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

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.

FACTUM OF THE MONITOR
(Motion Returnable November 10, 2010)

October 13, 2010

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Ashley John Taylor LSUC#: 39932E
Tel: (416) 869-5236
Lesley Mercer LSUC#: 54491E
Tel: (416) 869-6859
Fax: (416) 947-0866

Lawyers for the Monitor, FTI Consulting Canada ULC

TO: **SERVICE LIST**

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

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.

FACTUM OF THE MONITOR
(Motion Returnable November 10, 2010)

TABLE OF CONTENTS

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

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.

FACTUM OF THE MONITOR
(Motion Returnable November 10, 2010)

PART I - OVERVIEW

1. The Monitor brings this motion seeking an order: (a) declaring that none of the D&O Claims received by the Monitor are claims for which the Applicants are required to indemnify their directors and officers pursuant to paragraph 21 of the Initial Order; and (b) terminating, discharging and releasing the Directors' Charge from the Property.

2. Capitalized terms not otherwise defined herein have the meanings defined in prior Monitor's Reports, the Amended Amended and Restated Initial Order of the Honourable Mr. Justice Morawetz dated May 12, 2009 (the "**Initial Order**") or the Claims Procedure Order of the Honourable Mr. Justice Morawetz dated July 30, 2009 (the "**Claims Procedure Order**").

PART II - FACTS

General Background of the CCAA Proceeding

3. Indalex Limited's parent company and certain U.S. affiliates (collectively, the "**US Debtors**") commenced proceedings (the "**Ch.11 Proceedings**") under chapter 11 of title 11 of the United States Bankruptcy Code in the United States Bankruptcy Court, District of Delaware (the "**US Court**") on March 20, 2009.

> Twelfth Report of the Monitor dated April 28, 2010 (the "**Twelfth Report**"), para. 2, Motion Record of the Monitor, Tab 10.

4. On April 3, 2009, Indalex Limited ("**Indalex**"), Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc. (collectively, the "**Applicants**") made an application under the *Companies' Creditors Arrangement Act* (the "**CCAA**") and an Initial Order was made by the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) granting, *inter alia*, a stay of proceedings against the Applicants and appointing FTI Consulting Canada ULC as monitor (the "**Monitor**").

> Twelfth Report, para. 1, Motion Record of the Monitor, Tab 10.

5. On April 8, 2009, Morawetz J. granted the Amended and Restated Initial Order which, *inter alia*, authorized Indalex to borrow funds pursuant to a debtor-in-possession credit agreement among the US Debtors, the Applicants and a syndicate of lenders. The Amended and Restated Initial Order was subsequently amended by the Amended Amended and Restated Initial Order to correct certain references and typographical errors and to increase the Canadian sub-facility borrowing limit.

> Twelfth Report, para. 3, Motion Record of the Monitor, Tab 10.
>
> The Amended Amended and Restated Initial Order of the Honourable Mr. Justice Morawetz dated May 12, 2009 (the "**Initial Order**"), Motion Record of the Monitor, Tab 3.

6. The Stay Period has been extended a number of times and currently expires January 31, 2011 pursuant to the Order of the Honourable Mr. Justice Lederman dated August 5, 2010.

> Order of the Honourable Mr. Justice Lederman dated August 5, 2010, Motion Record of the Monitor, Tab 11.

The SERP Decision

7. On July 2, 2009, the Retired Executives (as defined below) brought a motion before Morawetz J. seeking an order requiring the Applicants to reinstate payment of certain supplemental pension benefits (the "**SERP Payments**") retroactive to April 2009. Morawetz J. dismissed the motion (the "**SERP Decision**").

> Twelfth Report, para. 15, Motion Record of the Monitor, Tab 10.
>
> Endorsement of the Honourable Mr. Justice Morawetz dated July 24, 2009, Motion Record of the Monitor, Tab 5.

8. On July 17, 2009, the Retired Executives filed a Notice of Motion with the Ontario Court of Appeal seeking leave to appeal the SERP Decision. On March 24, 2010, the Ontario Court of Appeal denied the Retired Executives' motion for leave to appeal.

> Twelfth Report, paras. 16-17, Motion Record, Tab 10.
>
> Endorsement of the Court of Appeal for Ontario dated March 24, 2010, Motion Record of the Monitor, Tab 9.

Executive Pension Plan

9. The Retired Executives are members of the Retirement Plan for Executive Employees of Indalex Canada and Associated Companies, a registered pension plan sponsored by Indalex (the "**Executive Plan**").

> Affidavit of Keith Cooper, sworn August 24, 2009 (the "**Cooper Affidavit**") at para. 4, Motion Record of the Applicants, dated August 20, 2009, (the "**Applicants' Deemed Trust Motion Record**"), Tab 2.

10. As of July 20, 2009, the date of the sale approval hearing discussed below, the Executive Plan had not been wound up. The Executive Plan is a defined benefit plan and is underfunded. However, as of July 20, 2009 and July 31, 2010, the closing of the Sapa Transaction (as defined below), Indalex had made all required contributions to the Executive Plan, including current service and special payments, and no amounts were due or accruing due to the Executive Plan.

> Reasons for Decision of the Honourable Mr. Justice Campbell, dated February 18, 2010 (the "**Reasons for Decision of Campbell J.**"), at paras. 24 and 50, Motion Record of the Monitor, Tab 8.

Salaried Pension Plan

11. Certain members of the United Steelworkers (the "**USW**") are members of the Retirement Plan for Salaried Employees of Indalex and Associated Companies (the "**Salaried Plan**").

> Reasons for Decision of Campbell J., at para 20, Motion Record of the Monitor, Tab 8.

12. As at July 20, 2009 and July 31, 2009, the Salaried Plan was in the process of being fully wound up with an effective date of December 31, 2006. A wind-up deficiency existed in the Salaried Plan and was the subject of annual special payments made in 2007 ($709,013.00), 2008 ($875,313.00) and 2009 ($601,000.00).

> Reasons for Decision of Campbell J., at para. 22, Motion Record of the Monitor, Tab 8.
>
> Cooper Affidavit, at para. 21, Applicants' Deemed Trust Motion Record, Tab 2.
>
> Affidavit of Bob Kavanaugh, sworn August 12, 2009 (the "**Kavanaugh Affidavit**") at paras. 5-11.

13. On or about June 30, 2009, Indalex filed with FSCO an actuarial valuation with respect to the Salaried Plan with an effective date of December 31, 2008 that indicated that an additional "catch-up" special payment of $25,100.00, plus interest accruing from January 1, 2009, was required to be made. Pursuant to section 12 of the Regulations to the PBA, this special payment was due 60 days after the filing of the

valuation report (about the end of August 2009). Therefore, all payments to the Salaried Plan that were due prior to the resignation of the directors on July 31, 2009 were made.

> Reasons for Decision of Campbell J., at para 22, Motion Record of the Monitor, Tab 8.
>
> Kavanaugh Affidavit, at para. 12.
>
> Pension Benefits Act Regulations, R.R.O. 1990, Regulation 909, ss. 4, 12 and 32.

