Court File No.: C52187
Court File No.: C52346
Superior Court File No.: CV-09-8122-00CL

COURT OF APPEAL FOR ONTARIO

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

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

Applicants

FACTUM OF GEORGE L. MILLER, THE CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATES OF THE US INDALEX DEBTORS
(Motion for Leave to Intervene)

CHAITONS LLP
Barristers & Solicitors
5000 Yonge Street, 10th Floor
Toronto, Ontario M2N 7E9

Harvey Chaiton
Tel: 416-218-1129
Fax: 416-218-1849
Email: harvey@chaitons.com

George Benchetrit
Tel: 416-218-1141
Fax: 416-218-1841
Email: george@chaitons.com

Lawyers for George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the US Indalex Debtors

TO: KOSKIE MINSKY LLP
20 Queen Street West Suite 900, Box 52
Toronto, ON M5H 3R3

Andrew Hatnay
Tel: (416) 595-2083
Fax: (416) 204-2877
Email: ahatnay@kmlaw.ca

Demetrios Yiokaris
Tel: (416) 595-2130
Fax (416) 204 2180
Email: dyiokaris@kmlaw.ca

Lawyers for Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Richard Smith, Robert Leckie, Neil Fraser and Fred Granville

TO: SACK GOLDBLATT MITCHELL LLP
20 Dundas Street West, Suite 1100
Toronto, ON M5G 2G8

Darrell L. Brown
Tel: (416) 979-4050
Fax: (416) 591-7333
Email: dbrown@sgmlaw.com

Lawyer for the United Steelworkers

TO: STIKEMAN ELLIOTT LLP
5300 Commerce Court West 199 Bay Street
Toronto, ON M5L 1139

Ashley John Taylor
Tel: (416) 869-5236
Fax: (416) 947-0866
Email: ataylor@stikeman.com

Lesley Mercer
Tel: (41 6) 869-6859
Fax: (416) 947-0866
Email: lmercer@stikeman.com

Lawyers for the Monitor, FTI Consulting Canada ULC

TO: GOODMANS LLP
Barristers & Solicitors
250 Yonge Street, Suite 2400
Toronto, ON M5B 2M6

Brian Empey
Tel: (416) 979-4194
Fax: (416) 979-1234
Email: bempey@goodmans.ca

Fred Myers
Tel: (416) 597-5923
Fax: (416) 979-1234
Email: fmyers@goodmans.ca

Lawyers for Sun Indalex Finance, LLC

TO: FINANCIAL SERVICES COMMISSION OF ONTARIO
Legal Services Branch
5160 Yonge Street, 17th Floor
Toronto, ON M2N 6L9

Mark Bailey
Tel: (416) 590-7555
Fax: (416) 590-7556
Email: mark.bailey@fsco.gov.on.ca

Lawyer for the Superintendent of Financial Services

TO: CAVALLUZZO HAYES SHILTON McINTYRE & CORNISH LLP
474 Bathurst Street, Suite 300
Toronto, ON M5T 266

Hugh O'Reilly
Tel: (416) 964-5514
Fax: (416) 964-5895
Email: horeilly@cavalluzzo.com

Amanda Darrach
Tel: (416) 964-1115
Fax: (416) 964-5895
Email: adarrach@cavalluzzo.com

Lawyers for Morneau Sobeco Limited Partnership

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PART I - OVERVIEW

1. These appeals raise the issue (among others) of whether deemed trusts arising under provincial legislation (the Ontario *Pension Benefits Act*), if proven, apply to funds held in reserve by the monitor of an insolvent company in priority to claims of secured creditors, contrary to the scheme of priorities established under federal legislation (the *Bankruptcy and Insolvency Act* (the **"BIA"**) and the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the **"CCAA"**)), and contrary to orders of the court having jurisdiction over the CCAA proceedings.

2. The US Chapter 7 Trustee (as defined below) brings this motion seeking leave to intervene on these appeals. It clearly has a direct, substantial and genuine interest in these appeals.

3. The US Chapter 7 Trustee was appointed approximately 2 months after the argument of the motion giving rise to these appeals. Had it been appointed prior to those motions, there is no question that it would have been made a respondent to the motions as a proper or necessary party and would have had the opportunity to participate fully as a party thereto.

4. The US Chapter 7 Trustee's intervention will not delay or prejudice the determination of the rights of the parties to the appeal. The US Chapter 7 Trustee has confirmed to the other parties that it is prepared to proceed on the basis of the record as it currently exists, that it will file a factum forthwith, and that the time for its oral argument (limited to a maximum of 20 minutes) shall come out of the time allotted to the Respondents.

