

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**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

**REPLY FACTUM
OF THE
MOVING PARTY UNITED STEELWORKERS
(returnable August 28, 2009)**

August 27, 2009

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PART I - RESPONSE TO APPLICANTS' SUBMISSIONS

1. In paragraph 5 of the Applicants' Factum, the Applicants assert that Indalex, pursuant to Section 14.03(3) of the Salaried Plan, contemplated that the Retirement Plan for Salaried Employees of Indalex Limited and Associated Companies (the "Salaried Plan") could be wound up with insufficient assets to pay all benefits under the Plan. Contrary to this assertion, section 14.03(2) obligates the Employer to contribute amounts due or that have accrued up to the effective date of the wind-up in accordance with the Plan and subject to the requirements under the *Pension Benefits Act* ("PBA"). Further, section 14.03(3) requires that benefits be paid in accordance with "Applicable Pension Legislation". Section 75 of the PBA requires the employer pay into the fund amounts sufficient to fund the promised vested benefits.

Retirement Plan for Salaried Employees of Indalex Limited and Associated Companies, (Restated and Amended as at January 1, 2003), Motion Record, Tab A, at pp. 40-41

Pension Benefits Act, R.S.O. 1990, c. P.8, s. 75

2. Paragraph 7 of the Applicants' Factum appears to confuse cash accounting principles with accrual accounting principles. All amounts that were accrued as of the date of the wind up were not paid into the Salaried Plan. The liability of Indalex at the time of the Salaried Plan's wind-up on December 31, 2006 is determined by valuing the accrued benefits under the Plan at the time of wind up as modified pursuant to sections 73 and 74 of the PBA. At wind-up this liability crystallizes. Consequently, it is inaccurate to state that all contributions and special payments due or accrued prior to wind up were made to the Salaried Plan. Indalex has not paid all amounts into the Salaried Plan necessary to eliminate the wind up deficiency. The Financial Services Commission of Ontario Policy W100-101 describes the scope of the liability:

The wind up liability must reflect all benefits provided under the plan and the applicable legislation on wind up and should be separately summarized for each major category of membership.

...

If the wind up report reveals that the plan does not have sufficient assets to pay the liabilities on wind up, the employer must pay into the pension fund amounts required under section 75 of the PBA.

Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 73 – 75

Financial Services Commission of Ontario, *Filing Requirements and Procedure on Full and Partial Wind Up of a Pension Plan*, Index No. W100-101 (December 9, 2004) ["FSCO Policy"], at pp. 10-11

3. Paragraph 12(c) of the Applicants' Factum mischaracterizes the scope and application of the deemed trust as defined under subsection 57(4) of the PBA. The deemed trust applies to liabilities that have accrued prior to the date of wind-up. The wind up liabilities are determined on the basis of the benefits vested under the Salaried Plan. Paragraph 12(c) of the Applicant's Factum implies that it is only the current service contributions and special payments due at the time of wind up that are payable. To accept this interpretation would render subsection (4) redundant. The sub-headings attaching to the sub-

sections of the PBA aid in interpreting these provisions. The sub-heading for subsection 57(3) reads “Accrued Contributions”. The subheading for subsection 4 reads “Wind Up”. It is the accrued liability or, to state it another way, the funding deficiency, that is subject to the deemed trust under subsection 57(4).

Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 57(3)-(4)

4. Paragraph 12(d) of the Applicants’ Factum misstates the effect arising from a finding that a deemed trust exists. The deemed trust provided in subsection 57(4) of the PBA gives the pension beneficiaries priority over secured claims and all unsecured claims against Indalex. Monies deemed to be held in trust by Indalex are not the property of Indalex and are not subject to attachment by Indalex’s creditors. Subsection 30(7) of the *Personal Property Security Act* (“PPSA”) reinforces this by providing that pension beneficiaries have priority over any other security interests in accounts and inventory. The Supreme Court of Canada has acknowledged that provincial legislation may validly affect priorities in a non-bankruptcy situation.

