

**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 July 2, 2009)**

July 1, 2009

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PART I – OVERVIEW

1. Upon filing for protection from their creditors under the *Companies' Creditors Arrangement Act* (the "CCAA"), the Applicants determined that it was necessary to suspend payments pursuant to the Indalex supplemental executive retirement plan (the "SERP") payable to certain retired executives (the "Retired Executives") in order to stabilize their business while the Applicants sought a going concern solution. Certain of the Retired Executives¹ (collectively, the "SERP Group") now seek an Order for the reinstatement of their supplementary pension benefits (the "SERP Payments").
2. The Applicants oppose this motion because
 - (i) the claims of the Retired Executives are pre-filing obligations relating to services rendered pre-filing;

¹ Keith Carruthers, Leon Kozierok, Bertram McBride, Max Degen, Eugene D'Iorio, Richard Smith, Robert Leckie and Neil Fraser

- (ii) the reinstatement of the SERP Payments will provide the Applicants with no tangible benefit and will unnecessarily divert precious resources away from the Applicants during the course of these proceedings; and
- (iii) the reinstatement of the SERP Payments will have the effect of giving the Retired Executives preferential treatment for otherwise unsecured debt, which is inequitable vis-à-vis other unsecured creditors and without justification.

Accordingly, the relief sought by the SERP Group should not be granted.

PART II - FACTS

3. On April 3, 2009, the Applicants filed for and obtained protection from their creditors under the CCAA, pursuant to an order (the “Initial Order”) of the Honourable Mr. Justice Morawetz (the “Canadian Proceedings”). Pursuant to the Initial Order, FTI Consulting Canada ULC was appointed as Monitor of the Applicants, and all proceedings against the Applicants were and remain stayed.

Affidavit of Dale Tabinowski sworn June 30, 2009 at para 3 [the “Tabinowski Affidavit”]

4. On April 8, 2009, the Initial Order was amended and restated (the “Amended and Restated Initial Order”) to, *inter alia*, authorize the Applicants to exercise certain restructuring powers and authorize Indalex Limited to borrow funds pursuant to a debtor-in-possession credit agreement among the Applicants, the U.S. Debtors and a syndicate of lenders for which JPMorgan Chase Bank, N.A. is administrative agent (the “DIP Credit Agreement”). By order dated May 12, 2009, the Court further amended the Amended and Restated Initial Order to correct certain references in the Order (now the “Amended Amended and Restated Initial Order”).

Tabinowski Affidavit, at paras 4 and 5

5. While this motion is brought by the SERP Group, there are six other Retired Executives² who are entitled to SERP Payments. Upon commencement of the CCAA proceedings, SERP Payments were suspended and no SERP Payments have been made to the Retired Executives subsequently. While the decision to suspend the SERP Payments was a difficult one, it was a fair decision given that the Applicants ceased making payments in connection with many other pre-filing obligations, including payments to trade creditors, other former employees entitled to pre-filing severance payments and other unsecured creditors.

Tabinowski Affidavit, at paras 8 and 9

6. The SERP is an unfunded and non-registered supplemental pension plan for the Retired Executives, which is a contract among Indalex and the Retired Executives. The SERP is intended as an additional top-up for the Retired Executives. At no time did the Retired Executives negotiate any form of security in respect of the SERP.

Tabinowski Affidavit, at para 11

7. In order to maintain stability while the Applicants seek a going concern solution, it was, and remains, necessary to keep a tight control on costs and cash. Since the beginning of the CCAA proceedings, the Applicants have endeavored to incur only costs necessary for the continuation of their business. The Applicants are in arrears of certain post-filing obligations which resulted in an emergency motion to the Court to approve an amendment to the DIP Credit Agreement for an increase in the borrowings thereunder. The Applicants are now working diligently to bring all arrears current.

Tabinowski Affidavit, at paras 13, 16 -17.

