

**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**

(Motion for Reinstatement of Supplementary Pension Benefits, returnable July 2, 2009)

June 30, 2009

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Eugene D'Iorio, Richard Smith, Robert  
Leckie and Neil Fraser  
(the "SERP Group")

**TO: THE SERVICE LIST**

## **PART I - OVERVIEW**

1. This is a motion brought by Keith Carruthers, Leon Kozierok, Bertram McBride, Max Degen, Eugene D'Iorio, Richard Smith, Robert Leckie and Neil Fraser (collectively, the "SERP Group") who are retirees of Indalex or its predecessor companies for reinstatement of payment of their supplemental pension benefits from the Applicants (the "Applicants" or the "company") retroactive to April 2009 which the company stopped paying immediately after obtaining protection from its creditors under the *Companies' Creditors Arrangement Act* R.S.C. 1985, c.C-36 ("CCAA") on April 3, 2009.

2. The SERP Group members are entitled to pension benefits under the Supplemental Retirement Plan for Executive Employees of Indalex Limited and Associated Companies (the "Supplemental Plan"). Through their years of employment service with the company, the SERP Group members became contractually entitled to supplemental pension benefits from the company payable on their retirement for their lifetimes.

3. Immediately after filing for CCAA protection, the company informed the SERP Group that their supplemental pension benefits were being stopped, effective immediately.

4. Paragraph 7 of the Amended and Restated Initial Order permits the Applicants to make payment of all employee and pension benefits, in accordance with the company's existing compensation policies and arrangements which would include payment of the supplemental pension benefits. The Applicants are choosing not to pay the supplemental pension benefits.

5. This is a liquidating CCAA. Two and half weeks after obtaining protection from creditors under the CCAA, the Applicants commenced a marketing process in order to facilitate a sale transaction. There is no restructuring.

6. This Honourable Court should order the reinstatement of the supplemental pension benefits retroactively to April 2009 for the following reasons:

(a) The Applicants have breached and/or terminated the contract that exists between the SERP Group and the Applicants post-CCAA filing without justification. The breach/termination is not necessary for the sale of the Applicants' business.

**Affidavit of K. Carruthers at paras. 14-17 and 31 – Exhibits B and C – Statement of Election and Benefits on Retirement and Supplemental Retirement Plan**

(b) Prior to the CCAA filing, the company represented to the SERP Group members both verbally and in writing that despite the unfunded structure of the Supplemental Plan, the company was committed to meeting its obligations to pay the supplemental benefits. The company also reassured members of the SERP Group that their "peace of mind" concerning the security of their supplemental retirement benefits was of importance to the company. The SERP group relied on these benefits when planning their retirements.

**Affidavit of K. Carruthers at para. 29 – Exhibit H –Letter to Keith Carruthers from Indal Limited dated January 13, 1993.**

(c) The sudden termination of payments to the SERP Group by the Applicants has created immediate financial hardship for the SERP Group members and their families.

**Affidavit of K. Carruthers at paras. 40-47.**

(d) The 8 SERP Group members are the only members of the Supplemental Plan. Membership to the Supplemental Plan is closed. The liability is finite and manageable.

**Affidavit of K. Carruthers at para. 21.**

(e) The cost of these supplemental benefit payments to the company is only \$21,207 per month which represents the cost of the supplemental payments owing to all 8 SERP Group members, effective July 1, 2009. The SERP Group members also are owed the amount of \$52,125, for the months of April, May and June 2009 in which the supplemental benefits were not paid. The approximate \$21,207 monthly Supplemental Plan payment for the supplementary pension benefits thus is a.1 of a percent of the company's monthly total disbursements.

**Affidavit of K. Carruthers at paras. 48.**

(f) The payment of the supplemental benefits will not put financial pressure on the company, nor will it impede or imperil the sale of the company.

(g) The company's plants made money in May 2009. Despite experiencing liquidity issues in early 2009, the company is moving into historically more profitable quarters.

**Affidavit of K. Carruthers at para. 28.**

(h) The SERP Group members are facing a further reduction to their monthly pension benefit income as a result of the underfunded status of their base pension plan (the "Executive Plan", described further below).

