File Number: 34308

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

FTI CONSULTING CANADA ULC,
IN ITS CAPACITY AS COURT-APPOINTED MONITOR OF INDALEX LIMITED, ON BEHALF OF INDALEX LIMITED

Applicant
(Respondent)

-and-

KEITH CARRUTHERS, LEON KOZIEROK, RICHARD BENSON, JOHN FAVERI, KEN WALDRON, JOHN (JACK) W. ROONEY, BERTRAM MCBRIDE, MAX DEGAN, EUGENE D'IORIO, RICHARD SMITH, ROBERT LECKIE, NEIL FRASER and FRED GRANVILLE ("RETIREES") and UNITED STEELWORKERS

Respondents
(Appellants)

-and-

MORNEAU SOBECO LIMITED PARTNERSHIP and THE SUPERINTENDENT OF FINANCIAL SERVICES

Interveners
(Interveners)

REPLY
TO THE RESPONSES OF THE UNITED STEELWORKERS AND THE RETIREES OF FTI CONSULTING CANADA ULC, IN ITS CAPACITY AS THE COURT-APPOINTED MONITOR OF INDALEX LIMITED, ON BEHALF OF INDALEX LIMITED, APPLICANT

Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*

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MORNEAU SOBECO LIMITED PARTNERSHIP and THE SUPERINTENDENT OF FINANCIAL SERVICES

Interveners
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REPLY MEMORANDUM OF ARGUMENT OF FTI CONSULTING CANADA ULC, IN ITS CAPACITY AS THE COURT-APPOINTED MONITOR OF INDALEX LIMITED, ON BEHALF OF INDALEX LIMITED, APPLICANT

Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada*

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A. Overview

1. This memorandum is filed by FTI Consulting Canada ULC, in its capacity as Court-Appointed Monitor (the "Monitor") of Indalex Limited ("Indalex") on behalf of Indalex, in reply to the responses of both the United Steelworkers (the "USW") and the retired executives of Indalex (the "Retirees") to Indalex's application for leave to appeal (together, the "Responses").

2. The Responses fail to substantively address the only relevant question on this application: whether any question raised in the proposed appeal is, by reason of its public importance, the importance of the legal issues or any other reason, of a nature or significance to warrant a decision by this Court. Rather, they defend the Court of Appeal's decision (the "Decision") on its merits, and argue on this basis that leave to appeal should not be granted.

3. The correctness of the Decision is properly left for determination by this Court upon hearing the appeal if leave is granted. The issue at this stage is whether the questions raised are of public or other national importance. These submissions will therefore reply first to the Respondents' passing submissions on the question of public importance, then to the misstatements and mischaracterizations of fact contained in the Responses, and finally to the Respondents' submissions regarding the merits of the Decision.

B. The Proposed Appeal Raises Significant Issues of Public Importance

4. Each of the Responses tries to minimize the importance of the Decision by effectively ignoring or misstating its central impact. A judge of the Superior Court acting as CCAA judge granted an order expressly allowing for DIP lending that was premised on the loan having a super-priority, including in particular priority over all statutory deemed trusts. That order was not challenged in any way, and financing that permitted the successful sale of Indalex as a going concern was given in reliance on it. Nonetheless, the Court of Appeal subsequently nullified the priorities in the Initial Order, to the detriment of those who had relied on it, first by making novel findings regarding the deemed trust claims of the USW and the fiduciary duty claims of the USW and the Retirees, and then by giving such claims priority over the DIP loan.

5. The ability of DIP lenders to rely on valid orders of a CCAA Court is of critical importance to Canadian insolvencies and restructurings, and has broader impacts on the rule of law generally. The Court of Appeal's conclusions regarding the scope of the deemed trust provision in the *Pension Benefits Act* (PBA) and the fiduciary duties of a pension plan

administrator that is entering CCAA protection also have broad ramifications that go well beyond this particular case. Indeed, the Court of Appeal itself noted this importance, stating that "It is important that the courts not address the interests of pension plan beneficiaries in a manner that thwarts or even discourages DIP funding in future CCAA proceedings."[1]

6. The public and national importance of these issues is described in the Monitor's application for leave to appeal, which sets out the impact of the decision in such areas as ordinary course lending, lending in CCAA proceedings, the administration of pension plans, and insolvency and restructuring practices across Canada. The Respondents' bare protests of lack of national importance do not counter these concerns at all. Indeed, the USW's response on the issue of public importance is almost non-existent; it is alluded to in only three paragraphs and then only through mere denial and unsupported assertions of exaggeration.[2]

7. The Retirees rely primarily on an argument that the Court of Appeal did not misstate the law with respect to fiduciary duties.[3] However, this glosses over the Court of Appeal's fundamental conclusion on this issue: that an employer that administers a pension plan owes a fiduciary duty to pension plan members to act in their best interest not just in its capacity "as plan administrator" as this Court has held,[4] but in its conduct of CCAA proceedings, *and* that it breaches that duty if it does not give priority to the interests of plan members over other creditors when planning and conducting such CCAA proceedings, including through commencing CCAA proceedings without notice,[5] obtaining DIP financing subject to a standard super-priority charge,[6] and selling assets without making any provision for the Plans,[7] regardless of whether such steps are taken under Court supervision and pursuant to Court orders.

8. Such a finding is not simply an application of the "well-settled law of fiduciary duty" as the Retirees contend,[8] but a dramatic and significant extension of it that has broad consequences to any employer who acts as administrator, particularly one who is or may become insolvent.

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[1] Court of Appeal Reasons, Monitor's Application Record, Tab 4E, at p. 85, para. 175.
[2] USW Memorandum of Argument, at paras. 4, 5 and 71.
[3] Retirees' Memorandum of Argument, at paras. 4-12, 13(a), 33, 44-54.
[4] *Burke v. Hudsons' Bay Co.*, [2010] 2 S.C.R. 273, 2010 SCC 34, Retirees' Authorities, Tab 1, at para. 41.
[5] Court of Appeal Reasons, Monitor's Application Record, Tab 4E, at p. 73, para. 139, a finding the Court made notwithstanding its own conclusion that Indalex had the right to commence such proceedings "wearing solely its corporate hat" (para. 131), and without any indication as to how such a step "undermined the possibility of additional funding to the Plans" (para. 139).
[6] Court of Appeal Reasons, Monitor's Application Record, Tab 4E, at p. 73, para. 139.
[7] Court of Appeal Reasons, Monitor's Application Record, Tab 4E, at p. 73, para. 139, a finding the Court made without indicating how "provision for the Plans" could have been made without improperly prejudicing the rights of other creditors.
[8] Retirees' Memorandum of Argument, at para. 8.

9. The Retirees themselves point out that no other cases have extended the law of fiduciary duty to such an extent,[9] even though the situation in this CCAA proceeding (including the priority given to the DIP Lenders) is unremarkable and arises in virtually every CCAA proceeding across Canada where the debtor is also the administrator of an employee pension plan. That this is the first time a Court has found such a CCAA debtor to be in breach of its fiduciary duty to pension plan members when it undertakes what are standard steps in a CCAA proceeding, taken with the approval of the Court, illustrates the importance of the issues raised by the proposed appeal and demonstrates the uncertainty caused by the Decision.

10. The Retirees' reliance on the fact that no statutory deemed trust was found in their case also ignores the consequences of the Court of Appeal's finding that the Retirees' fiduciary duty claim, as with the USW's deemed trust claim, ought to be given priority over the DIP loan (apparently through the creation of a constructive trust).[10] This again nullified the priorities given by Mr. Justice Morawetz in the Initial Order, effectively giving an unsecured creditor greater rights than other unsecured creditors, and even greater than secured creditors.

11. The Retirees' Response actually highlights the public importance of the issues. The affidavit filed by the Retirees from Robert Hilton, President of the Canadian Federation of Pensioners ("CFP"), notes that a "serious problem" arises for retirees when their former employer becomes bankrupt or insolvent and there is a funding deficiency in the pension plan, and that the Decision is a "positive development" that "has the potential to assist retirees" in future cases.[11] The CFP's recognition that the Decision will impact other cases mirrors the view of Jay Swartz, President of the Insolvency Institute of Canada, who noted the potentially far-reaching consequences of the Decision in the areas of credit granting and risk assessment (both in restructurings and in the ordinary course), insolvency practice and procedures, and creditor priorities generally.[12] The Canadian Bankers' Association and the International Swaps and Derivatives Association have also stated their concerns that the Decision creates uncertainty with respect to ordinary course lending and DIP financing throughout Canada that will have an adverse impact on the banking industry generally and on cash collateral arrangements.[13]

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[9] Retirees' Memorandum of Argument, at para. 48.
[10] Court of Appeal Reasons, Monitor's Application Record, Tab 4E, at p. 98, para. 205.
[11] Affidavit of Robert F. Hilton, sworn September 1, 2011, paras. 9, 15 and 16; Retirees' Memorandum of Argument, at para. 54.
[12] Affidavit of Jay A. Swartz sworn June 6, 2011 ("Swartz Affidavit"), Monitor's Application Record, Tab 6N, paras. 1-2.
[13] Swartz Affidavit, Monitor's Application Record, Tab 6N, Exhibits "D" and "E".

12. The views of these trade associations whose numerous members are affected by the Decision, as well as the extensive national media attention and commentary the Decision has received, belie the Retirees' claim that the Decision is a mere restatement of prior law with no broader impacts. Despite the Retirees' attempts to downplay the considerable uncertainty caused by the Decision by speaking of the fact-specific nature of the Decision (echoed by the USW's curious reference to the facts of this case as "unusual"[14]), they cannot ignore the changes in the law caused by the Decision and the wide-ranging importance of the issues raised.

C. Corrections to the Misstatements of Facts in the Responses

13. The Responses contain a number of statements of fact that are simply incorrect. As the Respondents' rely on these to support their arguments as to the merits of the Decision and the question of public importance, several of these misstatements require correcting.

1) The Initial Order was Based on the Model Order

14. The Retirees' Memorandum of Argument is replete with statements that Indalex "covertly inserted" a provision giving the DIP Lenders priority ahead of statutory trusts.[15] Such statements are unwarranted and unsupported.

15. The Initial Order was based on the Model Order approved by the Commercial List User's Committee of the Ontario Superior Court of Justice which is chaired by Justice Morawetz (who granted the Initial Order, approved the DIP Loan and approved the increase to the DIP Loan). The Model Order, available on the Court's website, specifically provides at paragraph 40 (in virtually identical language to that used in the Initial Order in this case) that the DIP Lender's Charge shall constitute a charge on the Property in priority to all other security interests, including, *inter alia,* trusts and claims of secured creditors, statutory or otherwise.[16] Thus, the Initial Order granted in this case was not only similar to initial orders routinely granted in CCAA proceedings throughout Canada, but was in the form of the Model Order approved by the Court.

16. Further, the Retirees' criticism that Indalex acted "covertly" by not giving the Retirees notice of the motion to approve the DIP Loan ignores not only the fact that this standard term was approved by the CCAA judge in open court after conducting a full analysis of the competing interests and balancing the benefits and potential prejudice to stakeholders,[17] but also what the

[14] USW Memorandum of Argument, at para. 3.
[15] Retirees' Memorandum of Argument, at paras. 10, 15, 16, 20 and 35.
[16] Commercial List Model Order, *Companies' Creditors Arrangement Act* Initial Order, Tab A hereto, at para. 40.
[17] Endorsement of Morawetz J. dated April 17, 2009, Monitor's Application Record, Tab 6C, at paras. 6-9.

Retirees point out is the "key distinction" between its position and the USW in the Decision: that the Court of Appeal did not find a deemed trust in favour of the Retirees.[18]

17. The Retirees argue that the issue of notice is now covered by amendments to the CCAA that came into force on September 18, 2009, notably s. 11.2(i) of the CCAA that requires a company to give prior notice of a motion granting priority to a DIP lender "to the secured creditors who are likely to be affected by the security or charge".[19]

18. However, even under the new section 11.2, the Retirees would not be entitled to notice of either the initial application or the motion to approve the DIP financing as the Retirees do not have a deemed or statutory trust and are not otherwise secured creditors likely to be affected by the charge. It would be impossible for a debtor company to serve all people who may potentially be granted constructive trusts based on potential findings of breaches of fiduciary duty (particularly those based on facts arising after the motion). Such a requirement would effectively require debtor companies to put the whole world on notice of the impending CCAA proceeding and would provide stakeholders with the opportunity to exercise self-help remedies in advance of the stay of proceedings, thereby undermining the very benefit of a CCAA filing.

19. Moreover, the Retirees' contention that the Decision requires debtor companies to give notice of CCAA filings and applications for DIP financing to people such as the Retirees, who at best have a potential claim for equitable relief such as a constructive trust, represents a considerable change to the law, to the detriment of the objectives of the CCAA, and exemplifies the pubic importance of the issues raised by the proposed appeal.

2) The Motion to Increase the DIP Loan

20. The Retirees claim that they did not attempt to reserve their rights with respect to the priority of the DIP Loan over statutory trusts at the motion to increase the DIP Loan. The USW similarly asserts that there was no substantive analysis of the Retirees' rights at the motion to increase the DIP, and relies on the Court of Appeal's footnoted finding on this issue.[20]

21. Such assertions are incorrect. Morawetz J.'s endorsement dated June 15, 2009 makes it clear that the Retirees' contemplated reservation of rights included the question of the priority of

[18] Retirees' Memorandum of Argument, at para. 7.
[19] Retirees' Memorandum of Argument, at para. 37.
[20] Retirees' Memorandum of Argument, at para. 20; USW Memorandum of Argument, at paras. 14, 46 and 47; Court of Appeal Reasons, Monitor's Application Record, Tab 4E, at p. 80, footnote 15.

the DIP Loan over the Retirees' claims in relation to the wind-up deficiency. This reservation was considered and rejected by Morawetz J., in a passage of his endorsement found prior to his noting that the Retirees had withdrawn their request to reserve rights: [21]

> Counsel to certain retirees and counsel to the Second Priority Secured Noteholders did, however, wish to reserve their rights with respect to the relief sought.
>
> I had difficulty in dealing with the request to reserve rights for two reasons. First, the relief sought is inconsistent with the ability for a party, on a practical level, to reserve rights. If the DIP Facility were to be increased with a reservation of rights, uncertainty would prevail if such a reservation was to be granted. Would it cause the DIP lender to withhold advances? Or, if advances were made, would they have priority?
>
> Second, neither the retirees nor the Noteholders put forth any alternative. In the face of no alternative suggestion or proposal, uncertainty would again prevail. At this stage of the CCAA proceedings, additional uncertainty does not represent a positive development. [emphasis added]

22. The Court of Appeal's finding that the reservation was solely to "obtain time to confirm that the motion related solely to an increase in the DIP loan amount" is thus incorrect and can only be explained by the fact that the Court of Appeal appears to have been unaware of Morawetz J.'s endorsement.

23. Notably, Morawetz J. also expressly considered the issue of short service of the motion and approved the service that had been given on the basis that urgency had been established and that no party opposed the motion.[22] The USW's and the Retirees' complaints about service are therefore both irrelevant and inappropriate at this stage.

3) Deemed Trust Motions Before Campbell J.

24. The USW's statement that Campbell J. dismissed Indalex's motion to lift the stay of proceedings to permit a voluntary assignment into bankruptcy is also incorrect.[23] Rather, based on His Honour's decision that neither the USW nor the Retirees had a deemed trust, Campbell J. concluded that it was unnecessary to deal with the Applicants' application to lift the stay.[24] This conclusion also meant that it was unnecessary for Campbell J. to address the issue of whether giving the trusts priority would be an improper variation of or attack on the Initial Order.

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[21] Endorsement of Morawetz J. dated June 15, 2009, Monitor's Application Record, Tab 6F, at pp. 72-73.
[22] Endorsement of Morawetz J. dated June 15, 2009, Monitor's Application Record, Tab 6F, at pp. 71.
[23] USW Memorandum of Argument, at para. 24.
[24] Reasons for Decision of Campbell J. dated February 18, 2010, Monitor's Application Record, Tab 4A at para. 54.

