

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

**BETWEEN:**

**IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,  
R.S.C. 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**

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**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**

**Plaintiffs**

**- and -**

**DAVID J. MCCALLEN, TIMOTHY STUBBS also known as TIM STUBBS,  
PATRICK LAWLOR, WESLEY ROSS, KEITH F. COOPER, INDALEX LIMITED, 6326765  
CANADA INC., NOVAR INC., and INDALEX HOLDINGS (B.C.) LTD.**

**Defendants**

**MOTION RECORD OF THE RETIREES  
(RETURNABLE FEBRUARY 21, 2012)**

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**Tab 1:**

**Notice of Motion**

**Pgs. 1-6**

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

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

BETWEEN:

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,  
R.S.C. 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

Court File No. CV-09-388836

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**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**

Plaintiffs

- and -

**DAVID J. MCCALLEN, TIMOTHY STUBBS also known as TIM STUBBS,  
PATRICK LAWLOR, WESLEY ROSS, KEITH F. COOPER, INDALEX LIMITED,  
6326765 CANADA INC., NOVAR INC., and INDALEX HOLDINGS (B.C.) LTD.**

Defendants

**NOTICE OF MOTION**

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 (the "Retirees") will make a motion to a judge of the

Commercial List on February 21, 2012 at 10:00 a.m., or as soon after that time as the motion can be heard, at 330 University Avenue, Toronto, Ontario.

**PROPOSED METHOD OF HEARING:** The motion is to be heard orally.

**THE MOTION IS FOR:**

1. An Order, if necessary, allowing for the late service and filing of the within motion record and/or dispensing with the need for service;
2. An Order directing the Registrar to not dismiss the action in Court File number CV-09-388836, further to the Notice that Action will be Dismissed, dated October 11, 2011;
3. An Order, *nunc pro tunc*, lifting the stay of proceedings in the May 12, 2009 Amended Amended and Restated Initial Order of Mr. Justice Morawetz (the "Stay") in Court File number CV-09-388836 to commence the action;
4. An Order that the Plaintiffs in Court File number CV-09-388836 have 90 days to serve the Statement of Claim once the Stay expires;
5. Costs of this motion if opposed; and
6. Such further and other relief as counsel may request and this Honourable Court permit.

**THE GROUNDS FOR THE MOTION ARE:**

1. This Retirees bring this motion for an order directing the Registrar to not dismiss the Action, as there is a stay of proceedings imposed by the May 12, 2009 Amended Amended and Restated Initial Order of Mr. Justice Morawetz (the "Stay"). Additionally, the Retirees' seek an order, *nunc pro tunc* lifting the Stay to commence the action in Court File number CV-09-388836 (the "Action").
2. The Action was commenced on October 9, 2009 by the Retirees regarding amounts owing to them (the "Unpaid Pension Benefits") under the Retirement Plan for the Executive Employees of Indalex Limited and Associated Companies (the "Executive Plan") and the Supplemental Executive Retirement Plan (the "Supplemental Plan"). The



Defendants are the Applicants of the within CCAA proceeding and the directors and officers of the Applicants.

3. The Action was issued after the Retirees concurrently claimed for the Unpaid Pension Benefits through:
  - (a) a motion seeking a declaration that funds held in reserve by the Monitor are subject to deemed trusts in favour of the beneficiaries of the Executive Plan (the "Deemed Trust Motion"); and
  - (b) a claim process established by a July 30, 2009 Court order in the CCAA proceedings regarding claims against Indalex and the directors and officers of Indalex (the "Claims Process").
4. As a result of the Deemed Trust Motion, on April 7, 2011, the Ontario Court of Appeal ordered the Monitor to pay from a reserve fund into the Executive Plan an amount sufficient to satisfy the deficiency. This decision has been appealed to the Supreme Court of Canada and is scheduled to be heard on June 5, 2012.
5. There will unlikely be any assets from the CCAA proceedings to pay unsecured creditors. There is a directors' and officers' charge provided for in the May 12, 2009, CCAA Order. However, the Monitor took the position that the D&O Claims did not trigger the indemnity in favour of the directors and officers that is secured by the directors' charge. This is disputed by the Retirees. A motion dealing with this issue was heard by Justice Campbell on November 20, 2010, and the decision is currently under reserve.
6. The granting of this motion will not affect the CAAA proceeding of Indalex. Indalex is a shell company that does not operate. There is no prejudice to any party or creditor of Indalex.
7. The Retirees want to preserve their rights to proceed with the action if the Supreme Court of Canada allows the appeal;
8. Rules 2.03, 3.02 and 37 of the *Rules of Civil Procedure*;

9. The *Companies' Creditors Arrangement Act*, R.S.C. C. C-36, as amended, including, sections 11.02 (1), and 11.03 and their predecessor section; and
10. Such further and other grounds that counsel may advise and this Honourable Court permit.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:

1. The affidavit of Andrea McKinnon, sworn February 1, 2012;
2. Such further and other material as counsel may advise and this Honourable Court permit.

February 9, 2012

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AND TO: **PATRICK LAWLOR**

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**Tab 2:**

**Affidavit of  
Andrea McKinnon**

**Pgs. 7-15**

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

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

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,  
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INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADA INC.  
and NOVAR INC.**

Applicants

---

Court File No. CV-388836

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**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**

Plaintiffs

- and -

**DAVID J. MCCALLEN, TIMOTHY STUBBS also known as TIM STUBBS,  
PATRICK LAWLOR, WESLEY ROSS, KEITH F. COOPER, INDALEX LIMITED,  
6326765 CANADA INC., NOVAR INC., and INDALEX HOLDINGS (B.C.) LTD.**

Defendants

**AFFIDAVIT OF ANDREA MCKINNON  
(sworn February 8, 2012)**

I, Andrea McKinnon, of the City of Toronto, in the Province of Ontario, MAKE OATH  
AND SAY:

1. I am a lawyer with the law firm, Koskie Minsky, 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 (the "Retirees"). The Retirees are plaintiffs in Court File number CV-09-388836 (the "Action").