(i) The company continues to make payments to other employee and/or retiree groups. It is unfair to discriminate against the 8 members of the SERP Group members by terminating payment of their supplemental pension benefits.

## **PART II – THE FACTS**

### ***The Indalex Canada Executive Pension Plan***

7. The SERP Group members are entitled to receive pension benefits that they earned during their employment with the company from two sources. First, they receive the base portion of their pension benefits from the Retirement Plan for Executive

Employees of Indalex Canada and Associated Companies, which is registered with FSCO and CRA under Registration No. 0455626 (the "Executive Plan").

**Affidavit of K. Carruthers at para. 14.**

8. The Executive Plan is a defined benefit pension plan which was closed by the company to new members effective September 1, 2005. Benefits under the Executive Plan are paid from a separate pension trust fund. There are currently 14 members of the Executive Plan of which eight are in the SERP Group.

**Affidavit of K. Carruthers, para 18 – Exhibit D – Affidavit of Timothy J. Stubbs, sworn April 3, 2009 ("Stubbs Affidavit").**

9. The Executive Plan is underfunded. As of January 1, 2008, the Executive Plan had a funding deficiency on an ongoing basis of \$2,535,100, on a solvency basis of \$1,102,800 and on a wind-up basis of \$2,996,400. Given the recent deterioration of the bond and equity markets in Canada, the Executive Plan is very likely even more underfunded. The current funded status of the plan is not known to the SERP Group. The SERP Group also has no information as to whether the company has continued to make the required special payments to the Executive Plan since commencing its CCAA proceedings. Counsel for the SERP Group has requested this information, among other things, but as of this writing has not yet received the information.

**Affidavit of K. Carruthers – Exhibit F – Letter to Counsel from Koskie Minsky LLP, dated June 17, 2009.**

10. If the Executive Plan is wound up in its current underfunded state, the members of the plan, including the SERP Group, will experience cuts to their base pension benefits in the range of approximately 30-40%.

**Affidavit of K. Carruthers, para 18 – Exhibit D – Stubbs Affidavit at para. 62.**

***The Indalex Canada Supplemental Pension Plan***

11. Second, the SERP Group members are entitled to receive a pension from the Supplemental Plan, which is an unfunded and non-registered supplemental pension plan. Benefits under the Supplemental Plan are to be paid out of the general revenues of the Applicants.

**Affidavit of K. Carruthers at para. 14 – Exhibit D – Stubbs Affidavit at para. 63.**

12. The amount of pension benefits that can be paid from the Executive Plan is capped by maximums in the *Income Tax Act* (Canada) ("ITA"). The purpose of the Supplemental Plan is to provide retirement income which was earned by the SERP Group during their employment with the company were it not for maximum limits imposed by the ITA on the Executive Plan.

**Affidavit of K. Carruthers at para. 14.**

13. As noted above, the SERP Group is comprised of 8 individuals who are all members of the Supplemental Plan. Six of these individuals were in receipt of benefits from the Supplemental Plan prior to the commencement of the company's CCAA proceedings on April 3, 2009. Two other members, Richard Smith and Robert Leckie, have requested the commencement of the pension benefits to which they are entitled from the Executive Plan and the Supplemental Plan. These individuals had not yet started to receive their monthly pension benefits as of the date of the commencement of the CCAA proceedings, and have since been told by the company that they will not be paid any of the supplementary benefits to which they are entitled.

**Affidavit of K. Carruthers at para. 21.**

***Company Assures SERP Group that their supplemental benefits are secure***

14. During the time the SERP Group members were working and earning their benefits under the Supplemental Plan, concerns were expressed by them to the company about the security of the pension benefits to be paid to them under the Supplemental Plan.

In response, members of the Supplemental Plan were assured in writing by P.G. Selley, Executive Vice-President, Finance & Administration of Indal Limited, that while there was no trust fund established to provide the benefits, "[the company is] absolutely committed to meeting all such obligations as they fall due". The letter also states that "your peace of mind with respect to your future retirement income is important to us".

**Affidavit of K. Carruthers at para. 29 – Exhibit H – Applicants' letter to K. Carruthers, dated January 13, 1993.**

### ***Termination of the SERP Group's supplemental pension benefits post-CCAA***

15. After the company obtained protection from its creditors under the CCAA on April 3, 2009, certain members of the SERP Group were informed by letter dated April 9, 2009, that their monthly pension benefits from the Supplemental Plan were being suspended immediately. The letters vaguely state that "this course is necessary to undertake a restructuring of the Company's indebtedness". No further details or justification is provided.

