DIP loan in fill. Accordingly, the US Debtors paid US$10,751,247.22 to satisfy the obligations of the Canadian Debtors to the DIP Lenders. Pursuant to the Approval and vesting Order, the US Debtors are subrogated to the super-priority rights of the DIP Lenders under the DIP Charge ***for that amount***.[16]
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> ***

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[15] *Lefebvre (Trustee of); Tremblay (Trustee of)*, 2004 SCC 63, [2004] 3 SCR 326, para. 37

[16] Motion Record of George L. Miller, the Chapter 7 Trustee of Bankruptcy Estates of the U.S. Indalex Debtors (motion record for leave to intervene)

> As you are aware, approximately $10.7M of the DIP loan was paid by the US Debtors which, pursuant to paragraph 14 of the Approval and Vesting Order, ***have a subrogated claim for the amount paid***, secured by the DIP Lenders Charge against the assets of the Canadian Debtors.[17]
>
> ***
>
> 13. The Approval and Vesting Order also provided that, to the extent that any indebtness owing by the Canadian Debtors to the DIP Lenders was satisfied by any of the US Debtors or their affiliates under their guarantee, the US Debtors are subrogated to the rights of the DIP Lenders under the DIP Charge ***to the extent of such payment.***[18]
>
> ***
>
> 3. Pursuant to the Initial Order and the Approval and Vesting order, the US Debtors are subrogated to the super-priority rights of the DIP Lenders under the DIP Charge ***for the amount of US$10,751,247.22 paid by the US Debtors to the DIP Lenders*** to satisfy the obligations of the Applicants.
>
> ...
>
> 15. The Canadian sale proceeds available for distribution were insufficient to re-pay the DIP loan in full. Accordingly, the US Debtors paid US$10,751,247.22 to satisfy the obligations of the Applicants to the DIP Lenders, and claims the benefits of the DIP Charge to secure repayment ***of that amount.***[19]
>
> Monitor's 21st Report, June 21, 2013

51. There was no complaint raised by any party, including Indalex U.S., about limiting the subrogation to only the actual amount paid out under the guarantee at the time of the issuance of the Approval and Vesting Order on July 20, 2009. Nor did the U.S. Trustee raise any issue during or after its intervention at the Court of Appeal on November 15, 2010. It was not until April 2013, when the U.S. Trustee, entirely contradicting its prior representations to the courts

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[17] Affidavit of Amy Casella sworn November 8, 2010, Tab 2, Exhibit E, para. 2. with letter from counsel to US Trustee (in motion record for leave to intervene)

[18] Factum of George L. Miller, the Chapter 7 Trustee of Bankruptcy Estates of the U.S. Indalex Debtors (factum on motion for leave to intervene)

[19] Factum of George L. Miller, the Chapter 7 Trustee of Bankruptcy Estates of the U.S. Indalex Debtors (factum on appeal to Court of Appeal)

and the parties that it only sought $10,751,247.22, announced it was asserting a new claim for interest and costs for an additional $5,366,577.23.

c) ***The U.S. Trustee's claim is an impermissible collateral attack on the Approval and Vesting Order***

52. The U.S. Trustee's claim is an impermissible collateral attack. In *R. v. Wilson,* the Supreme Court stated:

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment...[20]

53. Neither Indalex U.S. nor the U.S. Trustee appealed or moved to vary paragraph 14 of the Approval and Vesting Order. Indeed, Indalex U.S. would not have done so as the order is a consent order that was pre-drafted for the court to sign on the day of the motion to approve the sale of Indalex's assets to SAPA. Indalex U.S. did not oppose the issuance of that order and is therefore bound that its subrogation rights are limited to the amount paid out under the guarantee, and not for interest and costs.

54. For the U.S. Trustee to now advance a claim for interest and costs in this Court is an impermissible collateral attack on paragraph 14 of the Approval and Vesting Order. The U.S. Trustee's claim should be denied.

d) The U.S. Trustee's Claim is in substance a late claim that does not meet the Blue Range Test for the filing of late claims

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[20] *R. v. Wilson,* [1983] 2 S.C.R. 594 at p. 599.

55. In substance, the U.S. Trustee's claim is a late claim in a CCAA claims process. Indalex U.S. paid the guarantee amount to the DIP Lender in July, 2009. Indalex U.S. did not file a claim in the claims process for interest and costs on the guarantee payment. The U.S. Trustee was granted intervention status before the Court of Appeal on November 15, 2010. After that, it did not appeal or take any steps to file a claim. The U.S. Trustee's claim fails the *Blue Range* test for determining whether to permit the filing of a late claim. It should be barred as a late claim.