2. I swear this affidavit in support of a motion seeking an order directing the Registrar to not dismiss the Action, as there is a stay of proceedings imposed by the May 12, 2009 Amended Amended and Restated Initial Order of Justice Morawetz (the "Stay"). Additionally, the Retirees' seek an order, *nunc pro tunc*, lifting the Stay of proceedings to commence the action in Court File number CV-09-388836 (the "Action").

3. The Action was commenced on October 9, 2009 by the Retirees regarding amounts owing to them (the "Unpaid Pension Benefits") under the Retirement Plan for the Executive Employees of Indalex Limited and Associated Companies (the "Registered Plan") and the Supplemental Executive Retirement Plan (the "SERP"). The Defendants are the Applicants of the within CCAA and the alleged directors and officers of the Applicants.

4. The Action was issued after the Retirees made claims for the Unpaid Pension Benefits through a Deemed Trust Motion and a Claims Process in the CCAA Court. Given the Stay of proceedings and that the Deemed Trust Motions and Claims Process have not been resolved, the Action remains stayed. These are described in detail below.

5. The granting of this motion will not affect the reorganization of Indalex. Indalex is a shell company. There is no prejudice to any party or creditor of Indalex.

### **Background**

6. The Retirees worked at Indalex for many years and in some cases, over thirty years. Through their years of service and employment with Indalex, the Retirees earned an entitlement to Pension Benefits through two pension plans to be paid to them for their lifetime:

- a) the Retirement Plan for the Executive Employees of Indalex Limited and Associated Companies (the aforementioned "Registered Plan"); and
- b) the Supplemental Executive Retirement Plan (the aforementioned "SERP").

7. The Registered Plan has a CRA Registration Number of 0455626. It is a defined benefit

Pension Plan and the benefits are paid from a separate pension trust fund. The amount of Pension Benefit that can be paid from the Registered Plan is capped by a maximum stipulated by the *Income Tax Act* R.S.C. 1985, c. 1.

8. The SERP is also a defined benefit pension plan but does not have a separate pension trust fund. It was established to provide Pension Benefits in addition to the benefits from the Registered Plan which are limited by the *Income Tax Act* R.S.C. 1985, c. 1. The SERP benefits were paid by Indalex.

9. According to the terms of the Registered Plan and the SERP, the Retirees and/or their spouses upon their passing, are entitled to receive the above-described pension benefits for their lifetime.

10. The Retirees were contractually promised that their Registered Plan and SERP Pension Benefit payments would continue to be paid by Indalex for their lifetime, and in some cases with survivor benefits to be paid to their surviving spouses. The Retirees relied on the Registered Plan and SERP benefits being paid to them when planning their retirements.

#### **Indalex's CCAA Proceedings**

11. On April 3, 2009, Indalex obtained protection from its creditors under the *Companies' Creditors Arrangement Act* R.S., 1985, c. C-36, pursuant to an Order of the Ontario Superior Court of Justice, Commercial List (the "CCAA Proceedings"). FTI Consulting Canada was appointed as Monitor (the "Monitor").

12. Indalex's CCAA Proceedings were brought in conjunction with proceedings under Chapter 11 of the *United States Bankruptcy Code*, commenced by way of voluntary petition filed on March 20, 2009, in the United States Bankruptcy Court for the District of Delaware (the "Chapter 11 Proceedings").

13. With respect to the CCAA Proceedings, the Court issued an Amended Amended and Restated Order, dated May 12, 2009, which is attached hereto as **Exhibit "A"**. This order, *inter alia*, grants a stay of proceedings against Indalex and the Directors (the aforementioned "Stay").

14. The Stay period has been extended a number of times and currently expires 30 days following the release of the Supreme Court of Canada's decision on the appeals in *Sun Indalex Finance, LLC, et al. v. United Steelworkers et al.* A true copy of the January 23, 2012 Order of



Justice Morawetz is attached hereto as **Exhibit "B"**.

15. A true copy of the Monitor's Seventeenth Report dated January 11, 2012 is attached hereto as **Exhibit "C"**. It sets out the procedural chronology of the CCAA Proceedings.

#### **Indalex is Sold**

16. The sale of Indalex to SAPA Holdings was approved by the Court on July 20, 2009. One of the terms of the sale was that SAPA would not take on any of Indalex's liabilities under the Registered Plan nor the SERP.

17. At this time, as a result of the reservation of rights of the Retirees and the United Steelworkers (the "USW"), the Court ordered the Monitor to hold in reserve \$6.75 million of the sale proceeds, an amount approximating the deficiencies in the Registered Plan and the "Salaried Pension Plan."

#### **The Directors Resign**

18. On or about July 31, 2009, the Defendants in the Action, David J. McCallen, Tim Stubbs and Patrick Lawlor executed or purported to execute resignations with respect to being directors of Indalex.

19. On or around July 31, 2009, at the time of the sale of Indalex to SAPA, David J. McCallen, Tim Stubbs, Wesley Ross and Patrick Lawlor assumed management positions with SAPA. If the directors did validly resign, it is believed that they did so without replacement. At or around this time, Keith Cooper managed or supervised the management of the business and affairs of Indalex.