**Affidavit of K. Carruthers at paras. 5 and 21 – Exhibit A – Letter from the Applicants to the SERP Group members, dated April 9, 2009.**

16. The last monthly benefit payment received by the SERP Group members who currently are entitled to these payments from the Supplemental Plan was in March, 2009. No member of the SERP Group has received a benefit payment since March, 2009.

**Affidavit of K. Carruthers at paras. 32-38.**

### ***The SERP Group Members***

17. Keith Carruthers is the former President and CEO of Indalex Division of Caradon Limited, after having been promoted within the company for 27 years.. He is currently 67 years of age and has been retired for 10 years.. While he was President and CEO of Indalex Division, the company experienced significant growth in size and in profitability.



Indalex built four state-of-the-art manufacturing facilities, making the company one of the most modern aluminium extrusion operations in North America. In 1998, his last year with the company, Indalex Division had sales of approximately USD \$300,000,000 and profits of approximately USD \$30,000,000.

**Affidavit of K. Carruthers at paras. 1-3, 9-13.**

18. The other SERP Group members Leon Kozierok, Bertram McBride, Max Degen, Eugene D'Iorio, Richard Smith, Robert Leckie and Neil Fraser are also negatively affected by the Applicants' unilateral decision to stop making payment of their pension benefits under the Supplemental Plan. They too suffer hardship by having their supplemental pension benefits terminated by the company as these amounts represent a significant portion of their fixed retirement incomes. A chart summarizing the SERP Group members and their pension benefit entitlements follows:

<b>NAME</b>	<b>FORMER POSITION</b>	<b>AGE</b>	<b>EXECUTIVE PLAN ENTITLEMENT</b>	<b>LOST SERP ENTITLEMENT (MONTHLY)</b>
Keith Carruthers	President and CEO of Indalex Division, Caradon Limited	67	\$3,958.35	\$3,570.50
Leon Kozierok	President of Indalloy Division, Indalex Limited	67	\$3,600.14	\$4,325.80
Max Degen	Vice-President, Manufacturing Services	76	\$3,981.98	\$645.59
Bertram McBride	Account Manager, Indalex Limited	61	\$5,833.33	\$2,082.92
Neil Fraser	President and CEO of Caradon Windows and Doors Ltd.	70	\$1,722.22	\$2,800.73
Eugene D'Iorio	President of Indalex South Region of Indalex Limited	64	\$1,583.33	\$2,249.23
Richard Smith	Former President, Mideast Aluminum *payable starting July 1, 2009	59	*Indalex Canada has not yet calculated	\$3,831.74
Robert Leckie	Vice-President, General Counsel of Indal Limited *payable immediately	61	*Indalex Canada has not yet calculated	\$1,700.00
<b>TOTAL</b>				\$21,206.51

**Affidavit of K. Carruthers at paras. 32 -38.**

**Exhibit A –Letter to the SERP Group members from the Applicants dated April 9, 2009.**

**Exhibits I-V – Various documents regarding Executive Plan & Supplemental Plan Pension Benefits.**

19. The aggregate amount payable in monthly benefit payments to the SERP Group is approximately \$21,207 per month. According to the applicable contractual arrangements between the company and the members of the SERP Group, these benefits are payable for their lives and for the lives of their designated beneficiaries.

**Affidavit of K. Carruthers at para. 40.**

20. Based on the statements by the company that they would receive these benefits for the remainder of their lifetime, the SERP Group members relied on these benefits when planning their retirements.

**Affidavit of K. Carruthers at paras. 39 and 44.**

21. In suddenly ceasing to make payment in respect of their Supplemental Plan pension benefits, the company breached its contracts with the SERP Group members.

**Affidavit of K. Carruthers at para. 40.**

22. According to the Stubbs Affidavit, the company has maintained its obligations for payroll, source deductions, current pension liabilities and GST, and was not in arrears in respect of these items at the date of the commencement of the CCAA Proceedings. Further, the company is current on all contributions to the Canada-Wide Industrial Plan for its unionized employees and to the Group Registered Retirement Savings Plan for its union employees at the Port Coquitlam facility. It is unfair to discriminate against the SERP Group members by terminating payment of their supplemental pension benefits.