Deemed Trust Motion

14. On August 28, 2009, the Retired Executives and the USW brought a motion before the Honourable Mr. Justice Campbell seeking determinations that certain funds of the Applicants are subject to a deemed trust for any wind-up deficiency associated with the Executive Plan and the Salaried Plan pursuant to the *Pension Benefits Act* (the "**Deemed Trust Motions**"), and sought an order that the Plans be paid in advance of the DIP Lenders.

> Cooper Affidavit, at paras. 27 and 28, Applicants Deemed Trust Motion Record, Tab 2.
>
> USW Notice of Motion, dated August 5, 2009, USW's Motion Record for the Deemed Trust Motion, returnable August 28, 2009, Tab 1.
>
> Retirees Notice of Motion, dated August 5, 2009, Retirees' Motion Record for the Deemed Trust Motion, returnable August 28, 2009, Tab 1.

15. In reasons released on February 18, 2010, Campbell J. dismissed the motions and held, *inter alia*, that no deemed trusts arose with respect to wind-up deficiencies under either of the plans (the **"Deemed Trust Decision"**).

> Reasons for Decision of Campbell J., Motion Record of the Monitor, Tab 8.

16. Leave to appeal the Deemed Trust Decision was granted by the Court of Appeal for Ontario on May 20, 2010 and the appeal is scheduled to be heard on November 23 and 24, 2010.

Sale of Substantially all of the Business

17. On July 20, 2009, the sale of substantially all of the assets and business of the Applicants and the US Debtors to SAPA Canada Inc. and SAPA Holdings AB (the "**Sapa Transaction**") was approved by the Court pursuant to an order of Campbell J. (the "**Approval and Vesting Order**").

Twelfth Report, at para. 7, Motion Record of the Monitor, Tab 10.

Approval and Vesting Order of the Honourable Mr. Justice Campbell dated July 20, 2009, Motion Record of the Monitor, Tab 4.

18. The Sapa Transaction closed in Canada and the U.S. on July 31, 2009.

Twelfth Report, at para. 9, Motion Record of the Monitor, Tab 10.

Increase in Monitor's Powers

19. Following the closing of the Sapa Transaction, all of the directors of the Applicants resigned effective July 31, 2010. After that date, control of the Applicants was exercised by the U.S. Court-appointed Chief Restructuring Officer of the US Debtors until October 14, 2009, when the US Debtors' Chapter 11 proceedings were converted into Chapter 7 proceedings (analogous to a bankruptcy under the *Bankruptcy and Insolvency Act* in Canada). As a result, the Applicants were no longer under the control of the Chief Restructuring Officer.

Twelfth Report, at paras. 9-10, Motion Record of the Monitor, Tab 10.

20. On October 27, 2009, the Court issued an order increasing the Monitor's powers, including, *inter alia*, authorizing the Monitor to complete the Claims Procedure (as defined below) without consulting the Applicants and to take such steps and seek such additional orders as the Monitor considers necessary or appropriate in order to deal with any D&O Claims.

Order of the Honourable Mr. Justice Morawetz dated October 27, 2009, at para. 9, Motion Record of the Monitor, Tab 7.

D&O Claims Procedure

21. On July 30, 2009, a procedure for the solicitation, evaluation and adjudication of Claims against the Applicants and for the solicitation of claims, if any, against the directors and officers of the Applicants (the "**Claims Procedure**") was approved pursuant to the Claims Procedure Order.

Twelfth Report, at para. 8, Motion Record of the Monitor, Tab 10.

Claims Procedure Order of the Honourable Mr. Justice Morawetz dated July 30, 2009, Motion Record of the Monitor, Tab 6.

22. In accordance with the Claims Procedure Order, a Proof of Claim and a copy of the Claims Procedure were sent to each Known Creditor on August 4, 2009, the Notice to Creditors was published in the Globe and Mail on August 6, 2009 and in the Wall Street Journal on August 7, 2009, and a copy of the Notice to Creditors was posted on the Monitor's Website.

Twelfth Report, at para. 30, Motion Record of the Monitor, Tab 10.

23. Any person wishing to assert a Claim or D&O Claim was required to submit their Proof of Claim or Proof of D&O Claim, with all relevant supporting documentation, by the Claims Bar Date, 5:00 p.m. (Toronto time) on August 28, 2009.

Twelfth Report, at para. 31, Motion Record of the Monitor, Tab 10.

24. The Monitor received 17 Proofs of D&O Claim by the Claims Bar Date. During August 2010, the Monitor was informed by the USW that it intended to seek leave to file a late D&O Claim and intended to oppose the Monitor's motion. On September 29, 2010, the Monitor received a draft Proof of D&O Claim from counsel to the USW asserting a claim against the prior directors of Indalex and another individual based upon oppression. The Monitor has reviewed the 17 Proofs of D&O Claim submitted by the Claims Bar Date and the draft Proof of D&O Claim delivered

by the USW, and has discussed the D&O Claims with counsel to those individuals who were directors and officers of the Applicants during the CCAA Proceedings.

> Twelfth Report, at para. 33, Motion Record of the Monitor, Tab 10.
>
> Affidavit of Kaitlin Brown sworn October 13, 2010 (the **"Brown Affidavit"**), Motion Record of the Monitor, Tab 2.

25. In order to be in a position to distribute the proceeds of sale the Monitor requires a determination as to whether there are any valid claims against the Directors' Charge. Based on its review of the D&O Claims filed, the Monitor has formed the opinion that the D&O Claims received by the Monitor, including the draft D&O Claim from the USW, are not claims for which the Applicants are required to indemnify their directors and officers pursuant to paragraph 21 of the Initial Order and therefore the Directors' Charge can and should be released.

PART III - ISSUE

26. Are any of the D&O Claims filed with the Monitor by the Claims Bar Date or the draft D&O Claim delivered by the USW claims for which the Applicants are required to indemnify their directors and officers pursuant to paragraph 21 of the Initial Order?

PART IV - LAW AND ANALYSIS

27. The recent amendments to the CCAA allow the court to make an order declaring that all or part of the property of the debtor company is subject to a security or charge in favour of any director or officer of the company in order to indemnify the director or officer against obligations and liabilities they may incur as a director or officer of the company after the commencement of proceedings under the CCAA. Prior to these amendments, similar charges in favour of directors and

officers of debtor companies were routinely given by CCAA judges pursuant to their inherent jurisdiction.

> *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") at s. 11.51.
>
> Janis Sarra, "Rescue! The Companies' Creditors Arrangement Act" (Toronto: Thomson Carswell, 2007) at p. 154, Monitor's Book of Authorities, Tab 1.
>
> David E. Baird, "Baird's Practical Guide to the Companies' Creditors Arrangement Act" (Toronto: Carswell, 2009) at p. 37-39, Monitor's Book of Authorities, Tab 2.