#### **The Claims Process**

20. On July 30, 2009, the Court issued a Claims Procedure Order in the CCAA Proceedings, regarding claims against Indalex ("Claims") and the directors and officers ("D&O Claims") of Indalex (collectively the "Claims Process"). A copy of this Order is attached hereto as **Exhibit "D"**.

21. As part of the Claims Process, the Retirees filed claims against Indalex, as well as the directors and officers of Indalex regarding the deficiency in the Registered Plan and the unpaid SERP payments.

22. According to the Monitor's Seventeenth Report, attached hereto at Exhibit "C", the Monitor has held the determination as to the validity of unsecured Claims in abeyance pending a determination as to whether there will be funds available to distribute to unsecured creditors. The Monitor has indicated that it appears that there will not be any funds available to unsecured creditors.

23. The Monitor took the position that the D&O Claims did not trigger the indemnity in favour of the directors and officers that is secured by the directors' charge provided for in the May 12, 2009, CCAA Order. This is disputed by the Retirees.

24. The Monitor brought a motion to release the directors' charge and for a declaration that none of the D&O Claims are claims for which the Applicants are required to indemnify, which was opposed by the Retirees (the "D&O Motion"). The D&O Motion was heard by Justice Campbell on November 20, 2010, and the decision is currently under reserve.

#### **The Deemed Trust Motions**

25. On August 28, 2009, the Retirees and the USW brought motions seeking declarations that the funds held in Reserve by the Monitor are subject to deemed trusts in favour of the beneficiaries of the Registered Plan and the Salaried Pension Plan, respectively (the "Deemed Trust Motions").

26. On the same date, Indalex brought a motion for leave to lift the stay of proceedings for the purpose of allowing one or more of the Applicants to file an assignment in bankruptcy (the "Bankruptcy Leave Motion").

27. The Deemed Trust Motions and the Bankruptcy Leave Motion were heard by Justice Campbell on August 28, 2009. On February 18, 2010, Justice Campbell released written reasons dismissing the motions.

28. On April 7, 2011, the Court of Appeal for Ontario allowed an appeal of the Deemed Trust Motion. The Court of Appeal for Ontario ordered the Monitor to pay from the Reserve fund into each of the Salaried Pension Plan and the Registered Plan an amount sufficient to satisfy the deficiencies in each plan (the "CA Pension Decision"). Additionally, the Court of Appeal for Ontario ordered that Indalex breached its fiduciary duties and imposed a constructive trust over the Reserve Fund regarding the deficiencies in both plans. A true copy of this

decision is attached hereto as **Exhibit "E"**.

29. The US Chapter 7 Trustee, Sun Indalex and the Monitor, on behalf of Indalex, filed applications for leave to appeal the CA Pension Decision to the Supreme Court of Canada (the "SCC Leave Applications").

30. The SCC Leave Applications were granted by the Supreme Court of Canada on December 1, 2011 and Notices of Appeal were filed.

31. On January 27, 2012, the Supreme Court of Canada granted the Retirees' motion to expedite, and set the hearing date for June 5, 2012. A true copy of this order is attached hereto as **Exhibit "F"**

#### **Indalex terminates SERP benefits for all Retirees**

32. In a letter dated April 9, 2009, received sometime thereafter, and without any prior notice, Indalex wrote to all or most of the Retirees indicating that it will stop paying the SERP benefits to the Retirees. This was at the start of the CCAA Proceeding. Prior to this time, the SERP benefits were paid to the payable Retirees.

#### **The Registered Plan is Abandoned**

33. Indalex is now an insolvent shell company. The Registered Plan is wound up. The expectation of this wind up was first communicated to the Retirees on or about July 13, 2009, by the Monitor in the CCAA proceedings.

34. There is approximately \$3.25 million owing to the plan.

35. Around early April 2010, the Retirees received a letter from the actuarial firm Morneau Sobeco ("Morneau"). Morneau was appointed the administrator of the Registered Plan after it was abandoned by Indalex. The letters advised the Retirees that their monthly pension benefits were being cut by 35% due to the underfunding of the Registered Plan by Indalex. A true copy of one of these letters is attached here to as **Exhibit "G"**.

36. Between SERP and the Registered Plan, the Retirees have lost approximately one half to two thirds of their pension benefits. The following chart summarizes the Retirees' entitlements under the SERP and Registered Plan and the amount that each are actually receiving:

Retiree	Supplemental Plan Entitlement (per month)	Eliminated Supplemental Plan Payment (current)	Executive Plan Entitlement (per month)	Reduced Executive Plan Payment (per month)	Total Pension Entitlement (per month)	Current Actual Payment (per month)	% of loss of pension benefits
Leon Kozierok	\$4,326.00	\$0.00	\$3,600.14	\$2,340.09	\$7,926.14	\$2,340.09	70%
Eugene D'Iorio	\$2,249.33	\$0.00	\$1,583.33	\$1,029.16	\$3,832.66	\$1,029.16	73%
John Favari	\$329.17	\$0.00	\$4,158.12	\$2,702.78	\$4,487.29	\$2,702.78	40%
Ken Waldron	\$1,483.12	\$0.00	\$597.76	\$388.54	\$2,080.88	\$388.54	81%
Neil Fraser	\$2,893.97	\$0.00	\$1,722.22	\$1,119.44	\$4,616.19	\$1,119.44	76%
Jack Rooney	\$134.42	\$0.00	\$1,426.56	\$927.26	\$1,560.98	\$927.26	41%
Fred Granville	\$108.00	\$0.00	\$741.52	\$481.99	\$849.52	\$481.99	43%
Bertram McBride	\$2,082.92	\$0.00	\$5,833.33	\$3,791.66	\$7,916.25	\$3,791.66	52%
Richard Benson	\$1,466.17	\$0.00	\$3,248.13	\$2,111.28	\$4,714.30	\$2,111.28	55%
Keith Carruthers	\$3,570.50	\$0.00	\$3,958.35	\$2,572.93	\$7,528.85	\$2,572.93	66%
Max Degen	\$645.59	\$0.00	\$3,981.98	\$2,588.29	\$4,627.57	\$2,588.29	44%
Bob Leckie	\$2,394.45	\$0.00	\$944.45	\$771.76	\$3,338.90	To be commenced	77%
Richard Smith	\$3,831.74	\$0.00	\$1,364.02	\$886.61	\$5,195.76	To be commenced	83%
Douglas Williams	\$1,106.77	\$0.00	\$1,552.44	\$1,009.09	\$2,659.21	\$1,009.09	62%

