

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

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

**FACTUM OF THE SUPERINTENDENT OF FINANCIAL SERVICES ON  
EXECUTIVE PLAN AND US TRUSTEE ISSUES**

(Motion Returnable July 24, 2013)

July 10, 2013

**MINISTRY OF THE ATTORNEY GENERAL  
FOR THE PROVINCE OF ONTARIO**

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**TO: THE SERVICE LIST**

## PART I - OVERVIEW

1. This factum is filed in respect of the first motion to determine certain questions of law regarding certain claims raised in this proceeding (the “First Motion”) as identified in the Order (Advice and Directions) granted on May 31, 2013.
2. Specifically, the issues to be determined in the First Motion relate to (1) whether the beneficiaries of the Retirement Plan for Executive Employees of Indalex Limited and Associated Companies (the “Executive Plan”) are precluded from asserting a deemed trust because of the doctrine of *re judicata*; and (2) whether the US Trustee can claim interest and costs in respect of the DIP and whether that claim is entitled to priority.
3. In respect of the deemed trust for the Executive Plan, the Superintendent agrees with the beneficiaries under the Executive Plan (the “Retirees”) that they are not precluded from asserting a deemed trust. Any prior judicial determinations concerning the existence of the deemed trust were made in the context of the priority contest between the deemed trust and the US Trustee’s subrogated rights under the DIP Charge. The remaining issues revolve around a priority contest between each of the deemed trusts arising for each pension plan and the non-DIP claims of Sun Indalex Finance, LLC (“Sun Indalex”) and the US Trustee. These issues have not been previously determined and, therefore, the doctrine of *res judicata* has no application.
4. In respect of the US Trustee’s claim, the US Trustee is not entitled to claim interest and costs in respect of the DIP loan. The subrogation provision in the Approval and Vesting Order forms a complete answer to the US Trustee’s claim for costs and

interest. Under that provision, the US Trustee's claims covered under the DIP Charge are limited to the approximately US\$10.7 million Guarantee Payment. There is no provision for costs or interest. The US Trustee's claim for costs and interest is contrary to the terms of the Approval and Vesting Order and constitute an impermissible collateral attack on that order. Further, any claim for costs and interest is barred because no Proof of Claim has been filed prior to the Claims Bar Date.

## PART II – THE FACTS

### US Trustee's Claim for Costs and Interest

5. On April 8, 2009, Justice Morawetz granted the Amended and Restated Initial Order which approved the DIP Credit Agreement and established a priority charge in respect of the Applicants' direct indebtedness under the DIP Credit Agreement (the "DIP Lenders Charge") as follows:

39. THIS COURT ORDERS that the DIP Agent and the DIP Lenders shall be entitled to the benefit of and is hereby granted a charge (the "**DIP Lenders Charge**") on the Property, which charge shall not exceed the aggregate amount owed to the DIP Lenders under the DIP Documents. ...<sup>1</sup> (emphasis in original)

6. The term "DIP Lenders" is defined in paragraph 33 of the Amended and Restated Initial Order as the lender parties under the DIP Credit Agreement clearly excluding the US Debtors.<sup>2</sup> The "DIP Agent" is JP Morgan Chase Bank, N.A.

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<sup>1</sup> Twenty-First Report of the Monitor dated June 21, 2013 at paragraphs 71 and 74.

<sup>2</sup> The US Debtors are Indalex Holding Corp., Indalex Holdings Finance, Inc., Indalex Inc., Caradon Lebanon, Inc. and Dalton Aluminum Company, Inc.

7. On July 20, 2009, the Court granted an Approval and Vesting Order which, *inter alia*, approved the sale of substantially all of the assets of the Applicants and the US Debtors to Sapa Holding AB (the “Sapa Transaction”).<sup>3</sup> Paragraph 14 of the Approval and Vesting Order allowed, subject to the certain reserves to be maintained by the Monitor (including the Pension Reserve), the distribution of sale proceeds to the DIP Lenders.<sup>4</sup>

8. Paragraph 14 also spells out the specific scope of the US Debtors’ subrogation to the rights of the DIP Lenders under the DIP Lenders Charge. That right of subrogation only operated to the extent that the DIP obligations were satisfied by the US Debtors as follows:

...To the extent that any Canadian Obligations are satisfied by any of the Canadian Sellers’ affiliated entities resident in the United States (collectively, “Indalex US”) (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.<sup>5</sup> (emphasis added)

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<sup>3</sup> Twenty-First Report of the Monitor dated June 21, 2013 at paragraphs 8 and 45.