GMAC Commercial Credit Corporation – Canada v. T.C.T. Logistics Inc., [2006] 2 S.C.R. 123, 2006 SCC 35, at para. 121

Usarco Limited (1991). 42 E.T.R. 235 (Ont. Gen. Div.), at para. 9

Personal Property Security Act, R.S.O. 1990, c. P.10, s. 30(7)

5. Paragraph 13 does not apply to our motion. It refers to provisions of the *Bankruptcy and Insolvency Act*. If and when a BIA proceeding is initiated, arguments may be submitted to distinguish *Henfrey*. The USW has moved that the deemed trust continues to apply during CCAA proceedings. While the enforcement of the deemed trust has been stayed, upon the lifting of the stay, this Honourable Court has the discretion to order and should enforce the trust.

6. In paragraph 14 of the Applicants' Factum, the Applicants cite *Re Ivaco* as support for the proposition that the assignment in bankruptcy should be considered prior to weighing the merits of the deemed trust argument under CCAA proceedings. Commercial List proceedings are unique. Determinations depend largely on the particular facts and timing of events. In the *Re Ivaco* case, there were a substantial number of third party creditors with significant claims. One of the larger creditors, the Bank of Nova Scotia sought to petition one of the related companies to assert its security interest. The overall pension liability relative to the collective creditor claims was significant thereby posing a threat to the secured creditor's recovery. Further, the pension plan in question in *Re Ivaco* was ongoing and therefore subject to subsection 57(3), not wound up as is the case with the Salaried Plan.

Re Ivaco Inc., 2005 CanLII 27605 (Ont. S.C.J.), at paras. 28-31

7. In the case at hand, the party seeking to enter into bankruptcy proceedings, Indalex, is precisely the party that has the fiduciary obligation to protect the interests of the Salaried Plan beneficiaries. The entry into bankruptcy is contemplated for the sole purpose of defeating the deemed trust so that Indalex US, its parent company can obtain further proceeds of the sale. Indalex's DIP Lender priority was not created through normal course business relations but resulted from a court-sanctioned subrogation subject to the Monitor's reserve arising under the July 20 Approval and Vesting Order. The terms of the DIP Credit Arrangement were largely negotiated by a third party consultant to Indalex US, FTI Consulting Inc. ("FTI"), that coincidentally is the parent company of the Monitor. Keith Cooper, the Senior Managing Director of FTI deposed that he "was the main point person on behalf of Indalex in those negotiations".

Pension Benefits Act, R.S.O. 1990, c. P.8, s. 22

Order of the Honourable Mr. Justice Campbell, July 20, 2009 re Indalex Limited et al. ["Approval and Vesting Order"], at para. 14

Cross-examination of Keith Cooper on his Affidavit dated August 20th, 2009, at paras. 7, 31

8. All directors have resigned from Indalex. Pursuant to a Unanimous Shareholder Declaration dated August 12, 2009, the shareholders have appointed Mr. Cooper to manage Indalex. When questioned as to what would happen if the funds currently held on reserve by the Monitor pursuant to the USW and Executive Plan Member motions are paid to Indalex US under BIA proceedings, Mr. Cooper indicated that the funds would be distributed to creditors based in the United States. Mr. Cooper asserts that he is now the administrator of the Indalex pension plans. Mr. Cooper, as the controlling mind of Indalex, has made an active choice to avoid statutory and fiduciary obligations owed to the Salaried Plan beneficiaries in Canada and to seek voluntary assignment in bankruptcy to ensure that the funds on reserve will be paid over to US creditors of Indalex US. No Canadian creditor has sought to petition Indalex into bankruptcy. Mr. Cooper's actions constitute, at the least, a conflict of interest given his role in managing Indalex US compared with his management obligations with respect to Indalex in Canada, and a breach of statutory and fiduciary duty owed to Salaried Plan beneficiaries. The proposed motion for leave to use the bankruptcy procedure to nullify the deemed trust should be defeated on the basis that it was filed for an improper purpose.

Unanimous Shareholder Declaration, August 12, 2009

Cross-examination of Keith Cooper on his Affidavit dated August 20th, 2009, at paras. 87-88

Froese v. Montreal Trust Co. of Canada, [1996] B.C.J. No. 1091 (C.A.), at paras. 59-60

9. In paragraph 14 of the Applicant's factum, *Re Ivaco* is cited to support moving directly to bankruptcy proceedings so as to "avoid the artificial creation of a legislative gap." However, the *Ted LeRoy* case more closely approximates the fact situation at hand. In *Ted LeRoy*, proceeds of the sale of assets had been

received by the Monitor and restructuring efforts were at an end. While a stay was appropriate during the course of restructuring efforts, at the cessation of restructuring activities under the CCAA, the stay was lifted and the deemed trust enforced. Similar to the facts of the case at hand, Ted LeRoy made a voluntary assignment in bankruptcy. Third party creditors were not anxiously seeking a petition into bankruptcy. The Court recognized the enforceability of **both** a deemed trust and an express trust. Either was sufficient to lead the Court to order payment in favour of the trust.