37. The Retirees were a dynamic work force that built and operated Indalex into a world class, modern, efficient and very profitable business over many years.

38. The spouses of all or many of the Retirees have no income. The Retirees and their families are entirely reliant on the Pension Benefits they earned for the work they performed for Indalex. The reduction in the Registered Plan, compounded by the cessation of the SERP Benefits has caused a significant and sudden drop in their monthly retirement, has caused immediate hardship to their families. The Retirees and their spouses require these Pension Benefits in order to cover their daily living and health expenses. All or many of the Retirees' spouses are dependent on the Retirees' Pension Benefits and will require these funds to cover their living expenses on passing of their spouse.

39. The Retirees are too old to find new employment that would compensate them for the

termination of their Registered Plan and SERP Pension Benefits.

40. The Retirees have unsuccessfully tried to and continue to try to execute against and/or obtain against Indalex all or part of the deficiency in the Registered Pension Plan and the unpaid amounts owing under the SERP.

**The Action**

41. The Action was commenced on October 9, 2009, after the Deemed Trust Motions were brought and after Claims and D&O Claims were filed. A true copy of the Statement of Claim is attached hereto as **Exhibit "H"**.

42. Given the Stay of proceedings and that the Deemed Trust Motions and Claims Process have not been resolved, the Action remains stayed.

43. On October 11, 2011, the Registrar sent a Notice that Action will be dismissed, a true copy of which is attached hereto as **Exhibit "I"**.

44. On November 14, 2011, our firm wrote to the Registrar advising that the matter is currently stayed because of the Stay of Proceedings and requested that the Action not be dismissed. A true copy of this letter, without attachments is attached hereto as **Exhibit "J"**.

45. The Registrar advised that a motion would need to be brought to stop the action from being administratively dismissed. A true copy of the email exchange dated November 28, 2011 between Mr. Demetrios Yiokaris of Koskie Minsky LLP and the lawyers for the Monitor and the directors in the CCAA Proceeding memorializing this information are attached hereto as **Exhibit "K"**.

46. A motion was set down in the regular court list for January 2012. Out of an abundance of caution, this motion was then set down herein before the Commercial List as it seeks relief to lift the CCAA Stay *nunc pro tunc* to commence the Action.


47. The granting of this motion will not affect the reorganization of Indalex. As indicated above, Indalex is a shell company. There is no prejudice to any party or creditor of Indalex.

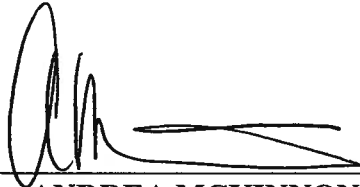
48. This motion is brought to preserve the Action, particularly if the Retirees are unsuccessful before the Supreme Court of Canada regarding the Deemed Trust Appeal and the D&O Motion. However, if the Retirees are successful on those matters and receive payment

regarding the deficiency in the Registered Plan and the unpaid SERP payments, then the Action becomes moot.

49. I swear this Affidavit in good faith and for no improper purpose.

SWORN BEFORE ME at the city of  
Toronto in the Province of Ontario, on  
February 8, 2011.

  
\_\_\_\_\_  
Demetrios Yiokatis (LSUC# 45852L)  
Commissioner for Taking Affidavits

  
\_\_\_\_\_  
ANDREA MCKINNON

**Tab 3:**

**Exhibit A**

**Pgs. 16-42**

This is *Exhibit "A"* referred to in the  
affidavit of  
ANDREA McKINNON  
sworn before me, this 8<sup>TH</sup>  
day of FEBRUARY, 2012



.....  
Demetrios Yiokaris  
A Commissioner for taking affidavits, etc.



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

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

THE HONOURABLE MR.	)	TUESDAY, THE
	)	
JUSTICE MORAWETZ	)	12 <sup>th</sup> DAY OF MAY, 2009



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. (the "Applicants")

**ORDER**

**THIS MOTION** made by the Applicants pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, for an Order amending the amended and restated initial order of the Honourable Justice Morawetz dated April 8, 2009 (the "Amended and Restated Initial Order"), was heard this day at 330 University Avenue, Toronto, Ontario.

**ON READING** the material filed, including the Notice of Motion and the Third Report of the Monitor, FTI Consulting Canada ULC, and on hearing the submissions of counsel for the Applicants, counsel for the Monitor, and counsel for the JPMorgan Chase Bank, N.A., and on being advised that the Applicants' Service List was served with the Motion Record herein;

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1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record herein be and is hereby abridged and that the Motion is properly returnable today and service on any interested party other than those parties served is hereby dispensed with.
2. **THIS COURT ORDERS AND DECLARES** that the Amended and Restated Initial Order is hereby amended in the form attached hereto as Schedule "A".