**Affidavit of K. Carruthers at para. 47 – Exhibit D – Stubbs Affidavit at paras. 64-66.**

23. Membership in the Supplemental Plan is closed. The SERP Group members are the only members of the Supplemental Plan. The amount of the company's supplementary benefit payment obligations is finite. As noted, the monthly amount of

these benefits payments to the company is only \$21,207. This is a negligible amount for the company, yet the benefits provide vital income for the SERP Group members and their families.

**Affidavit of K. Carruthers at para. 48.**

24. According to the actual cash flow for the month of May 2009 in the Monitor Fourth Report, Indalex Canada had total disbursements of \$20,591,000, of which \$573,000 were for benefits and \$797,000 were for legal and professional fees (the latter being double the forecasted amount). The approximate \$21,207 monthly Supplemental Plan payment for the pension benefits of the SERP Group thus is a mere .1 of a percent of the company's monthly total disbursements.

**Affidavit of K. Carruthers at para. 50.**

25. The company has obtained debtor-in-possession financing in the amount of \$24,360,000. The interim financing facility was later increased to the amount of \$29,500,000.

**Affidavit of K. Carruthers at para. 26.**

**Monitor's Fourth Report, dated June 11, 2009.**

**Endorsement of the Honourable Justice Morwaetz, dated June 12, 2009.**

### **PART III – THE ISSUE**

26. The main issue in this motion is: *should the company in this liquidating CCAA be required to reinstate payment of the SERP Group members' supplemental pension benefits that the company terminated immediately after obtaining protection under the CCAA?*

**PART IV – THE LAW**

27. A pension plan is a contract between an employer and its employees:

Because the establishment of a pension plan is voluntary in Canada, a pension plan is, in essence, a contract between an employer and its employees. The Supreme Court of Canada has observed that "pensions are now generally given for consideration rather than being merely gratuitous rewards" from an employer. An employee's consideration is the promise and performance of work. An employer's consideration is the promise to contribute towards future income, deferred until retirement. While it is sometimes said, strictly speaking, that the "pension entitlements are separate and collateral to contracts of employment", it is nevertheless accepted that pension rights and employment rights do not operate in a legal vacuum. The pension is an important component of the contract of employment. It is a negotiated benefit forming part of the employee's total wage package and, in this regard, "there is a close relationship between salaries and pensions".

Ari N. Kaplan, *Pension Law* (2006: Irwin Law, Toronto) at pp. 11-12.

28. The purpose of the CCAA was recently summarized by the British Columbia Court of Appeal in the *Cliffs Over Maple Bay* case:

[27] The fundamental purpose of the CCAA is expressed in the long title of the statute:

“An Act to facilitate compromises and arrangements between companies and their creditors”.

[28] This fundamental purpose was articulated in, among others, two decisions quoted with approval by this Court in *Re United Used Auto & Truck Parts Ltd.*, 2000 BCCA 146 (CanLII), 2000 BCCA 146, 16 C.B.R. (4th) 141. The first is *A.G. Can. v. A.G. Que.* (sub. nom. *Reference re Companies' Creditors Arrangement Act*), [1934] O.K. 659, 16 CABER. 1 at 2, [1934] 4 O.K. 75, where the following was stated:

. . . the aim of the Act is to deal with the existing condition of insolvency in itself to enable arrangements to be made in view of the insolvent condition of the company under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy. Ex facie it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation.”

The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain **the status quo for a period** while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

[29] The second decision is *Honking Bank v. Chef Ready Foods* 1990 Cannily 529 (BC C.A.), (1990), 4 CABER. (3d) 311 (B.C.C.A.) at 315-16, where Gibbs J.A. said the following:

The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A., the Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the Court under s. 11.

*Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* 2008 BCCA 327 at paras. 28-29 [*Cliffs Over Maple Bay*].