4) The Plan was not Underfunded by Indalex

25. The Retirees and USW state that both pension plans were "underfunded" by Indalex.[25] This assertion is incorrect. It is an acknowledged fact that Indalex made all contributions to the Executive Plan and the Salaried Plan, as mandated by regulation, including all current service contributions and special payments.[26] Any wind-up deficiency in either Plan is not the result of "underfunding" by Indalex but is rather a result of the fact that, based on an actuarial calculation, it has been determined that the funds in the Plan as of the date of wind-up are insufficient to provide the required monthly pension benefits to the members. Such a situation is primarily the result of market conditions including interest rate fluctuations.

5) DIP Lender Having Been Repaid is Irrelevant

26. The Retirees note that the DIP Lender has been re-paid in full and is not participating in these proceedings.[27] However, that is not relevant to the public importance of the issues in the proposed appeal. The DIP Lender was paid by Indalex US as a result of a mutual guarantee granted by it, pursuant to which Indalex US became fully subrogated to the rights of the DIP Lender, including the priority rights granted to the DIP Lender under the terms of the Initial Order. Moreover, the Court of Appeal failed to recognize that any order providing priority to the Plans ahead of the priority granted to the DIP Lenders in the Initial Order negatively impacts the recovery of the creditors of Indalex US, which is in insolvency proceedings in the United States.

6) The Cross-Examination of Keith Cooper is Mischaracterized

27. The Retirees misstate the evidence of Keith Cooper on cross-examination.[28] Mr. Cooper did not state that he and his staff acted as the administrator of the Executive Plan; he correctly identified Indalex as the administrator of the Plan.[29] Moreover, contrary to the "inference" suggested by the Retirees, Mr. Cooper's refusal, on the advice of counsel, to answer questions about the steps Indalex took to have the purchaser take over administration of the Plan was based on the fact that: (i) the questions had already been answered in writing by way of letter; (ii) the cross-examination of Mr. Cooper was with respect to Indalex's motion to lift the stay of

[25] Retirees' Memorandum of Argument, at para. 3; USW Memorandum of Argument, at paras. 8, 13.
[26] Affidavit of Keith Cooper sworn August 24, 2009, Monitor's Application Record, Tab 6M, at para. 20-21; Affidavit of Bob Kavanaugh sworn August 12, 2009, Monitor's Application Record, Tab 6L, at paras. 5-11, 15-26; Reasons for Decision of Campbell J. dated February 18, 2010, 2010 ONSC 114, Monitor's Application Record, Tab 4A, at pp. 21-22, paras. 23-24.
[27] Retirees' Memorandum of Argument, at paras. 5, 26.
[28] Retirees' Memorandum of Argument, at para. 29.
[29] It should be noted that Indalex Limited was the administrator of the Executive Plan, not Indalex US as incorrectly stated in paragraph 27 of the Retirees' Memorandum of Argument.

proceedings to permit the filing of a voluntary assignment into bankruptcy and the question was irrelevant to that motion; and (iii) it was Fred Fazio of Jeffries & Company, Inc. and not Mr. Cooper who ran the sale of Indalex.[30] Mr. Fazio filed a lengthy affidavit in support of Indalex's motion for approval of the sale and he was not cross-examined on that affidavit.

D. Reply to the Respondents' Arguments on the Merits of the Decision

28. Most of the Respondents' arguments on the merits have been addressed in Indalex's application for leave. Ultimately, these matters are appropriately dealt with on the appeal should leave be granted. However, four particular submissions in the Responses require reply.

1) The Concern About Collateral Attack was Raised

29. The Respondents' contention that no party argued before Campbell J. that the Deemed Trust Motions constituted a collateral attack on the Initial Order is incorrect.[31] While the exact phrase "collateral attack" may not have been used, Indalex did in fact raise the issue in its factum before Campbell J., stating as follows: "The court had, and exercised, authority to order that the DIP Lenders Charge take priority over deemed trusts. The DIP Lenders have relied upon these provisions in the court's order and no steps have been taken to amend or vary those provisions." In support of this position, Indalex relied on *Re Collins & Aikman Automotive Canada Inc.,* a case in which the issue of collateral attack was specifically argued and addressed. [32]

30. Moreover, contrary to the USW's assertion,[33] the doctrine of collateral attack can be properly applied in the context of an interlocutory order, and in particular a CCAA proceeding. This is, in fact, exactly what was done by Justice Spence in *Collins & Aikman*, *supra*. Campbell J. did not need to address the question in this case, given his findings regarding the deemed trusts.

2) The USW's Reliance on the Doctrine of Paramountcy is Misplaced

31. The USW argues that Indalex did not present evidence of a conflict between the PBA and the CCAA and that paramountcy was not "invoked" by Morawetz J. in granting the Initial Order. The USW then attempts to minimize the effect of the Decision on future CCAA proceedings by arguing that DIP lenders may obtain priority by raising the issue of paramountcy at the time of the Initial Order granting a DIP loan. There are three problems with this argument.

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[30] Cross-Examination of Keith Cooper, August 26, 2009, QQ. 62-68, 91-101 and Exhibit "2", Tab B hereto.
[31] USW Memorandum of Argument, at para. 25; Retirees' Memorandum of Argument, at para. 36.
[32] Factum of the Applicants before Campbell J., dated August 25, 2009, Tab D hereto, at paras. 12(d), 27; *Re Collins & Aikman Automotive Canada Inc.* (2007), 37 C.B.R. (5th) 282 (Ont.S.C.J.), Tab G hereto, at paras. 93-100.
[33] USW Memorandum of Argument, at paras. 32-34.

32. First, the paramountcy doctrine deals with conflict in the exercise of legislative power where there is overlapping provincial and federal legislation.[34] It is not an evidentiary doctrine nor one that requires an "invocation" of paramountcy every time a CCAA order is made, particularly based on a "law-by-law" or "trust-by-trust" analysis of paramountcy at the time of an Initial Order, as the Court of Appeal would appear to require.[35] This would be wholly impractical if not impossible, since at the outset of a CCAA proceeding the debtor will rarely have complete knowledge of all potential claims against it and thus all provincial statutes that may be affected. It would also undermine a fundamental purpose of the CCAA: to address an arrangement of all of a debtor's obligations – including provincial statutory deemed trusts – in a single proceeding.[36]

33. Second, Morawetz J. *did* find that the Initial Order was necessary to effect the purpose of the CCAA, finding that "there is no other alternative available to the Applicants for a going concern solution", and that the balancing of the prejudice weighs in favour of the approval of the DIP Financing (including the priority, which expressly overrides statutory trusts).[37] There was no obligation for Morawetz J. to say "I invoke paramountcy" when the constitutional power of a CCAA judge to affect claims arising under provincial laws has already been well established.

34. Third, there was no reason for Morawetz J. to make a finding regarding paramountcy as no party, including notably the USW, had argued that he was prevented from making the DIP Lending order on constitutional grounds. In this regard, the Respondents' (and the Court of Appeal's) reliance on the fact that Morawetz did not "invoke" paramountcy – an issue that was raised by the Respondents for the first time before the Court of Appeal – is directly at odds with their attempted exclusion of the collateral attack argument based on it not having been raised clearly enough by Indalex before Campbell J.

3) There was No Conflict of Interest or Breach of Fiduciary Duty

35. The Respondents' contention that the Monitor was intertwined in its own conflict of interest with Indalex through its affiliation with the Chief Restructuring Officer (CRO) in the U.S. bankruptcy proceeding is wholly without merit. In fact, the Monitor's role and the role of the CRO were specifically addressed with Morawetz J. at the commencement of the CCAA

[34] *Quebec (Attorney General) v. Cdn. Owners and Pilots Assn.*, [2010] 2 S.C.R. 536, 2010 SCC 39, Tab F hereto, at para. 53.
[35] Court of Appeal Reasons, Monitor's Application Record, Tab 4E, at pp. 85-87, paras. 176-179.
[36] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, Monitor's Application Record, Tab 7A, at paras. 22, 47.
[37] Endorsement of Morawetz J. dated April 17, 2009, Monitor's Application Record, Tab 6F, at pp. 41-43, paras. 6-9.

proceeding, both in writing in the Monitor's Pre-Filing Report and in oral submissions, and Morawetz J. was satisfied that there was no conflict of interest.[38]

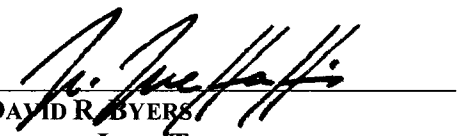
36. In addition, both the USW and the Court of Appeal blur the timelines surrounding the involvement of Mr. Cooper, the U.S. court-appointed CRO of the US Debtors. The actual timelines show that both the DIP Loan and the sale transaction were approved at a time when the Applicants had an independent board of directors. It was not until the closing of the sale transaction on July 31, 2009, that the directors of the Applicants resigned and control of the Applicants was assumed by the CRO pursuant to a shareholders' declaration.

4) Century Services *and the CCAA Recognize that Insolvency Regimes Are Integrated*

37. Finally, the Retirees rely on s. 23(1)(h) of the CCAA (which requires a monitor to advise a CCAA Judge if it is of the opinion that it would be more beneficial to the company's creditors if proceedings were taken under the BIA) in support of its contention that the CCAA and the BIA contemplate distinct recovery scenarios.[39] On the contrary, s. 23(1)(h) supports the conclusion reached by this Court in *Century Services* – that the scheme of distribution under the CCAA should be harmonized with the BIA.

E. Conclusion

38. The Decision, if allowed to stand, will cause uncertainty and have a significant detrimental impact on ordinary course lending, lending in CCAA proceedings, the administration of pension plans, and insolvency and restructuring practices across Canada and raises, among others, the three pressing questions of public importance set out in paragraph 1 of the Monitor's Memorandum of Argument filed on behalf of Indalex. Accordingly, the Monitor, on behalf of Indalex, reiterates its request for an Order granting the Monitor leave to appeal, with costs.



DAVID R. BYERS
ASHLEY JOHN TAYLOR
NICHOLAS MCHAFFIE
DAN MURDOCH
LESLEY MERCER

Of Counsel for the Applicant

[38] Pre-Filing Report to Court Submitted by FTI Consulting Canada, ULC, the Proposed Monitor dated April 3, 2009, Tab B hereto, at paras. 23-25. Endorsement of Justice Morawetz, dated April 3, 2009, Tab C hereto.
[39] Retirees' Memorandum of Argument, at para. 37.

II. TABLE OF AUTHORITIES

January 15, 2010

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	WEEKDAY, THE #
	)	
JUSTICE	)	DAY OF MONTH, 20YR

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 [APPLICANT'S NAME] (the "Applicant")

INITIAL ORDER

THIS APPLICATION, made by the Applicant, 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.

ON READING the affidavit of [NAME] sworn [DATE] and the Exhibits thereto, and on being advised that the secured creditors who are likely to be affected by the charges created herein were given notice, and on hearing the submissions of counsel for [NAMES], no one appearing for [NAME][1] although duly served as appears from the affidavit of service of [NAME] sworn [DATE] and on reading the consent of [MONITOR'S NAME] to act as the Monitor,

[1] Include names of secured creditors or other persons who must be served before certain relief in this model Order may be granted. See, for example, CCAA Sections 11.2(1), 11.3(1), 11.4(1), 11.51(1), 11.52(1), 32(1), 32(3), 33(2) and 36(2).

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged and validated[2] so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. THIS COURT ORDERS AND DECLARES that the Applicant is a company to which the CCAA applies.

PLAN OF ARRANGEMENT

3. THIS COURT ORDERS that the Applicant shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "Plan").

POSSESSION OF PROPERTY AND OPERATIONS

4. THIS COURT ORDERS that the Applicant shall remain in possession and control of its 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 Applicant shall continue to carry on business in a manner consistent with the preservation of its business (the "Business") and Property. The Applicant 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 it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

5. [THIS COURT ORDERS that the Applicant shall be entitled to continue to utilize the central cash management system[3] currently in place as described in the Affidavit of [NAME]

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[2] If service is effected in a manner other than as authorized by the Ontario *Rules of Civil Procedure*, an order validating irregular service is required pursuant to Rule 16.08 of the *Rules of Civil Procedure* and may be granted in appropriate circumstances.

sworn [DATE] or replace it with another substantially similar central cash management system (the "Cash Management System") and that any present or future bank providing the Cash Management System 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 the Cash Management System, or as to the use or application by the Applicant of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Applicant, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, 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. THIS COURT ORDERS that the Applicant shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay 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 Applicant in respect of these proceedings, at their standard rates and charges.

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

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[3] This provision should only be utilized where necessary, in view of the fact that central cash management systems often operate in a manner that consolidates the cash of applicant companies. Specific attention should be paid to cross-border and inter-company transfers of cash.

(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; and

(b) payment for goods or services actually supplied to the Applicant following the date of this Order.

8. THIS COURT ORDERS that the Applicant 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) all goods and services or other applicable sales taxes (collectively, "Sales Taxes") required to be remitted by the Applicant in connection with the sale of goods and services by the Applicant, 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

(c) 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 creditors and which are attributable to or in respect of the carrying on of the Business by the Applicant.

9. THIS COURT ORDERS that until a real property lease is disclaimed [or resiliated][4] in accordance with the CCAA, 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 Rent relating to the period commencing from and including the date of this Order shall also be paid.

10. THIS COURT ORDERS that, except as specifically permitted herein, the Applicant is 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 Applicant to any of its creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

11. THIS COURT ORDERS that the Applicant shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as hereinafter defined), have the right to:

(a) 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 $● in any one transaction or $● in the aggregate]**[5]

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[4] The term "resiliate" should remain if there are leased premises in the Province of Quebec, but can otherwise be removed.

[5] Section 36 of the amended CCAA does not seem to contemplate a pre-approved power to sell (see subsection 36(3)) and moreover requires notice (subsection 36(2)) and evidence (subsection 36(7)) that may not have occurred or be available at the initial CCAA hearing.

(b) **[terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate]**;[6] and

(c) pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

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

12. THIS COURT ORDERS that the 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 disclaims [or resiliates] the lease governing such leased premises in accordance with Section 32 of the CCAA, 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 Section 32(5) of the CCAA), and the disclaimer [or resiliation] of the lease shall be without prejudice to the Applicant's claim to the fixtures in dispute.

13. THIS COURT ORDERS that if a notice of disclaimer [or resiliation] is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer [or resiliation], the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicant and the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer [or resiliation], the

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[6] It is not clear to the Model Order Subcommittee whether the termination of an employee is a "disclaimer or resiliation" of the employment agreement within the meaning of Section 32 of the amended CCAA; since the termination of an employee may not be a matter governed by Section 32 of the amended CCAA (except to the extent that collective agreements are exempted from the application of that Section), the Subcommittee has left this provision in the Model Order.

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 APPLICANT OR THE PROPERTY

14. THIS COURT ORDERS that until and including [DATE – MAX. 30 DAYS], 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 Applicant or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicant and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicant or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

15. 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 Applicant or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicant and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicant to carry on any business which the Applicant is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

16. 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 Applicant, except with the written consent of the Applicant and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

17. THIS COURT ORDERS that during the Stay Period, all Persons having oral or written agreements with the 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, transportation services, utility or other services to the Business or the Applicant, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Applicant, and that the Applicant shall be entitled to the continued use of its 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 Applicant in accordance with normal payment practices of the Applicant or such other practices as may be agreed upon by the supplier or service provider and each of the Applicant and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

18. THIS COURT ORDERS that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicant. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.[7]

[7] This non-derogation provision has acquired more significance due to the recent amendments to the CCAA, since a number of actions or steps cannot be stayed, or the stay is subject to certain limits and restrictions. See, for example, CCAA Sections 11.01, 11.04, 11.06, 11.07, 11.08, 11.1(2) and 11.5(1).

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

19. THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicant with respect to any claim against the directors or officers that arose before 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, is sanctioned by this Court or is refused by the creditors of the Applicant or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

20. THIS COURT ORDERS that the Applicant shall indemnify its directors and officers against obligations and liabilities that they may incur as directors or officers of the Applicant after the commencement of the within proceedings,[8] except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

21. THIS COURT ORDERS that the directors and officers of the Applicant shall be entitled to the benefit of and are hereby granted a charge (the "Directors' Charge")[9] on the Property, which charge shall not exceed an aggregate amount of $●, as security for the indemnity provided in paragraph **[20]** of this Order. The Directors' Charge shall have the priority set out in paragraphs **[38]** and **[40]** herein.