ENTERED AT / INSCRIT A TORONTO  
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LE / DANS LE REGISTRE NO.:

MAY 12 2009

PER / PAR: 

- 3 -

**SCHEDULE "A"**

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

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

THE HONOURABLE MR.	)	TUESDAY, THE
	)	
JUSTICE MORAWETZ	)	12 <sup>th</sup> DAY OF MAY, 2009

· 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. (the "Applicants")

**AMENDED AMENDED AND RESTATED INITIAL ORDER**

THIS APPLICATION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") was heard this day at 330 University Avenue, Toronto, Ontario.

WHEREAS AN INITIAL ORDER in this matter was issued on April 3, 2009, which order was subsequently amended and restated by an order dated April 8, 2009, and such order is hereby further amended and restated.

ON READING the affidavit of Timothy R.J. Stubbs sworn April 3, 2009 and the Exhibits thereto, the supplemental affidavit of Patrick Lawlor sworn April 8, 2009 and the Exhibits thereto, (the "Supplemental Affidavit"), the affidavit of Michelle Schwartzberg sworn May 6, 2009 and the Exhibits thereto, the pre-filing report of FTI Consulting Canada ULC ("FTI Canada" or the "Monitor") in its capacity as proposed Monitor and the First Report of the Monitor for the Applicants, and on hearing the submissions of counsel for the Applicants, counsel for the Monitor, and counsel for the DIP Agent, JPMorgan Chase Bank, N.A. ("JPM")

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under the Prepetition Credit Agreement (in such capacity, the "Prepetition Agent") and as administrative agent for the proposed DIP Lenders (in such capacity, the "DIP Agent"), and on reading the consent of FTI Canada to act as the Monitor,

#### **SERVICE**

1. THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged so that this Application is properly returnable today and hereby dispenses with further service thereof.

#### **APPLICATION**

2. THIS COURT ORDERS AND DECLARES that the Applicants are companies to which the CCAA applies.

#### **PLAN OF ARRANGEMENT**

3. THIS COURT ORDERS that the Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court one or more plans of compromise or arrangement with respect to one or more of the Applicants (hereinafter referred to as the "Plan") between, *inter alia*, the Applicants and one or more classes of their secured and/or unsecured creditors as they deem appropriate.

#### **POSSESSION OF PROPERTY AND OPERATIONS**

4. THIS COURT ORDERS that the Applicants shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "Property"). Subject to further Order of this Court, the Applicants shall continue to carry on business in a manner consistent with the preservation of their businesses (the "Business") and Property. The Applicants shall be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "Assistants") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

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5. THIS COURT ORDERS that the Applicants are authorized and directed to remit to the DIP Agent immediately upon the Applicants' receipt thereof or otherwise in accordance with the Applicants' current practices all cash, monies and collection of account receivables and other book debts (collectively, "Cash Collateral") in its possession or control and all Cash Collateral so remitted shall be applied in accordance with the DIP Documents. The DIP Agent is hereby authorized, as of the Effective Date (as defined in the DIP Credit Agreement, as defined below), to (i) send a notice to each Receivables Account Bank (as defined in the Canadian Security Agreement referred to in the DIP Credit Agreement) to commence a period during which the applicable Receivables Account Bank shall cease complying with any instructions originated by any applicable Applicant and shall comply with instructions originated by the DIP Agent directing dispositions of funds, without further consent of the applicable Applicant, and (ii) apply (and allocate) the funds in each Receivables Account (as defined in the Canadian Security Agreement referred to in the DIP Credit Agreement) pursuant to sections 2.09(d) of the DIP Credit Agreement without further order or approval of this Court. Each Receivables Account Bank is hereby authorized to comply with any instructions originated by the DIP Agent on or after the Effective Date directing disposition of funds, without further consent of the applicable Applicant or further order or approval of this Court, and is further authorized to comply with any instructions delivered by the DIP Agent or JPM in its capacity as Prepetition Agent under that certain Credit Agreement among, *inter alia*, the Applicants, dated May 21, 2008 as amended from time to time (the "Prepetition Credit Agreement") to such Receivables Account Bank prior to the Effective Date directing disposition of funds, without further consent of the applicable Applicant or further order or approval of this Court. As of the Effective Date, each "Deposit Account Control Agreement" and "Receivables Account Control Agreement" (as each such term is defined in the Domestic Security Agreement or the Canadian Security Agreement referred to in the Prepetition Credit Agreement) will continue and remain in full force and effect, in each case substituting the Prepetition Agent as the secured party thereunder with the DIP Agent. The Applicants shall maintain their cash management and accounts receivable collection system (the "Cash Management System") in existence prior to the date of this Order, including the Collateral Accounts (as defined below) associated therewith. Each Receivable Account Bank shall not be under any obligation whatsoever to inquire into the propriety validity, or legality of any transfer, payment, collection, or other action taken under this paragraph, or as to the use or application by

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the Applicants of funds transferred, paid, collected, or otherwise dealt with in accordance with this paragraph, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Applicants, pursuant to the terms of this paragraph or any documentation applicable to the Cash Management System, and shall be, in its capacity as a Receivable Account Bank, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

6. [RESERVED]

7. THIS COURT ORDERS that subject to the terms of the DIP Documents (as 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; and
- (b) the fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings, at their standard rates and charges;

8. THIS COURT ORDERS that, except as otherwise provided to the contrary herein and pursuant to the terms and conditions of the DIP Documents, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course after the date of this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

- (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services;

- (b) payment for goods or services actually supplied to the Applicants following the date of this Order; and
- (c) with the consent of the Monitor, in consultation with the DIP Lenders or their financial advisors, costs and expenses incurred prior to the date of this Order, up to the maximum amount approved by the DIP Lenders pursuant to the DIP Credit Agreement, where in the opinion of the Applicants and the Monitor such payments (i) are necessary to preserve the Property, Business and/or ongoing operations of 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.