28. The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they may incur in their capacity as directors and officers after the filing date. It is not the purpose of a directors' charge to protect directors and officers from liabilities they may have incurred pre-filing or that they may incur as a result of their own misconduct.

> *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 (S.C.J.) at para. 48, Monitor's Book of Authorities, Tab 3.
>
> *General Publishing Co., Re*, 2003 CarswellOnt 275 (S.C.J.) at para. 6, Monitor's Book of Authorities, Tab 4.

29. The Directors' Charge granted in the Initial Order (in the Applicants' CCAA Proceeding) is similar in nature to that which has been granted in numerous other cases and is expressly restricted to post-filing obligations and provides an express carve out to the indemnity where the director or officer is liable due to his/her own misconduct. Paragraph 21 states in full:

> 21. **THIS COURT ORDERS** that, the Applicants shall indemnify their respective directors and officers from all claims, costs, charges and expenses relating to the failure of the Applicants, after the date of [the Initial Order], to make payments of the nature referred to in subparagraphs 7(a), 9(a), 9(b), 9(c) and 9(d) of [the Initial Order] which they sustain or incur by reason of or in relation to their respective capacities as directors and/or

> officers of the Applicants except to the extent that, with respect to any officer or director, such officer or director has actively participated in the breach of any related fiduciary duties or has been grossly negligent or guilty of wilful misconduct.
>
> Initial Order, at paras. 21 and 22, Motion Record of the Monitor, Tab 3.

30. Pursuant to paragraph 22 of the Initial Order, the directors and officers of the Applicants were granted the benefit of a charge on the Property (not to exceed the amount of US$3,300,000 in the aggregate) as security for the indemnity provided in paragraph 21 of the Initial Order.

Initial Order, at para. 22, Motion Record of the Monitor, Tab 3.

31. Subparagraph 7(a) of the Initial Order provides for the payment of wages and salaries (but not severance or termination pay), employee and pension benefits, current service contributions (but not special payments) to pension plans, vacation pay, bonuses and expenses payable on or after the date of the Initial Order. Subparagraph 7(a) states in full:

> 7. **THIS COURT ORDERS** that subject to the terms of the DIP Documents (defined below), the Applicants shall be entitled to but not required to pay the following expenses whether incurred prior to or after this Order:
>
> (a) all outstanding and future wages and salaries (for greater certainty wages and salaries shall not include severance or termination pay), employee and pension benefits, current service contributions to pension plans (which for greater certainty shall not include special payments) vacation pay, bonuses and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;
>
> Initial Order, at para. 7, Motion Record of the Monitor, Tab 3.

32. Subparagraphs 9(a), 9(b), 9(c), and 9(d) provide for the payment of withholding taxes, current service contributions (but not special payments), sales taxes and municipal taxes. Paragraph 9 states in full:

> 9. **THIS COURT ORDERS** that the Applicants shall remit, in accordance with legal requirements, or pay:
>
> (a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;
>
> (b) current service ("normal cost") contributions to pension plans when due (which, for greater certainty, shall not include special payments);
>
> (c) all goods and services or other applicable sales taxes (collectively, "Sales Taxes") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and
>
> (d) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicants.
>
> Initial Order, at para. 9, Motion Record of the Monitor, Tab 3.

33. The Monitor has reviewed the 17 Proofs of D&O Claim filed by the Claims Bar Date by: (a) various retirees of Indalex Limited; (b) the Official Unsecured Creditors Committee in the Ch.11 Proceedings; (c) an ex-employee; (d) Revenue Quebec; and (e) the draft Proof of D&O Claim delivered by the USW.

34. Based on its review, the Monitor has formed the opinion that none of these D&O Claims are claims for which the Applicants are required to indemnify their directors and officers pursuant to paragraph 21 of the Initial Order. Set forth below is a summary of the Proofs of D&O Claims and the reasons why the D&O Claims are not claims for which the Applicants are required to indemnify their directors and officers pursuant to paragraph 21 of the Initial Order. Copies of the Proofs of D&O Claims are attached as Exhibits "A" to "R" to the Affidavit of Kaitlin Brown sworn October 13, 2010.

Brown Affidavit, Exhibits "A" to "R", Motion Record of the Monitor, Tabs 2A to 2R.

The Retired Executives' D&O Claim

35. Bertram Gerald Arthur McBride, Eugene John D'Iorio Jr, Frederick John Granville, John Eugene Faveri, John William Rooney, Keith Burton Carruthers, Leon Kozierok, Max Degen, Neil Edward Fraser, Richard Nelson Benson, Richard Donald Smith, Robert B. Leckie, and Robert Kenneth Waldron (the "**Retired Executives**") each submitted a Proof of D&O Claim, asserting:

(a) a $2,000 secured claim based on "pension/wage super-priority charge";

(b) a $482,905 claim in respect of supplemental pension benefit payments; and

(c) a claim for an undetermined amount in respect of an underfunded registered pension plan,

on the basis that the Applicants ceased making the SERP Payments and the fact that the Executive Plan is being wound up while in a deficit position.

Brown Affidavit, Exhibits "A" to "M", Motion Record of the Monitor, Tabs 2A to 2M.

36. The Retired Executives' D&O Claims relating to the SERP Payments are not claims for which the Applicants are required to indemnify their directors and officers pursuant to paragraph 21 of the Initial Order for the following reasons:

(a) The Applicants were not authorized to make the SERP Payments. In making the SERP Decision, Morawetz J. found:

> [9] SERP payments are based on services provided to Indalex prior to April 2009. These obligations are, in my view, pre-filing obligations. A breach of the SERP payment obligations gives rise to an unsecured claim of the SERP Group against the Indalex Applicants. The SERP Group is stayed from enforcing these payment obligations.
>
> [10] The SERP Group has not established that they are entitled to any priority with respect to their SERP benefits and there is, in my view, no basis in principle, to treat the SERP Group differently than any other unsecured creditors of the Indalex Applicants. The reinstatement of the SERP payments would, in my view, represent an improper re-ordering of the existing priority regime.
>
> [11] The Amended and Restated Order authorizes the Indalex Applicants to pay all reasonable expenses incurred by the Indalex Applicants in carrying on their business in the ordinary course. SERP payments are not, in my view, payments required to carry on the business and, accordingly, the Indalex Applicants are not authorized to pay the monthly SERP payments.

Endorsement of the Honourable Mr. Justice Morawetz dated July 24, 2009, Motion Record of the Monitor, Tab 5.

(b) The Retired Executives sought leave to appeal the SERP Decision, which motion was dismissed by the Court of Appeal.

Endorsement of the Court of Appeal for Ontario dated March 24, 2010, Motion Record of the Monitor, Tab 9.

(c) As the Applicants were not authorized to pay the SERP Payments, the directors and officers cannot be liable for the failure of the Applicants to make the SERP Payments post-filing, and the indemnity obligation of the Applicants in paragraph 21 of the Initial Order cannot be triggered.