Re Ted LeRoy Trucking Inc., 2009 BCCA 205, at paras. 22 - 23, 30

10. Paragraphs 19 and 20 of the Applicants' Factum artificially narrow the application of subsection 57(4) of the PBA, repeating the assertion initially stated in paragraph 12(c). Section 57(4) speaks to liabilities at the time of wind up. At the time of wind up, the employer is obligated to pay into the fund sufficient amounts to meet the vested benefit entitlements of its members. That amount includes any current service costs, special payments and deficiency liabilities. The payments due over the five year amortization permitted by the regulations to extinguish the deficiency constitute contributions for purposes of the PBA that are "not yet due under the plan or regulations".

FSCO Policy, *supra*, at pp. 10-11

11. To date, no case under the CCAA in Ontario has dealt with a ss. 57(4) deemed trust claim. Past cases have either considered current service contributions and special payments in an ongoing plan or a wind up situation during bankruptcy proceedings. This is the first instance where the Court has been asked to consider the interaction of the PBA and CCAA when the employer under CCAA proceedings has already wound up the pension plan and crystallized the wind up liability. *General Chemical, Re Ivaco* and *Usarco's*

decisions, while instructive on general principles, do not engage the same provisions under the PBA under similar circumstances.

General Chemical Canada Ltd., Re, 51 C.C.P.B. 297 (Ont. S.C.J.), at para. 2

Ivaco, supra, at paras. 26-27

Usarco, supra, at para. 3

12. In paragraph 22 of the Applicants' Factum, reference is made to *Toronto Dominion Bank v. Usarco Ltd.* Justice Farley later recanted on the view that ss. 57(4) deemed trusts would be limited to special payments to be paid up to the wind-up date. At paragraph 16 of the same decision Justice Farley elaborated on the impact of the deemed trust provisions noting that it "implied a fiduciary obligation on the part of [the employer]" and that "a trustee in bankruptcy stepping into the shoes of *Usarco* must deal with that fiduciary obligation". In this instance, it is not a trustee in bankruptcy that is stepping into the shoes of Indalex but instead a restructuring consulting company named FTI Consulting Inc. Their obligation is to meet the fiduciary obligation imposed by the PBA in their capacity as the stand-in executive for Indalex.

Ivaco, supra at para. 11

13. Paragraph 25 of the Applicant's factum excludes critical information. The July 20th Approval and Vesting Order renders any subrogated right arising from the Indalex US guarantee subject to the Monitor's reserve. In the event that this Honourable Court sees fit to declare the deemed trust, the funds held in reserve related to the Salaried Plan deficiency will be subject to the PPSA super-priority in favour of the subsection 57(4) deemed trust. Indalex US has also stepped into the shoes of a fiduciary with obligations to protect the interests of beneficiaries under the Salaried Plan. It has chosen to ignore its fiduciary obligations and, instead, assert a claim as a DIP Lender.

Approval and Vesting Order, *supra*, at para. 14

Personal Property Security Act, R.S.O. 1990, c. P.10, s. 30

Pension Benefits Act, R.S.O. 1990, c. P.8, ss. (57(4))

14. *Re Collins & Aikman Automotive Canada Inc.* does not stand for the proposition that a DIP Lenders Charge takes priority over deemed trusts as is stated in paragraph 27 of the Applicants' Factum. Quite the contrary, at paragraph 110 Spence J. opens the opportunity for interested parties to re-assert their claims upon cessation of the stay. Here, the critical issue is whether a seamless move to voluntary assignment is permitted or, as the USW supports, upon lifting the stay, the court will declare and enforce the deemed trust.