5. The US Chapter 7 Trustee clearly meets the test for intervention under the *Rules of Civil Procedure*, and accordingly, this motion should be granted on such terms as the Court deems appropriate.

PART II – THE FACTS

Summary of Procedural History

6. On March 20, 2009, the parent company of Indalex Limited (**"Indalex"**) and certain US affiliates (collectively, the **"US Debtors"**) commenced proceedings under Chapter 11 of Title 11 of the United States Bankruptcy Code in the United States Bankruptcy Court, District of Delaware (the **"US Bankruptcy Court"**).

*Affidavit of Keith Cooper swum August 24, 2009 (**"Cooper Affidavit"**) at para. 4, Exhibit A to Affidavit of Amy Casella sworn November 8, 2010 (**"Casella Affidavit"**)*

7. On April 3, 2009, Indalex, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc. (collectively, the **"Canadian Debtors"**) made an application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the **"CCAA"**). The application was granted and FTI Consulting Canada ULC was appointed as monitor (the **"Monitor"**).

Cooper Affidavit at paras. 5 and 6

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

Cooper Affidavit at paras. 7 and 12

9. The Initial Order provides that the Canadian Debtors' obligation to repay their DIP loan is secured by a super-priority charge (the **"DIP Charge"**) in favour of the lenders (the **"DIP Lenders"**). The Initial Order provides that the DIP Charge has priority over all liens and encumbrances, expressly including deemed trusts and statutory liens.

Cooper Affidavit at para. 8

10. The Canadian Debtors' obligation to repay their DIP loan was guaranteed by the US Debtors.

Cooper Affidavit at paras. 10

11. The Canadian Debtors and US Debtors jointly sold substantially all of their assets to SAPA Holdings AB in a transaction (the **"Sale Transaction"**) that was approved by an Order made by Justice Campbell dated July 20, 2009 (the **"Approval and Vesting Order"**).

Cooper Affidavit at para. 16

12. The Approval and Vesting Order required that the proceeds of sale from the Sale Transaction be paid to the Monitor. It also directed the Monitor to make a distribution to the DIP Lenders subject to a reserve that the Monitor considered to be appropriate in the circumstances.

Cooper Affidavit at paras. 16 and 18

13. The Approval and Vesting Order also provided that, to the extent that any indebtedness owing by the Canadian Debtors to the DIP Lenders was satisfied by any of the US Debtors or their affiliates under their guarantee, the US Debtors are subrogated to the rights of the DIP Lenders under the DIP Charge to the extent of such payment.

Cooper Affidavit at paras. 16 and 18; Approval and Vesting Order at para 14, Exhibit B to the Casella Affidavit

14. The Sale Transaction closed on July 31, 2009.

Cooper Affidavit at para. 24

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

Cooper Affidavit at paras. 23 and 24

Motion Before Justice Campbell

16. At the court hearing to approve the Sale Transaction, certain retired executives of Indalex (the **"Retirees"**) asserted a deemed trust claim over the Canadian sale proceeds and requested that $3.2 million, an amount representing an estimate of the wind up deficit in their pension plan (the **"Executive Plan"**), be held in reserve by the Monitor. The United Steelworkers Union (the **"USW"** and together with the Retirees, the **"Appellants"**) reserved its rights with respect to any deemed trust claim it might assert with respect to its members' pension plan (the **"Salaried Plan"** and together with the executive Plan, the **"Plans"**).

Cooper Affidavit at paras. 17, 19 and 21

17. The Monitor retained in excess of $6.75 million from the proceeds of sale of the assets of Indalex, which the Appellants assert are covered by the alleged deemed trusts in priority to the DIP Charge, notwithstanding the terms of the Initial Order which expressly provide that the DIP Charge has priority over all liens and encumbrances, expressly including deemed trusts and statutory liens.

Cooper Affidavit at para. 22

18. The Appellants brought motions asserting their claims for alleged deemed trusts (the **"Deemed Trust Motions"**), which were heard by Justice Campbell on August 28, 2009.

Cooper Affidavit at paras. 27 and 33

19. Pursuant to Reasons released on February 18, 2010, Justice Campbell dismissed the Deemed Trust Motions.

Reasons of Justice Campbell, Exhibit C to the Casella Affidavit

Appointment of the US Chapter 7 Trustee

20. On October 14, 2009, approximately 2 months after the Deemed Trust Motions were argued, the US Bankruptcy Court entered an Order converting the US Debtors' bankruptcy cases from Chapter 11 of the United States Bankruptcy Code to Chapter 7. On October 30, 2009, the US Chapter 7 Trustee was appointed.