29. The Court of Appeal in *Cliffs Over Maple Bay* recognized that the company under CCAA protection was undergoing a liquidation and there was no intent to restructure. The Court appropriately questioned whether a liquidation of a company under CCAA should first be put to a vote to creditors, rather than keeping creditors effectively hostage in a liquidation proceeding where they are unable to resort to conventional debt recovery remedies. The unanimous B.C. Court of Appeal held that CCAA protection was not appropriate and refused to extend the CCAA stay. The Court further observed:

[38] . . . What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights of all creditors while it undertook its restructuring plan without giving creditors an opportunity to vote on the plan. The CCAA was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve an arrangement or

compromise upon which the creditors may vote.

*Cliffs Over Maple Bay, supra at para. 38.*

30. In the case at bar there are at least five reasons why the company should be required to pay the supplemental pension benefits:

- a) The Applicants can afford to pay the supplemental pension benefits;
- b) The burden is on the Applicants to demonstrate why the termination of the SERP post-CCAA is justified and necessary for their activities while they are under CCAA protection and this burden has not been met;
- c) The prejudice to the SERP Group is real in the form of a significant cut to their retirement fixed incomes, and far outweighs any possible prejudice to the Applicants by making the supplemental pension payments while it markets itself for sale;
- d) It is fair and equitable that the company be required to pay the supplemental pension benefits; and
- e) The payment of the SERP Benefits is within the reasonable expectation of the parties.

***a) The Applicants can afford to pay the supplemental pension benefits while they liquidate***

31. The approximate \$21,207 monthly Supplemental Plan pension benefits payments cost a mere .1 of one percent of the company's monthly total disbursements. These amounts owed to the SERP Group are negligible for the company.

**Affidavit of K. Carruthers at paras. 48-49.**

32. Despite experiencing liquidity issues in early 2009, the company is moving into its historically more profitable quarters. A note from the company's President states that the company's plants made money in May 2009.

**Affidavit of K. Carruthers at paras. 29 – Exhibit G – Memorandum from Tim Stubbs dated June 5, 2009. .**

33. The 8 SERP Group members are the only members of the Supplemental Plan. Membership to the Supplemental Plan is closed. The liability is fixed and affordable.

**Affidavit of K. Carruthers at para. 48.**

34. The court in *Re United Airlines* refused to allow the company under CCAA protection to cease making pension contributions when such payments would not cause any material stress on the restructuring. Justice Farley held:

1 United Air Lines, Inc. (UAL) moved for an order authorizing it to cease making contributions to its Canadian funded pension plans...

7 As discussed above, the relative size of the Canadian problems vis-à-vis the U.S.A. problems is rather insignificant. It would not seem on the evidence before me that payment of funding obligations would in any way cause any particular stress or strain on the U.S. restructuring - given their relatively insignificant amounts in question. UAL had no qualms about making such payments in the other countries internationally. Additionally there is the issue of the U.S. situation having the benefit of the Pension Benefits Guarantee Corp. (as to which UAL would have paid premiums) but there being no such safety net in Canada on the federal level (and thus no previous premium obligation on UAL).

8 In the end result on the basis of fairness and equity, I find no reason to excuse UAL from its obligation to fund its pension funding commitments in Canada and I therefore direct it to resume such funding.

***Re United Air Lines Inc* (2005), 9 C.B.R. (5<sup>th</sup>) 159 (Ont. S.C.J.) at paras. 1, 7 and 8.**

35. A .1 of one percent increase in monthly expenses would hardly cause any stress to the company, particularly given that the Applicants are planning to engage in a sale of the company, and not to restructure.

***b) The is burden on the Applicants to demonstrate why the termination of the SERP post-CCAA is justified and necessary - this burden has not been discharged***

36. There is no evidence that the termination of the SERP Group's supplemental pension benefits is necessary for the company to sell itself. Obtaining CCAA protection does not give a company a licence to breach contracts with impunity.

37. The burden is on the Applicants to satisfy the court that a contract termination post-CCAA is fair and reasonable in all of the circumstances”.

38. As the Court found in *Doman Industries*, the fact that a company can reduce its costs if it can terminate contracts is not sufficient for a CCAA Court to authorize the termination of the contract.

