

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

IN THE MATTER OF the *Companies' Creditors
Arrangement Act*, R.S.C. 1985, c. C-36, as amended

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

Applicants

**FACTUM OF THE APPLICANTS
(Motion returnable August 28, 2009)**

August 24, 2009

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6326765 CANADA INC. and NOVAR INC.

the Applicants

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IN THE MATTER OF the *Companies' Creditors
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NOVAR INC.

(the “Applicants”)

FACTUM OF THE APPLICANT

(Motion regarding Alleged Deemed Trusts returnable August 28, 2009)

PART I - OVERVIEW

1. The two pending motions relate to the Retirement Plan for Salaried Employees of Indalex Limited and Associated Companies (the “**Salaried Plan**”) and the Retirement Plan for Executive Employees of Indalex Limited and Associated Companies (the “**Executive Plan**”). The Salaried Plan has been wound up and has an unfunded deficit. The Executive Plan has not been wound up but the premise of the moving parties is that if it were to be wound up it would also have a deficiency.

2. The moving parties seek declarations that, as a result of the actual wind up deficiency in the Salaried Plan or the deficiency which might exist in the Executive Plan if that plan were to be wound up, the assets held by the Monitor are subject to a deemed trust pursuant to subsection 57(4) of the *Pension Benefits Act* (Ontario) (the “**PBA**”) and such deemed trust ranks in priority to the charge granted to the debtor-in-possession lenders (the “**DIP Lenders**”) to the Applicants pursuant to the Amended Amended and Restated Initial Order dated May 12, 2009.

3. Indalex filed for and received protection from its creditors pursuant to the *Companies' Creditors Arrangement Act* (Canada) (“**CCAA**”) on March 3, 2009. Indalex funded its working capital needs during the course of the CCAA proceedings by way of court approved DIP financing secured by the DIP Lenders Charge. Substantially all of Indalex’s assets have

been sold through a Court supervised and approved sale process. As the moving parties have asserted a claim to the proceeds of sale in priority to that of the DIP Lenders Charge, Indalex is unable to fulfil its obligation to the DIP Lenders (whose rights have now been acquired under an order dated July 20, 2009 by Indalex's US affiliate by right of subrogation following payment on a guarantee of Indalex's obligation to the DIP Lender in the amount of US\$10,751,247.22) until the merits of the moving parties' motions have been adjudicated.

4. The Applicants ("Indalex") submit that the motions are ill-founded and that they should be dismissed and the Applicants should be allowed to discharge the prior ranking obligations secured by the DIP Lenders Charge.

PART II - FACTS

5. Indalex is the sponsor and administrator of both the Salaried Plan and the Executive Plan. Section 14.03(3) of the Salaried Plan and section 14.3(c) of the Executive Plan both contemplate the possibility that the respective plan may be wound up with insufficient assets to pay all benefits under the plan and contemplate a possible reduction in benefits payable in that eventuality.

Affidavit of Bob Kavanaugh, paras 5 and 15.

Affidavit of Cathy Braker, Exhibit A. Union Motion Record pp 49-50

Affidavit of Keith Carruthers, Exhibit C, Retirees' Motion Record p. 68

6. The Salaried Plan is in the process of being fully wound up with an effective wind up date of December 31, 2006. As at the wind-up date, the Salaried Plan had an estimated wind up deficiency of \$1,655,200. The estimated wind up deficiency for the Salaried Plan as at December 31, 2008 was \$1,795,600.

Affidavit of Bob Kavanaugh, paras 5, 7 and 10.

7. All contributions in respect of the Salaried Plan that were due or accrued prior to its wind up were made and special payments were made to the Salaried Plan of \$709,013 in 2007, of \$875,313 in 2008 and of \$601,000 in 2009.

Affidavit of Bob Kavanaugh, paras 6-11.

8. The Executive Plan has not been wound up. There is currently one member of the Executive Plan who is on long term disability who continues to accrue benefits under the Executive Plan.

Affidavit of Bob Kavanaugh, paras 15 and 20

9. Indalex has made all required contributions to the Executive Plan to date and no amounts are currently due or owing to the Executive Plan.

Affidavit of Bob Kavanaugh, para 16.

10. The most recent actuarial valuation report for the Executive Plan was as at January 1, 2008. It estimated that the deficiency in the Executive Plan as at that date on a wind up basis was \$2,996,400. The actual funded status of the Executive Plan in the event of a wind up could only be determined by an actuarial valuation performed after such wind up occurred.