8. The Applicants seek to restructure its business through a going concern sale process. With the assistance of the Monitor, the Applicants have commenced a

² Richard Benson, John Faveri, Fred Granville, Jack Rooney, G.R. Rutledge and Robert Waldron

marketing and sale process (the “Marketing Process”) which was approved by the Court on April 22, 2009. As a result of the Marketing Process, the Applicants have identified a stalking horse bidder (the “Stalking Horse Bidder”). The Applicants (with the exception of Novar Inc.) entered into an asset purchase agreement among the Stalking Horse Bidder, and certain of the Applicants’ U.S. based affiliates (the “Stalking Horse APA”), which will form the basis of an auction to be conducted on July 16, 2009, with a view of having a transaction approved on July 20, 2009. The Stalking Horse Bidder will not be assuming the SERP, and it is unlikely that any other bidder will assume the SERP.

Tabinowski Affidavit, at paras 6-7

9. While the Applicants identify a going concern purchaser, they can only afford to satisfy immediate cash needs that are strictly necessary to continued operations. Survival of the Applicants long enough to achieve a going concern solution is to the ultimate benefit of all stakeholders, including the Retired Executives.

Tabinowski Affidavit, at para 15

PART III – ISSUES

10. The issue is whether this Court should require the Applicants to reinstate SERP Payments to the Retired Executives

PART IV – LAW AND ARGUMENT

Purpose of the CCAA

11. The purpose of the CCAA has been characterized by many courts as involving a broad balancing of a plurality of stakeholder interests. The CCAA was designed to serve a broad constituency of investors, creditors, employees and the public at large.

Uniforet inc., Re (2003), 44 C.B.R. (4th) 158 (QCCA) at para. 19

Re Air Canada (2004), 47 C.B.R. (4th) 189 (Ont. S.C.) at para 27

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101 (Ont. C.A.) at paras 56 and 59

12. In order for an insolvent company to restructure there must be a means of holding the creditors at bay, hence the powers vested in the Court under s.11 of the CCAA.

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 4 C.B.R. (3d) 311 (BC CA), at p. 4

13. A fundamental element in achieving this balancing of interests and of keeping creditors at bay is the court ordered stay imposed under s.11 of the CCAA that temporarily enjoins creditors from making claims against the debtor company. This stay maintains the *status quo* and prevents any creditor from obtaining an advantage over other creditors.

Re Woodward's Ltd. (1993), 17 C.B.R. (3d) 236 (B.C. S.C.) at para. 12

14. The CCAA is a remedial status that ought to be given a purposive interpretation. It is well established that:

- (a) one of the purposes of the CCAA is to preserve the going concern value of debtor companies and avoid liquidation of the company; and
- (b) the court's jurisdiction extends to authorizing the sale of the debtor's business, even in the absence of a plan or creditor vote.

Re Residential Warranty Co. of Canada Inc. (2006), 21 C.B.R. (5th) 57 (Alta. Q.B.) at para 78.

Re Canadian Red Cross Society (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div) at paras. 43 and 45

Citibank Canada v. Chase Manhattan Bank of Canada (1991), 5 C.B.R. (3d) 165 (Ont. Gen. Div.) at p. 16

Re Winnipeg Motor Express Inc. (2008), 49 C.B.R. (5th) 302 (Man. Q.B.) at paras 39 and 41 ["*Re Winnipeg Motor*"]

15. The Retired Executives rely on the decision of *Cliffs Over Maple Bay v. Fisgard Capital Corp.* However, this case can be distinguished on its facts as it involved a debtor who had no active business but who nonetheless sought to stave off its secured creditor indefinitely. While the Court of Appeal, *in obiter*, questioned whether a court should authorize a sale under the CCAA without requiring the matter to be voted upon by its creditors, the foregoing proposition has been criticized in other jurisdictions, and is not consistent with the views of other courts who have accepted that a sale of assets without a plan of arrangement is appropriate in CCAA proceedings.