56. The Order of Mr. Justice Morawetz dated June 30, 2009 (the "**Claims Procedure Order**") provided for a fulsome claims process pursuant to which all creditors with claims against the Applicants *must* submit claims to the Monitor by August 28, 2009 or else their claims will be forever barred. The Claims Procedure Order states in paragraph 7 as follows:

> [7] THIS COURT ORDERS that any Person that wishes to assert a Claim must file a Proof of Claim, together with all relevant supporting documentation in respect of such Claim, so that such Proof of Claim is received by the Monitor by no later than the Claims Bar Date. [Emphasis added.]
>
> [8] THIS COURT ORDERS that any Person who does not deliver a Proof of Claim in respect of a Claim to the Monitor by the Claims Bar Date shall be forever barred from asserting or enforcing such Claim against the Applicants and the Applicants shall not have any liability whatsoever in respect of such Claim and such Claim shall be extinguished.[21]

57. In *Re Blue Range Resource Corp*[22] the Alberta Court of Appeal set out the criteria for determining whether a creditor can file a claim past the claims bar date:

i. Was the delay caused by inadvertence and if so, did the claimant act in good faith?[23]

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[21] Claims Procedures Order dated June 30, 2009, paras. 7-8, Motion Record of the Retirees, tab 3.
[22] *Re Blue Range Resource Corp* (2000), 193 D.L.R. (4th) 314 (C.A.) leave to appeal refused 2001 CarswellAlta 1210 (S.C.C.).

ii. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?[24]

iii. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?

iv. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

(i) Was the delay caused by inadvertence and if so, did the claimant act in good faith?

58. Inadvertence includes carelessness, negligence and accident but the conduct must be unintentional[25] and the delay not egregious.[26]

59. There is no evidence that the delay by the U.S. Trustee was due to inadvertence. The U.S. Trustee has proffered no evidence or excuse as to why it initially sought $10,751,247.22, and then, in April, 2013, decided to seek an additional $5,366,577.23 in interest and costs. Given the total absence of evidence of inadvertence and the prior representations of the U.S. Trustee, this court should draw an inference that the delay was intentional or due to gross negligence. Further, the length of the delay is egregious. The U.S. Trustee's claim does not meet this criteria of the *Blue Range* test.

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[23] *Blue Range* at para. 26
[24] *Blue Range* at para. 26.
[25] See *Blue Range* at para. 27
[26] See *Blue Range* at para. 14. In *Re BA Energy Inc.* (2010), 2010 CarswellAlta 1598 (Alta. Q.B.) at para. 39, Justice Romaine found it to be inequitable to allow a late filed amended claim in circumstances where the creditor delayed for eight months.

(ii) What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?

60. Prejudice is determined by assessing whether other creditors who filed on time lost something as a result of the late filing by being denied a realistic opportunity to do something different.[27] The materiality of the late claim is also a relevant consideration.[28] Whether the claim was known to the other creditors is relevant and[29] the "interests of all affected parties" must be considered.[30] In considering these issues, certainty in the restructuring process, and the "certainty of court orders must be assured."[31]

61. The U.S. Trustee's new claim would consume the entirety of the Estate Funds, and in relation to the amount of funds remaining for distribution to creditors, it is highly material. The U.S. Trustee has been paid $10,751,247.22 and should have no further involvement in these proceedings. By advancing a new substantial claim that exceeds the amount left in the estate at this stage it is interfering with the remaining creditors and obstructing prospects of a settlement.

62. Further, by not raising this claim at an earlier stage, the U.S. Trustee caused the other parties to expend thousands of dollars in legal costs. If the Supreme Court had ultimately found that the U.S. Trustee had valid claim for interest and costs, then this proceeding would have been over in February of 2013. Since this claim was not raised, the parties have had to spend months arguing over entitlement to the Estate Funds with the U.S Trustee.

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[27] *Blue Range* at para. 40

[28] Materiality has received different interpretations. In *Blue Range* the relationship between the total of late claims compared to the total claims filed within time was .435 per cent: see *Blue Range* at para. 37. In *Ontario v. Canadian Airlines Corp.,* 2000 CarswellAlta 1336 (Alta. Q.B.) at para. 22, the amount of the late claim (for $2 million) was compared to Air Canada's total funding cost (of $3 billion) and found not to be material. In this case, the late claim is equal to approximately 20% of the total sale proceeds, and would wipe out recovery for all other creditors.