(d) To hold otherwise, would have the effect of allowing the Retired Executives to obtain indirectly through the mechanism of the Directors' Charge what they were not permitted to obtain directly through the SERP motion - payment in full of a pre-filing, unsecured obligation. If the Retired Executives are permitted to claim against the directors and officers for the Applicants' failure to make the SERP Payments post-filing and the directors and officers are permitted to call upon the indemnity in paragraph 21 of the Initial Order, which is secured by the Directors' Charge, then the Retired Executives will have successfully made an end run around the SERP Decision and the decision of the Court of Appeal dismissing the Retired Executives' motion for leave to appeal.

37. The Retired Executives' D&O Claims relating to the deficit in the Executive Plan are not claims for which the Applicants are required to indemnify their directors and officers pursuant to paragraph 21 of the Initial Order as the Applicants had made all required contributions to the Executive Plan (including special payments) and no amounts were due or owing to the Executive Plan as of July 31, 2009, when the Applicants' directors and officers resigned. Therefore, there could not be a "failure of the Applicants, after the date [of the Initial Order], to make payments" in

respect of the Executive Plan and therefore the indemnity obligation of the Applicants in paragraph 21 of the Initial Order cannot be triggered.

> Kavanaugh Affidavit, at paras. 5-11.
>
> Reasons for Decision of Campbell J., at para. 24, Motion Record of the Monitor, Tab 8.

38. Also, allowing the Retired Executives to claim against the directors and officers for the fact that a deficiency exists in the Executive Plan and gain access to the super-priority Directors' Charge would have the effect of allowing the Retired Executives to obtain indirectly what they were not permitted to obtain directly through the Deemed Trust Motion, and, if the Retiree's appeal of the Deemed Trust Motion is successful, something which is unnecessary.

Irene Wagner D&O Claim

39. Irene Wagner submitted a Proof of D&O Claim asserting a $4688.08 secured claim based upon a failure to pay 20 days of vacation pay, which were allegedly accrued and due in 2007 and 2008.

> Brown Affidavit, Exhibits "N" and "O", Motion Record of the Monitor, Tabs 2N and 2O.

40. Irene Wagner's D&O Claim is not a claim for which the Applicants are required to indemnify their directors and officers pursuant to paragraph 21 of the Initial Order. As the obligation to pay vacation pay to Irene Wagner, if any, pre-dated the CCAA Proceedings, such obligation, if any, was a pre-filing unsecured obligation and the same reasoning set forth in paragraph 36 above with respect to the Retired Executives' claims related to the SERP Payments applies.

The Official Unsecured Creditors Committee's D&O Claim

41. The Official Unsecured Creditors Committee (the "**Committee**") submitted a Proof of D&O Claim for $61,225,600 "on the basis of the insurance coverage provided to the Debtors in the AIG Executive Liability, Directors, Officers and Private

Company Liability Insurance Policy (Policy Number: 01-589-00-75) for the period from February 23, 2009 to February 23, 2010" (the "**Policy**").

Brown Affidavit, Exhibit "P", Motion Record of the Monitor, Tab 2P.

42. In particular, the Committee asserts that the Policy provides insurance for, *inter alia,* all Wrongful Acts committed or allegedly committed by the officers and/or directors of the Applicants and submits that several theories of liability exist with respect to the officers and directors of the Applicants including preference and fraudulent transfers made while the Applicants were insolvent, breach of fiduciary duty and mismanagement. The Committee also submits that the Policy is an asset of the US Debtors and any proceeds therefrom constitute property of the US Debtor's bankruptcy estates.

43. The Committee's D&O Claim is not a claim for which the Applicants are required to indemnify their directors and officers pursuant to paragraph 21 of the Initial Order as the Committee's D&O Claim does not allege any failure of the Applicants, after the date of the Initial Order, to make a payment of the nature referred to in subparagraphs 7(a), 9(a), 9(b), 9(c) or 9(d) of the Initial Order.

Revenue Quebec D&O Claim

44. Revenue Quebec has submitted a Proof of D&O Claim for $398,958.08 for Quebec sales tax deductions that it claims should have been paid in January, February and March of 2009.

Brown Affidavit, Exhibit "Q", Motion Record of the Monitor, Tab 2Q.

45. Revenue Quebec's D&O Claim is not a claim for which the Applicants are required to indemnify their directors and officers pursuant to paragraph 21 of the Initial Order. As the obligation to pay sales tax, if any, pre-dated the CCAA Proceedings, such obligation, if any, was a pre-filing unsecured obligation and the

same reasoning set forth in paragraph 36 above with respect to the Retired Executives' claims related to the SERP Payments applies.

USW D&O Claim

46. The USW has delivered a draft Proof of D&O Claim to the Monitor pursuant to which the USW asserts a D&O Claim against the past directors of Indalex and Mr. Keith Cooper, the Chief Restructuring Officer of Indalex's U.S. parent company, for the estimated amount of the deficiency in the Salaried Plan plus interest. The basis of the USW's D&O Claim is that the directors of Indalex and Mr. Cooper "exercised their powers and conducted the affairs of the Applicants in a way that was oppressive and unfairly disregarded the interests" of the USW and thereby "caused or permitted deficiencies in the Applicants' contributions" to the Salaried Plan.

Brown Affidavit, Exhibit "R", Motion Record of the Monitor, Tab 2R.

47. The Monitor has reviewed the draft Proof of D&O Claim and a statement of the legal basis for the D&O Claim provided by the USW. For purposes of efficiency, the Monitor has attempted to anticipate and address the USW's position in this factum based upon the draft Proof of D&O Claim and the statement of legal basis provided.

48. In the opinion of the Monitor, the USW's D&O Claim raises serious issues regarding, *inter alia*, whether (a) the USW has standing as a "creditor"; (b) those members of the USW that are beneficiaries of the Salaried Plan are "creditors" of Indalex; (c) the USW is a proper complainant under the oppression remedy provisions of the *Canada Business Corporations Act*; (d) Mr. Cooper is a proper defendant of a D&O Claim; and (e) Mr. Cooper is entitled to the benefit of the indemnity.

49. Further, the USW's D&O Claim ignores the distinction between Indalex as administrator and Indalex as employer - the "Two Hats" Doctrine. An administrator

which is also the employer (as is generally the case in single-employer pension plans and is expressly contemplated by section 8 of the PBA) does not owe fiduciary duties to plan beneficiaries when it is acting *qua* employer.

> *Imperial Oil Ltd. v. Ontario (Superintendent of Pensions)*, 1995 CarswellOnt 2252 (Pension Commission) at para. 30, Monitor's Book of Authorities, Tab 5.
>
> *Assoc. provinciale des retraités d'Hydro-Québec c. Hydro-Québec*, 2005 CarswellQue 13745 (C.A.) at para. 88, Monitor's Book of Authorities, Tab 6.
>
> *Pensions Benefit Act*, R.S.O. 1990, c.P.8 (the "**PBA**"), sections 8, 22.

50. However, it is not necessary to deal with these issues on this motion because, even assuming that the USW can overcome these issues, the USW's draft Proof of D&O Claim does not disclose a D&O Claim for which the Applicants are required to indemnify their directors and officers.