Cliffs Over Maple Bay v. Fisgard Corp. (2008), 46 C.B.R. (5th) 7 (B.C.C.A.)

Re Winnipeg Motor at paras 39 and 40

16. Contrary to the assertions of the Retired Executives, this is not a “liquidating CCAA”, this is a complex cross-border restructuring involving the going concern sale of the assets of the Applicants and their U.S. based affiliates. Given the integrated nature of these businesses, a cross-border asset sale is the best way to preserve and maximize value for the Applicants’ stakeholders. The Stalking Horse APA represents the baseline of what the Applicants will achieve for their stakeholders in the course of these proceedings. As a result of the Marketing Process, it is anticipated that the Applicants’ business will continue as a going concern, customers will continue to receive supply of goods and services, employees will maintain employment and creditors whose liabilities are not assumed will have an opportunity to claim against the sale proceeds. The anticipated result of these proceedings is a successful going concern solution and accordingly, these proceedings are anything but a “liquidating CCAA”.
17. As is required in any restructuring, including a going concern sale under the CCAA, the Applicants require a means by which they can keep creditors at bay while a going concern purchaser is located and a transaction can be negotiated.

The fact that the Applicants are restructuring by way of a going concern sale is not a justification for the relief requested by the Retired Executives.

Reinstatement of SERP Payments contrary to the purpose of CCAA

18. The powers vested in the court under Section 11 of the CCAA to achieve the purposes and goals of the CCAA include the ability to stay past debts; and the ability to require the continuance of present obligations to the debtor. The SERP Payments are based on services provided pre-filing and accordingly these obligations are pre-filing obligations and, like all pre-filing unsecured creditors, the claims of the Retired Executives are stayed.

Re Collins & Aikman Automotvie Canada Inc. (2007) C.B.R. (5th) 282 at para 88.

Re AbitibiBowater Inc. (reasons May 8, 2009), Quebec 500-11-036133-094 (Quebec Sup. Ct.) at paras. 37-44. [“Re AbitibiBowater”]

Re Nortel Networks Corp. (endorsement June 18 2009), No. 09-CI-7950 (Ontario Superior Court of Justice) [Commercial List] at paras 48 and 67 [“Re Nortel”]

19. Post-filing creditors are engaged and paid only to the extent required to facilitate a going concern solution to the Applicants’ current situation. Current employees are engaged and paid as their services are required for these purposes. The provision of benefits to current employees is crucial to the ongoing business of the Applicants. Without the hard work and dedication of the Applicants’ current employees during these proceedings, the ability of the Applicants’ to locate a purchaser of its business as a going concern would be seriously impaired. In contrast to the current employees, the Retired Executives are no longer providing services to the Applicants.
20. The Retired Executives are unsecured creditors. The SERP Payments are payable pursuant to the SERP, which is simply a contract among Indalex and the Retired Executives. A breach of the SERP gives rise to an unsecured claim against Indalex, and the Retired Executives are stayed from enforcing these payment

obligations. The Retired Executives are not entitled to any priority with respect to the SERP Payments and there is no basis in principle to treat the Retired Employees any differently than other unsecured creditors of the Applicants. The reinstatement of the SERP Payments would represent a significant and improper reordering of the existing priority regime on which parties have relied in advancing pre-filing credit.

Re Nortel at para 80

21. In CCAA proceedings, the courts have granted relief in certain specialized circumstances to permit payment of pre-filing unsecured debt; however, in these cases such payments *were crucial to the ongoing business of the debtor company*. The Applicants' are seeking a going concern solution for the benefit of all stakeholders and their resources should be used for such a purpose. The SERP Payments are not crucial to the ongoing business of the Applicants and such payments offer no benefit to the Applicants whatsoever.