22. 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 Applicant's directors and officers shall only be entitled to the

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[8] The broad indemnity language from Section 11.51 of the CCAA has been imported into this paragraph. The granting of the indemnity (whether or not secured by a Directors' Charge), and the scope of the indemnity, are discretionary matters that should be addressed with the Court.

[9] Section 11.51(3) provides that the Court may not make this security/charging order if in the Court's opinion the Applicant could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

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 **[20]** of this Order.

APPOINTMENT OF MONITOR

23. THIS COURT ORDERS that [MONITOR'S NAME] is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Applicant with the powers and obligations set out in the CCAA or set forth herein and that the Applicant and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicant pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

24. 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 Applicant's receipts and disbursements;

(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 Applicant, to the extent required by the Applicant, in its dissemination, to the DIP Lender and its counsel on a [TIME INTERVAL] basis of financial and other information as agreed to between the Applicant and the DIP Lender which may be used in these proceedings including reporting on a basis to be agreed with the DIP Lender;

(d) advise the Applicant in its preparation of the Applicant's cash flow statements and reporting required by the DIP Lender, which information shall be reviewed with the Monitor and delivered to the DIP Lender and its counsel on a periodic basis, but not less than [TIME INTERVAL], or as otherwise agreed to by the DIP Lender;

(e) advise the Applicant in its development of the Plan and any amendments to the Plan;

(f) assist the Applicant, to the extent required by the Applicant, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(g) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Applicant, to the extent that is necessary to adequately assess the Applicant's business and financial affairs or 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; and

(i) perform such other duties as are required by this Order or by this Court from time to time.

25. 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.

26. 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.

27. THIS COURT ORDERS that that the Monitor shall provide any creditor of the Applicant and the DIP Lender 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 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 the 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 Applicant may agree.

28. 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.

29. THIS COURT ORDERS that the Monitor, counsel to the Monitor and counsel to the Applicant shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicant as part of the costs of these proceedings. The Applicant is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicant on a [TIME INTERVAL] basis and, in addition, the Applicant is hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Applicant, retainers in the amount[s] of $● [, respectively,] to be held by them as security for payment of their respective fees and disbursements outstanding from time to time

30. 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.

31. THIS COURT ORDERS that the Monitor, counsel to the Monitor, if any, and the Applicant's counsel 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 $●, 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 **[38]** and **[40]** hereof.

DIP FINANCING

32. THIS COURT ORDERS that the Applicant is hereby authorized and empowered to obtain and borrow under a credit facility from [DIP LENDER'S NAME] (the "DIP Lender") in order to finance the Applicant's working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under such credit facility shall not exceed $● unless permitted by further Order of this Court.

33. THIS COURT ORDERS THAT such credit facility shall be on the terms and subject to the conditions set forth in the commitment letter between the Applicant and the DIP Lender dated as of [DATE] (the "Commitment Letter"), filed.

34. THIS COURT ORDERS that the Applicant is hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "Definitive Documents"), as are contemplated by the Commitment Letter or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Applicant is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the Commitment Letter and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

35. THIS COURT ORDERS that the DIP Lender shall be entitled to the benefit of and is hereby granted a charge (the "DIP Lender's Charge") on the Property, which DIP Lender's Charge shall not secure an obligation that exists before this Order is made. The DIP Lender's Charge shall have the priority set out in paragraphs **[38]** and **[40]** hereof.

36. THIS COURT ORDERS that, notwithstanding any other provision of this Order:

(a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the Definitive Documents or the DIP Lender's Charge, the DIP Lender, upon ● days notice to the Applicant and the Monitor, may exercise any and all of its rights and remedies against the Applicant or the Property under or pursuant to the Commitment Letter, Definitive Documents and the DIP Lender's Charge, including without limitation, to cease making advances to the Applicant and set off and/or consolidate any amounts owing by the DIP Lender to the Applicant against the obligations of the Applicant to the DIP Lender under the Commitment Letter, the Definitive Documents or the DIP Lender's 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 a bankruptcy order against the Applicant and for the appointment of a trustee in bankruptcy of the Applicant; and

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

37. THIS COURT ORDERS AND DECLARES that the DIP Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicant under the CCAA, or any proposal filed by the Applicant under the *Bankruptcy and Insolvency Act* of Canada (the "BIA"), with respect to any advances made under the Definitive Documents.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

38. THIS COURT ORDERS that the priorities of the Directors' Charge, the Administration Charge and the DIP Lender's Charge, as among them, shall be as follows[10]:

[10] The ranking of these Charges is for illustration purposes only, and is not meant to be determinative. This ranking may be subject to negotiation, and should be tailored to the circumstances of the case before the Court. Similarly, the quantum and caps applicable to the Charges should be considered in each case. Please also note that the CCAA

First – Administration Charge (to the maximum amount of $●);

Second – DIP Lender's Charge; and

Third – Directors' Charge (to the maximum amount of $●).

39. THIS COURT ORDERS that the filing, registration or perfection of the Directors' Charge, the Administration Charge or the DIP Lender's 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.

40. THIS COURT ORDERS that each of the Directors' Charge, the Administration Charge and the DIP Lender's 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, claims of secured creditors, statutory or otherwise (collectively, "Encumbrances") in favour of any Person.

41. THIS COURT ORDERS that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicant 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 Lender's Charge, unless the Applicant also obtains the prior written consent of the Monitor, the DIP Lender and the beneficiaries of the Directors' Charge and the Administration Charge, or further Order of this Court.

42. THIS COURT ORDERS that the Directors' Charge, the Administration Charge, the Commitment Letter, the Definitive Documents and the DIP Lender's 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 Lender 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

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now permits Charges in favour of critical suppliers and others, which should also be incorporated into this Order (and the rankings, above), where appropriate.

pursuant to 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 Applicant, 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 Commitment Letter or the Definitive Documents shall create or be deemed to constitute a breach by the Applicant 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 Applicant entering into the Commitment Letter, the creation of the Charges, or the execution, delivery or performance of the Definitive Documents; and

(c) the payments made by the Applicant pursuant to this Order, the Commitment Letter or the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

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

SERVICE AND NOTICE

44. THIS COURT ORDERS that the Monitor shall (i) without delay, publish in [newspapers specified by the Court] a notice containing the information prescribed under the CCAA, (ii) within five days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicant of more than $1000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it

publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

45. THIS COURT ORDERS that the Applicant 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 Applicant's creditors or other interested parties at their respective addresses as last shown on the records of the Applicant 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.

46. THIS COURT ORDERS that the Applicant, 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, and the Monitor may post a copy of any or all such materials on its website at [INSERT WEBSITE ADDRESS].

GENERAL

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

48. 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 Applicant, the Business or the Property.

49. 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 Applicant, 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 Applicant 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 Applicant and the Monitor and their respective agents in carrying out the terms of this Order.

50. THIS COURT ORDERS that each of the Applicant 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, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

51. THIS COURT ORDERS that any interested party (including the Applicant 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.

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

_____

Court File No. 09-CL-_____

Indalex Limited
Indalex Holdings (B.C.) Ltd.
6326765 Canada Inc. and
Novar Inc.

PRE-FILING REPORT TO COURT SUBMITTED BY
FTI CONSULTING CANADA ULC, THE PROPOSED MONITOR
April 3, 2009

Court File No. 09-CL-_____

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

PRE-FILING REPORT TO THE COURT
SUBMITTED BY FTI CONSULTING CANADA ULC
IN ITS CAPACITY AS PROPOSED MONITOR

INTRODUCTION

1. FTI Consulting Canada ULC ("**FTI Canada**" or the "**Proposed Monitor**") has been informed that Indalex Limited ("**Indalex**"), Indalex Holdings (B.C.) Ltd. ("**Indalex BC**"), 6326765 Canada Inc. ("**632**") and Novar Inc. ("**Novar**") (collectively, the "**Applicants**") intend to make an application under the *Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended* (the "**CCAA**") for an initial order (the "**Initial Order**") granting, *inter alia*, a stay of proceedings against the Applicants until May 1, 2009, (the "**Stay Period**") and appointing FTI Canada as monitor (the "**Monitor**"). FTI Canada has provided its consent to act as Monitor. The proceedings to be commenced by the Applicants under the CCAA will be referred to herein as the "**CCAA Proceedings**".

2. The purpose of this report is to inform the Court on the following:

(a) The proceedings commenced by certain of the Applicants' US affiliates (the "**Ch.11 Proceeedings**") under chapter 11 of the *United States Bankruptcy Code* (the "**USBC**") in the United States Bankruptcy Court, District of Delaware (the "**US Court**");

(b) The Applicants' efforts to arrange debtor-in-possession financing ("**DIP Financing**");

(c) The charge being sought by the Applicants in favour of its directors and officers in the amount of $3.3 million (the "**D&O Charge**"); and

(d) The roles of FTI Consulting, Inc. ("**FTI US**") and FTI Canada.

3. In preparing this report, FTI Canada has relied upon unaudited financial information of the Applicants, the Applicants' books and records, certain financial information prepared by the Applicants and discussions with the Applicants' management. FTI Canada has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of the information. Accordingly, FTI Canada expresses no opinion or other form of assurance on the information contained in this report or relied on in its preparation. Future oriented financial information reported or relied on in preparing this report is based on management's assumptions regarding future events; actual results may vary from forecast and such variations may be material.

4. Unless otherwise stated, all monetary amounts contained herein are expressed in United States Dollars. Capitalized terms not otherwise defined herein have the meanings defined in the affidavit of Timothy R. J. Stubbs, President and Chief Executive Officer of the Applicants, sworn April 2, 2009, and filed in support of the CCAA application (the "**Stubbs Affidavit**").

5. This report should be read in conjunction with the Stubbs Affidavit as certain information contained in the Stubbs Affidavit has not been included herein in order to avoid unnecessary duplication.

THE CHAPTER 11 PROCEEDINGS

6. A corporate organization chart is attached as Exhibit A to the Stubbs Affidavit. As shown thereon and as described in the Stubbs Affidavit, Indalex's parent is Indalex Holding Corp. ("**Indalex Holding**"), which is a wholly-owned subsidiary of Indalex Holdings Finance, Inc. ("**Indalex Finance**"). Indalex BC, 632 and Novar are wholly owned subsidiaries of Indalex. Collectively, Indalex Finance and its affiliates (the "**Indalex Group**") is the second largest aluminium extruder in North America.

7. On March 20, 2009, Indalex Holding, Indalex Finance, Indalex Inc., Caradon Lebanon, Inc. and Dolton Aluminum Company, Inc. (collectively, the "**US Debtors**") commenced the Ch.11 Proceedings in the US Court. The case has been assigned to Judge Walsh.

8. On March 23, 2009, the following orders (collectively, the "**First Day Orders**") were issued in the Ch.11 Proceedings by Judge Walsh:

   (a) Order pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure directing joint administration of cases;

   (b) Order pursuant to 28 USBC §156(c) and Bankruptcy Rule 2002 authorizing employment and retention of Epiq Bankruptcy Solutions, LLC as Claims, Noticing, and Balloting Agent;

   (c) Order approving the Cash Management System, authorizing use of prepetition bank accounts and business forms and waiving the requirements of 11 USBC § 345(b) on an interim basis;

   (d) Order pursuant to Sections 507(a), 363(b) and 105(a) of the USBC authorizing payment of wages, compensation and employee benefits and authorizing financial institutions to honour and process cheques and transfers related thereto;

(e) Order pursuant to Sections 105(a) and 363 of the USBC authorizing Debtors to honour certain prepetition obligations to customers; and

(f) Order authorizing use of cash collateral and granting adequate protection.

THE APPLICANTS' EFFORTS TO ARRANGE DIP FINANCING

9. In anticipation of the possibility that the Applicants and the US Debtors may have to commence formal restructuring proceedings, the Indalex Group, assisted by its Investment Bankers, Jefferies & Company, Inc. ("**Jefferies**"), undertook efforts to obtain DIP Financing.

10. Given the capital structure of the US Debtors, which includes approximately $306 million of secured debt, Jefferies determined that there was no likelihood of obtaining DIP Financing ranking subordinate to the existing secured lenders. The Proposed Monitor concurs with this view.

11. Accordingly, Jefferies approached the following parties that were considered as logical potential candidates to consider providing DIP Financing secured by a priming charge. These groups included:

(a) The Senior Secured Lenders;

(b) Sun Indalex LLC ("**Sun Indalex**"), which holds $30 million of secured debt ranking subordinate to the Senior Secured Lenders;

(c) The ad hoc committee of holders of the Senior Secured Notes (the "**Noteholders**"); and

(d) Two parties not currently providing financing to the Indalex Group.

12. Sun Indalex, the Noteholders and one of the unconnected parties all declined to provide DIP Financing.

13. The Senior Secured Lenders and one of the unconnected parties ("**Party A**") indicated that they were prepared to consider providing DIP Financing.

14. After lengthy negotiation, both the Senior Secured Lenders and Party A provided term sheets for DIP Financing. Both Party A and the Senior Secured Lenders stated that they would require that the DIP Financing for the US Debtors and the Applicants be secured by Court-ordered charges and be fully cross-guaranteed.

15. On its face, the term sheet provided by Party A provided better pricing terms. However, it was subject to due diligence conditions, giving rise to closing risk. Furthermore, proceeding with Party A would require the Indalex Group to obtain priming charges ranking in priority to the Senior Secured Lenders, and it was anticipated that the Senior Secured Lenders would strenuously object to any priming charge.

16. Indalex Group was advised by Jefferies and its US legal counsel that because of the "adequate assurance" requirements that would need to be met in the Ch.11 Proceedings in order to obtain a priming charge over the objection of the Senior Secured Lenders, obtaining approval of DIP Financing with Party A would take significantly longer than approval of DIP Financing with the Senior Secured Lenders and there could be no assurance that the application for the priming charge would be successful.

17. Given these risks and the likely destabilising effect a drawn out contested US DIP approval process would have on the business, the Indalex Group, in consultation with Jefferies and its legal and professional advisors, concluded that the additional uncertainty and closing risk associated with proceeding with Party A were not justified and elected to proceed with the Senior Secured Lenders.

18. The Proposed Monitor believes that the decision reached by the Indalex Group and its advisors to select the Senior Secured Lenders as the party with which to attempt to negotiate DIP Financing was reasonable and justified in the circumstances.

19. Unfortunately, despite the efforts of the Applicants and the Senior Secured Lenders, the parties have been unable to conclude negotiations in respect of the DIP Financing before the actions of other creditors forced the Applicants to commence the CCAA Proceedings. However, it appears to the Proposed Monitor that all parties are working diligently to conclude negotiations and it is currently anticipated that an agreement will be reached and that the Applicants will be bringing a motion for the approval of DIP Financing and the DIP Charge, substantially in the form described above, in the very near future.

20. In order to provide for funding of operations in the meantime, the Applicants' have requested an extension of the Forbearance Agreement by the Senior Secured Lenders. Assuming that such extension is granted by the Senior Secured Lenders, the Applicants' forecast (the "**April 2 Forecast**") shows that the Applicants will have sufficient liquidity to fund operations. A copy of the April 2 Forecast is attached hereto as Appendix A.

THE PROPOSED D&O CHARGE

21. The Applicants are seeking the D&O Charge in the amount of $3.3 million.

22. The Proposed Monitor has reviewed the underlying calculations upon which the Applicants have based the estimate of the potential liability in respect of directors' statutory obligations and is of the view that the D&O Charge is reasonable in relation to the quantum of the estimated potential liability. The Proposed Monitor notes, however, that the ranking of the DIP Charge in relation to the security of the Senior Secured Lenders has not, as at the time of writing, been agreed between the Applicants and the Senior Secured Lenders.