Affidavit of Bob Kavanaugh, paras 17-18.

PART III - ARGUMENT

11. The moving parties assert that in the absence of a bankruptcy, a deemed trust exists under the PBA in respect of the amount by which the liabilities in a pension plan exceed its assets following a wind up. Indalex disputes this assertion.

12. As set out below, Indalex submits that:

- (a) Because any deemed trust under the PBA would not be recognized in a bankruptcy, it is premature to determine these motions prior to a determination as to whether the Indalex will be permitted to make an assignment under the *Bankruptcy and Insolvency Act*.
- (b) The Executive Plan has not yet been wound up and no wind up liability exists under that plan at this date. For this reason alone, the motion in respect of the Executive Plan must be dismissed.
- (c) In any event, the subsection 57(4) of the PBA by its terms only creates a deemed trust in respect of contribution obligations which accrue prior to the wind up date. The PBA does not create any deemed trust in respect of those obligations of an employer pursuant to section 75(1)(b) of the PBA which arise only following a wind up in circumstances where the wound up plan has insufficient assets to satisfy accrued pension benefits.

- (d) Even if a deemed trust were found to exist in this case, claims pursuant to any such deemed trusts would rank behind, *inter alia*, the DIP Lenders Charge.

Bankruptcy and Insolvency Act

13. Section 67(1)(a) of the BIA provides that a trust which subsists in bankruptcy is one which meets the three common law certainties. The Supreme Court of Canada has authoritatively held that a provincial deemed trust does not meet the definition of a trust that can survive bankruptcy.

British Columbia v Henfrey Samson Belair Ltd. [1989] 2 S.C.R. 24

14. Indalex in a separate motion has sought leave to make an assignment under the *Bankruptcy and Insolvency Act* (the “BIA”). As noted above, under the BIA, provincial deemed trusts are not effective to create super-priority charges or to remove assets from the bankrupt’s estate. As the CCAA is “spent”, the Court of Appeal has held that even though these proceedings remain under the CCAA for the time being priorities are to be determined in accordance with the BIA in order to avoid the artificial creation of a legislative gap. As such, the deemed trust provisions of the provincially enacted PBA are of no import and will create no priority. As a result, the within motions will be moot if there is an assignment under the BIA. In these circumstances, it is submitted the court should determine whether or not an assignment under the BIA will be permitted prior to considering the merits of the within motions.

Re Ivaco (2006), 83 O.R. (3d 108) (C.A.) at para 38

No Wind-Up of Executive Plan

15. To date there has been no wind up of the Executive Plan and no determination of what deficiency would exist in the event of such a wind up. Even if, in the absence of a bankruptcy, a deemed trust existed in respect of the an employer’s statutory obligation in respect of a wind up deficiency (which for the reasons set out below is vigorously disputed), no wind up funding obligation exists and thus no deemed trust can exist unless and until a wind up happens. For this reason alone the motion in respect of the Executive Plan must be dismissed.

No Deemed Trust

16. The obligations of an employer to make contributions to a wound up pension plan are created by subsection 75(1) of the PBA which provides:

75. (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39(3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

17. Subsection 75(1) identifies two distinct obligations. Paragraph 75(1)(a) creates a funding obligation in respect of amounts that on the wind up “have accrued and that have not been paid into the pension fund”. Paragraph 75(1)(b) creates a separate funding obligation in respect of any deficiency that exists in a plan following the wind up.

18. The deemed trusts created by the PBA and relied upon by the moving parties arise pursuant to section 57, which provides:

57. (1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee’s contribution under the pension plan, the employer shall be deemed to hold the money in trust for

the employee until the employer pays the money into the pension fund.

(2) For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from money payable to an employee shall be deemed to be money received by the employer from the employee.

(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

(5) The administrator of the pension plan has a lien and charge on the assets of the employer in an amount equal to the amounts deemed to be held in trust under subsections (1), (3) and (4).

(6) Subsections (1), (3) and (4) apply whether or not the money has been kept separate and apart from other money or property of the employer.

(7) Subsections (1) to (6) apply with necessary modifications in respect of money to be paid to an insurance company that guarantees pension benefits under a pension plan.