<sup>4</sup> Twenty-First Report of the Monitor dated June 21, 2013 at paragraphs 46 and 79.

<sup>5</sup> Approval and Vesting Order, paragraph 14, Twenty-First Report of the Monitor dated June 21, 2013, Appendix B.

9. Paragraph 14 clearly limits the scope of any subrogation rights to the amounts actually paid out by the US Debtors under the guarantee. There is no provision in paragraph 14 for the payment of the interest and costs to the US Debtors.

10. On July 30, 2009, Justice Morawetz granted an order approving the procedure for the submission, evaluation and adjudication of claims against the Applicants and the directors and officers of the Applicants (the "Claims Procedure Order"). The claims bar dated under the Claims Procedure Order was August 28, 2009 (the "Claims Bar Date").<sup>6</sup> The Claims Procedure Order states at paragraph 8 that any person who does not deliver a Claim (as defined in the Claims Procedure Order) 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."

11. The asset sale to Sapa closed on July 31, 2009. A partial payment (US\$17,041,391.80) of the amounts owing under the DIP Credit Agreement was made to the DIP Lenders out of the sale proceeds. The sale proceeds were insufficient to repay the DIP loan in full resulting in the DIP Lenders making a claim against the US Debtors. The amount of the claim was US\$10,751,247.22. The US Debtors paid precisely this amount to the DIP Lenders to satisfy the claim under the guarantee.<sup>7</sup> Accordingly, the amount of US\$10,751,247.22 is the Guarantee Payment as defined in paragraph 14 of the Approval and Vesting Order.

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<sup>6</sup> Twenty-First Report of the Monitor dated June 21, 2013, paragraphs 10 and 22.

<sup>7</sup> Twenty-First Report of the Monitor dated June 21, 2013 at paragraphs 77 and 78.

12. The US Trustee characterized its claim in respect of amounts paid pursuant to the guarantee as specifically limited to US\$10,751,247.22 amount:

(a) The US Trustee cited, in its Notice of Motion, the following as grounds in support of its motion to intervene in the appeal of the February 18, 2010 decision of Justice Campbell (the "Pension Appeal"):

8. The Approval and Vesting Order also provided that, to the extent that any indebtedness 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.** ...

10. The available Canadian sale proceeds (net of the Monitor's reserve) 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 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.**<sup>8</sup> (emphasis added)

(b) Those grounds were exactly restated in the factum of the US Trustee filed in support of the US Trustee's motion to intervene in the Pension Appeal.<sup>9</sup>

(c) In a letter dated October 29, 2010 to counsel to the parties, counsel to the US Trustee set out his client's interest in the Pension Appeal and described the US Debtors subrogation right in the following terms:

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<sup>8</sup> Notice of Motion dated November 8, 2010, Twenty-First Report of the Monitor dated June 21, 2013, Appendix M.

<sup>9</sup> Factum of George L. Miller, the Chapter 7 Trustees of the Bankruptcy Estates of the US Indalex Debtors (Motion for Leave to Intervene) dated November 9, 2010, paragraph 13 and 15, Twenty-First Report of the Monitor dated June 21, 2013, Appendix N.

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 (emphasis added).<sup>10</sup>

(d) In the US Trustee's factum filed in the Court of Appeal in the Pension Appeal, the US Trustee again states:

3. Pursuant to the Initial Order and the Approval and Vesting Order, the US Debtors are subrogated to the superpriority 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 benefit of the DIP Charge to secure repayment of that amount.**<sup>11</sup> (emphasis added)

13. Further, in opposing the Pension Appeal, the US Trustee specifically relied upon paragraph 14 of the Approval and Vesting Order and cited the rule against collateral attack. The US Trustee stated that the Appellants' position amounted to an "impermissible attack" on the orders relating to the DIP (including the Approval and

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<sup>10</sup> Letter dated October 29, 2010 from counsel for the US Trustee, Twenty-First Report of the Monitor dated June 21, 2013, Appendix O.

<sup>11</sup> Factum of George L. Miller, the Chapter 7 Trustees of the Bankruptcy Estates of the US Indalex Debtors dated November 16, 2010, paragraphs 3 and 15, Twenty-First Report of the Monitor dated June 21, 2013, Appendix P.