THE ROLES OF FTI US AND FTI CANADA

23. On February 20, 2009, FTI US was engaged by Holding as financial advisor. Since the week commencing March 9, 2009, FTI Canada personnel have been involved in that mandate, providing advice and assistance in respect of the Canadian aspects of the Indalex Group and its potential restructuring.

24. FTI US will, subject to the approval of the US Court, continue to act as financial advisor to the US Debtors in the Ch.11 Proceeding. In addition, Mr. Keith Cooper, a Senior Managing Director of FTI US, has been appointed as Chief Restructuring Officer of the US Debtors, again subject to the approval of the US Bankruptcy Court. The Proposed Monitor has been informed that FTI US is being compensated based on its hourly rates and that FTI US's mandates as financial advisor to the US Debtors and Chief Restructuring Officer do not carry any form of success-based compensation. Accordingly, FTI US has no economic interest in the outcome of the Ch.11 Proceedings or the CCAA Proceedings.

25. FTI Canada has informed the Ch. 11 Debtors, the Applicants and FTI US of the duties and obligations of the Monitor in any proceedings under the CCAA. The Ch.11 Debtors, the Applicants, FTI US and FTI Canada are all fully cognizant that such duties and obligations are to the Court and the stakeholders of the Applicants. In order to maximize efficiency and minimize costs, it is proposed that FTI Canada be appointed as Monitor of the Applicants in the CCAA Proceedings. FTI Canada has consented to such appointment if made by this Honourable Court.

The Proposed Monitor respectfully submits to the Court this, its Pre-Filing Report.

Dated this 3rd day of April, 2009.

FTI Consulting Canada ULC
The Proposed Monitor of
Indalex Limited, Indalex Holdings (B.C.) Ltd.,
6326765 Canada Inc. and Novar Inc.

Nigel D. Meakin
Senior Managing Director

IN THE MATTER OF THE *COMPANIES CREDITORS ARRANGEMENT ACT*, R.S.C., 1985 c. C-36
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
INDALEX LIMITED et al

Court File No.

Applicants

K. McEachern + L. Rogers for Applicats April 3/09.
R. J. Taylor for FTI Consulting Canada ULC
proposed Monitor.
W. Rostom per J. P. Morgan.

Indalex Limited ("Indalex Canada") and affiliated applicats (collectively the "Applicants") applied for CCAA protection. The Applicants are part of an enterprise referred to as the Indalex group. The ultimate parent entity Indalex Finance and certain of its US Affiliates filed for protection under Chapter 11 - March 20, 2009.

The record establishes that the Applicants qualify as a debtor company or affiliated debtor company within the meaning of the CCAA

12287896.1

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

APPLICATION RECORD

BLAKE, CASSELS & GRAYDON LLP
Barristers and Solicitors
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Lawyers for the Applicants

Total indebtedness exceeds $ 5 million and insolvency has been acknowledged.

Indalex Canada is a Canadian corporation and the entity through which the Indalex Group operates its Canadian business as an aluminum extruder and producer of aluminum extrusion billets. The Indalex Canada carries on business at locations in B.C., Alberta, Quebec and at 2 facilities in Ontario. Its headquarters are located at in Mississauga

As such, the jurisdiction of the Court to receive the CCAA application has been established.

Indalex Canada has filed the required statement of projected cash flow and other financial documents required under s 11(2) of the CCAA.

The requested relief is not opposed by the other parties in Court today. The relief sought does not include a provision for DIP financing. This issue is expected to be addressed next week. In

the interim, the Applicants are operating under the terms of a Forbearance Agreement with J. P. Morgan. The Forbearance Agreement expires Wed April 8/09 and arrangements have been made for a 1 hour hearing before me on that date.

KTI Consulting Canada ULC has been appointed as Monitor and KTI has filed a helpful and informative pre-filing report.

The proposed order provides for an Administration Charge and a Directors' Charge, with priority being subordinated, at this time, to the Bank Security. Counsel to the Applicants advised

that this issue may be revisited at the hearing next week. At this time it is noted that all parties are waiving their rights on the issue of the ~~[illegible]~~ priority of these charges.

I am satisfied that circumstances exist that justify the granting of a limited order under the CCAA. FTI is ~~[illegible]~~ appointed Monitor. The Stay Termination Date is May 1, 2009.

A comeback provision is contained in the order, which provision is to be considered to be neutral in all respects.

An order shall issue in the form presented as amended.

Justice Farley J.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

Applicants

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

August 24, 2009

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Lawyers for the Applicants

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

(the "**Applicants**")

FACTUM OF THE APPLICANT

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

PART I - OVERVIEW

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

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

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

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

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

PART II - FACTS

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

Affidavit of Bob Kavanaugh, paras 5 and 15.

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

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

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

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

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

Affidavit of Bob Kavanaugh, paras 6-11.

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

Affidavit of Bob Kavanaugh, paras 15 and 20

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

Affidavit of Bob Kavanaugh, para 16.

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

Affidavit of Bob Kavanaugh, paras 17-18.

PART III - ARGUMENT

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

12. As set out below, Indalex submits that:

(a) Because any deemed trust under the PBA would not be recognized in a bankruptcy, it is premature to determine these motions prior to a determination as to whether the Indalex will be permitted to make an assignment under the *Bankruptcy and Insolvency Act.*

(b) The Executive Plan has not yet been wound up and no wind up liability exists under that plan at this date. For this reason alone, the motion in respect of the Executive Plan must be dismissed.

(c) In any event, the subsection 57(4) of the PBA by its terms only creates a deemed trust in respect of contribution obligations which accrue prior to the wind up date. The PBA does not create any deemed trust in respect of those obligations of an employer pursuant to section 75(1)(b) of the PBA which arise only following a wind up in circumstances where the wound up plan has insufficient assets to satisfy accrued pension benefits.

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

Bankruptcy and Insolvency Act

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

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

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

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

No Wind-Up of Executive Plan

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

No Deemed Trust

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

> 75. (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,
>
> (a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and
>
> (b) an amount equal to the amount by which,
>
> (i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,
>
> (ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and
>
> (iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39(3) (50 per cent rule) and section 74,
>
> exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> The PBA does not expressly state whether the funding deficiency on the wind up of a pension plan is secured by the deemed trust, but it appears that the deemed trust is intended to apply to the deficiency to the extent it relates to employer contributions and remittances due and owing to the pension fund on wind up but which have not been paid.
>
> ...The deemed trust does not extend to the obligation of an employer to fund pension obligations that have not yet become due or which "crystallize" only upon the wind up of the pension plan.
>
> Ari Kaplan, *Pension Law* (Irwin Law, 2006) p.396
>
> ***
>
> Of particular note to secured creditors will be the fact that the courts have determined that the deemed trust created under the OPBA [Ontario Pension Benefits Act] does not extend to the unfunded pension liability upon wind up of the plan, but is limited to the outstanding unremitted contributions that are past due plus those arising in respect of the stub period. Accordingly while the entirety of the pension fund shortfall remains an obligation of the employer, and an obligation exists under the OPBA to fund this deficiency over a period not exceeding five years from the date of windup, at present this is an unsecured claim on the assets of the debtor. [emphasis added]
>
> Gregory Winfield, "Pension Management in Insolvency and Restructuring: What is at Stake?" (Insight, 2005)

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

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

> It therefore appears to me that the deemed trust provisions of s. 58(3) and (4) only refer to the regular contributions together with those special contributions which were to have been made but were not. In this situation that would be the regular and special payments that should have been made but were not (as reflected in the report as of December 31, 1988) together with any regular or special payments that were scheduled to have been made by the wind-up date, July 13, 1990, but were not made. This is contrasted with the obligation of Usarco to fully fund its pension obligations as of the wind-up date pursuant to s. 76(1). It is recognized in these circumstances however, that the Bank will have a secured position which will prevail against these additional obligations as to the special payments which have not yet required to be paid into the fund. Sadly, it is extremely unlikely there will be a surplus after taking care of the Bank to allow the pension fund to be fully funded for this (the likelihood being that the wind-up valuation of assets and liabilities of the pension fund will show a deficiency) [emphasis added].
>
> *Toronto Dominion Bank v. Usarco Ltd* (1991), 42 E.T.R. 235 (Ont. Gen Div) para. 26

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

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

> in *Usarco* is correct, but I do not need to resolve the issue on this appeal [emphasis added].
>
> *Re Ivaco* (2006), 83 O.R. (3d 108) (C.A.) affirming [2005] O.J. No. 3337 (O.S.C.J.)

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

Priority of DIP Lenders

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

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

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

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

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

> *Minister of National Revenue v Temple Housing Inc.*(2008), 43 C.B.R. (5th) 35 (Alta C.A.)
>
> *Re Collins & Aikman Automotive Canada Inc.* (2007), 37 C.B.R. (5th) 282 (O.S.C.J.) at paras. 42, 87

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

PART IV - ORDER REQUESTED

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Counsel for the Applicants

SCHEDULE "A"

LIST OF AUTHORITIES

TAB

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

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

FACTUM OF THE APPLICANTS

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Lawyers for the Applicants

VICTORY VERBATIM

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

HP/lms

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

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

Applicants

- - - - - - - - - - -

This is the Cross-Examination of KEITH COOPER, on his affidavit sworn the 20th day of August, 2009, taken at the offices of VICTORY VERBATIM REPORTING SERVICES, Suite 900, Ernst & Young Tower, 222 Bay Street, Toronto, Ontario, on the 26th day of August, 2009.

- - - - - - - - - - -

APPEARANCES:

ANDREW J. HATNAY DEMETRIOS YIOKARIS	}	-- for Keith Carruthers, and Pensioners of The Executive Pension Plan
DARRELL BROWN		-- for United Steel Workers
KATHERINE McEACHERN JACKIE MOHER LINC ROGERS	}	-- for Indalex Limited
ASHLEY JOHN TAYLOR		-- for FTI Consulting Canada ULC

I would like you to read the middle paragraph, if you don't mind.

A. The paragraph beginning with: "...Following the completion..."

57. Q. Yes.

A. Okay. I have read that.

58. Q. Do you disagree with anything in that paragraph?

MS. McEACHERN: I don't think that this witness can really answer that. This is a letter from counsel to the monitor answering certain questions.

59. MR. HATNAY: This is in a monitor's report.

MS. McEACHERN: Yes.

60. MR. HATNAY: So, why can't he answer my simple question, does he disagree with anything in that paragraph?

MS. McEACHERN: Go ahead.

THE DEPONENT: No, I do not disagree with anything in that paragraph.

61. MR. HATNAY: Can we mark this as an exhibit, please?

--- EXHIBIT NO. 2: Stikeman Elliott letter to monitor,

VICTORY VERBATIM

K. Cooper - 22

dated July 13, 2009

BY MR. HATNAY:

62. Q. Who was responsible for administering the executive pension plan in Canada?

A. It is...my understanding is Indalex Limited was the administrator, plan administrator.

63. Q. Okay. Now, in your affidavit, and Mr. Brown mentioned this, if I could take you to paragraph 33. I will just read it out loud for convenience.

"...The applicants are no longer carrying on business, have no active employees and no tangible assets other than cash (including sale proceeds) and certain tax refunds. The board of directors of the applicants of the applicants have resigned and the former directors are all currently employed by SAPA. The applicants are insolvent shells..."

If you flip the page, paragraph 35(e), you state again:

"...The applicants are insolvent shells and are no longer carrying on business..."

So, can you tell me who is administering the

executive plan now?

A. It would be Indalex Limited as controlled by myself via the unanimous shareholder declaration, as well as the monitor. The combination of myself and the monitor oversee the activities of Indalex Limited at this point.

64. Q. So, the executive plan administration has fallen to the company you are working for in the U.S.; is that what you said?

MS. McEACHERN: That is not what he said. He said it was Indalex Limited.

BY MR. HATNAY:

65. Q. Okay. So, I am just clarifying his answer. So, the administration of the plan has now been assumed by...

MS. McEACHERN: It hasn't been assumed by anyone. The administrator is still Indalex Limited.

66. MR. HATNAY: No, that is not what he said.

MR. TAYLOR: The administrator is still Indalex Inc. I can confirm that the monitor is not acting as administrator of the plan. The monitor is acting in a court

appointed role pursuant to the CCAA and the orders of the Court, and is not acting as administrator.

BY MR. HATNAY:

67. Q. Okay. So, if you don't mind, Mr. Cooper, let me just ask you again. So, the Indalex Canada are insolvent shells. They are not functioning, so who is administering the executive plans?

A. It still rests with Limited, Indalex Limited. It hasn't changed to my knowledge.

68. Q. Is that the Canadian company or the U.S. company?

A. That is the Canadian company.

69. Q. Who is doing the day-to-day administration of the executive plan?

MS. McEACHERN: Sorry, what do you mean by day-to-day administration? What day-to-day administration?

70. MR. HATNAY: Well, simple things. Like, if you get a phone call from a pensioner inquiring about the pension plan, who is instructing the actuary; things like that.

MS. McEACHERN: I don't think there is

date of this Friday for Canadians to file claims. Do you know what will happen with that claims procedure if your bankruptcy proceeds?

MS. McEACHERN: I don't think that is a matter for this witness to answer, the date. There will be a transition. There will be an Order. The monitor will be involved in the preparing of an Order that will transition, for instance...

MR. TAYLOR: Perhaps I could answer that question. The monitor has filed a report and will recommend to the Court that if a bankruptcy order is made, that the monitor be authorized to continue to complete the claims process in Canada.

BY MR. HATNAY:

91. Q. Okay, thank you. Let's talk a little bit about the sale to SAPA, if you don't mind. Can you tell me what efforts, if any, were made by you or anyone else with the company in the negotiation of the SAPA transaction for SAPA to assume the executive pension plan as part of the transaction?

MS. McEACHERN: Sorry, I don't think

that is relevant to this motion. This issue was raised...

92. MR. HATNAY: It is in his affidavit.

MS. McEACHERN: This issue was raised and argued already by your client.

93. MR. HATNAY: I am not arguing anything, I am just asking a question.

MS. McEACHERN: Well, maybe you could direct us to the provision that you are speaking of.

94. MR. HATNAY: Paragraph 16 refers to this affidavit. Paragraph 13 refers to SAPA.

MS. McEACHERN: The issue of whether SAPA was asked to assume that plan is not relevant to this motion.

95. MR. HATNAY: It is a fair question. In his own affidavit he talks about SAPA.

MS. McEACHERN: He talks about a sale to SAPA.

96. MR. HATNAY: That is my question. The sale involved negotiation.

MS. McEACHERN: Do I not recall that question was already answered in written answers to your questions raised on your client's prior motion?

VICTORY VERBATIM

97. MR. HATNAY: I would like to ask Mr. Cooper what his answer is.

MS. McEACHERN: I say it is not relevant to this motion.

98. MR. HATNAY: So, you are refusing to answer that question?

MS. McEACHERN: Yes. Do you want to take five? /R

99. MR. HATNAY: Sure. Let's take a five minute break.

--- A BRIEF RECESS

KEITH COOPER, resumed

CONTINUED CROSS-EXAMINATION BY MR. HATNAY:

MR. TAYLOR: I just want to take the opportunity. When I answered that first question I think I might have said Indalex Inc. rather than Indalex Limited. If I did it was a mistake and I intended to refer to the Canadian debtor, Indalex Limited.

MS. McEACHERN: Okay.

100. MR. HATNAY: Can you just repeat your answer? Do you remember it?

MR. TAYLOR: No. But it is in the

transcript, so if it says Indalex Inc. sub Indalex Limited.

101. MR. HATNAY: But I think your point was the monitor is not the administrator of the pension plan?

MR. TAYLOR: Is not administrating the pension plan, correct. Yes.

BY MR. HATNAY:

102. Q. Mr. Cooper, a couple questions about the shareholder declaration. Now, are you...maybe your counsel can answer this one. Are you seeking to assign all of the Canadian applicants into bankruptcy?

MS. McEACHERN: That is still in consideration. We are at this point asking for leave to lift the stay.

103. MR. HATNAY: For all the Canadian applicants?

MS. McEACHERN: Correct, but we are asking to lift the stay. The decision of what entities will be filed is under consideration.