51. The purpose of the indemnity is to protect the directors and officers where as a result of the Applicants failing to make a payment that they were required to make the directors and officers are liable <u>because they are directors or officers</u>. It is not the purpose of the indemnity to protect the directors and officers from liability caused by their own malfeasance. It is also not the purpose of the indemnity to enhance the recovery rights of unsecured creditors by allowing them to recover in full through the mechanism of the Directors' Charge where they would otherwise share *pro rata* with other unsecured creditors.

52. The indemnity is triggered by "the failure of the Applicants, after the date of [the Initial Order], to make" certain payments. With respect to the USW's D&O Claim, the USW claims that the directors "exercised their powers and conducted the affairs of the Applicants in a way that was oppressive and unfairly disregarded the interests" of the USW and thereby "caused or permitted deficiencies in the Applicants' contributions" to the Salaried Plan.

53. The deficiency in the Salaried Plan gave rise to a pre-filing obligation to make periodic special payments into the plan. Subparagraph 7(a) of the Initial Order, which is one of the paragraphs referenced in the paragraph 21 indemnity, authorized, but did not require, the Applicants to pay "current service contributions to pension plans (which for greater certainty shall not include special payments)". Therefore, pursuant to the Initial Order, the Applicants were not entitled to make special payments in respect of the Salaried Plan post-filing. As the Applicants were not authorized to pay special payments post-filing, the directors cannot be liable for the Applicants' failure to do so and the indemnity obligation of the Applicants in paragraph 21 of the Initial Order cannot be triggered.

54. Further, the facts disclose that all special payments to the Salaried Plan that were due prior to the resignation of the directors on July 31, 2009 had in fact been made. Therefore, there was no failure to make a payment by the Applicants and the indemnity obligation cannot be triggered.

55. Even if the Applicants had failed to make a required payment post-filing, which they did not, the Applicants' obligation to indemnify the directors and officers pursuant to paragraph 21 of the Initial Order is subject to an express exception where "such officer or director has actively participated in the breach of any related fiduciary duties or has been grossly negligent or guilty of wilful misconduct".

56. In order to avoid the exception to the indemnity obligation, the USW has attempted to argue that the conduct complained of and that underlies the USW's proposed oppression action is not based upon a breach of "fiduciary duty" and does not constitute wilful misconduct. Rather, the USW suggests that it is based upon a breach of the "statutory" duties set forth in section 22 of the PBA and that such duties are distinguishable from fiduciary duties. Section 22(1) of the PBA provides:

> Care, diligence and skill
>
> 22.(1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.
>
> PBA, section 22(1).

57. Such a distinction is a fiction and is completely unsupportable for the following reasons:

(a) The statutory duties imposed on pension plan administrators are modelled on the common law standards of care imposed upon fiduciaries;

(b) If there is a difference between the statutory duties and the common law fiduciary duties, section 22 holds the administrator to a higher standard than the standard required at common law. At common law a fiduciary's conduct is measured by the standard of what a person of ordinary prudence would do when managing *his own property*. Under the PBA an administrator must act as a person of ordinary prudence in dealing with the property of *another person;*

(c) Independent of its statutory obligations, a pension plan administrator is a fiduciary at common law. A person (or entity) owes another a fiduciary duty at common law where there is evidence of a dependency relationship in which that person is reposed with trust and confidence by the other to act in his best interests. With respect to a pension plan administrator, the administrator meets this criteria by virtue of its statutory obligations and the fact that the plan beneficiaries are dependent upon the administrator to manage and protect the fund. Thus, in addition to the statutory duty of care, the administrator is also subject to the following common law duties of a fiduciary relationship:

(i) duty of diligence (to administer and invest with careful attention and review;

(ii) duty of skill (to administer and invest with the requisite knowledge and skill);

(iii) duty of loyalty and good faith (to act in the best interests of the beneficiaries);

(iv) duty to avoid any conflicts of interest (whether actual or perceived);

(v) the duty of even-handedness (to hold impartial balance among beneficiaries); and

(vi) the duty to inform and disclose (to employees and the regulator).

Ari N. Kaplan, *Pension Law* (Toronto: Irwin Law Inc., 2006), pp. 331- 345, Monitor's Book of Authorities, Tab 7.

Guerin v. The Queen, [1984] 2 S.C.R. 335 at p. 384, Monitor's Book of Authorities, Tab 8.

Patricia J. Myhal, "Doing One's Duty: Pension Plan Administrators, Agents, and Trustees," (1991) 11 Estates & Trusts Journal 10 at 11, Monitor's Book of Authorities, Tab 9.

58. Therefore, if Indalex has breached its obligations as administrator of the Salaried Plan under section 22 of the PBA as alleged by the USW then it must have also breached one or more of its fiduciary duties owed to the members of the Salaried Plan.

59. In order to substantiate their oppression claim, the USW must prove that the directors exercised their powers in such a manner as to cause Indalex, as administrator of the Salaried Plan, to breach its duties to the members of the Salaried Plan. If the USW is successful in proving its claim, it follows that the Applicants are

not required to indemnify their directors and officers because the directors have actively participated in the breach of related fiduciary duties.

Release of Directors' Charge

60. In order to facilitate the distribution of the sale proceeds, the orderly completion of the CCAA Proceedings and the winding up of the Applicants' estates, it is necessary to determine whether any valid claim exists against the Directors' Charge. The Claims Procedure provides for the solicitation of claims against the directors and officers of the Applicants and bars and extinguishes any D&O Claim which is not filed by the Claims Bar Date. As no valid claims exist against the directors and officers for which the Applicants are required to indemnify their directors and officers pursuant to paragraph 21 of the Initial Order, the Directors' Charge can and should be released and any claims alleged against the directors and officers in the D&O Claims can be adjudicated in the ordinary course.

PART V - RELIEF REQUESTED

61. For the reasons outlined above, the Monitor respectfully requests that this Honourable Court grant an order:

(a) Declaring that none of the D&O Claims received by the Monitor are claims for which the Applicants are required to indemnify their directors and officers pursuant to paragraph 21 of the Initial Order; and

(b) Terminating, discharging and releasing the Directors' Charge from the Property.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of October, 2010.

Stikeman Elliott LLP

Lawyers for the Monitor, FTI Consulting Canada ULC

SCHEDULE "A"
LIST OF AUTHORITIES

1. Janis Sarra, "Rescue! The Companies' Creditors Arrangement Act" (Toronto: Thomson Carswell, 2007).

2. David E. Baird, "Baird's Practical Guide to the Companies' Creditors Arrangement Act" (Toronto: Carswell, 2009).

3. *Canwest Global Communications Corp., Re,* 2009 CarswellOnt 6184 (S.C.J.).

4. *General Publishing Co., Re,* 2003 CarswellOnt 275 (S.C.J.).

5. *Imperial Oil Ltd. v. Ontario (Superintendent of Pensions),* 1995 CarswellOnt 2252 (Pension Commission).