Vesting Order) “and, if permitted, would make a mockery of the orders and would also seriously undermine the integrity and reputation of the Canadian Insolvency system.”<sup>12</sup>

14. The Supreme Court of Canada released its decision in the Pension Appeal on February 1, 2013. On March 15, 2013, the Monitor paid the US Trustee the amount of US\$10,751,247.22 pursuant to the Approval and Vesting Order.<sup>13</sup>

15. To date, the US Trustee has not filed a Proof of Claim. Although the US Trustee has been appointed since October 2009, the US Trustee has not sought to appeal or vary the Claims Procedure Order.<sup>14</sup>

### **PART III – ISSUES AND ARGUMENT**

16. The Order (Advice and Directions) sets out the issues for determination:

(a) Whether or not the beneficiaries of the Executive Plan are precluded from asserting a deemed trust over any accounts or inventory of Indalex Limited and their proceeds as a result of the doctrine of *res judicata*; and

**Answer:** Any prior judicial determinations concerning the existence of the deemed trust were made in the context of the priority contest between the deemed trust and the US Trustee’s subrogated rights under the DIP

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<sup>12</sup> Factum of George L. Miller, the Chapter 7 Trustees of the Bankruptcy Estates of the US Indalex Debtors dated November 16, 2010, paragraphs 4 and 22 to 24, Twenty-First Report of the Monitor dated June 21, 2013, Appendix P.

<sup>13</sup> Twenty-First Report of the Monitor dated June 21, 2013, paragraph 14.

<sup>14</sup> Twenty-First Report of the Monitor dated June 21, 2013, paragraph 22.

Charge. The remaining issues revolve around a priority contest between each of the deemed trusts arising for each pension plan and the non-DIP claims of Sun Indalex Finance, LLC (“Sun Indalex”) and the US Trustee. These issues have not been previously determined and, therefore, the doctrine of *res judicata* has no application.

(b) Whether the US Trustee is entitled to claim interest and costs in respect of the DIP Loan and whether such claim is 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:** The US Trustee is not entitled to claim interest and costs in respect of the DIP loan and no priority attaches to such a claim even if it could be advanced (which the Superintendent denies). The subrogation provision in paragraph 14 of the Approval and Vesting Order forms a complete answer to the US Trustees claim for costs and interest. Under that provision, the US Trustee’s claims covered under the DIP Charge are limited to the approximately US\$10.7 million Guarantee Payment. There is no provision for costs or interest. The US Trustee’s claim for cost and interest is contrary to the terms of the Approval and Vesting Order and constitute a collateral attack on that order. Further, any claim for costs and interest is barred because no claim has been filed prior to the Claims Bar Date.

**A) DEEMED TRUST CLAIMS OF THE RETIREES**

17. The Superintendent supports the position of the Retirees that they are not precluded from asserting a deemed trust and does not have detailed submissions at this stage.

**B) US TRUSTEE'S CLAIM FOR COSTS AND INTEREST**

**US Trustee Cannot Claim Under the DIP Charge**

18. The US Trustee cannot rely on the terms of the DIP Lenders Charge itself. The DIP Charge as it is worded in paragraph 39 of the Amended and Restated Initial Order states that the "DIP Agent and DIP Lenders shall be entitled to the benefit of and are hereby granted a charge ..." Neither the US Debtors nor the US Trustee are included within the scope of the terms "DIP Lenders" or "DIP Agent". Accordingly, the DIP Lenders Charge itself simply does not apply to the US Trustee's Claim.

19. Further, paragraph 14 of the Approval and Vesting Order provides a complete answer to any argument that the US Trustee's Claim for costs and interest arises under any subrogation rights granted to the US Debtors. Paragraph 14 states that to the extent that the obligations to the DIP Lenders are satisfied by the US Debtors by way of the Guarantee Payment, the US Debtors "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 ...**" (emphasis added).

20. Further, paragraph 14 states that the US Debtors are entitled to a distribution of sale proceeds pursuant to the US Debtors' subrogation rights "**in an amount up to the Guarantee Payment**" subject to the reserve held by the Monitor. Paragraph 14 definitively deals with the US Debtors' subrogation rights and there is simply no contemplation of any payment beyond the Guarantee Payment and certainly no provision for the payment of costs and interest.

21. There is no dispute that the amount of the Guarantee Payment is US\$10,751,247.22 and that this amount has already been paid. All of the US Trustees' rights in respect DIP amounts paid by the US Debtors have been satisfied.