104. MR. HATNAY: Will you be taking any steps to wind up the executive plan?

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BY EMAIL

July 13, 2009
File No.: 1096791002

Mr. Andrew J. Hatnay
Koskie Minsky LLP
20 Queen Street West,
Suite 900
Toronto, Ontario
M5H 3R3

Dear Andrew:

Re: Indalex Limited, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc. ("**Indalex**"); Court File No. CV-09-8122-00CL

This letter is written in response to the Questions for Monitor and Company Re: Executive Plan and Supplementary Pension Plan you gave to counsel to Indalex and counsel to the Monitor on July 2, 2009. We have received responses from Indalex to each of your questions other than question 6, which was addressed to the Monitor. The responses are set forth below following each of your questions.

1. **What efforts were pursued with the purchaser for the purchaser to take the Executive Plan and Supplementary Plan?**

The Stalking Horse Asset Purchase Agreement was negotiated with a view to maximizing monetary recovery for Indalex's stakeholders, minimizing closing risks associated with the transaction and ensuring stable, continued employment for Indalex's current workforce. The Stalking Horse Bidder maintained consistently throughout the course of negotiations with Indalex that it was only prepared to accept certain liabilities arising prior to the closing date relating to employees who were being offered employment by the Stalking Horse Bidder.

The Stalking Horse Bidder expressed no interest in assuming the Retirement Plan for the Executive Employees of Indalex Canada and Associated Companies (the "Executive Plan") or the Supplementary Retirement Plan for Executive Employees of Indalex Canada and Associated Companies (the "**Supplementary Plan**") or otherwise paying direct consideration to any creditor of Indalex that would not have a continuing business or employment relationship with the Stalking Horse Bidder.

2. **Did any potential purchaser express a willingness to take the Executive Plan and Supplementary Plan?**

No other potential bidder expressed any willingness to assume the Executive Plan or the Supplementary Plan or assume any liabilities relating to current or former employees who would not be offered employment with the bidder.

3. **What is the company's intention with respect to the Executive Plan and Supplementary Plan?**

Indalex's focus has been on maintaining its post-filing obligations and securing a viable going concern solution for its business. As is evident from the court material filed to date, Indalex has not made any recommendations to the Court with respect to the wind-down of its estate following the sale of its assets and business to a Successful Bidder.

Following the completion of the asset sale, there will no longer be any active members of the Executive Plan. As discussed at the July 2, 2009 Court hearing, it is unlikely that any bidder will elect to absorb obligations owing by Indalex that provides no corresponding benefit to such bidder. Accordingly, it is expected that the Executive Plan will be fully wound up in accordance with the requirements of the *Pension Benefits Act* (Ontario). All unsecured claims, including those arising from the wind up of the Executive Plan and in connection with the Supplementary Plan, will be dealt with in accordance with applicable law.

4. **What steps did the Company and Monitor take to look after the Executive Plan and Supplementary Plan?**

Indalex has continued to make all required current service contributions to the Executive Plan. Contrary to Mr. Hatnay's statement in Court, Indalex made all required special payments to the Executive Plan prior to filing, and no requirement to make special payments has arisen or is currently outstanding since the commencement of these proceedings. Indalex is therefore not in default with respect to special payments to the Executive Plan. The Supplementary Plan has been dealt with in accordance with the terms of the Amended Amended and Restated Initial Order.

5. **Were the purchasers informed of the existence of the Executive Plan and Supplementary Plan?**

Both the Executive Plan and the Supplementary Plan were posted in the electronic data room made available for bidders in connection with their due diligence.

6. **What is the recommendation of the Monitor to the Court regarding the Executive Plan and Supplementary Plan?**

The Monitor has been informed that Indalex has made all required current service contributions and special payments with respect to the Executive Plan. The Monitor understands that a restructuring of Indalex is not feasible and that the best remaining alternative is to sell the business of Indalex as a going concern. The Monitor further understands that no bidders expressed any interest in assuming the Executive Plan or the Supplementary Plan. The only other available alternative appears to be a liquidation of Indalex. In neither scenario would the Executive Plan or the Supplementary Plan continue. Therefore, in the circumstances, it is unnecessary for the Monitor to make a recommendation with respect to the plan.

7. **What is the current funded status of the Executive Plan and Supplementary Plan?**

The most recently determined funded status of the Executive Plan (i.e., as at January 1, 2008) is as set out in the affidavit of Timothy Stubbs sworn April 3, 2009 (the "Stubbs Affidavit"). We understand Mr. Hatnay has a copy of the Stubbs Affidavit. The Supplementary Plan is an unfunded and unsecured arrangement.

Please call me if you have any questions.

Yours truly,

Ashley John Taylor

cc: Nigel Meakin and Toni Vanderlaan, *FTI Consulting Canada ULC*
Lesley Mercer, *Stikeman Elliott LLP*
Linc Rogers, Katherine McEachern and Jackie Moher, *Blake, Cassels & Graydon LLP*
Tushara Weerasooriya, *McMillan LLP*
Ken Kraft and John Salmas, *Heenan Blaikie LLP*

SUPREME COURT OF CANADA

CITATION: Quebec (Attorney General) *v.* Canadian Owners and Pilots Association, 2010 SCC 39, [2010] 2 S.C.R. 536

DATE: 20101015
DOCKET: 32604

BETWEEN:

Attorney General of Quebec
Appellant
and
Canadian Owners and Pilots Association
Respondent
- and -
Attorney General of Canada, Attorney General of Ontario, Attorney General of New Brunswick, Attorney General of British Columbia, Pierre Lortie, judge of the Court of Québec, Commission de protection du territoire agricole du Québec, Administrative Tribunal of Québec (Territory and Environment Division), City of Shawinigan, William Barber, Louise Barber, Rusty Barber, Louise Sokolik, Michel Sokolik, Berthe Ducasse, Jocelyne Galardo, Chantale Trépanier, Bruce Shoor and Greater Toronto Airports Authority
Interveners

OFFICIAL ENGLISH TRANSLATION: Reasons of LeBel and Deschamps JJ.

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: (paras. 1 to 75)	McLachlin C.J. (Binnie, Fish, Abella, Charron, Rothstein and Cromwell JJ. concurring)
DISSENTING REASONS: (paras. 76 to 78):	LeBel J.
DISSENTING REASONS: (paras. 79 to 93):	Deschamps J.

[50] First, the Province argues that s. 26 of the *ARPALAA* does not impair the federal power because Parliament remains free to designate particular locations where airfields should be constructed, overriding the provincial law by the doctrine of federal paramountcy. In essence, this argument asserts that the doctrine of paramountcy suffices to render the intrusion on the core federal power insignificant. With respect, I do not agree.

[51] First, the argument effectively applies a sterilization test to interjurisdictional immunity. It asserts that the doctrine does not apply because the federal power will not be sterilized, given the doctrine of paramountcy. This test is contrary to *Canadian Western Bank*.

[52] Second, it impermissibly mingles the distinct doctrines of interjurisdictional immunity and paramountcy, in a way that distorts the former. In those circumstances where interjurisdictional immunity applies, the doctrine asks whether the core of the legislative *power* has been impaired, not whether or how Parliament has, in fact, chosen to exercise that power.

[53] Third, this argument does not answer the fact that the impact of s. 26 is to impair the federal aeronautics power to designate land for the construction of airfields. If Parliament wished to override s. 26 of the *ARPALAA* by way of federal paramountcy, it would be forced to establish a legislative conflict with each of the Commission's decisions regarding aerodromes, since the doctrine of paramountcy deals with conflict in the exercise of power in the situation where there is overlapping federal and provincial legislation: *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, [2005] 1 S.C.R. 188, at para. 11. Parliament would not be free

to introduce broad, permissive legislation, should it so choose (and as it has chosen to do). Acceptance of this argument would narrow Parliament's legislative options and impede the exercise of its core jurisdiction. See *Re Orangeville Airport Ltd. and Town of Caledon* (1976), 11 O.R. (2d) 546 (C.A.), at p. 550, *per* MacKinnon J.A. (as he then was). It might also result in rival systems of regulation, which would be a "source of uncertainty and endless disputes" (*Bell Canada*, at p. 843, *per* Beetz J.) and a "jurisdictional nightmare" (*British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86, at para. 140, *per* Bastarache J.).

[54] The Province's second argument is that interjurisdictional immunity does not apply to the case at bar because s. 26 of the *ARPALAA* raises a double aspect. The Province relies on the statement in *Lafarge Canada*, at para. 4, that interjurisdictional immunity "should not be used where, as here, the legislative subject matter (waterfront development) presents a double aspect" — one provincial, one federal.

[55] This comment should be read in the context of the reasons as a whole. Binnie and LeBel JJ. went on to consider the application of interjurisdictional immunity, despite having identified a clear double aspect (para. 43). Indeed, at para. 42 of *Lafarge Canada*, they cited with approval *Bell Canada*, at pp. 839 and 859-60, in which it was found that interjurisdictional immunity actually rendered the impugned legislation inapplicable, even though the law in question raised a double aspect.

[56] The Province's real objection appears to be that a law which presents a double

Case Name:

Collins & Aikman Automotive Canada Inc. (Re)

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 Collins & Aikman Automotive Canada Inc.
APPLICATION UNDER the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

[2007] O.J. No. 4186

37 C.B.R. (5th) 282

63 C.C.P.B. 125

161 A.C.W.S. (3d) 675

2007 CanLII 45908

2007 CarswellOnt 7014

Court File No. 07-CL-7105

Ontario Superior Court of Justice

J.M. Spence J.

Heard: September 20 and 26, 2007.
Judgment: October 31, 2007.

(141 paras.)

Insolvency law -- Legislation -- Companies' Creditors Arrangement Act -- Motion by Superintendent of Financial Services, United Steelworkers, and CAW - Canada for relief relating to Initial Order made under Companies Creditors Arrangement Act dismissed -- Collins & Aikman Automotive filed for protection under CCAA -- Collins had obtained funding from lender subject to certain terms, which terms were approved in Initial Order -- Court declined to order changes to paragraphs in Initial Order, as moving parties provided insufficient basis for their objections -- Court could not compel Collins to make "special payments" ordinarily required under statutory pension law when terms of financing did not contemplate such payments.

Insolvency law -- Receivers, managers and monitors -- Liability -- Motion by Superintendent of

Financial Services, United Steelworkers, and CAW - Canada for relief relating to Initial Order made under Companies Creditors Arrangement Act dismissed -- Collins & Aikman Automotive filed for protection under CCAA -- Court declined to alter paragraphs of Initial Order and Order approving engagement of Chief Restructuring Officer that provided limitation of liability for monitor and CRO because moving parties failed to show that Court lacked jurisdiction to make such provision -- Established practice indicated that Court did have authority to grant such protection.

Motion by Superintendent of Financial Services, United Steelworkers, and CAW - Canada for relief relating to Initial Order made under Companies Creditors Arrangement Act -- Collins & Aikman Automotive filed for protection under CCAA -- Collins had obtained funding from a lender subject to certain terms, which terms were approved in Initial Order of July 19, 2007 -- Moving parties objected to wording of certain paragraphs of Initial Order, and also sought to compel Collins to make "special payments" contemplated under statutory pension law -- HELD: Motion dismissed -- Paragraph 4 of Initial Order allowing Collins to hire further individuals was not altered, since USW provided no basis for its concern that paragraph authorized unilateral contracting out of union positions -- Paragraph 6 of Initial Order stating that Collins was "not required" to make various employee compensation payments was not altered because terms of financing that Collins obtained specifically set out what disbursements were contemplated in cash flow, and "special payments" at issue were not included -- Collins was precluded by terms of financing agreement from making any material disbursements not contemplated in cash flow approved by lender -- Even if the "not required" provision resulted in abrogation of statutory pension plan law by permitting Collins to refrain from making "special payments" ordinarily required by Pension Benefits Act, Court had jurisdiction to approve an order under CCAA which conflicted with, and overrode provincial legislation -- Further, it was a proper exercise of Court's discretion to approve provision because moving parties had opportunity to object to Court's approval of financing terms, but did not do so -- Ordering Collins to make "special payments" would constitute a collateral attack on Initial Order that approved financing because Collins had no alternative funds available and such an order would require it to use funds for a purpose which was not permitted pursuant to Initial Order -- Paragraph 11 of Initial Order allowing Collins to terminate employment arrangements as it deemed appropriate was not altered, since USW did not establish that paragraph would allow Collins to repudiate its collective agreements -- Paragraph 26 of Initial Order providing that monitor was not to be deemed to have become an employer was not altered because if monitor started to act as de facto employer, motion could be brought at that time to consider matter in context of actual fact situation, rather than in current abstract circumstances -- Paragraph 29 of Initial Order providing for limitation of monitor's liability to gross negligence or willful misconduct was not altered because Court did not agree with USW's argument that such provision was beyond Court's jurisdiction to make under CCAA -- Similar limitation of liability that was provided for Chief Restructuring Officer in paragraph 4 of Order approving engagement of CRO was not altered for the same reason, and since established practice showed that Court did have authority to grant such protection to CRO.

Statutes, Regulations and Rules Cited:

Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11(3), s. 11(4), s. 11(6), s. 11.3, s. 11.8(1)

Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A, s. 69(1), s. 69(2), s. 69(12), s. 116

Pension Benefits Act, R.S.O. 1990, c. P.8, s. 55(2)

Pension Benefits Act, General Regulation, R.R.O. 1990, Reg.909, s. 4, s. 5

Counsel:

M.E. Bailey, for the Superintendent of Financial Services (Ontario).

K.T. Rosenberg and M.C. Starnino, for the United Steelworkers.

C.E. Sinclair, for the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW - Canada).

R.J. Chadwick, for Ernst & Young Inc., as Monitor of Collins & Aikman Automotive Canada Inc.

A.J. Taylor and K.L. Mah, for Collins & Aikman Automotive Canada Inc.

J.E. Dacks, for JP Morgan Chase Bank NA.

C.J. Hill, for Chrysler LLC.

REASONS FOR DECISION

1 **J.M. SPENCE J.**:-- Each of the three moving parties, the Superintendent of Financial Services, the USW and the CAW - Canada, seeks relief relating to the Initial Order made by this Court under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") on July 19, 2007 (the "Initial Order") with respect to Collins & Aikman Automotive Canada Inc. ("Automotive" or the "Applicant").

2 On July 19, 2007, Collins & Aikman Automotive Canada Inc. ("Automotive") filed for protection from its creditors pursuant to the CCAA. The Applicant is insolvent. It was clear at the time of the CCAA filing that Automotive would not be able to reorganize and the Court was informed by counsel to Automotive and the Monitor that this proceeding is effectively a liquidation. The Court is advised that the CCAA is being utilized by the Applicant to attempt to maximize the potential recovery for the benefit of all creditors by creating the opportunity to attempt to sell some or all of its remaining operating facilities on a going concern basis.

3 Chrysler LLC (previously known as DaimlerChrysler Company LLC) ("Chrysler") is Automotive's largest remaining customer. In order to provide Automotive with the stability to pursue the sale of its facilities, Automotive, Chrysler, the U.S. Debtors and JPMorgan Chase Bank, N.A. as Agent for the U.S. Debtors' pre-petition secured creditors negotiated a comprehensive funding agreement whereby Chrysler (the "DIP Lender") will fund the costs of this CCAA filing.

4 The relief sought by the moving parties concerns, *inter alia*, the pension plans of

Automotive. The Superintendent advises that Automotive maintains seven pension plans which are registered in Ontario,

The Impugned Provisions of the Initial Order

Paragraph 4

5 Paragraph 4 of the Initial Order provides as follows:

> 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 it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

The USW is concerned that, as presently worded, paragraph 4 of the Initial Order is open to an interpretation that permits the Applicant to employ individuals in a manner inconsistent with the terms of the Collective Agreement, contrary to applicable labour legislation. In particular, paragraph 4 could be taken to authorize the unilateral contracting out of union positions. Accordingly, the USW proposes that the following text should be appended at the end of paragraph 4: ", provided that such further retainers are not in breach of any of its collective agreements."

6 The CAW supports the Superintendent and the USW with respect to their submissions in respect of the above provisions of the Order.