6. *Assoc. provinciale des retraités d'Hydro-Québec c. Hydro-Québec,* 2005 CarswellQue 13745 (C.A.).

7. Ari N. Kaplan, *Pension Law,* (Toronto: Irwin Law Inc., 2006).

8. *Guerin v. The Queen,* [1984] 2 S.C.R. 335.

9. Patricia J. Myhal, "Doing One's Duty: Pension Plan Administrators, Agents, and Trustees," (1991) 11 Estates & Trusts Journal 10.

SCHEDULE "B"
RELEVANT STATUTES

Companies Creditor's Arrangement Act, R.S.C. 1985, c. C-36, as amended

Security or charge relating to director's indemnification

11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge -- in an amount that the court considers appropriate -- in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Restriction -- indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Pensions Benefits Act, **R.S.O. 1990, c. P.8**

8. (0.1) A pension plan must be administered by a person or entity described in subsection (1).

Prohibition

(0.2) No person or entity other than a person or entity described in subsection (1) shall administer a pension plan.

Administrator

(1) A pension plan is not eligible for registration unless it is administered by an administrator who is,

(a) the employer or, if there is more than one employer, one or more of the employers;

(b) a pension committee composed of one or more representatives of,

(i) the employer or employers, or any person, other than the employer or employers, required to make contributions under the pension plan, and

(ii) members of the pension plan;

(c) a pension committee composed of representatives of members of the pension plan;

(d) the insurance company that provides the pension benefits under the pension plan, if all the pension benefits under the pension plan are guaranteed by the insurance company;

(e) if the pension plan is a multi-employer pension plan established pursuant to a collective agreement or a trust agreement, a board of trustees appointed pursuant to the pension plan or a trust agreement establishing the pension plan of whom at least one-half are representatives of members of the multi-employer pension plan, and a majority of such representatives of the members shall be Canadian citizens or landed immigrants;

(f) a corporation, board, agency or commission made responsible by an Act of the Legislature for the administration of the pension plan;

(g) a person appointed as administrator by the Superintendent under section 71; or

(h) such other person or entity as may be prescribed.

Additional members

(2) A pension committee, or a board of trustees, that is the administrator of a pension plan may include a representative or representatives of persons who are receiving pensions under the pension plan.

Interpretation

(3) For the purposes of clause (1) (b), "employer" includes the following persons and entities:

1. Affiliates within the meaning of the *Business Corporations Act* of the employer.

2. Such other persons or entities, or classes of persons or entities, as may be prescribed.

...

Care, diligence and skill

22 (1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

Special knowledge and skill

(2) The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.

Member of pension committee, etc.

(3) Subsection (2) applies with necessary modifications to a member of a pension committee or board of trustees that is the administrator of a pension plan and to a member of a board, agency or commission made responsible by an Act of the Legislature for the administration of a pension plan.

Conflict of interest

(4) An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

Employment of agent

(5) Where it is reasonable and prudent in the circumstances so to do, the administrator of a pension plan may employ one or more agents to carry out any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund.

Trustee of pension fund

(6) No person other than a prescribed person shall be a trustee of a pension fund.

Responsibility for agent

(7) An administrator of a pension plan who employs an agent shall personally select the agent and be satisfied of the agent's suitability to perform the act for which the agent is employed, and the administrator shall carry out such supervision of the agent as is prudent and reasonable.

Employee or agent

(8) An employee or agent of an administrator is also subject to the standards that apply to the administrator under subsections (1), (2) and (4).

Benefit by administrator

(9) The administrator of a pension plan is not entitled to any benefit from the pension plan other than pension benefits, ancillary benefits, a refund of contributions and fees and expenses related to the administration of the pension plan and permitted by the common law or provided for in the pension plan.

Member of pension committee, etc.

(10) Subsection (9) applies with necessary modifications to a member of a pension committee or board of trustees that is the administrator of a pension plan and to a member of a board, agency or commission made responsible by an Act of the Legislature for the administration of a pension plan.

Payment to agent

(11) An agent of the administrator of a pension plan is not entitled to payment from the pension fund other than the usual and reasonable fees and expenses for the services provided by the agent in respect of the pension plan.

Pensions Benefits Act Regulations, R.R.O. 1990, Regulation 909

Funding of Pension Plans Payments – General

4. (1) Every pension plan shall set out the obligation of the employer or any person or entity required to make contributions on behalf of the employer and, in the case of a jointly sponsored pension plan, the obligation of the members of the pension plan, if applicable, to contribute both in respect of the normal cost and any going concern unfunded liability and solvency deficiency under the plan.

(2) Subject to subsection (2.1), an employer who is required to make contributions under a pension plan or, if a person or entity is required to make contributions under the pension plan on behalf of the employer, that person or entity and, if applicable, the members of the pension plan or their representative shall make payments to the pension fund or to an insurance company, as applicable, that are not less than the sum of,

(a) all contributions, including contributions in respect of any going concern unfunded liability and solvency deficiency and money withheld by payroll deduction or otherwise from an employee, that are received from employees as the employees' contributions to the pension plan;

(b) all contributions required to pay the normal cost;

(c) all special payments determined in accordance with section 5;

(c.1) all special payments determined in accordance with section 5.6; and

(d) all special payments determined in accordance with sections 31, 32 and 35 and all payments determined in accordance with section 31.1.

(2.1) Despite subsection (2), an employer required to make contributions under a designated plan shall not be required to make a payment to the pension fund or to an insurance company, as applicable, that is not an eligible contribution..

(2.2) Despite subsections (1) and (2), the amount of contributions required to be made to a pension plan that provides defined benefits may be determined by using an actuarial cost method other than a benefit allocation method if,

(a) the actuarial cost method that is used is consistent with accepted actuarial practice; and

(b) the rules set out in subsection (2.3) are satisfied.

(2.3) For the purposes of clause (2.2) (b), the rules are as follows:

1. If the valuation date of a report filed under section 3, 13 or 14 is before December 31, 2006 and, at the valuation date, the amount determined under clause (a) of the definition of "going concern assets" in subsection 1 (2) is not less than the going concern liabilities determined using a benefit allocation method, the present value of the required contributions for the three-year period referred to in paragraph 1.1 must not be less than the present value of the contributions for that period that would be made in respect of the normal cost for the plan if the benefit

allocation method were used, after the application of any actuarial gains to reduce the normal cost in accordance with subsection 7 (3).

1.1 The three-year period referred to in paragraph 1 must begin,

i. in the case of a pension plan that is not a jointly sponsored pension plan, on the valuation date, or

ii. in the case of a jointly sponsored pension plan, on a date not later than 12 months after the valuation date or, in the case of an inter-valuation report described in section 5.5, not later than January 1, 2007.