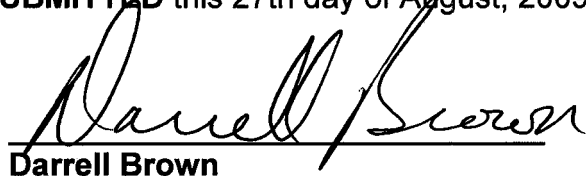
Re Collins & Aikman Automotive Canada Inc., [2007] O.J. No. 4186 (S.C.J.), at para. 110

PART II - RELIEF SOUGHT

15. The Moving Party seeks the following Orders:
- (a) A declaration that a deemed trust equal in amount to the Deficiency of assets in the Salaried Plan is enforceable against the assets of Indalex;
 - (b) An order that the amount of assets required to eliminate the Deficiency in the Salaried Plan be segregated from the general assets of Indalex;
 - (c) An order that the amount of assets segregated pursuant to (b) be paid to the fund of the Salaried Plan;
 - (d) An order for costs;

(e) Such further and other relief as to this Honourable Court seems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of August, 2009.

A handwritten signature in black ink, appearing to read "Darrell Brown", written over a horizontal line.

Darrell Brown
Sack Goldblatt Mitchell LLP

Lawyer for the Moving Party
United Steelworkers

SCHEDULE "A"
LIST OF AUTHORITIES

1. *GMAC Commercial Credit Corporation – Canada v. T.C.T. Logistics Inc.*, [2006] 2 S.C.R. 123, 2006 SCC 35
2. *Froese v. Montreal Trust Co. of Canada*, [1996] B.C.J. No. 1091 (C.A.)
3. *Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd.*, 2007 ONCA 600
4. *Re Collins & Aikman Automotive Canada Inc.*, [2007] O.J. No. 4186 (S.C.J.)

SCHEDULE "B"
RELEVANT STATUTES

Sections 73 – 75 of the *Pension Benefits Act*, R.S.O. 1990, c. P.8

Determination of entitlements

73.(1) For the purpose of determining the amounts of pension benefits and any other benefits and entitlements on the winding up of a pension plan, in whole or in part,

(a) the employment of each member of the pension plan affected by the winding up shall be deemed to have been terminated on the effective date of the wind up;

(b) each member's pension benefits as of the effective date of the wind up shall be determined as if the member had satisfied all eligibility conditions for a deferred pension; and

(c) provision shall be made for the rights under section 74.

Transfer rights on wind up

(2) A person entitled to a pension benefit on the wind up of a pension plan, other than a person who is receiving a pension, is entitled to the rights under subsection 42 (1) (transfer) of a member who terminates employment and, for the purpose, subsection 42 (3) does not apply. R.S.O. 1990, c. P.8, s. 73.

Combination of age and years of employment

74. (1) A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least fifty-five, at the effective date of the wind up of the pension plan in whole or in part, has the right to receive,

(a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;

(b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,

(i) the normal retirement date under the pension plan, or

(ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date; or

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date. R.S.O. 1990, c. P.8, s. 74 (1).

Part year

(2) In determining the combination of age plus employment or membership, one-twelfth credit shall be given for each month of age and for each month of continuous employment or membership at the effective date of the wind up. R.S.O. 1990, c. P.8, s. 74 (2).

Member for ten years

(3) Bridging benefits offered under the pension plan to which a member would be entitled if the pension plan were not wound up and if the membership of the member were continued shall be included in calculating the pension benefit under subsection (1) of a person who has at least ten years of continuous employment with the employer or has been a member of the pension plan for at least ten years. R.S.O. 1990, c. P.8, s. 74 (3).

Prorated bridging benefit

(4) For the purposes of subsection (3), if the bridging benefit offered under the pension plan is not related to periods of employment or membership in the pension plan, the bridging benefit shall be prorated by the ratio that the member's actual period of employment bears to the period of employment that the member would have to the earliest date on which the member would be entitled to payment of pension benefits and a full bridging benefit under the pension plan if the pension plan were not wound up. R.S.O. 1990, c. P.8, s. 74 (4).

Notice of termination of employment

(5) Membership in a pension plan that is wound up in whole or in part includes the period of notice of termination of employment required under Part XV of the Employment Standards Act, 2000. R.S.O. 1990, c. P.8, s. 74 (5); 2004, c. 31, Sched. 31, s. 3.

Application of subs. (5)

(6) Subsection (5) does not apply for the purpose of calculating the amount of a pension benefit of a member who is required to make contributions to the pension fund unless the member makes the contributions in respect of the period of notice of termination of employment. R.S.O. 1990, c. P.8, s. 74 (6).