Paragraph 6

7 Paragraph 6 of the Initial Order provides as follows:

> THIS COURT ORDERS that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:
>
> (a) all outstanding and future wages, salaries, employee benefits, contributions to pension plans, 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 ...

8 The Superintendent objects to any provision that would be inconsistent with the Applicant being required to make any and all required employee contributions to its pension plans.

9 The USW objects to the foregoing provision of the Initial Order on the basis that Automotive appears to be interpreting that provision so as to amend the terms of their employment by staying Automotive's obligation to pay compensation accruing due to employees post filing, including, wages, benefits and special payments to the pension plan. Accordingly, the USW proposes that the words "but not required" be struck from paragraph 6.

Paragraph 11

10 Paragraph 11 of the Initial Order provides as follows:

> THIS COURT ORDERS that the Applicants shall, subject to such covenants as may be contained in the Definitive Documents (as hereinafter defined), have the right to:
>
> ...
>
> 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 Applicants and such employee, or failing such agreement, to deal with the consequences thereof in any plan of arrangement or compromise filed by the Applicants under the CCAA (the "Plan"); ...
>
> d. Repudiate such of its arrangements or agreement of any nature whatsoever, whether oral or written, as the Applicants deem appropriate on such terms as may be agreed upon between the Applicants and such counter-parties, or failing such agreement, to deal with the consequences thereof in the Plan; ...

The USW is concerned that these provisions are open to an interpretation that permits Automotive to repudiate its collective agreements with the USW's members. Accordingly, the USW proposes that the following text be added at paragraph 11, following the phrase "(as hereinafter defined)":

> "and any and all applicable collective agreements (including, without limitation, all employee benefit, pension and related agreements, compensation policies, and arrangements), and labour laws ...."

11 The Superintendent seeks an order directing the Applicant to make all required employer contributions to its Pension Plans in accordance with the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the "PBA") and an order amending the Initial Order as is necessary to reflect this relief.

12 The CAW seeks an order compelling the Applicant to make the special payments due to the pension plans operated for the benefit of the CAW's members. The special payments that are referred to include the special payments that are provided for under s. 5(1)(b) and section 5(1)(e) of the Regulation under the PBA. These payments are required to be made to liquidate any unfunded liability in the plan by reason of a going concern deficiency and any insolvency deficiency based on actuarial valuation of the plan. The other special payments referred to are those dealt with in s. 31 of the Regulation. These payments are post wind-up special payments owing under s. 75 of the PBA to address a wind-up deficit. Section 31 states that annual special payments are to commence at the "effective date of wind up" and are equal to "the amount required in the year to fund the employer's liabilities under section 75 of the [PBA] in equal payments, payable annually in advance, over not more than five years".

13 As stated in *Toronto-Dominion Bank v. Usarco Ltd.*, (1991), 42 E.T.R. 235 at paragraph 25

(Ont. Gen. Div.), in the context of going concern special payments, special payments "may fluctuate depending upon the investment results of the pension fund and the employer's ongoing contributions, together with estimated demands on the fund by the beneficiaries" and other factors. The true position of the plan cannot, in fact, be known until the crystallization of all benefits when benefits are settled after a wind-up at which time "it will be known what are the assets in the fund and the liabilities to be set against such funds by those beneficiaries who are then established as being legally entitled to claim".

14 Accordingly, special payments are better understood as the payments which (in accordance with the PBA and Regulations and actuarial practice) have to be made to a pension plan now to meet the plan's benefit obligations which do not arise until some point in the future (either on retirement or termination for individual members or when benefits are settled in a plan wind up for the plan as a whole).

15 Likewise, post-wind-up special payments to address a wind up deficit are based on an actuarial estimate of the position of the plan as of the wind up date. Again, the actual liabilities of the pension plan are not determined until benefits are settled and the funds in the plan are used to actually purchase annuities from an insurance company (at then prevailing annuity rates) to provide the monthly pension benefit to the member.

16 The Applicant has indicated that monthly special payments for the Pension Plans are approximately $345,000 as of June 2007. The Superintendent is not in a position to confirm this amount precisely but advises that, owing to the funded position of the Plans it is clear that special payments are required for all the Pension Plans on the basis of the actuarial valuation reports last filed with the FSCO. The requirement to make special payments also applies to two of the Pension Plans which have been wound up, the Gananoque and Stratford Plans, although the special payment requirement arises on an annual rather than a monthly basis.

17 The factums of the USW and the CAW state that the most recently filed valuations for Automotive's various pension plans identify an aggregate wind-up deficiency of approximately $18.2 million.

Paragraph 26

18 Paragraph 26 provides as follows:

> 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 - or be deemed to have been or become an employer of any of the Applicant's employees.

The USW is concerned that this provision usurps the exclusive jurisdiction of the Labour Relations Board (the "Board" or the "OLRB") to determine, on a full factual record, whether someone is a successor employer. Accordingly, the USW proposes that the following text be deleted from paragraph 26: "or be deemed to have been or become an employer of any of the Applicant's employees"; and that the following words be added: ", provided that the foregoing is without prejudice to any rights pursuant to the *Labour Relations Act, 1995*, (Ontario)."

19 The CAW seeks the same order.

Paragraph 29

20 Paragraph 29 provides as follows:

> 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 on this Order, save and except for any gross negligence or willful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

The USW is concerned that this provision provides the Monitor with a blanket immunity on a prospective basis, and that the court has no jurisdiction to provide this immunity and should not provide this immunity even if it did have such authority. Accordingly, the USW proposes that paragraph 29 be deleted and replaced with the following:

> THIS COURT ORDERS that nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any other applicable legislation.

The CRO Order

21 On September 11, 2007, Automotive returned a motion for an order approving its engagement of Axis Consulting Group Inc. ("Axis") and Allan Rutman ("Rutman") as Chief Restructuring Officer of Automotive (the "CRO Approval Motion")

22 On September 11, 2007, this court made an order approving Automotive and Axis' engagement (the "CRO Order"), subject to a reservation of rights by the USW to challenge paragraph 4 of the CRO Order.

23 Paragraph 4 of the CRO Order is similar to paragraph 29 of the Automotive Initial Order and the USW objects to it for the same reason. That paragraph provides as follows:

> THIS COURT ORDERS that the CRO shall not incur any liability or obligation as a result of the fulfillment of its duties, save and except for any liability or obligation arising from the gross negligence or willful misconduct of the CRO, and no action or other proceedings may be commenced against the CRO relating to its appointment or its conduct as CRO except with the prior leave of this Court obtained on at least seven (7) days' notice to Automotive and the CRO and provided further that any liability of the CRO hereunder shall not in any event exceed the quantum of the fees and disbursements paid to or incurred by the CRO in connection herewith. This last limitation of liability will be effective up until + including Sept. 20/07 + thereafter as directed by the judge hearing the motion on Sept. 20/07.

24 The USW proposes that this paragraph be deleted and replaced with the following:

> THIS COURT ORDERS that no action or other proceedings may be commenced against the CRO relating to its appointment or its conduct as CRO except with the prior leave of this Court obtained on at least seven (7) days' notice to Automotive and the CRO.

Relevant Statutory and Regulatory Provisions

The *Companies Creditors Arrangement Act*

25 Section 11(1) of the CCAA provides as follows:

> Notwithstanding anything in the Bankruptcy and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

26 Subsections 11(3) and (4) of the CCAA provide as follows:

> (3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.
>
> Other than initial application court orders -
>
> (4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,
>
> (a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

27 Section 11(6) of the CCAA provides as follows:

> Burden of Proof on Application -
>
> (6) The court shall not make an order under subsection (3) or (4) unless
>
> (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
> (b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

28 Section 11.3 of the CCAA provides as follows:

> 11.3 No order made under section 11 shall have the effect of
>
> (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
> (b) requiring the further advance of money or credit.

The *Pension Benefits Act*

29 Section 55(2) of the PBA provides as follows:

> An employer required to make contributions under a pension plan, or a person or entity required to make contributions under a pension plan on behalf of an employer, shall make the contributions in accordance with the prescribed requirements for funding and shall make the contributions in the prescribed manner and at the prescribed times, ...

30 The General Regulation to the Act, R.R.O. 1990, Reg. 909, provides in part as follows:

> 4. (2) Subject to subsection (2.1), an employer who is required to make contributions under a pension plan ... shall make payments to the pension fund or to an insurance company, as applicable, that are not less than the sum of,
>
> (a) all contributions, including contributions in respect of any going concern unfunded liability and solvency deficiency and money withheld by payroll deduction or otherwise from an employee, that are received from employees as the employees' contributions to the pension plan;
> (b) all contributions required to pay the normal cost;
> (c) all special payments determined in accordance with section 5; and
> (d) all special payments determined in accordance with sections 31, 32 and 35 and all payments determined in accordance with section 31.1.
>
> ...

5. (1) Except as otherwise provided in this section and in sections 4, 5.1 and 7, the special payments required to be made after the initial valuation date under clause 4(2)(c) shall be not less than the sum of,

...

(b) with respect to any going concern unfunded liability not covered by clause (a), the special payments required to liquidate the liability, with interest at the going concern valuation interest rate, by equal monthly instalments over a period of fifteen years beginning on the valuation date of the report in which the going concern unfunded liability was determined;

...

(e) with respect to any solvency deficiency arising on or after the Regulation date, the special payments required to liquidate the solvency deficiency, with interest at the rates described in subsection (2), by equal monthly instalments over the period beginning on the valuation date of the report in which the solvency deficiency was determined and ending on the 31st day of December, 2002, or five years, whichever is longer.

The *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A (the "LRA")

31 Section 69 of the LRA provides in part as follows:

69. (1) In this section,

"business" includes a part or parts thereof; ("enterprise")

"sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings. ("vend", "vendu", "vente")

Successor employer

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.

...

Power of Board to determine whether sale

(12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision is final and conclusive for the purposes of this Act.

32 Section 116 of the LRA provides as follows:

Board's orders not subject to review

116. No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, *quo warranto*, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.

Jurisdiction of the Court under the *Companies' Creditors Arrangement Act*

33 In *Canadian Red Cross Society (Re)*, [1998] O.J. No. 3306 (Gen. Div. [Commercial List]), Blair J. adopted, at paragraph 46, the following passage from the decision of Farley J. in *Lehndorff General Partner Ltd. (Re)* (1993), 17 C.B.R. (3d) 24, at p. 31 (Ont. Gen. Div.):

> The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course *or otherwise deal with their assets* so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 7, 8 and 11 of the CCAA (a lengthy list of authorities cited here is omitted).
>
> The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating *or to otherwise deal with its assets* but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA (citations omitted)
>
> [emphasis added]

34 In *Sulphur Corp. of Canada Ltd. (Re)*, [2002] 35 C.B.R. (4th) 304 (Alta. Q.B.), Lovecchio

J. considered the jurisdiction of the Court to make an order under s. 11 of the CCAA with provisions that conflicted with provisions of the *Builders Lien Act* of British Columbia (the "BLA"), a conflict which arose because of the grant under a CCAA order of a priority to the financing charge of a debtor in possession ("DIP financing") over all other creditors of the applicant company. Lovecchio J. decided that the Court has jurisdiction to grant a change under the CCAA to secure DIP financing which ranks in priority to a statutory lien under the BLA of British Columbia (paragraph 16).

35 After noting that, apart from the circumstances of the case, the lien under the BLA would have priority, Lovecchio J. provided the following analysis under the headings set out below in the following excerpt which addresses the jurisdiction of the Court in helpful detail and is therefore set out fully here:

> The Paramountcy Argument and the Jurisdiction of the Courts
>
> para. 23 Sections 11(3) and 11(4) of the CCAA read as follows:
>
> > 11(3) A Court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such a period as the Court deems necessary not exceeding 30 days, ... [staying proceedings, restraining proceedings and prohibiting proceedings against the debtor company].
> >
> > 11(4) A court may on application in respect of a company other than an initial application, make an order on such terms as it may impose, ... [staying proceedings, restraining proceedings and prohibiting proceedings against the debtor company].
>
> para. 24 It is clear that the power of the Court to create a charge to support a DIP financing is not mentioned. Are the words "such terms as it may impose" sufficient to give inherent jurisdiction a statutory cloak?
>
> para. 25 The facts at bar are similar to those that were before Associate Chief Justice Wachowich (as he then was) in *Re Hunters Trailer & Marine Ltd.*[3] In that case, Wachowich C.J.Q.B. granted Hunters an *ex parte*, 30 day stay of proceedings under the CCAA and, further, granted a DIP financing and Administrative Charge with a super-priority ranking over the claims of the other creditors.

Note 3: (2002) 94 Alta. L.R.(3d) 389.

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para. 26 In discussing the objective of the CCAA, Wachowich C.J.Q.B. stated the following at para. 15:

> The aim of the CCAA is to maintain the status quo while an insolvent company attempts to bring its creditors on side in terms of a plan of arrangement which will allow the company to remain in business to the mutual benefit of the company and its creditors ...

At para 18:

> I agree with the statement made by Mackenzie J.A. in United Used Auto & Truck Parts Ltd., Re (2000), 16 C.B.R. (4th) 141 (BCCA), at 146 that: "... the CCAA's effectiveness in achieving its objectives is dependent on a broad and flexible exercise of jurisdiction to facilitate a restructuring and continue the debtor as a going concern in the interim.

Later, at para.32:

> Having reviewed the jurisprudence on this issue, I am satisfied that the Court has the inherent or equitable jurisdiction to grant a super-priority for DIP financing and administrative charges, including the fees and disbursements of the professional advisors who guide a debtor company through the CCAA process. Hunters brought its initial CCAA application *ex parte* because it was insolvent and there was a threat of seizure by some of its major floor planners. If super-priority cannot be granted without the consent of secured creditors, the protection of the CCAA effectively would be denied a debtor company in many cases.

...

para. 27 In addressing the Court's jurisdiction to grant an order, the Court of Appeal in *Luscar Ltd. v. Smoky River Coal Ltd.*[4] confirmed the conclusion that s. 11(4) confers broad powers on the Court to exercise a wide discretion to make an order "on such terms as it may impose". At p. 11, para 53 of the decision, Hunt J.A. for the Court wrote:

> These statements about the goals and operations of the CCAA support the view that the discretion under s. 11(4) should be interpreted widely.

Note 4: [1999] A.J. No. 185 (C.A.), online: (AJ).

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para. 28 As indicated by Wachowich C.J.Q.B., numerous decisions in Canada have supported the proposition that s. 11 provides the courts with broad and liberal power to be used to help achieve the overall objective of the CCAA. It is within this context that my initial Order and the June 19 Order were based.

para. 29 Counsel for the Applicants referred to *Royal Oak Mines Inc., Re*[5] as an authority supporting their submission that the Courts cannot use inherent jurisdiction to override a provincial statute. ...

Note 5: (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div.).

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para. 30 In *Royal Oak*, Farley J. also relied on *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*[6], where the Supreme Court of Canada remarked that there is a limit to the inherent jurisdiction of superior courts and, in the circumstances of that particular case, the Court's inherent jurisdiction should not be applied to override an express statutory provision. At p. 480 the Court wrote the following:

> Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or a Rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case.

Note 6: (1975), [1976] 2 S.C.R. 475.

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para. 31 *Baxter* may be distinguished from the case at hand since, in that particular case, the contest came down to the Court's inherent jurisdiction pursuant to s. 59 of the *Court of Queen's Bench Act*[7], a provincial statute which, the Supreme Court of Canada noted, was not intended to empower the Court to negate the unambiguous expression of the legislative will found in s.

11(1) of the *Mechanics' Liens Act*[8], also a provincial statute.

Note 7: R.S.M. 1970, c. C280.

Note 8: R.S.M. 1970, c. M80.

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para. 32 ... In *Smoky*, Hunt J.A. used the words the exercise of discretion - a discretion she found to have been broad and one provided for in the statute.

para. 33 It is clear that the Court's power to attach conditions was envisioned by Parliament. The intent of Parliament, through the enactment of the CCAA, was to help foster restructuring which, in turn, fosters the preservation and enhancement of the insolvent corporation's value.

para. 34 In *Re United Used Auto & Truck Parts Ltd.*[9], Mackenzie J.A., of the Court of Appeal, wrote the following at p. 152, para. 29:

> When, as here, the cash flow from operations is insufficient to assure payment and asset values exceeding secured charges are in doubt, granting a super-priority is the only practical means of securing payment. In such circumstances, if a super-priority cannot be granted without the consent of secured creditors, then those creditors would have an effective veto over CCAA relief. I do not think that Parliament intended that the objects of the Act could be indirectly frustrated by secured creditors.