19. Subsection 57(4) addresses wind-ups and by its clear terms creates a deemed trust only in respect of “employer contributions accrued to the date of the wind up”. Subsection 57 (4) reflects the employer obligations specifically referred to in paragraph 75(1)(a) of the PBA.

20. While subsection 57(4) by its terms creates a deemed trust in respect of the obligation created by paragraph 75(1)(a), there is no equivalent provision anywhere in the PBA creating a deemed trust in respect of the obligation to fund a wind up deficiency created by paragraph 75(1)(b). By restricting the scope of subsection 57(4) to the obligation covered by paragraph 75(1)(a) (i.e. amounts that have accrued and have not been paid into the pension fund) the Legislature has clearly excluded from any deemed trust pursuant to that subsection the obligation created by paragraph 75(1)(b). In other words, no deemed trust is created in respect

of the amount needed to fund a deficit in a wound up pension plan; the deemed trust exists only in respect of contribution obligations which existed and had not been satisfied at the time of the wind up.¹

21. The absence of any deemed trust in respect of wind up deficiencies has been recognized by commentators:

The PBA does not expressly state whether the funding deficiency on the wind up of a pension plan is secured by the deemed trust, but it appears that the deemed trust is intended to apply to the deficiency to the extent it relates to employer contributions and remittances due and owing to the pension fund on wind up but which have not been paid.

...The deemed trust does not extend to the obligation of an employer to fund pension obligations that have not yet become due or which “crystallize” only upon the wind up of the pension plan.

Ari Kaplan, *Pension Law* (Irwin Law, 2006) p.396

Of particular note to secured creditors will be the fact that the courts have determined that the deemed trust created under the OPBA [Ontario Pension Benefits Act] does not extend to the unfunded pension liability upon wind up of the plan, but is limited to the outstanding unremitted contributions that are past due plus those arising in respect of the stub period. Accordingly while the entirety of the pension fund shortfall remains an obligation of the employer, and an obligation exists under the OPBA to fund this deficiency over a period not exceeding five years from the date of windup, at present this is an unsecured claim on the assets of the debtor. [emphasis added]

Gregory Winfield, “Pension Management in Insolvency and Restructuring: What is at Stake?” (Insight, 2005)

¹ The dates upon which pension plan contributions are due are established by section 4 of Regulation 909. For example, employer contributions for normal service costs are payable in monthly installments and are due 30 days after the month for which they are payable. As a result, even if an employer made all contributions when due, there could for an August 29, 2009 wind up be 60 days of service for which contributions obligations had accrued but were not yet due as at the wind up. It is this type of accrued contribution obligation that is addressed by subsection 57(4) of the PBA.

22. The extent of the deemed trust under the PBA was considered by the Court in *Toronto Dominion Bank v. Usarco Ltd.* In that case Justice Farley (dealing with section 58 of the then PBA which mirrors the current section 57) wrote:

It therefore appears to me that the deemed trust provisions of s. 58(3) and (4) only refer to the regular contributions together with those special contributions which were to have been made but were not. In this situation that would be the regular and special payments that should have been made but were not (as reflected in the report as of December 31, 1988) together with any regular or special payments that were scheduled to have been made by the wind-up date, July 13, 1990, but were not made. This is contrasted with the obligation of Usarco to fully fund its pension obligations as of the wind-up date pursuant to s. 76(1). It is recognized in these circumstances however, that the Bank will have a secured position which will prevail against these additional obligations as to the special payments which have not yet required to be paid into the fund. Sadly, it is extremely unlikely there will be a surplus after taking care of the Bank to allow the pension fund to be fully funded for this (the likelihood being that the wind-up valuation of assets and liabilities of the pension fund will show a deficiency) [emphasis added].

Toronto Dominion Bank v. Usarco Ltd (1991), 42 E.T.R. 235 (Ont. Gen Div)
para. 26

23. In their factum the moving parties under the Executive Plan refer to a passing comment by Justice Farley in the later case of *Re Ivaco* in which, without reasons or reference to his earlier decision in *Usarco*, Justice Farley appeared to suggest that wind up liabilities were subject to the deemed trust. The moving parties fail, however, to cite the decision of the Court of Appeal in *Re Ivaco* which specifically commented on this aspect of Justice Farley's reasons. Justice Laskin writing for a unanimous panel expressed his disagreement with Justice Farley's passing comment in *Re Ivaco* concerning the scope of the deemed trust and expressed agreement with the reasoning in *Usarco*. Justice Laskin wrote:

44. At para. 11 of his decision, the motions judge said that both unpaid contributions and wind-up liabilities are deemed to be held in trust under s. 57(3). In his earlier decision in *Toronto-Dominion Bank v. Usarco* (1991), 42 E.T.R 235, Farley J. said, at para. 25, that the equivalent legislation then in force under the *Pension Benefits Act, 1987*, S.O. 1987, c. 35 referred only to unpaid contributions, not to wind-up liabilities. I think that the statement

in *Usarco* is correct, but I do not need to resolve the issue on this appeal [emphasis added].