Order of the U.S. Bankruptcy Court dated October 14, 2009, Exhibit D to the Casella Affidavit

Leave to Intervene

21. The US Chapter 7 Trustee has notified the other parties to this appeal that it seeks leave to intervene on the appeal, and that it is prepared to proceed on the basis of the record as it currently exists, that it will file a factum forthwith, and that the time for its oral argument (limited to a maximum of 20 minutes) shall come out of the time allotted to the Respondents.

Letter from Chaitons LLP to other counsel dated October 29, 2010, Exhibit E to Casella Affidavit

22. The Respondents are consenting to this motion.

23. The Appellants have already consented to leave to intervene being granted to two other persons in these appeals:

a. the Superintendent of Financial Services; and

b. Morneau Sobeco Limited Partnership, as administrator of the Plans.

PART III – LAW AND ARGUMENT

24. Rule 13 of the *Rules of Civil Procedure* provides as follows:

> **LEAVE TO INTERVENE AS ADDED PARTY**
>
> 13.01 (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,
>
> (a) an interest in the subject matter of the proceeding;
>
> (b) that the person may be adversely affected by a judgment in the proceeding; or
>
> (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.
>
> (2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.
>
> **LEAVE TO INTERVENE AS FRIEND OF THE COURT**
>
> 13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.
>
> **LEAVE TO INTERVENE IN DIVISIONAL COURT OR COURT OF APPEAL**
>
> 13.03 (1) Leave to intervene in the Divisional Court as an added party or as a friend of the court may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of the Superior Court of Justice or a judge designated by either of them.
>
> (2) Leave to intervene as an added party or as a friend of the court in the Court of Appeal may be granted by a panel of the court, the Chief Justice of Ontario or the Associate Chief Justice of Ontario.

25. The US Chapter 7 Trustee seeks to intervene as an "added party" pursuant to Rule 13.01.

26. The relief sought by the Appellants includes:

a. declarations that the alleged deemed trusts have priority over all secured creditor claims;

b. orders requiring the Monitor to remit the sale proceeds to then Plans, notwithstanding the DIP Charge, the super-priority ranking thereof under the Initial Order and the subrogation provisions of the Approval and Vesting Order.

27. The US Chapter 7 Trustee has the right to assert and to rely upon the super-priority of the DIP Charge under the Initial Order and the subrogation provisions of the Approval and Vesting Order.

28. Had the US Chapter 7 Trustee been appointed by the time of the Deemed Trust Motions, clearly it would have been made a respondent to the motions as a proper and necessary party and would have had the opportunity to participate fully as a party thereto.

29. If the Appellants are successful on these appeals, there will be insufficient funds available to repay the US Chapter 7 Trustee in full, as subrogee and beneficiary of the DIP Charge.

30. The US Chapter 7 Trustee clearly therefore has a direct, substantial and genuine interest in these appeals, and will be adversely affected if the appeals are successful.

31. The US Chapter 7 Trustee's intervention will not delay or prejudice the determination of the rights of the parties to the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 9th day of November, 2010.

CHAITONS LLP

Lawyers for George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the US Indalex Debtors

SCHEDULE "A" – LIST OF AUTHORITIES

Rule 13 of the *Rules of Civil Procedure*

LEAVE TO INTERVENE AS ADDED PARTY

13.01 (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,

(a) an interest in the subject matter of the proceeding;

(b) that the person may be adversely affected by a judgment in the proceeding; or

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(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

LEAVE TO INTERVENE AS FRIEND OF THE COURT

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

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(2) Leave to intervene as an added party or as a friend of the court in the Court of Appeal may be granted by a panel of the court, the Chief Justice of Ontario or the Associate Chief Justice of Ontario.

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PROCEEDINGS COMMENCED AT TORONTO

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

(MOTION FOR LEAVE TO INTERVENE)

CHAITONS LLP
Barristers and Solicitors
5000 Yonge Street, 10th Floor
Toronto, ON M2N 7E9

Harvey Chaiton
Tel: 416-218-1129
Fax: 416-218-1849
George Benchetrit
Tel: (416) 218-1141
Fax: (416) 218-1841

Lawyers for George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the US Indalex Debtors