Consent of employer

(7) For the purposes of this section, where the consent of an employer is an eligibility requirement for entitlement to receive an ancillary benefit, the employer shall be deemed to have given the consent. R.S.O. 1990, c. P.8, s. 74 (7).

Consent of administrator, jointly sponsored pension plans

(7.1) For the purposes of this section, where the consent of the administrator of a jointly sponsored pension plan is an eligibility requirement for entitlement to receive an ancillary benefit, the administrator shall be deemed to have given the consent. 2005, c. 31, Sched. 18, s. 9.

Application of section

(8) This section and sections 73 (determination of entitlements), 84, 85 and 86 (guaranteed benefits) apply in respect of the wind up, in whole or in part, of a pension plan where the effective date of the wind up is on or after the 1st day of April, 1987. R.S.O. 1990, c. P.8, s. 74 (8).

Refund

(9) A person affected by a wind up who elects to receive a benefit under subsection (1) is not entitled to payment of any refund of contributions or interest under subsection 63 (3) or (4) (refunds). R.S.O. 1990, c. P.8, s. 74 (9).

Liability of employer on wind up

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. R.S.O. 1990, c. P.8, s. 75 (1); 1997, c. 28, s. 200.

Payment

(2) The employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times. R.S.O. 1990, c. P.8, s. 75 (2).

Exception, jointly sponsored pension plans

(3) This section does not apply with respect to jointly sponsored pension plans. 2005, c. 31, Sched. 18, s. 10.

Liability on wind-up, jointly sponsored pension plans

Employers, etc.

75.1 (1) Where a jointly sponsored pension plan is wound up in whole or in part, the employer or the person or entity required to make contributions under the plan on behalf of 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 plan, are payable by the employer or by the person or entity on behalf of the employer, that are due or have accrued and that have not been paid into the pension fund; and

(b) any additional amounts that, under the documents that create and support the plan, are payable in the circumstances by the employer or the person or entity on behalf of the employer. 2005, c. 31, Sched. 18, s. 11.

Members

(2) Where a jointly sponsored pension plan is wound up in whole or in part, the members shall pay into the pension fund,

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

(b) any additional amounts that, under the documents that create and support the plan, are payable in the circumstances by the members. 2005, c. 31, Sched. 18, s. 11.

Payments

(3) The payments required by subsections (1) and (2) shall be made in the prescribed manner and at the prescribed times. 2005, c. 31, Sched. 18, s. 11.

Subsections 57(3) and (4) of the *Pension Benefits Act*, R.S.O. 1990, c. P-8

Accrued contributions

(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.

Wind up

(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.

Section 30 of the *Personal Property Security Act*, R.S.O., 1990, c. P.10

Priorities

30. (1) If no other provision of this Act is applicable, the following priority rules apply to security interests in the same collateral:

1. Where priority is to be determined between security interests perfected by registration, priority shall be determined by the order of registration regardless of the order of perfection.

2. Where priority is to be determined between a security interest perfected by registration and a security interest perfected otherwise than by registration,

i. the security interest perfected by registration has priority over the other security interest if the registration occurred before the perfection of the other security interest, and

ii. the security interest perfected otherwise than by registration has priority over the other security interest, if the security interest perfected otherwise than by registration was perfected before the registration of a financing statement related to the other security interest.

3. Where priority is to be determined between security interests perfected otherwise than by registration, priority shall be determined by the order of perfection.

4. Where priority is to be determined between unperfected security interests, priority shall be determined by the order of attachment.

Idem

(2) For the purpose of subsection (1), a continuously perfected security interest shall be treated at all times as if perfected by registration, if it was originally so perfected, and it shall be treated at all times as if perfected otherwise than by registration if it was originally perfected otherwise than by registration.

Future advances

(3) Subject to subsection (4), where future advances are made while a security interest is perfected, the security interest has the same priority with respect to each future advance as it has with respect to the first advance.

Exception

(4) A future advance under a perfected security interest is subordinate to the rights of persons mentioned in subclauses 20 (1) (a) (ii) and (iii) if the advance was made after the secured party received written notification of the interest of any such person unless,

(a) the secured party makes the advance for the purpose of paying reasonable expenses, including the cost of insurance and payment of taxes or other charges incurred in obtaining and maintaining possession of the collateral and its preservation; or

(b) the secured party is bound to make the advance, whether or not a subsequent event of default or other event not within the secured party's control has relieved or may relieve the secured party from the obligation.