[29] See *Canadian Airlines Corp.* at para. 20; *Blue Range* at para. 39.

[30] See *Canadian Airlines Corp.* at para. 12.

[31] *Re Noma Co.,* (2004) 2004 CarswellOnt 5033 at para. 55.

63. If not due to gross negligence, the U.S. Trustee appears to have made a strategic decision to not advance the claim for interest and costs before the Ontario Court of Appeal or the Supreme Court of Canada. This decision must have been made to assist the U.S. Trustee's arguments before those courts so that it was not tainted by the optics of a related U.S. company claiming super-priority to a 13% DIP interest rate, in the context of a proceeding against Canadian Retirees (and USW members) of a Canadian subsidiary of Indalex U.S., who had, in large part, only launched the prior proceedings to challenge (in addition to the deemed trust) conduct that was found by the Court of Appeal and Supreme Court to be a breach of fiduciary duty. For whatever reason, the U.S. Trustee chose not to advance this claim earlier. Allowing the claim to be made today is highly prejudicial.

(iii) If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?

64. The U.S. Trustee's new claim, if allowed, will wipe out the entire Estate Funds. There are no conditions that can be attached to alleviate this prejudice to the Retirees and other creditors. The U.S. claim should be denied in its entirety.

(iv) If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

65. The granting of an extension of the Claims Bar Date is an exercise of equitable discretion to be exercised sparingly.[32] As the court held in *SemCanada Crude Co*, to allow a creditor with "full knowledge of the CCAA Proceedings and the Claims Process to ignore the Claims Bar Date

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[32] *SemCanada Crude Co. (Re)* (2012), 93 C.B.R. (5TH) 188 (A.B.Q.B.) at para. 71 affirmed (2012) 536 A.R. 396 (C.A.).

and file a significant new claim more than two years after such date would throw the entire CCAA restructuring process into disrepute."[33] Allowing the U.S. Trustee's new claim, which appears to have been intentionally delayed, would put the administration of justice into dispute.

66. Further, allowing such a claim to go forward would be inequitable as the U.S. Trustee's claim for interest and costs arose directly from the period of litigation that resulted from Indalex Ltd.'s breach of fiduciary duty. As discussed in the Ontario Court of Appeal's decision, Keith Cooper, the Chief Restructuring Officer for all of the Indalex U.S. entities, was "a key advisor to the Indalex group of companies prior to and during the *CCAA* proceedings", and as CRO, he "was responsible not only for Indalex U.S. but for the entire Indalex group of companies and subsidiaries, including the Applicants".[34] Indalex U.S., and its CRO, controlled Indalex Ltd. and was complicit in the decision to file under the CCAA without notice to the Retirees. All three sets of judges at the Supreme Court of Canada found that this decision was a breach of fiduciary duty to the Retirees. The U.S. Trustee's claim for interest and costs was only generated because the Retirees had to take legal action to challenge that breach of fiduciary duty and the accrual of interest and costs during the time for that litigation. Allowing Indalex U.S. to profit from the breach would be unconscionable.

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[33] *SemCanada Crude Co. (Re)* (2012), 93 C.B.R. (5TH) 188 (A.B.Q.B.) at para. 76 affirmed (2012) 536 A.R. 396 (C.A.).
[34] At para. 44.

e) The U.S. Trustee's is barred by cause of action estoppel

67. The U.S. Trustee's Claim is also barred by cause of action estoppel. Cause of action estoppel prohibits a party from advancing a claim in litigation that it ought to have advanced in prior litigation.[35] In *Doering v. Grandview* (Town)[36], the Supreme Court held:

> [W]here a given matter becomes a subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, in which the parties, exercising reasonable diligence, might have brought forward at the time.[37]

68. Upon judgment, a plaintiff's cause of action merges with the judgment precluding additional claims based on the same cause of action.[38] A judgment recovered and satisfied is a bar to any further claim for interest on the underlying debt obligation.[39]

69. In *Elguidy v. Wakeworth Institution*, the court identified four criteria[40] for the application of cause of action estoppel met: (a) the prior judicial decision was final; (b) the parties to both proceedings were the same or their privies; (c) the cause of action in the prior action is not be separate and distinct; (d) the basis of the cause of action and the subsequent action should have been argued in the prior action.