[36] On the present application, all that the evidence establishes is that Doman will likely be able to reduce its costs to some extent at some point in the future if it can terminate the two contracts in question. Mr. Zimmerman’s affidavit states that the reason Western made the recommendation to terminate the two contracts was to improve or increase its profitability. There is no evidence on this application with respect to the following points:

- (a) whether the logging at Plumper Harbour under the existing contracts has produced a loss in the past or is expected to produce a loss in the future;
- (b) whether other logging operations of Doman produce a greater loss;
- (c) whether other aspects of Doman's business produce a loss and, if so, what consideration has been given to rationalizing that loss in comparison to the termination of the contracts in question;
- (d) whether it is expected that the restructured company will operate at a profit;
- (e) what parts of the constituency of stakeholders will benefit from the termination of the contracts in question;
- (f) whether the developed timber at Plumper Harbour can be harvested in the next two years by other contractors at a cost less than the cost under the contracts in question; and
- (g) what is the fallacy, if any, in the assertion of Mr. Hayes that the termination of the contracts will have no material impact on cost reduction after taking into account the 20% government take-back.

...



[38] In my opinion, therefore, there is insufficient evidence for me to conclude that the proposed contract terminations are fair and reasonable in all of the circumstances. All that the evidence available to me supports is a conclusion that the restructured company will have an opportunity of being more profitable if the contracts are terminated. It has not been demonstrated that the loss of this opportunity will outweigh the prejudice which will be suffered by Hayes and Strathcona if the contracts are terminated. In weighing the competing interests on the evidence before me, it is my conclusion that I should exercise my discretion against approving the contract terminations.

*Doman Industries et al., 2004 BCSC 733 (BCSC) at paras. 36 and 38.*

39. In this case there is not even evidence that the termination of the supplemental benefits would result in a meaningful cost reduction that the company requires for its activities under the CCAA. Rather, the record suggests that the termination of the supplemental benefits is arbitrary and without any justification.

***c) The prejudice to the SERP Group is real, and far outweighs any possible prejudice to the Applicants***

40. The sudden termination of the supplemental pension payments to the SERP Group by the Applicants has created immediate and tangible prejudice to the SERP Group members and their families.

**Affidavit of K. Carruthers at paras. 44-58.**

41. If in relative terms, the prejudice to the affected party is greater than the benefit that will be achieved by the insolvent company, the Court should decline to exercise its inherent jurisdiction. In the case at bar, this Honourable Court should not exercise its jurisdiction to allow the company to terminate the supplemental benefits.

33 In deciding whether to exercise its inherent jurisdiction the Court should weigh the interests of the insolvent company against the interests of the parties who will be affected by the exercise of the inherent jurisdiction. If, in relative terms, the prejudice to the affected party is greater than the benefit that will be achieved by the insolvent company, the Court should decline to exercise its inherent jurisdiction. The threshold of prejudice will be much lower than the threshold required to persuade the Court that it should not exercise its discretion under s. 11 of the CCAA to grant or continue a stay that is prejudicial to a

creditor of the insolvent company (or other party affected by the stay).

*Woodward's Ltd. (Re)*, [1993] B.C.J. No. 42 at paras. 32-34.

***d) It is fair and equitable that the company be required to pay the supplemental pension benefits***

42. Justice Spence in *Collins* with reference to the *United Airlines* case states that:

Farley J.'s decision states in paragraph 8 that it was made "on the basis of fairness and equity" after a consideration of the facts and circumstances existing in that case.

*Collins & Aikman Auto Canada (Re)*, 2007 CanLII 45908 (Ont. S.C.J.) at para. 84.

43. The Court in *Doman Industries* stated that:

33 I prefer the approach of Farley J. in *Dylex*, which involves the court weighing the competing interests and prejudices in deciding what is fair and reasonable.

...

There is no single test for the debtor company to satisfy apart from demonstrating that the termination is fair and reasonable in all of the circumstances.

...

35 On the other hand, there will be circumstances where it will not be appropriate to authorize the debtor company to terminate contracts. For example, suppose that a debtor company became insolvent because its business had been operating at a loss but market conditions had changed and, with a financial restructuring of its existing debt, it was expected to be profitable in the future. Suppose further that the debtor company was party to a contract which did not cause the company to operate the relevant aspect of its business at a loss but the contract was not as favourable as the market would permit the company to obtain if it could divest itself of the existing contract. If the company could terminate the contract and enter into a new one with different rates, it could become substantially more profitable into the future. In these circumstances, it may well be inappropriate for the court to authorize the termination of the contract. The risk of the failure of the debtor company after its restructuring would be relatively low and, depending on the terms of the plan of arrangement, the future benefit of the contract termination may accrue to the shareholders of the company or to the creditors of the company who took risks in exchange for high rates of return.