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



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creditors and which are attributable to or in respect of the carrying on of the Business by the Applicants.

10. THIS COURT ORDERS that until such time as an Applicant delivers a notice in writing to repudiate a real property lease in accordance with paragraph 12(c) of this Order (a "Notice of Repudiation"), the Applicant shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Applicant and the landlord from time to time ("Rent"), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any arrears relating to the period commencing from and including the date of this Order shall also be paid. Upon delivery of a Notice of Repudiation, the Applicant shall pay all Rent due for the notice period stipulated in paragraph 12(c) of this Order, to the extent that Rent for such period has not already been paid.

11. THIS COURT ORDERS that, except as specifically permitted herein and the DIP Documents or with the consent of the Monitor and the DIP Agent, the Applicants are hereby directed, until further Order of this Court:

- (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of this date; provided, however, that the Applicants shall make all such payments under the Prepetition Credit Agreement as required pursuant to the terms of the DIP Documents and contemplated in the Applicants' cash flow projections and budget approved by the DIP Agent;
- (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of the Property; and
- (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

**RESTRUCTURING**

12. THIS COURT ORDERS that the Applicants shall, subject to such covenants as may be contained in the DIP Documents (as hereinafter defined), have the right to:

- (a) with the consent of the Monitor and the DIP Agent, permanently or temporarily cease, downsize or shut down any of its business or operations and to dispose of redundant or non-material assets not exceeding \$250,000 in any one transaction or \$1,000,000 in the aggregate, subject to paragraph 12(c) if applicable;
- (b) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate on such terms as may be agreed upon between the Applicant and such employee, or failing such agreement, to deal with the consequences thereof in the Plan;
- (c) in accordance with paragraphs 13 and 14, vacate, abandon or quit the whole but not part of any leased premises and/or repudiate any real property lease and any ancillary agreements relating to any leased premises, on not less than seven (7) days notice in writing to the relevant landlord on such terms as may be agreed upon between the Applicant and such landlord, or failing such agreement, to deal with the consequences thereof in the Plan;
- (d) repudiate such of its arrangements or agreements of any nature whatsoever, whether oral or written, other than collective agreements, as the Applicant deems appropriate on such terms as may be agreed upon between the Applicant and such counter-parties, or failing such agreement, to deal with the consequences thereof in the Plan; and
- (e) pursue all avenues of refinancing and offers for material parts of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing or any sale (except as permitted by subparagraph (a), above),

all of the foregoing to permit the Applicant to proceed with an orderly restructuring of the Business (the "Restructuring").

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13. THIS COURT ORDERS that each Applicant shall provide each of the relevant landlords with notice of the Applicant's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Applicant's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicant, or by further Order of this Court upon application by the Applicant on at least two (2) days notice to such landlord and any such secured creditors. If the Applicant repudiates the lease governing such leased premises in accordance with paragraph 12(c) of this Order, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in paragraph 12(c) of this Order), and the repudiation of the lease shall be without prejudice to the Applicant's claim to the fixtures in dispute.

14. THIS COURT ORDERS that if a Notice of Repudiation is delivered, then (a) during the notice period prior to the effective time of the repudiation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the applicable Applicant and the Monitor 24 hours' prior written notice, and (b) at the effective time of the repudiation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicant in respect of such lease or leased premises and such landlord shall be entitled to notify the Applicant of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

#### **NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY**

15. THIS COURT ORDERS that until and including May 1, 2009, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, except with the written

consent of the applicable Applicant, the Monitor and the DIP Agent, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

#### **NO EXERCISE OF RIGHTS OR REMEDIES**

16. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the applicable Applicant and the Monitor, or leave of this Court, provided that nothing in this Order shall (a) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on, (b) exempt the Applicants from compliance with statutory or regulatory provisions relating to health, safety or the environment, (c) prevent the filing of any registration to preserve or perfect a security interest, or (d) prevent the registration of a claim for lien.

#### **NO INTERFERENCE WITH RIGHTS**

17. THIS COURT ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicants, except with the written consent of the relevant Applicant and the Monitor, or leave of this Court.

#### **CONTINUATION OF SERVICES**

18. THIS COURT ORDERS that during the Stay Period, all Persons having oral or written agreements with an Applicant or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, employee benefits, transportation, services, utility or other services to the Business or an Applicant (including, where a notice of termination may have been given with an effective date after the date of this Order), are hereby restrained until further Order of this Court from discontinuing, altering,

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interfering with or terminating the supply of such goods or services as may be required by an Applicant, and that the Applicants shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with normal payment practices of the Applicants or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court.

#### **NON-DEROGATION OF RIGHTS**

19. THIS COURT ORDERS that, notwithstanding anything else contained herein, no creditor of the Applicants shall be under any obligation after the making of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

#### **PROCEEDINGS AGAINST DIRECTORS AND OFFICERS**

20. THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.5(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of an Applicant with respect to any claim against the directors or officers that arose before or after the date hereof and that relates to any obligations of the Applicant whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicant, if one is filed in respect of the Applicant, is sanctioned by this Court or is refused by the relevant creditors or this Court.

#### **DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE**

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 hereof, to make payments of the nature referred to in subparagraphs 7(a), 9(a), 9(b), 9(c) and 9(d) of this 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.

22. THIS COURT ORDERS that the directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "Directors' Charge") on the Property, which charge shall not exceed an aggregate amount of U.S.\$3,300,000, as security for the indemnity provided in paragraph 21 of this Order. The Directors' Charge shall have the priority set out in paragraphs 42 and 45 herein.