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[36] *Doering v. Grandview* (Town) (1975), [1976] 2 S.C.R. 621 (S.C.C.) (1975) citing *Henderson v. Henderson* (1843), 3 Hare 100 (Eng. V.-C.).
[37] *Doering v. Grandview* (Town) (1975) (SCC)
[38] *AGB Halifax Enterprises Inc. v. Wood Street Developments Inc.* (1999), 125 O.A.C. 275 (Ont. C.A.) at para. 6, where a plaintiff obtained judgment against the agent of a principal and was subsequently barred from seeking judgment against the principals due to the doctrine of merger, whereby a cause of action merges in the judgment given by the Court
[39] *McKay v. Fee* (1860) 20 U.C.W.B. 268 (U.C.Q.B.) at paras. 1-4.
[40] *Elguindy v. Wakeworth* Institution (2011) 2011 ONSC 4670.

70. All the criteria are met in this case:

a) The Supreme Court decision is final;

b) The U.S. Trustee's claim for interest and costs involves the same parties who were before the Supreme Court;

c) The claim relates to the priority of the DIP charge and recovery to the Indalex U.S., the DIP guarantor. This is exactly the same cause of action that was before the Supreme Court; and

d) Any claim for interest and costs should have been argued in the prior motion. The U.S. Trustee is now simply pleading an additional claim that it ought to have been raised before.

f) The U.S. Trustee's Claim is barred by issue estoppel

71. Prior to April, 2013, the U.S. Trustee did not advance a claim for interest and costs, however, it did seek its costs before the Supreme Court of Canada and in the courts below.[41] The U.S. Trustee is now seeking an order from this court for those exact same costs. Its claim is barred by the doctrine of issue estoppel.

72. Similar to cause of action estoppel, issue estoppel has three elements, all of which are met to bar the U.S. Trustee's claim:

a) the issue must be the same as the one decided in the prior decision (it is);

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[41] Factum of the U.S. Trustee at the Supreme Court of Canada, para. 5 Motion Record of the Retirees, Tab 2.

b) the prior judicial decision must have been final (it is); and

c) the parties to both proceedings must be the same, or their privies[42] (they are).

73. The Supreme Court dealt with costs in its decision and ordered that all parties were to bear their own costs in the Court of Appeal and in the Supreme Court.[43]

74. Further and respectfully, this court has no jurisdiction to award costs in respect of a proceeding before a different level of court. Only the Supreme Court has such jurisdiction.[44]

g) The U.S. Trustee's Claim is an abuse of process

75. Finally, the U.S. Trustee's claim should be denied as an abuse of process. The doctrine of abuse of process "engages the power of the court to prevent the misuse of its procedure, in a way that would…bring the administration of justice into disrepute".[45]

76. As Henry J. stated in *Heather's House of Fashion Inc.*:

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[42] *Danyluk v. Ainsworth Technologies Inc.,* [2011] 2 S.C.R. 460 at para. 25

[43] *Sun Indalex Finance, LLC v United Steelworkers,* 2013 SCC 6 at para 260

> "260. With respect to costs, I would set aside the Court of Appeal's orders with respect to the costs of the appeals before that court and order that all parties bear their own costs in the Court of Appeal and in this Court."

[44] Section 47 of the *Supreme Court Act* R.S.C. 1985, c. S-26 provides that:

> The Court may, in its discretion, order the payment of the costs of the court appealed from, of the court of original jurisdiction, and of the appeal, or any part thereof, whether the judgment is affirmed, or is varied or reversed.

Section 15(1) of the *CCAA* provides:

> (1) An appeal lies to the Supreme court of Canada on leave therefor being granted by that Court from the highest court of final resort in or for the province or territory in which the proceeding originated.
> (2) The Supreme Court of Canada shall have jurisdiction to hear and to decide according to its ordinary procedure any appeal under subsection (1) and to award costs.

See also: *The Law of Costs,* 2nd ed. (Aurora, Ontario: Canada Law Books, looseleaf) notes at section 402 that the Superior Court only has jurisdiction with respect to its own hearings.

[45] *Toronto (City) v. C.U.P.E., Local 79,* [2003] 3 S.C.R. 77 at para. 37 citing *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (Ont. C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63 (S.C.C.))).