22. In asserting a priority claim under the Approval and Vesting Order, the US Trustees seeks a result which is contrary to the terms of paragraph 14 of the Approval and Vesting Order. That Order was never appealed nor was there ever any motion to have it varied or set aside. As such, the rule against collateral attack applies to bar any claim for costs and interest by the US Trustee.

23. The rule against collateral attack can be stated succinctly. In the words of the Supreme Court of Canada, the rule is that "an order of a court which has not been set aside or varied on appeal may not be collaterally attacked and must receive full effect according to its terms."<sup>15</sup> The purpose of the rule is to preserve the integrity of the

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<sup>15</sup>*R v. Wilson*, [1983] 2 S.C.R. 594 at page 7 (QL version); see also *I. Waxman & Sons Ltd (Re)* (2010), 100 O.R. (3d) 561 at paragraph 28.

justice system by preventing a party from circumventing the effect of a decision rendered against it by going to another forum.<sup>16</sup>

24. It is not without irony that the US Trustee asserted the collateral attack rule against the pension claimants in its response to Pension Appeals. This argument was rejected by the Supreme Court because the pension plan members did not receive notice of the motion to approve the DIP financing, the pension plans members raised their objection at the first possible opportunity and continued to assert that position whenever the occasion arose and, finally, the objection of the pension plan members was ultimately dealt with at the hearing of the deemed trust motion on August 28, 2009 as directed by the Court.<sup>17</sup>

25. Although the US Trustee was not yet appointed at the time the Approval and Vesting Order was granted, the US Trustee, unlike the pension claimants, did not take steps to immediately assert a priority claim for costs and interest after the US Trustee's appointment in October 2009.<sup>18</sup> Instead and as outlined in paragraph 11 above, the US Trustee, since his appointment has, specifically quantified the US Trustee's claims as limited to the \$10.7 million amount with no claim for or even mention of costs and interest.

26. It was only after that claim was satisfied that the US Trustee advised that it seeks more. This is a claim which should be rejected by the Court.

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<sup>16</sup> *Garland v. Consumers Gas Co.* [2004] 1 S.C.R. 629 at paragraphs 72 and 73.

<sup>17</sup> *Indalex Ltd., Re*, 2013 SCC 6 at paragraph 75.

<sup>18</sup> Twenty-First Report of the Monitor dated June 21, 2013, paragraph 22.

### **The US Trustee's Claim is Barred**

27. Under the Claims Procedure Order, the US Trustee's claim for costs and interest is barred. Neither the US Trustee nor the US Debtors have, to date, file a Proof of Claim with respect to the claim for costs and interest. Nor have they sought any relief respecting the claims bar or sought to appeal or vary the Claims Procedure Order.

28. The definition of "Claims" in the Claims Procedure Order is very wide. It specifically covers claims for interests and for costs. The only limitation on the definition of Claims is that it does not cover "any claims secured by the Charges created under the Initial Order." As argued above, the US Trustee's claim for costs and interest does not enjoy coverage by any of the Charges created under the Initial Order and, therefore, is barred and should be dismissed by the Court.

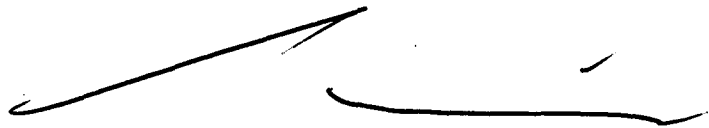
### **PART IV – ORDER SOUGHT**

29. The Superintendent requests that this Honourable Court grant an order:

- (a) Declaring that the Executive Plan Retirees may assert a deemed trust over any accounts and inventory of Indalex; and

(b) Dismissing the US Trustee's claim for costs and interest in respect of the DIP Loan.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of July, 2013.

A handwritten signature in black ink, appearing to read 'Mark Bailey', written over a horizontal line.

Mark Bailey

Counsel for the Superintendent of Financial Services

**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

1. *R v. Wilson*, [1983] 2 S.C.R. 594.
2. *I. Waxman & Sons Ltd (Re)* (2010), 100 O.R. (3d) 561.
3. *Garland v. Consumers Gas Co.* [2004] 1 S.C.R. 629.
4. *Indalex Ltd., Re*, 2013 SCC 6.



IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, 1985,  
R.S.C. c. C-36, AS AMENDED

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

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

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**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
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Proceeding commenced at **Toronto**

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**FACTUM OF THE SUPERINTENDENT OF  
FINANCIAL SERVICES ON EXECUTIVE PLAN  
AND US TRUSTEE ISSUES  
(MOTION RETURNABLE JULY 24, 2013)**

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