Re Ivaco (2006), 83 O.R. (3d 108) (C.A.) affirming [2005] O.J. No. 3337 (O.S.C.J.)

24. It is respectfully submitted that on both the plain language of the PBA and the authorities it is clear that the PBA does not create a deemed trust in respect of an employer's obligation under paragraph 75(1)(b) of the PBA to fund a wind up a deficiency in a pension plan. As there is no such deemed trust, there is no basis for the allegation that Indalex has an obligation to pursue (as the pension plan administrator) or recognize a claim based on such a trust. There is, accordingly, no basis for granting the relief sought by the moving parties in these motions.

Priority of DIP Lenders

25. As stated above, by operation of court order, the Applicants U.S. shareholders have stepped into the shoes of the DIP Lender for the amount of a payment made on a guarantee of Indalex's obligations to the DIP Lenders. Paragraph 45 of the Amended Amended and Restated Initial Order provides:

THIS COURT ORDERS that each of the Administration Charge, the Directors' Charge and the DIP Lenders Charge (all as constituted and defined herein) shall constitute a charge on the property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise (collectively "Encumbrances") in favour of any Person.

26. Paragraph 56 of the Amended Amended and Restated Initial Order provides:

THIS COURT ORDERS that any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order; provided however, the DIP Agent and the DIP Lenders shall be entitled to rely on this Order as issued for all advances made under the DIP Credit Agreement up to and including the date this Order may be varied or amended.

27. The court had, and exercised, authority to order that the DIP Lenders Charge take priority over deemed trusts. The DIP Lenders have relied upon these provisions in the court's order and no steps have been taken to amend or vary those provisions.

Minister of National Revenue v Temple Housing Inc.(2008), 43 C.B.R. (5th) 35
(Alta C.A.)


Re Collins & Aikman Automotive Canada Inc. (2007), 37 C.B.R. (5th) 282
(O.S.C.J.) at paras. 42, 87

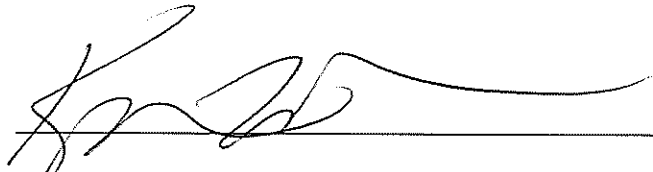
28. Even if, contrary to the above submissions, a provincially created deemed trust existed in respect of the pension deficiencies, any claims pursuant to such deemed trusts would, by the terms of the Amended Amended and Restated Initial Order (which was authorized and made pursuant to a federal statute) rank below the Administration Charge, the Directors' Charge and the DIP Lenders Charge.

PART IV - ORDER REQUESTED

29. The Company requests an order dismissing the within motions with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED





Counsel for the Applicants

SCHEDULE "A"

LIST OF AUTHORITIES

TAB

1. *Re Ivaco* (2006)83 O.R. (3d 108) (C.A.) affirming [2005] O.J. No. 3337 (O.S.C.J.)
2. *British Columbia v Henfrey Samson Belair Ltd.* [1989] 2 S.C.R. 24
3. Ari Kaplan, *Pension Law* (Irwin Law, 2006)
4. Gregory Winfield, "Pension Management in Insolvency and Restructuring: What is at Stake?" (Insight, 2005)
5. *Toronto Dominion Bank v. Usarco Ltd* (1991), 42 E.T.R. 235 (Ont. Gen Div)
6. *Minister of National Revenue v. Temple Housing Inc.*(2008), 43 C.B.R. (5th) 35 (Alta C.A.)
7. *Re Collins & Aikman Automotive Canada Inc.* (2007), 37 C.B.R. (5th) 282 (O.S.C.J.)

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

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