> [17] It goes without saying that it would be an abuse of the process of the court to permit successive motions on different occasions to be brought in those circumstances [bringing an application to declare a debenture did not comply with the registration procedure, followed by an application to have the giving of the debenture declared a fraudulent preference], when by the exercise of reasonable diligence the means could be found to assert them all and have them disposed of at the same time. [46]

77. In that case, Henry J. found that it would be an abuse of process to permit the trustee to engage in almost interminable litigation.

78. Up until April, 2013, the U.S. Trustee represented to the courts and the parties that it sought $10,751,247.22 with no claim for interest or costs. The U.S. Trustee has led no evidence that its delay was due to inadvertence. Whether the U.S. Trustee's failure to raise this claim earlier was intentional for some strategic reason or due to gross negligence, the result is the same: it is an abuse of process to raise it for the first time in April, 2013.

79. The U.S. Trustee's claim for interest and costs should be denied.

80. The Retirees adopt the arguments and submissions of the Superintendent and the USW with respect to these motions.

PART II - ORDERS REQUESTED

81. The Retirees respectfully request an order that:

a) the Retirees are not precluded from asserting the PBA deemed trust over the Estate Funds;

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[46] *Heather's House of Fashion Inc., Re* (No. 2) (1977) 24 C.B.R. (N.S.) 193 (Ont. S.C.) at para. 17.

b) the U.S. Trustee is not entitled to a new super priority claim for interest and costs in the amount of $5,366,577.23 on top of the $10,751,247.22 payment already paid to it; and

c) costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of July, 2013.

ANDREW J. HATNAY

DEMETRIOS YIOKARIS

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Sun Indalex Finance, LLC v United Steelworkers,* 2013 SCC 6, [2013] SCJ No 6.

2. *Paul Perell and John Morden, The Law of Civil Procedure in Ontario 1st ed (Toronto: LexisNexist, 2010)*

3. *Danyluk v Ainsworth Technologies Inc*, [2001] 2 SCR 460.

4. *Ontario Dairy Cow Leasing Ltd. v Ontario Milk Marketing Board*, [1993] OJ No 464 (C.A.)

5. *Ivaco Inc. (Re),* (2006), 83 OR (3d) 108, at para. 63.

6. *Afton Food Group Ltd (Re),* [2006] OJ No 1950, 21 CBR (5th) 102.

7. *AbitibiBowater Inc, (Re),* (2009), [2009] Q.J. No. 16097 (Q.C.C.S.) (Q.L)

8. *Re Shire International Real Estate Investments Ltd.* (11 January 2010), Calgary 0901-11866 (Alta. Q.B.)

9. *Pope & Talbot Ltd. (Re)*, (13 August 2008) Vancouver S077839 (B.C.S.C.)

10. *In re Point Blank Solutions Inc. et al.,* 2010 Bankr. LEXIS 5846 (Bankr. D. Del. 2010)

11. *R. v Wilson,* [1983] 2 SCR 594.

12. *Blue Range Resources Corp. (Re),* 2000 ABCA 285, 2000 CarswellAlta 1145.

13. *BA Energy Inc. (Re),* 2010 ABQB 507, 2010 CarswellAlta 1598.

14. *Re Noma Co.,* (2004) 2004 CarswellOnt 5033

15. *Ontario v Canadian Airlines Corp.,* 2000 CarswellAlta 1336 (Alta. Q.B.)

16. *SemCanada Crude Co. (Re)* (2012), 93 C.B.R. (5TH) 188 (A.B.Q.B.)

17. *Doering v Grandview (Town),* [1975] 2 SCR 621.

18. *AGB Halifax Enterprises Inc. v. Wood Street Developments Inc.* (1999), 125 O.A.C. 275 (Ont. C.A.)

19. *McKay v. Fee* (1860) 20 U.C.W.B. 268 (U.C.Q.B.) at paras. 1-4.

20. *Elguindy v. Wakeworth Institution* (2011) 2011 ONSC 4670

21. *The Law of Costs,* 2nd ed. (Aurora, Ontario: Canada Law Books, looseleaf)

22. *Toronto (City) v. C.U.P.E., Local 79,* [2003] 3 S.C.R. 77 at para. 37

23. *Heather's House of Fashion Inc., Re* (No. 2) (1977) 24 C.B.R. (N.S.) 193 (Ont. S.C.)

SCHEDULE "B"
RELEVANT STATUTES

***Supreme Court Act*, R.S.C 1985 c. S-26.**

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

N THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,*
R.S.C. 1985, c. C-36 AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF INDALEX LIMITED et al. the Applicants

Court File No: CV-09-8122-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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