Proceeds

(5) For the purpose of subsection (1), the date for registration or perfection as to collateral is also the date for registration or perfection as to proceeds.

Reperfected security interests

(6) Where a security interest that is perfected by registration becomes unperfected and is again perfected by registration, the security interest shall be deemed to have been continuously perfected from the time of first perfection except that if a person acquired rights in all or part of the collateral during the period when the security interest was unperfected, the registration shall not be effective as against the person who acquired the rights during such period. R.S.O. 1990, c. P.10, s. 30 (1-6).

Same, extended time

(6.1) Despite subsection (6), where a security interest that is perfected by registration becomes unperfected between February 26, 1996 and April 3, 1996, the security interest shall be deemed to have been continuously perfected from the time of first perfection if the security interest is again perfected by registration by April 12, 1996. 1996, c. 5, s. 2.

Deemed trusts

(7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the Employment Standards Act or under the Pension Benefits Act.

Exception

(8) Subsection (7) does not apply to a perfected purchase-money security interest in inventory or its proceeds. R.S.O. 1990, c. P.10, s. 30 (7, 8).

Priority rules for security interests in investment property

30.1(1) The rules in this section govern priority among conflicting security interests in the same investment property. 2006, c. 8, s. 138.

Secured party with control

(2) A security interest of a secured party having control of investment property under subsection 1 (2) has priority over a security interest of a secured party that does not have control of the investment property. 2006, c. 8, s. 138.

Certificated security perfected by delivery

(3) A security interest in a certificated security in registered form which is perfected by taking delivery under subsection 22 (2) and not by control under section 22.1 has priority over a conflicting security interest perfected by a method other than control. 2006, c. 8, s. 138.

Rank by priority in time

(4) Except as otherwise provided in subsections (5) and (6), conflicting security interests of secured parties each of which has control under subsection 1 (2) rank according to priority in time of,

(a) if the collateral is a security, obtaining control;

(b) if the collateral is a security entitlement carried in a securities account,

(i) the secured party's becoming the person for which the securities account is maintained, if the secured party obtained control under clause 25 (1) (a) of the Securities Transfer Act, 2006,

(ii) the securities intermediary's agreement to comply with the secured party's entitlement orders with respect to security entitlements carried or to be carried in the securities account, if the secured party obtained control under clause 25 (1) (b) of the Securities Transfer Act, 2006, or

(iii) if the secured party obtained control through another person under clause 25 (1) (c) of the Securities Transfer Act, 2006, when the other person obtained control; or

(c) if the collateral is a futures contract carried with a futures intermediary, the satisfaction of the requirement for control specified in subclause 1 (2) (d) (ii) with respect to futures contracts carried or to be carried with the futures intermediary. 2006, c. 8, s. 138.

Securities intermediary

(5) A security interest held by a securities intermediary in a security entitlement or a securities account maintained with the securities intermediary has priority over a conflicting security interest held by another secured party. 2006, c. 8, s. 138.

Futures intermediary

(6) A security interest held by a futures intermediary in a futures contract or a futures account maintained with the futures intermediary has priority over a conflicting security interest held by another secured party. 2006, c. 8, s. 138.

Interests granted by broker, intermediary

(7) Conflicting security interests granted by a broker, securities intermediary or futures intermediary which are perfected without control under subsection 1 (2) rank equally. 2006, c. 8, s. 138.

Priority determined under s. 30

(8) In all other cases, priority among conflicting security interests in investment property shall be governed by section 30. 2006, c. 8, s. 138.

Section 22 of the *Pension Benefits Act*, R.S.O. 1990, c. P.8

Care, diligence and skill

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

Special knowledge and skill

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

Member of pension committee, etc.

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

Conflict of interest

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

Employment of agent

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

Trustee of pension fund

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

Responsibility for agent

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

Employee or agent

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

Benefit by administrator

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

Member of pension committee, etc.

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

Payment to agent

(11) An agent of the administrator of a pension plan is not entitled to payment from the pension fund other than the usual and reasonable fees and expenses for the services provided by the agent in respect of the pension plan. R.S.O. 1990, c. P.8, s. 22.

**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

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

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**REPLY FACTUM OF THE MOVING PARTY
UNITED STEELWORKERS
(RETURNABLE AUGUST 28, 2009)**

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