23. THIS COURT ORDERS that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 21 of this Order, or the insurer fails to fund defence costs on a timely basis; provided, however, any defence costs paid in respect of the same claim by the insurer shall first be used to reimburse the amounts paid under this paragraph to fund such costs.

#### **APPOINTMENT OF MONITOR**

24. THIS COURT ORDERS that FTI Canada is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Property and the Applicants' conduct of the Business with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and their respective shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations.

25. THIS COURT ORDERS that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

- (a) monitor the Applicants' receipts and disbursements;

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- (b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;
- (c) assist the Applicants, to the extent required by the Applicants, in their dissemination, to the DIP Agent and its counsel on a periodic basis of financial and other information as agreed to between the Applicants and the DIP Agent which may be used in these proceedings including reporting on a basis to be agreed with the DIP Agent;
- (d) advise the Applicants in their preparation of the Applicants' cash flow statements and any reporting required by the DIP Agent, which information shall be reviewed with the Monitor and delivered to the DIP Agent and its counsel on a periodic basis, as agreed to by the DIP Agent;
- (e) advise the Applicants in their development of any one or more Plans and any amendments to such Plan or Plans;
- (f) assist the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on any Plan or Plans;
- (g) have full and complete access to the books, records and management, employees and advisors of the Applicants and to the Business and the Property to the extent required to perform its duties arising under this Order;
- (h) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order, including being at liberty to retain and utilize the services of entities related to the Monitor as may be necessary to perform its duties hereunder;
- (i) be at liberty to act as a Foreign Representative in any foreign proceedings in respect of the Applicants;

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- (j) consider, and if deemed advisable by the Monitor, prepare a report and assessment on the Plan;
- (k) advise and assist the Applicants, as requested in its negotiations with suppliers, customers, creditors and other stakeholders; and
- (l) perform such other duties as are required by this Order or by this Court from time to time.

26. THIS COURT ORDERS that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

27. THIS COURT ORDERS that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "Environmental Legislation"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

28. THIS COURT ORDERS that the Monitor shall provide the DIP Agent and any other creditor of an Applicant with information provided by the Applicant in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor



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shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by an Applicant is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the relevant Applicant may agree.

29. THIS COURT ORDERS that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

30. THIS COURT ORDERS that the Monitor, counsel to the Monitor, counsel to the Applicants and counsel for the Applicants' directors and officers shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicants on a weekly basis and, in addition, the Applicants are hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Applicants, retainers in the amounts of \$50,000, each, respectively, and a retainer to counsel for the Applicants' directors and officers in the amount of \$20,000, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

31. THIS COURT ORDERS that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

32. THIS COURT ORDERS that the Monitor, counsel to the Monitor, the Applicants' counsel and counsel for the Applicants' directors and officers shall be entitled to the benefit of and are hereby granted a charge (the "Administration Charge") on the Property, which charge shall not exceed an aggregate amount of U.S.\$500,000 as security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both

before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 42 and 45 hereof.

#### **DIP FINANCING**

33. THIS COURT ORDERS that the Canadian Subsidiary Borrower (as defined in the DIP Credit Agreement) is hereby authorized and empowered to obtain, borrow and repay under a credit facility pursuant to an agreement, substantially in the form of Exhibit "D" to the Supplemental Affidavit (subject to such non-material amendments thereto as may be consented to in advance to the Monitor) (the "DIP Credit Agreement") among the Applicants, Indalex Holdings Finance, Inc., Indalex Holding Corp., the non-Applicant affiliates party thereto, the lenders party thereto (the "DIP Lenders") and the DIP Agent as administrative agent for the purposes set out in the DIP Credit Agreement provided that the aggregate principal amount of the borrowings by the Applicants under such credit facility outstanding at any time shall not exceed a sub-facility in the amount of U.S. \$24,360,000 and shall be made in accordance with the terms of the DIP Loan Documents.

34. THIS COURT ORDERS that the Applicants other than Indalex Limited are hereby authorized and empowered to guarantee to and in favour of the DIP Agent and the DIP Lenders the Canadian Obligations under the DIP Credit Agreement (as those are defined in the DIP Credit Agreement).

35. [RESERVED]

36. THIS COURT ORDERS that the Applicants are hereby authorized and empowered to guarantee to and in favour of the DIP Agent and the DIP Lenders the "Secured Obligations" subject to and in accordance with the DIP Credit Agreement (as those terms are defined in the DIP Credit Agreement).

37. THIS COURT ORDERS that notwithstanding paragraph 36, the guarantee by the Applicants of the Secured Obligations under the DIP Credit Agreement in an amount equal to the amount of any reduction of the U.S. Revolving Exposure (as defined in the Prepetition Credit Agreement) plus the amount of the Swap Obligations (as defined in the DIP Credit Agreement) after the Effective Date shall not be enforceable only to the extent that this Court issues an order

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declaring that any guarantee given by the Applicants and any security granted by the Applicants related to such guarantee in respect of the U.S. Guaranteed Obligations under the Prepetition Credit Agreement is voidable or not valid, not binding or not enforceable, provided, however, that the guarantee granted by the Applicants under the DIP Credit Agreement as to all other amounts constituting Secured Obligations under the DIP Credit Agreement is hereby deemed to be fully enforceable as against the Applicants and third parties, including any trustee in bankruptcy appointed in respect of any of the Applicants.