1.2. If the valuation date of a report filed under section 3, 13 or 14 is on or after December 31, 2006 and, at the valuation date, the amount determined under clause (a) of the definition of "going concern assets" in subsection 1 (2) is not less than the going concern liabilities determined using a benefit allocation method, the present value of the required contributions for the five-year period referred to in paragraph 1.3 must not be less than the present value of the contributions for that period that would be made in respect of the normal cost for the plan if the benefit allocation method were used, after the application of any actuarial gains to reduce the normal cost in accordance with subsection 7 (3).

1.3 The five-year period referred to in paragraph 1.2 must begin,

i. in the case of a pension plan that is not a jointly sponsored pension plan, on the valuation date, or

ii. in the case of a jointly sponsored pension plan, on a date not later than 12 months after the valuation date.

2. If, at the valuation date of a report filed under section 3, 13 or 14, the amount determined under clause (a) of the definition of "going concern assets" in subsection 1 (2) is less than the going concern liabilities determined using a benefit allocation method, the present value of the required contributions, which are determined under the actuarial cost method used by the plan, must not be less than the sum of the present value of the normal cost and the present value of the special payments determined in accordance with section 5 that would be required to liquidate any going concern unfunded liability determined using the benefit allocation method.

2.1 The present values referred to in paragraphs 1, 1.2 and 2 shall be determined without reference to paragraphs 7 and 10 and without reference to subsections (2.7) and (2.7.1).

3. The rate or rates of interest to be used in calculating present values referred to in paragraphs 1, 1.2 and 2 shall be the rate or rates used in the report for the going concern valuation.

3.1 For the purposes of paragraphs 1, 1.2 and 2, the going concern valuation prepared using the benefit allocation method shall use the same rate or rates of interest as those used in the going concern valuation prepared using the actuarial cost method used by the plan.

4. In the case of a pension plan that is not a jointly sponsored pension plan, the present values referred to in paragraph 2 shall be calculated using whichever of the following periods is longer:

   i. The period that begins on the valuation date and continues until the end of the remaining amortization period of the going concern unfunded liability that has the longest remaining amortization period.

   ii. The period of five years that begins on the valuation date.

4.1 In the case of a jointly sponsored pension plan, the present values referred to in paragraph 2 shall be calculated using whichever of the following periods is longer:

   i. The period that begins on a date not later than 12 months after the valuation date or, in the case of an inter-valuation report described in section 5.5, not later than January 1, 2007, and continues until the end of the remaining amortization period of the going concern unfunded liability that has the longest remaining amortization period.

   ii. The period of five years that begins on a date not later than 12 months after the valuation date or, in the case of an inter-valuation report described in section 5.5, not later than January 1, 2007.

5. In the case of a jointly sponsored pension plan,

   i. the present values referred to in paragraph 1 shall be calculated based on the sum of the projected pensionable earnings for each year in the three-year period referred to in that paragraph,

   ii. the present values referred to in paragraph 1.2 shall be calculated based on the sum of the projected pensionable earnings for each year in the five-year period referred to in that paragraph,

   iii. the present values referred to in paragraph 2 shall be calculated based on the period used for the purposes of paragraph 4.1 and the sum of the projected pensionable earnings for each year in that period, and

   iv. the actuarial assumptions used to determine the sums referred to in subparagraphs i, ii and iii of the projected pensionable earnings shall be consistent with those used in the report for the going concern valuation based on the benefit allocation method.

6. Subject to paragraph 7, the required contribution rate for a jointly sponsored pension plan shall be determined as a level percentage of pensionable earnings for each class of members, subject to any variation that is necessary in order to take into account integration with the *Canada Pension Plan* or the *Quebec Pension Plan*.

7. If the required contribution rate set out in a report filed under section 3 or 14 in respect of a jointly sponsored pension plan is higher than the required contribution rate determined in the last report filed under section 3, 13 or 14, the required contribution rate may be increased each year for up to three years,

commencing not later than 12 months after the valuation date, by at least one third of the difference between the two contribution rates, but only if,

i. the contribution rate after that period is a level percentage of pensionable earnings, subject to any variation that is necessary in order to take into account integration with the *Canada Pension Plan* or the *Quebec Pension Plan*, and

ii. the present value of the required contributions using the increased rates is not less than,

A. the present value of the contributions that would be made in respect of the normal cost for the plan if the benefit allocation method were used, after the application of any actuarial gains to reduce the normal cost in accordance with subsection 7 (3), if paragraph 1 or 1.2 applies, or

B. the sum of the present value of the normal cost and the present value of the special payments determined in accordance with section 5 that would be required to liquidate any going concern unfunded liability determined using the benefit allocation method, if paragraph 2 applies.

8. For the purposes of paragraph 7, the determination of whether the required contribution rate set out in the report is higher than the required contribution rate determined in the last filed report shall be made without taking into account the ability to increase required contribution rates each year for up to three years under that paragraph, and without taking into account the ability to carry forward amounts under paragraph 10 to reduce those increases.

9. The present values referred to in subparagraph 7 ii shall be calculated using the same period as was used to calculate the present values referred to in paragraph 1, 1.2 or 2, whichever is applicable.

10. If paragraph 7 permits the required contribution rate to be increased each year for up to three years and the amount of any increase in the first or second year exceeds one third of the difference between the required contribution rate set out in the report and the required contribution rate determined in the last filed report, the excess may be carried forward to the following year or years and used to reduce the increases in the following year or years, as long as the present value of the required contributions using the increased rates, as adjusted, is not less than the present value referred to in sub-subparagraph 7 ii A or B, whichever is applicable.

(2.4) If, in accordance with subsection (2.2), the amount of contributions required to be made to a pension plan that provides defined benefits is determined by using an actuarial cost method other than a benefit allocation method, the payments to the pension fund or to an insurance company, as applicable, shall not be less than the sum of,

(a) the required contributions determined using the actuarial cost method; and

(b) all special payments determined in accordance with section 5 with respect to any solvency deficiency.

(2.5) If the amount of contributions required to be made to a pension plan that provides defined benefits is determined in accordance with subsection (2.2) using an actuarial cost method other than a benefit allocation method, the contributions shall be deemed to be the contributions required to be made under this Regulation and the definitions in section 1 shall apply with necessary modifications.

(2.6) If a report filed under section 3 or 14 discloses, in respect of a jointly sponsored pension plan for which a benefit allocation method is used to set contribution rates, that an increase in the normal cost is required or that an increase is required in the amount of contributions that were previously reduced under subsection 7 (3), payment of that increase shall commence on a date not later than 12 months after the valuation date.

(2.7) If a report filed under section 3 or 14 discloses that there is a going concern unfunded liability that is required to be liquidated in respect of a jointly sponsored pension plan for which a benefit allocation method is used to set the contribution rates, the special payments in respect of the going concern unfunded liability, as determined in accordance with subsection 5 (1.2), may be increased each year for up to three years, commencing not later than 12 months after the valuation date or, in the case of an inter-valuation report described in section 5.5, not later than January 1, 2007, by at least one third of the special payments, but only if,

(a) the special payments after that period are a level percentage of pensionable earnings for each class of members, subject to any variation that is necessary in order to take into account integration with the *Canada Pension Plan* or the *Quebec Pension Plan*; and

(b) the present value of the special payments, including the increased special payments, over the amortization period is not less than the amount of the going concern unfunded liability.