...

38 In my opinion, therefore, there is insufficient evidence for me to conclude that the proposed contract terminations are fair and reasonable in all of the circumstances. All that the evidence available to me supports is a conclusion that the restructured company will have an opportunity of being more profitable if the contracts are terminated. It has not been demonstrated that the loss of this opportunity will outweigh the prejudice which will be suffered by Hayes and Strathcona if the contracts are terminated. In weighing the competing interests on the evidence before me, it is my conclusion that I should exercise my discretion against approving the contract terminations. I dismiss the application with costs.

*Doman Industries et al., supra at paras. 33 and 35.*

44. It is unfair to discriminate against the SERP Group by terminating payment of their supplemental pension benefits while the company continues to make payments to other employee and/or retiree groups.

45. The payment of the supplemental benefits would not impede or imperil a restructuring of the company or a sale of the company.

46. The SERP Group members will be subject to a further reduction in their monthly pension benefit payments from the Applicants as a result of the underfunded status of the Executive Plan. A reduction in their base pension further threatens members of the SERP Group's retirement income.

*e) The payment of the SERP Benefits is within the reasonable expectation of the parties*

47. The company reassured the SERP Group members both verbally and in writing that despite the unfunded structure of the Supplemental Plan, the company was committed to meeting its obligations to pay the benefits. The company reassured members of the SERP Group that their "peace of mind" about the safety of their supplemental retirement benefits was of importance to the company.

**Affidavit of K. Carruthers, paras 29, and 43-45 – Exhibit H – January 13, 1993 letter from Indal Limited to K. Carruthers.**

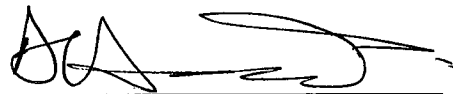
48. Overall, it is fair and equitable that the company be required to reinstate payment of the supplemental pension benefits to the SERP Group members and to issue a retroactive payment for the benefits not paid to date as the company markets itself for sale while under CCAA protection.

**PART V - ORDERS REQUESTED**

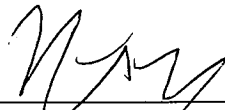
49. The SERP Group respectfully requests:

- a) An order amending the Amended Amended and Restated Order to require the Company to pay supplemental pension benefits required under the Supplemental Plan to the SERP Group with a retroactive payment for the payments owing from April May and June, 2009 plus interest; and
- b) An order for costs.

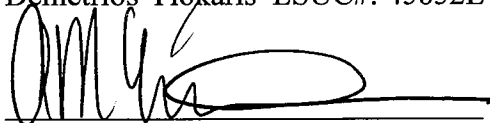
ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30 day of June, 2009.



Andrew J. Hatnay LSUC#: 31885W



Demetrios Yiokaris LSUC#: 45852L



Andrea McKinnon LSUC#: 55900A

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

1. Ari N. Kaplan, *Pension Law* (2006: Irwin Law, Toronto).
2. *Doman Industries et al*, 2004 BSCS 733 (BCSC).
3. *Re United Air Lines Inc.* (2005), 9 C.B.R. (5th) 159 (Ont. S.C.J.).
4. *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327 (BCCA).
5. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* (1990), 4 C.B.R. (3d) 311 (BCCA).
6. *Woodward's Ltd. (Re)*, [1993] B.C.J. No. 42 (S.C.).
7. *Collins & Aikman Automotive Canada (Re)*, 2007 CanLII 45908 (Ont. S.C.J.).

**SCHEDULE "B"**  
**RELEVANT STATUTES**

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

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

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF INDALLEX LIMITED, INDALLEX HOLDINGS (B.C.) LTD., 6326765 CANADA INC. and NOVAR INC.

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

Proceeding commenced at Toronto

**FACTUM**

(Motion for Reinstatement of Supplementary Pension Benefits, returnable July 2, 2009)

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