38. THIS COURT ORDERS that the Applicants are hereby authorized and empowered to execute and deliver the DIP Credit Agreement and such commitment letters, fee letters, credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "DIP Documents"), as are contemplated by the DIP Credit Documents or as may be reasonably required by the DIP Agent and the DIP Lenders pursuant to the terms thereof, and subject to paragraph 37, the Applicants are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the DIP Lenders and the DIP Agent under and pursuant to the DIP Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

39. THIS COURT ORDERS that the DIP Agent and the DIP Lenders shall be entitled to the benefit of and is hereby granted a charge (the "DIP Lenders Charge") on the Property, which charge shall not exceed the aggregate amount owed to the DIP Lenders under the DIP Documents. The DIP Lenders Charge shall have the priority set out in paragraphs 42 and 45 hereof.

40. THIS COURT ORDERS that, notwithstanding any other provision of this Order, but subject to paragraph 37:

- (a) the DIP Agent and the DIP Lenders may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Agent and the DIP Lenders Charge or any of the DIP Documents;
- (b) upon the occurrence of an event of default under the DIP Documents or the DIP Lenders Charge, the DIP Agent, on behalf of the DIP Lenders, upon three business

days notice to the Applicants and the Monitor, may exercise any and all of its rights and remedies against the Applicants or the Property under or pursuant to DIP Documents and the DIP Lenders Charge, including without limitation, to cease making advances to the Applicants and set off and/or consolidate any amounts owing by the DIP Lenders to the Applicants against the obligations of the Applicants to the DIP Lenders under the DIP Documents or the DIP Lenders Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for bankruptcy orders against the Applicants and for the appointment of a trustee in bankruptcy of the Applicants, and upon the occurrence of an event of default under the terms of the DIP Documents, the DIP Lenders, upon three business days notice to the Applicants and the Monitor, shall be entitled to seize and retain proceeds from the sale of the Property and the cash flow of the Applicants to repay amounts owing to the DIP Lenders in accordance with the DIP Documents and the DIP Lenders Charge, but subject to the priorities as set out in paragraphs 42 and 45 of this Order; and

- (c) the foregoing rights and remedies of the DIP Agent and the DIP Lenders shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicants or the Property.

41. THIS COURT ORDERS AND DECLARES that, unless otherwise agreed, the DIP Agent and the DIP Lenders shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicants under the CCAA, or any proposal filed by the Applicants under the *Bankruptcy and Insolvency Act* of Canada (the "BIA"), with respect to any advances made under the DIP Documents.

#### **VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER**

42. THIS COURT ORDERS that the priorities of the Administration Charge, the Directors' Charge and the DIP Lenders Charge, as among them, shall be as follows:

First – Administration Charge;

Second – Directors' Charge (up to a maximum amount of U.S.\$1.0 million);

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Third – DIP Lenders Charge; and

Fourth – Directors Charge (for the balance thereof, being U.S.\$2.3 million).

43. THIS COURT ORDERS that any distribution in respect of the DIP Lenders Charge as amongst the beneficiaries thereto shall be governed by the DIP Documents.
44. THIS COURT ORDERS that the filing, registration or perfection of the Administration Charge, the Directors' Charge or the DIP Lenders Charge (collectively, the "Charges") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.
45. 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.
46. THIS COURT ORDERS that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Directors' Charge the Administration Charge or the DIP Lenders Charge, unless the Applicants also obtain the prior written consent of the Monitor, the DIP Agent and the beneficiaries of the Directors' Charge and the Administration Charge, or further Order of this Court.
47. THIS COURT ORDERS that subject to paragraph 37, the Directors' Charge, the Administration Charge, the DIP Documents and the DIP Lenders Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "Chargees") and/or the DIP Lenders thereunder shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to the BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any

assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "Agreement") which binds the Applicants, or any of them, and notwithstanding any provision to the contrary in any Agreement:

- (a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the DIP Documents shall create or be deemed to constitute a breach by any of the Applicants of any Agreement to which it is a party;
- (b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Applicants entering into the DIP Credit Agreement, the creation of the Charges, or the execution, delivery or performance of the DIP Documents; and
- (c) the payments made by the Applicants pursuant to this Order or the DIP Documents, and the granting of the Charges, do not and will not constitute fraudulent preferences, fraudulent conveyances, oppressive conduct, settlements or other challengeable, voidable or reviewable transactions under any applicable law.

48. THIS COURT ORDERS that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the relevant Applicant's interest in such real property leases.

#### **SERVICE AND NOTICE**

49. THIS COURT ORDERS that the Applicants shall, within ten (10) business days of the date of entry of this Order, send notice of this Order to their known creditors, other than employees and creditors to which the Applicants owe less than \$5000, at their addresses as they appear on the Applicants' records, advising that such creditor may obtain a copy of this Order on the internet at the website of the Monitor, <http://cfcanda.fticonsulting.com/indalex> (the "Website") and, if such creditor is unable to obtain it by that means, such creditor may obtain a copy from the Monitor. The Monitor shall promptly send a copy of this Order to any interested

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Person requesting a copy of this Order, and the Monitor is relieved of its obligation under Section 11(5) of the CCAA to provide similar notice, other than to supervise this process.

50. THIS COURT ORDERS that the Applicants and the Monitor be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Applicants' creditors or other interested parties at their respective addresses as last shown on the records of the Applicants and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

51. THIS COURT ORDERS that the Applicants, the Monitor, and any party who has filed a Notice of Appearance may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, in accordance with the E-filing protocol of the Commercial List to the extent practicable, and the Monitor may post a copy of any or all such materials on the Website.

#### **GENERAL**

52. THIS COURT ORDERS that the Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of their powers and duties hereunder.

53. THIS COURT ORDERS that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicants, the Business or the Property.

54. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding,

or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

55. THIS COURT ORDERS that each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

56. 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.

57. THIS COURT ORDERS that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Daylight Time on the date of this Order.

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

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

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding commenced at Toronto

**AMENDED AMENDED AND RESTATED INITIAL  
ORDER**

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**ORDER**

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