(2.7.1) If subsection (2.7) permits the special payments in respect of the going concern unfunded liability, as determined in accordance with subsection 5 (1.2), to be increased each year for up to three years, and the amount of any increase in the first or second year exceeds one third of the special payments, the excess may be carried forward to the following year or years and used to reduce the increases in the following year or years, as long as the present value of the special payments, including the increased special payments, as adjusted, over the amortization period is not less than the amount of the going concern unfunded liability.

(2.8) In the case of a jointly sponsored pension plan, contributions referred to in subsection 39 (3) of the Act include contributions made by a former member in respect of any going concern unfunded liability or solvency deficiency.

(3) Where there is a prior year credit balance, the employer may apply the prior year credit balance to reduce the payments required under clauses (2) (b), (c) and (d).

(3.1) Subsection (3) does not apply if the pension plan provides defined benefits and a benefit allocation method is not used to set contribution rates.

(4) The payments referred to in subsections (2) and (2.4) shall be made by the employer or, if a person or entity is required to make contributions on behalf of the employer, by that person or entity and, if applicable, by the members of the pension plan within the following time limits:

1. All sums received by the employer from an employee, including money withheld by payroll deduction or otherwise from the employee, as the employee's contribution to the pension plan, within thirty days following the month in which the sum was received or deducted.

2. Revoked: O. Reg. 116/06, s. 4 (8).

3. In the case of a pension plan that provides defined benefits, employer contributions in respect of the normal costs reported under clause 13 (1) (a) or 14 (7) (a) for each period covered by a report beginning on or after the 1st day of January, 1988, in monthly instalments within thirty days after the month for which contributions are payable, the amount of the instalments to be either a total fixed dollar amount, a fixed dollar amount for each employee or member of the plan or a fixed percentage either of the portion of the payroll related to members of the plan or of employee contributions.

3.1 Where all the pension benefits provided under the plan are defined contribution benefits, employer contributions for the plan's fiscal year, in monthly instalments within 30 days after the month for which contributions are payable, the amount of the instalments to be either a total fixed dollar amount, a fixed dollar amount for each employee or member of the plan or a fixed percentage either of the portion of the payroll related to members of the plan or of employee contributions.

4. Revoked: O. Reg. 116/06, s. 4 (8).

5. All special payments determined in accordance with section 5, subsection 31 (5) and subsection 35 (5), other than a payment made under paragraph 4, in equal monthly instalments in accordance with the times for payment set out in sections 5, 31 and 35.

6. All special payments determined in accordance with subsections 31 (1) and (2), section 32 and subsection 35 (3), by annual instalment in accordance with the times for payment set out in sections 31, 32 and 35.

(5) Subject to subsections (10) and (11), if the period covered by a report filed under section 3, 5.3, 13 or 14 or submitted under this section has ended, and no report covering a subsequent period is filed under section 14 or submitted under this section, the employer or, if a person or entity is required to make contributions on behalf of the employer, that person or entity and, if applicable, the members of the pension plan shall continue to make payments in accordance with the report most recently filed or submitted under section 3, 5.3, 13 or 14 or this section.

(6) The Superintendent may cause a report on a plan to be prepared where,

(a) a report required under section 3, 13 or 14 on the plan has not been filed within one year after the time required by this Regulation; and

(b) the Superintendent is of the opinion that the preparation of a report in accordance with subsection (7) is necessary to ensure that the plan is sufficiently funded to provide the benefits under the plan.

(7) A report under subsection (6) must contain the information required by section 3, 13 or 14, whichever applies.

(7.1) A report under subsection (6) must be prepared by an actuary chosen by the Superintendent and must be submitted by the actuary to the Superintendent.

(8) If, during the preparation of a report on a plan, under this section, the Superintendent forms the opinion that the report is no longer necessary to ensure that the plan is sufficiently funded to provide the benefits under the plan, the Superintendent may cause work on the report to cease and the actuary need not submit the report to the Superintendent.

(9) If a report is submitted to the Superintendent under subsection (7.1), the employer or, if another person or entity is required to make contributions on behalf of the employer, that person or entity and, if applicable, the members of the pension plan shall make payments in accordance with the report.

(10) Except as provided in subsection (11), if a payment requirement set out in a report submitted under subsection (7.1) concerning a plan differs from a payment requirement set out in a report filed by the administrator, the employer or, if another person or entity is required to make contributions on behalf of the employer, that person or entity and, if applicable, the members of the pension plan shall make payments in accordance with the higher requirement.

(11) If, in the opinion of the Superintendent, a payment in accordance with the higher requirement under subsection (10) is not necessary to ensure that the plan is sufficiently funded to provide benefits under the plan, the payments shall be made in accordance with the lower requirement.

(12) Revoked: O. Reg. 144/00, s. 4 (3).

(13) This section does not apply to a pension plan described in subsection 6 (1) unless it is a jointly sponsored pension plan.

...

Contribution Requirements in Year of Report

12. (1) This section applies in respect of a pension fund for a pension plan other than a jointly sponsored pension plan when a report required under section 3 or 14 is filed with the Superintendent or a report prepared under section 4 or 13 is submitted to the Superintendent.

(2) Within 60 days after the report is filed or submitted, the employer shall pay into the pension fund,

(a) all amounts due under the report on the date the report is filed or submitted; and

(b) interest on those amounts calculated at the going concern interest rate or the solvency valuation interest rate, whichever applies in the circumstances.

(3) The actuary who prepares the report shall calculate the amount of interest that is payable under clause (2) (b).

...

Wind up Notices

...

32. (1) Until the employer's liability under section 75 of the Act is funded, the administrator of the plan shall annually cause the plan to be reviewed and a report to be prepared by a person authorized by section 15 and shall file the report within six months after the valuation date of the report.

(2) A report required under subsection (1) shall show,

(a) the gain or the loss in the pension plan since the valuation date of the immediately preceding report as a result of differences between the actual experience and the experience anticipated by the assumptions made in the previous report; and

(b) the increase or decrease in the remaining special payments that will liquidate the gain or loss referred to in clause (a) over the remainder of the five-year period commencing from the effective date of the wind up.

(3) Any special payments required as a result of a loss referred to in clause (2) (a) shall be included as payments required to be made by the employer under section 75 of the Act.

(4) Where a report made under this section shows that there is no further amount to be funded, any surplus may revert to the employer, subject to the requirements of section 79 of the Act.

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.

Court File No: 09CV-8221-00CL

ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

FACTUM OF THE MONITOR
(Motion Returnable November 10, 2010)

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Ashley John Taylor LSUC#: 39932E
Tel: (416) 869-5236
Lesley Mercer LSUC#: 54491E
Tel: (416) 869-6859
Fax: (416) 947-0866

Lawyers for the Monitor, FTI Consulting Canada, ULC