Note 9: (2000), 16 C.B.R. (4th) 141 (BCCA).

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para. 35 Parliament's way of ensuring that the CCAA would have the necessary force to meet this objective was to entitle the Courts, pursuant to s. 11, to exercise its discretion and no specific limitations were placed on the exercise of that discretion. There is a logic to the lack of specificity as what is

> required to be done is often dictated at least in part by the particular circumstances of the case. Whether the Court should exercise that discretion is obviously a different matter and that will be discussed below.
>
> para. 36 For the foregoing reasons, I find that in the circumstances of this case, there is a federal statute versus a provincial statute conflict.
>
> Paramountcy
>
> para. 37 Having established that the Court has a statutory basis to use its inherent jurisdiction in the exercise of a discretion granted under the CCAA, the next question is whether this jurisdiction can be used to override an express provincial statutory provision, in this case s. 32 of the BLA.
>
> para. 38 The case of *Pacific National Lease Holding Corp. v. Sun Life Trust Co.*[10] was raised by Sulphur's Counsel to draw an analogy to the paramountcy issue at bar. While the facts are not identical, the case involved a conflict between the Court's power pursuant to the federal CCAA and the Legal Professions Act of British Columbia. In that decision, the Court found that it is within the Court's jurisdiction, pursuant to the CCAA, to exercise broad "power and flexibility", and proceeded to comment on p. 6 that the CCAA "will prevail should a conflict arise between this and another federal or provincial statute". I agree with that conclusion and would apply it in this case.

Note 10: [1995] B.C.J. No. 1535 (C.A.)

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36 More recently, the Court of Appeal, in its decision in its decision in *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5, considered the jurisdiction of the Court under s. 11 of the CCAA in connection with an order given under that section removing directors from the board of the applicant company. Paragraphs 31ff of the decision dealt first with the jurisdiction of the Court and then with the exercise of its discretion. The following passages from that decision are relevant with respect to the jurisdiction of the Court:

> Jurisdiction
>
> [31] The motion judge concluded that he had the power to rescind the appointments of the two directors on the basis of his "inherent jurisdiction" and "the discretion given to the court pursuant to the CCAA". He was not asked to, nor did he attempt to rest his jurisdiction on other statutory powers

imported into the CCAA.

[32] The CCAA is remedial legislation and is to be given a liberal interpretation to facilitate its objectives: *Babcock & Wilcox Canada Ltd. (Re)*, [2000] O.J. No. 786, 5 B.L.R. (3d) 75 (S.C.J.), at para. 11. See also, *Chef Ready Foods Ltd. v. Hong Kong Bank of Canada*, [1990] B.C.J. No. 2384, 4 C.B.R.(3d) 311 (C.A.), at p. 320 C.B.R.; *Re Lehndorff General Partners Ltd.*, [1993] O.J. No. 14, 17 C.B.R.(3d) 24 (Gen. Div.). [page17] Courts have adopted this approach in the past to rely on inherent jurisdiction, or alternatively on the broad jurisdiction under s. 11 of the CCAA, as the source of judicial power in a CCAA proceeding to "fill in the gaps" or to "put flesh on the bones" of that Act: see *Re Dylex Ltd.*, [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div. (Commercial List)), *Royal Oak Mines Inc. (Re)*, [1999] O.J. No. 864, 7 C.B.R. (4th) 293 (Gen. Div. (Commercial List); and *Westar Mining Ltd. (Re)*, [1992] B.C.J. No. 1360, 70 B.C.L.R. (2d) 6 (S.C.).

[33] It is not necessary, for purposes of this appeal, to determine whether inherent jurisdiction is excluded for all supervisory purposes under the CCAA, by reason of the existence of the statutory discretionary regime provided in that Act. In my opinion, however, the better view is that in carrying out his or her supervisory functions under the legislation, the judge is not exercising inherent jurisdiction but rather the statutory discretion provided by s. 11 of the CCAA and supplemented by other statutory powers that may be imported into the exercise of the s. 11 discretion from other statutes through s. 20 of the CCAA.

...

[35] ... [I]nherent jurisdiction does not operate where Parliament or the legislature has acted. As Farley J. noted in Royal Oak Mines, supra, inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should [page18] not be brought into play" (para. 4). See also, *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*, [1976] 2 S.C.R. 475, 57 D.L.R. (3d) 1, at p. 480 S.C.R.; *Richtree Inc.* (Re) (2005), 74 O.R. (3d) 174, [2005] O.J. No. 251 (S.C.J.).

[36] In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. In that regard, I agree with the comment of Newbury J.A. in *Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.*, [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187 (C.A.), at para. 46, that:

> ... the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. ... This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above[2] at the end of the document], rather than the integrity of their own process.

[37] As Jacob observes, in his article "The Inherent Jurisdiction of the Court", supra, at p. 25:

> The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital juridical distinction between jurisdiction and discretion, which must always be observed.

[38] I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to control its own process, should the need arise. There is a distinction, however -- difficult as it may be to draw -- between the court's process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the company's process, on the other hand. The court simply supervises the latter [page19] process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period "on such terms as it may impose"[3] at the end of the document]. Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it is designed to supervise the company's process, not the court's process.

37 As to the exercise of the jurisdiction given by s. 11, the Court in *Stelco* said the following at paragraphs 43 and 44:

> [43] Mr. Leon and Mr. Swan argue that matters relating to the removal of directors do not fall within the court's discretion under s. 11 because they fall outside of the parameters of the court's role in the restructuring process, in contrast to the company's role in the restructuring process. The court's role is defined by the "on such terms as may be imposed" jurisdiction under subparas. 11(3)(a) -- (c) and 11(4)(a) -- (c) of the CCAA to stay, or restrain, or prohibit proceedings against the company during the "breathing space" period for negotiations and a plan. ...

> [44] What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in Lehndorff, supra, at para. 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructuring efforts.

38 The Court in *Stelco* went on to determine that it was not for the Court under s. 11 to usurp the role of the directors and management in conducting the restructuring efforts and found that there was no authority in s. 11 of the CCAA for the Court to interfere with the composition of a board of directors.

In the course of that analysis the Court stated as follows at paragraph 48:

> [48] There is therefore a statutory scheme under the CBCA (and similar provincial corporate legislation) providing for the election, appointment and removal of directors. Where another applicable statute confers jurisdiction with respect to a matter, a broad and undefined discretion provided in one statute cannot be used to supplant or override the other applicable statute. There is no legislative "gap" to fill. See Baxter Student *Housing Ltd. v. College Housing Cooperative Ltd., supra*, at p. 480 S.C.R.; *Royal Oak Mines Inc. (Re), supra*; and *Richtree Inc. (Re), supra*.

39 It appears to me that in making the analysis set out in the above paragraphs and coming to the conclusion that it reached, the Court was addressing the need to ensure that the "terms" imposed by the Court under its s. 11 powers to do so are terms that are properly related to the jurisdiction given under s. 11 to the Court to grant stays and the purpose of that jurisdiction under the CCAA. In that regard, the Court did not consider that intervening in the composition of the internal management of the company contrary to the applicable laws in that regard was proper. This conclusion is perhaps best understood in the context of the earlier discussion in the decision of the nature of the jurisdiction of the Court under s. 11. In particular, the Court emphasized the role of the Court as a supervisory one which is exercised through its ability "to stay, restrain or prohibit proceedings against the company during the plan negotiation period" on such terms as the Court may impose (paragraph 38). It is not apparent how an order removing directors would be inherently or functionally related to the Court's role to provide a protection against legal proceedings which are potentially adverse to the facilitation of "the continuation of the corporation as a viable entity" (paragraph 36, in the quoted passage from the *Skeena* decision).

40 On this basis, the limitation expressed by the Court in *Re Stelco* is not to be understood as restricting the jurisdiction of the Court to make orders which carry out that protective function.

41 Similarly, but in a quite different fact situation, Lax J. of this Court, in her decision in *Richtree Inc. (Re)* (2005), 74 O.R.(3d) 174 dismissed a motion to exempt the applicant company from certain filing requirements with regulatory authorities: see paragraphs 13 to 18 of the decision. In paragraph 18 of the decision, Lax J. said that the order that was sought had nothing to do with the restructuring process of the applicant company.

42 In view of the reasoning and the decisions in the above cases considered, the Court has a jurisdiction under the CCAA which, in the words of the decision in *Re Sulphur Corp. of Canada Ltd., supra*, at paragraph 37, "can be used to override an express provincial statutory provision" where that would contribute to carrying out the protective function of the CCAA as reflected particularly in the provisions of s. 11 of the CCAA.

43 This analysis is developed further with regard to the special payments in the part of the text below that deals with the issue relating to paragraph 6 of the Initial Order.

The Context of the Initial Order and the CRO Order

44 On July 19, 2007, the Court issued the Initial Order authorizing, *inter alia*, Automotive to obtain and borrow under a credit facility (the "DIP Facility") from Chrysler as DIP Lender in order to finance certain expenditures contemplated by the cash flows that are approved by the DIP Lender and filed with the Court.

45 The Initial Order provided that the DIP Facility was to be on the terms and subject to the conditions set forth in the DIP Term Sheet and Commitment Letter between Automotive and the DIP Lender dated as of July 18, 2007 (the "Commitment Letter"), filed with the Court.

46 The Commitment Letter provides:

> The Borrower covenants as follows:
>
> > The Borrower shall not, without the Lender's prior written consent, make any material disbursement unless it is contemplated in the Initial cash flow, attached as Schedule "A" to this DIP Term Sheet and Commitment Letter (the "Initial Cash Flow") or any rolling cash flow approved by the Lender (collectively "Cash Flow Projections") and, for greater certainty, the Borrower shall not issue any cheques or make any disbursements until such point in time as the Lender has approved the same and confirmed sufficient funding of the same in accordance with the terms hereof[.]

47 The Initial Order also stated that rights of the DIP Lender under the Commitment Letter shall not be impaired in any way in Automotive's CCAA proceedings or by any provincial or federal statutes and that the DIP Lender shall not have any liability to any person whatsoever resulting from the breach by Automotive of any agreement caused by Automotive entering into the Commitment Letter.

48 The Initial Order provided that the DIP Lender was entitled to the benefit of the DIP Lender's Charge on all of the property of Automotive (except certain tax refunds).

49 The Affidavit of John Boken, dated July 19, 2007, sworn on behalf of Automotive and filed with the Court in connection with the application for the Initial Order (the "Boken Affidavit") stated the following at paragraph 46 with respect to the pension plans of Automotive:

> [Automotive] intends to continue to pay current service costs with respect to benefits accruing from the date of filing. The DIP Loan (as defined below), does not provide for the funding of any special payments.

50 In addition, the initial cash flow approved by Chrysler and filed with the Court on the application for the Initial Order clearly stated that special payments would not be made and that such payments were not included in the cash flow projections.

51 Automotive brought a motion to the Court on July 30, 2007 for, inter alia, an Order confirming the terms of the DIP Facility (the "DIP Approval Motion"). The DIP Approval Motion was made on notice to, among others, the USW and the Superintendent. The Boken Affidavit was again served in connection with the DIP Approval Motion. As noted above, the Boken Affidavit unequivocally indicated that special payments would not be made and were not permitted by the DIP Facility.

52 In addition, the Monitor filed its First Report with the Court at the return of the DIP Approval Motion and specifically noted that Automotive could not make any payments that were not in the cash flow forecast and that special pension payments were not provided for in the forecast. That point was reiterated in the notes to the cash flow forecast.

53 On July 30, 2007, the Court issued an Order confirming the terms of the DIP Facility (the "DIP Approval Order"). The DIP Approval Order provided:

> 3. THIS COURT ORDERS that the DIP Facility provided by DCC to the Applicant in the amount of Cdn.$13.6 million on the terms and subject to the conditions contained in the DIP Term Sheet and Commitment Letter between the Applicant and DCC dated as of July 18, 2007, all as set forth in the Initial Order, is hereby confirmed and approved.

54 Based on the First Report of the Monitor and the submissions of all counsel Justice Stinson granted the requested relief and approved the DIP Loan "on the terms and subject to the conditions contained in the DIP Term Sheet and Commitment Letter between the Applicant and the DIP Lender dated as of July 18, 2007, all as set forth in the Initial Order". As noted in Justice Stinson's endorsement in respect of the DIP Approval Order, Mr. Bailey on behalf of FSCO and Mr. Starnino on behalf of the USW requested that the Court "record their respective clients' reservation of rights in relation to the pension fund payments and other matters referenced in paragraphs 6(a), 11(b) and (d) of paragraph 26 of the [Initial] Order". Although the CAW did not attend the hearing on July 30, it did receive notice of Automotive's CCAA proceedings on July 23, 2007.

55 No party objected to the approval of the DIP Loan, or the terms and conditions set forth

therein. No party appealed Justice Stinson's July 30 order approving the DIP Loan. The appeal period expired on August 20, 2007.

56 The DIP Approval Order was not opposed by the USW or the Superintendent, although they did appear at the DIP Approval Motion.

57 Automotive brought a motion to the Court on August 23, 2007 for an Order, inter alia, extending the stay of proceedings and increasing the amount of an amended DIP Facility. The motion was made on notice to the Unions and the Superintendent. The revised Cash Flow approved by Chrysler and filed with the Court (as a Schedule to the Monitor's Second Report) clearly stated that special payments would not be made and that such payments were not included in the cash flow projections.

58 On August 23, 2007, the Court issued an Order (the "August 23 Order") approving the Amended DIP Term Sheet and Commitment letter dated August 21, 2007 (the "Amended Commitment Letter"). The Amended Commitment Letter provides that Automotive shall not, without the DIP Lender's prior written consent, make any material disbursement unless it is contemplated in the cash flows approved by the DIP Lender. The Unions and the Superintendent did not oppose the August 23 Order, and they did not seek leave to appeal it.

59 The Boken Affidavit filed in support of the Initial Application indicated that:

(a) Automotive had no other realistic source of DIP funding to continue operations;
(b) the DIP Loan was the only basis on which funding was available to keep the potential for the preservation of some of the plants as going concerns; and
(c) the DIP Loan was being provided as a component of a complex multi-party agreement that represented a compromise of the rights of Chrysler, Automotive and the U.S. Debtors, which agreement was approved by the US Bankruptcy Court.

60 By Order of Justice Pepall dated September 11, 2007, Axis Consulting Group and Allan Rutman was appointed Chief Restructuring Officer ("CRO") of Automotive (the "CRO Order"). Paragraph 4 of that CRO Order states:

> THIS COURT ORDERS that the CRO shall not incur any liability or obligation as a result of the fulfilment of its duties, save and except for any liability or obligation arising from the gross negligence or wilful misconduct of the CRO, and no action or other proceedings may be commenced against the CRO relating to its appointment or its conduct as CRO except with the prior leave of this Court obtained on at least seven (7) days' notice to Automotive and the CRO and provided further that any liability of the CRO hereunder shall not in any event exceed the quantum of the fees and disbursements paid to or incurred by the CRO in connection therewith. This last limitation on liability will be effective up until and including Sept. 20, 2007 and thereafter as ordered by the judge hearing the motion on Sept. 20, 2007.

61 The last sentence in paragraph 4 of the CRO Order was added by Justice Pepall in response

to submissions by counsel that the issue of protections for the CRO were to be further addressed on this motion by the USW.

The Issues

Paragraph 4

62 The USW states its concern that the provision in paragraph 4 that allows the Applicant to retain further Assistants could be interpreted to allow hiring "in a manner inconsistent with the terms of the Collective Agreement, contrary to applicable labour legislation" (USW Factum, paragraph 43). How in particular that might come about is not explained. It is not suggested that the Applicant has acted or intends to act in such a manner.