PIC Canada Ltd. v. Great West Stock Farm (1996) Ltd. (2005), 18 C.B.R. (5th) 31 (Sask Q.B.) at para. 6

Mirant Canada Energy Marketing Ltd. (Red) (2004), A.J. No. 331 at para 28

Re Nortel at para 80 an 86

Tabinowski Affidavit, at para 14

22. Pursuant to the Amended Amended and Restated Initial Order, the Applicants are authorized to pay all reasonable expenses incurred by the Applicants in carrying on their business in the ordinary course. The SERP Payments are not payments required to carry on the Applicants' business and accordingly, the Applicants are not authorized to pay the monthly SERP Payments. The Applicants are only authorized to pay pre-filing amounts with the consent of the Monitor if such payments are (i) necessary to preserve the property, business and/or ongoing operation so the Applicants, and (ii) can be made on such terms and conditions as will provide a material benefit to the Applicants and their stakeholders as a whole.

The Retired Executives do not meet the foregoing requirements in respect of the SERP Payments and accordingly, the Applicants are not authorized to pay the monthly SERP Payments.

Amended Amended and Restated Initial Order dated May 12, 2009, s. 8

23. The SERP Payments are payments that remain claims against the Applicants, that are currently suspended and will be addressed once the protection offered by the CCAA has ended. In the event that amounts are available for distribution to unsecured creditors, it is anticipated that a process for such distribution will be undertaken, in which the Retired Executives will be able to participate.

Re AbitibiBowater at para 31

Tabinsowski Affidavit at para 22

Conclusion


24. By staying pre-filing claims, the CCAA provides the necessary latitude to a qualifying debtor to find a going concern solution for the benefits of a broad cross section of stakeholders. In keeping with the bedrock principle of insolvency law, all unsecured creditors should receive a ratable distribution of proceeds on their unsecured claims. It is not necessary or beneficial, in this particular case, to entitle the Retired Executives to payment on their claims in priority to the claims of other unsecured creditors.

PART V – RELIEF SOUGHT

25. The Applicants request that the motion brought by the Retired Executives for reinstatement of the SERP Payments be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

July 1, 2009


FOK _____
KATHERINE MCEACHERN
Counsel for the Applicants

SCHEDULE "A"**LIST OF AUTHORITIES**

1. *Uniforet inc., Re* (2003), 44 C.B.R. (4th) 158 (Q.C.C.A.).
2. *Re Air Canada* (2004), 47 C.B.R. (4th) 189 (Ont. S.C.).
3. *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101 (Ont. C.A.).
4. *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C.C.A.).
5. *Re Woodward's Ltd.* (1993), 17 C.B.R. (3d) 236 (B.C.S.C.).
6. *Re Residential Warranty Co. of Canada Inc.* (2006), 21 C.B.R. (5th) 57 (Alta. Q.B.).
7. *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.).
8. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3d) 165 (Ont. Gen. Div.).
9. *Re Winnipeg Motor Express Inc.* (2008), 49 C.B.R. (5th) 302 (Man. Q.B.).
10. *Cliffs Over Maple Bay v. Fisgard Corp.* (2008), 46 C.B.R. (5th) 7 (B.C.C.A.).
11. *Re Nortel Networks Corp.* (endorsement June 18 2009), No. 09-C1-7950 (Ontario Superior Court of Justice) [Commercial List].
12. *Re Collins & Aikman Automotvie Canada Inc.* (2007) C.B.R. (5th) 282 (Ont. Sup. Crt.).
13. *Re AbitibiBowater Inc.* (reasons May 8, 2009), Quebec 500-11-036133-094 (Que. Sup. Crt.).
14. *PIC Canada Ltd. v. Great West Stock Farm (1996) Ltd.* (2005), 18 C.B.R. (5th) 31 (Sask Q.B.).
15. *Mirant Canada Energy Marketing Ltd. (Red)* (2004), A.J. No. 331.

SCHEDULE "B"

LIST OF STATUTES

Legislation

1. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, section 11

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