63 Paragraph 4 does not provide that such hirings may be made in the manner that is the cause of concern. No basis was submitted for considering that such a result is implicit in paragraph 4.

64 Paragraph 4 is, as it is stated, consistent with the protective function of s. 11 because it effectively restrains proceedings that might otherwise be brought against the Applicant for making further hirings. It is conceivable in principle that hirings might be made in a way that would raise issues of the kind raised in *Re Richtree Inc., supra*. In such circumstances, having regard to the approach taken by the Court in *Richtree*, the aggrieved parties would apparently be able to seeks appropriate relief from the Court as part of administrative or supervisory jurisdiction in respect of orders made by the Court under the CCAA. That would be an appropriate context in which to address the question of whether there is a conflict between the Collective Agreement and/or the LRA on the one hand and the CCAA and/or the Initial Order on the other. In the present circumstances, it is unnecessary to address the matter and there is no fact situation before the Court to allow it to be addressed properly.

Paragraph 6

65 The objection taken to the phrase "but not required" in paragraph 6 is that Automotive regards the phrase as staying its obligations to pay various kinds of post-filing employee compensation, including in particular special payments to the pension plan.

66 Under the DIP Approval Order, the Court approved the DIP Facility on the terms and subject to the conditions contained in the DIP Term Sheet and Commitment Letter dated July 18, 2007. As noted, the Commitment Letter precludes Automotive from making distributions not contemplated in approved cash flows and the cash flow filed with the Court stated that special payments under the pension plans would not be made. These features link the DIP Approval Order to the paragraph 6 provision in the Initial Order that the specified kinds of payments are not required to be made. That is to say, the Initial Order and the DIP Approval Order are an integrated arrangement. The rationale given for this arrangement in the records is that Automotive will not be in a position to carry on business and will not have available funds without the DIP Facility and the terms on which the DIP Lender is prepared to commit to the DIP Facility are as stated.

67 Automotive states in its factum that it has continued to pay all wages and vacation pay during the course of this CCAA proceeding and intends to continue such payments and that the DIP Loan will, subject to certain conditions, provide advances to facilitate payment of statutory

severance obligations.

68 The Initial Cash Flow provides for certain operating disbursements in respect of "Payroll, Payroll Taxes, Benefits, Severance, Other". The associated note states:

> The Forecast [Initial Cash Flow] assumes that payments are made for medical and health benefits and current service pension payments will be made while a plant is operating and then cease on the end of production date. The Forecast does not provide for the payment of any special pension payments as it is assumed these will be stayed in a CCAA filing.

69 The Court has approved the DIP Facility and, subject to this motion, the Initial Order. It is obvious that the DIP Facility and the Initial Order are integrally related. In consequence, if Automotive were to fail to use the funds available under the DIP Facility for the purposes that have been indicated for those funds in these CCAA proceedings, that would be a matter that might properly found a motion to the Court for relief. So the phrase "but not required" in paragraph 6 does not given Automotive a carte blanche to withhold contemplated payments, contrary to a suggestion that was made against the paragraph in the course of the hearing.

70 On the other hand, it is clear that the effect of the terms of the DIP Approval and paragraph 6 of the Initial Order is that Automotive, under the Order, is "not required" to make the special payments under its Pension Plans that would otherwise be required.

71 The requirement for the making of such special payments is a statutory requirement. The special payments are provided for in the pension benefits regime under the PBA and the related regulations, as set out in the relevant provisions excerpted above.

Jurisdiction under the CCAA re the Special Payments

72 The USW and the CAW submitted that the obligation under the pension benefits statutory regime to make special payments is an obligation under their respective collective agreements with Automotive. Those agreements require Automotive to maintain pension plans for members having certain specific features, principally relating to the amount of the pension to be earned and paid for the period of employment served by the employee. It was not shown that any provisions in the collective agreements do expressly require Automotive to comply with the statutory regime as to special payments. Rather, the submission seemed to be that because Automotive has an obligation under the Collective Agreement to maintain the pension plan and also has a statutory obligation in respect of pension plans it maintains to make certain special payments, that the contractual obligation impliedly includes the statutory obligations and therefore, any relief from the statutory obligation also constitutes relief from the contractual obligation under the Collective Agreement. Whenever it is argued, as here, that a term should be implied in a contract, the necessary question is why that is so and in this case, no answer is evident from the submissions. The implication was perhaps that it is self-evident but that may be debatable. The pension plan provisions in the collective agreements are addressed to the pension benefits that the plan is required to make available to the members and not to how that is to be done. On this basis, it would seem to be a stretch to say that just because a pension plan is required to conform to the statutory regime, the company sponsoring the plan has impliedly agreed with the bargaining agent to do so. This would suggest that all that the company has agreed to do in the Collective Agreement is to maintain a plan that provides for the benefits

contracted for in the collective bargain.

73 However, that analysis may be unduly technical for purposes of the issues on this motion. The commitment of Automotive in its collective agreement to maintain pension plans would given rise to a reasonable expectation that it would keep those plans in good standing in accordance with applicable regulatory requirements designed to ensure that the plans will be able to meet their payment obligations. Moreover, at least one of the pension plans contains a provision which requires the making of all payments required by the applicable statutes. So the better approach is probably to regard the maintenance of the special payments as effectively contemplated by the collective agreements.

74 Even so, this consideration would be relevant to the issue of the jurisdiction of the Court to make the impugned order only if this relationship to the collective agreements gives rise to jurisdictional considerations that are different from those that arise by reasons of the payments being required pursuant to the PBA.

75 As observed by the Supreme Court of Canada in its decision in *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, [2007] S.C.J. No. 27, 2007 SCC 27 at paragraph 86, collective bargaining is a fundamental aspect of Canadian society, which has emerged as the most significant collective activity through which the freedom of association protected by s. 2(d) of the Charter is expressed in the labour context. Recognizing that workers have the right to bargain collectively reaffirms the values of dignity, personal autonomy, equality and democracy.

76 This fundamental process of collective bargaining is entrenched in the laws of Ontario by the LRA, which provides a comprehensive scheme for employment relations. Among other things, that statute directs that:

> (a) there shall only be one collective agreement in force between a trade union and an employer;
> (b) the trade union that is a party to the collective agreement is recognized as the exclusive bargaining agent of the employees in the bargaining unit defined therein;
> (c) the collective agreement is binding upon the employer and the employees;
> (d) the collective agreement shall not be terminated by the parties before it ceases to operate in accordance with its provisions or the statute without the consent of the Labour Board on the joint application of the parties;
> (e) a provision of a collective agreement may only be revised on the mutual consent of the parties;
> (f) no employer and no person acting on behalf of an employer shall interfere with the representation of employees by a trade union; and,
> (g) no employer shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with any person on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

77 Based on these elements of the LRA, it appears that the employees cannot legally terminate their employment under their collective agreement before "it ceases to operate in accordance

with its provisions or the LRA without consent of the O.L.R.B. on the joint application of the parties". The USW submits that therefore, the employees cannot legally terminate their services. However, whether this is so would depend first on whether the making of the Initial Order or its terms would allow the Collective Agreement to be terminated. No submissions were made that assist on this point.

78 Secondly, since the LRA provides that the Collective Agreement could be terminated with the consent of the Board, there is a question whether that consent could be obtained - a matter that was not canvassed in the submissions.

79 The above considerations relating to the LRA do not suggest that the relationship of the PBA requirements for special payments to the collective agreements should be considered to give those requirements any jurisdictional status for the issues in this case that would go beyond the implications that arise from the fact of those requirements being imposed pursuant to statute.

80 This result is not altered by the Court's recognition that collective bargaining is a fundamental aspect of Canadian society involving the exercise of the freedom of association protected by s. 2(d) of the *Charter*. It was not suggested that the Initial Order constitutes a breach of the *Charter* rights of the employees.

81 The Moving Parties rely upon the decision of Farley J. in *United Air Lines, Inc. (Re)* (2005), 45 C.C.P.B. 151 (Ont. S.C.J. [Commercial List]) as authority for the proposition that a CCAA debtor must in all circumstances continue to make special payments post-filing. *United Air Lines* involved a motion brought by UAL for an order authorizing it to cease making contributions to its Canadian pension plans. UAL applied for protection from its creditors pursuant to section 18.6 of the CCAA, whereby it sought recognition of a Chapter 11 proceeding in the United States. UAL had filed for bankruptcy protection in the United States in December 2002 and filed under section 18.6 of the CCAA in 2003. The motion was not brought until February 2005.

82 UAL was a large U.S. corporation that was attempting to restructure. It had an international workforce, including a small Canadian workforce. In its motion, it was seeking authority to cease making all contributions to its Canadian pension plans even though it continued to meet its pension funding commitments in all countries other than the United States and Canada. UAL's U.S. employees and retirees had the benefit of the protections provided by the Pension Benefits Guarantee Corporation, while the Canadian employees, as the beneficiaries of a federally regulated scheme, did not. UAL had not presented any evidence of its inability to make the pension payments.

83 After reviewing all of the facts, Farley J. summarized as follows at paragraph 7:

> As discussed above, the relative size of the Canadian problems *vis-a-vis* the U.S.A. problems is rather insignificant. It would not seem on the evidence before me that payment of funding obligations would in any way cause any particular stress or strain on the U.S. restructuring - given their relatively insignificant amounts in question. UAL had no qualms about making such payments in the other countries internationally. Additionally there is the issue of the U.S. situation having the benefit of the Pension Benefits Guarantee Corp. (as to which UAL would have paid premiums) but there being no such

safety net in Canada on the federal level (and thus no previous premium obligation on UAL).

84 *United Air Lines* does not appear to stand for the proposition that all pension contributions, including special payments, must in all cases be paid by a CCAA debtor absent an agreement with its unions and FSCO. On the contrary, Farley J.'s decision states in paragraph 8 that it was made "on the basis of fairness and equity" after a consideration of the facts and circumstances existing in that case.

85 Based on the decision of the Court of appeal for Quebec in *Syndicat national de l'amiante d'Asbestos inc. et al. v. Jeffrey Mine Inc*., [2003] Q.J. No. 264, there is a reason to consider that the "not required" clause does not purport to abrogate the pension plan obligations. It authorizes the company not to make payments on account of its obligations during the currency of the Initial Order. Unpaid obligations would constitute debts of the company to be dealt with at the termination of its protection under the CCAA: see *Jeffrey Mine* paragraphs 60 to 62.

86 It was submitted that the text of the *Jeffrey Mine* decision at paragraph 57 shows that in that case there was no suspension of the special payments obligation in respect of the employees who continued to work in the post-filing period. The phrase in paragraph 57 that is relied on in this regard is that the monitor was authorized to suspend pension contributions "except for employees whose services are retained by the monitor". This phrase is stated in the text to be a translation. The text of the original version of the initial order in *Jeffrey Mine* is set out at paragraph 9 of the decision. Paragraph [22] of the order authorizes the monitor to suspend "contributions to pension plans made by employees other than those kept by the monitor". At paragraphs 10 and 11 of the decision, the text makes clear that, in respect of the pension plan, the monitor advised that the payments that would continue to be paid were the current service payments, which are described as monthly remuneration to the employees to be paid to them by being paid to the plan. Nothing is said there about making any other payments to the plan. Paragraphs 68 and 70 express the Court's rejection of paragraph 16 of the Court's Order of November 29, 2006 which exempted the monitor from the collective agreements. However, paragraphs 54 and 55 of the decision deal with the suspension by the Court of payments to offset actuarial liability, which would seem to be payments in the nature of the special payments that are in issue in the present case. At paragraph 55 the Court gave its opinion that it was within the power of the Superior Court to suspend those payments. The Court of Appeal may have been making a distinction between the powers of the monitor and the Court.

87 Based on the analysis set out earlier in these reasons, even if it is correct to view the "not required" provision as abrogating provisions of pension plan statutory law, the Court has the jurisdiction under the CCAA to make an order under the CCAA which conflicts with, and overrides, provincial legislation. There is no apparent reason why this principle would not apply to an order made under the CCAA which conflicts with the PBA.

88 Reference was made to s. 11.3(a) of the CCAA, which provides that no order made under s. 11 is to have the effect of prohibiting a person from requiring payment for services provided after the order is made. The Applicant is paying the wages and the current service obligations under the pension plans of the employees who continue to be employed. The special payments do not relate exclusively to the continuing employees. It is not shown (and does not seem to be submitted) that the amounts that might be required under the special payments arise from or are in connection with the current service obligations to the plan (assuming those obligations are

paid in due course). The most that can be said on the basis of the material now before the Court is that the fact that Automotive continues to operate with employment services being provided by Plan members may occasion some change in the amounts that were due and the payments that were required to be made as at the time of the CCAA filing, but what that amount might be and how, if at all, it could be attributed materially to the continuing service as opposed to other factors such as plan asset valuation is impossible to determine.

89 Accordingly, this point does not alter the conclusion that the Court has the jurisdiction to approve the "not required" clause, notwithstanding its effect in respect of the special payments.

Exercise of the Statutory Discretion under the CCAA

90 There is a separate question raised whether it is a proper exercise of the discretion of the court for it to approve the provision in question. That question must be addressed in the context discussed above.

91 The evidence before this Court is that Automotive is incapable of making the special payments. Automotive does not have the funds necessary to make the special payments. As at July 19, 2007, Automotive had no cash of its own. In the five-week period from July 19, 2007 to August 25, 2007, Automotive had negative cash flow from operations of approximately $5 million. It is forecast that in the four-week period from August 26, 2007 until September 22, 2007 Automotive will have negative cash flow of approximately an additional $12 million. Since filing, Automotive has been wholly dependent on the DIP Loan to fund all disbursements.

92 Two other important considerations are evident in the present case. First, for the reasons given above, the effective suspension of special payments is a feature of the integrated arrangement which was made available by Chrysler as the DIP Lender and which was the arrangement which enabled the company to continue in operation. So there was and is a very good reason for the Court to approve that arrangement.

93 Secondly, the moving parties each had a full opportunity to object to the approval of the DIP Facility and none of them did so, even though it was clear from the terms of the DIP Facility and the terms of the Initial Order that they are an integrated arrangement. Instead of objecting to the DIP Facility, they have allowed it to be approved and have objected only to the related provisions of the Initial Order. In proceeding this way, it appears they have avoided facing the question whether if they opposed the DIP Approval Order for the reasons they now advance in respect of the special payments, the DIP Lender might have resisted their demands at the first moment, to the detriment of the continuing employment of members, and they now seek to raise the issue now that the DIP lender is in place and has been advancing funds, in circumstances where the only practical consequence could be to raise the question which would have appropriately been raised at the earlier stage.

94 Chrysler submitted that this conduct is a collateral attack on the DIP Approval Order and should not be countenanced by the Court.

95 The Initial Order was approved on July 19, 2007 with a provision in paragraph 3 providing for a further hearing on July 30, 2007 (the "Comeback Date") at which time the Initial Order could be supplemented or otherwise varied. On July 30, 2007 the Court ordered the approval of the DIP Facility. It ordered an extension of the Stay Period to August 24, 2007.

96 The Court did not make any order to supplement or vary the Initial Order in any other respects. Neither did it make any order to the contrary. Nor does it appear from the recitals in the DIP Approval Order that the Court was asked on that motion to deal with the Initial Order in other respects. Stinson J., in his endorsement of July 30, 2007 approving the issuance of the DIP Approval Order, recorded the requests on behalf of the Superintendent and the USW that he record their respective clients' reservation of rights in relation to the pension fund payment and other matters referenced in paragraphs 6(a), 11(b) and (d) and paragraph 26 of the Initial Order. Since this reservation was recorded at the same time as the DIP Approval Order was granted and without any order being granted at that time to deal with any variations to the Initial Order, this raises a question of whether it is fair to regard the motion now before the Court as a collateral attack on the DIP Approval Order.

97 It is important that, in the Initial Order at paragraph 34, the DIP Facility was ordered to be on the terms and conditions in the DIP Term Sheet and Commitment Letter dated as of July 18, 2007 which was approved in that paragraph subject to a further hearing on the Comeback Date. Covenant No. 1 in the DIP Term Sheet and Commitment Letter provides that the Borrower shall not without the Lender's prior written consent make any material disbursement unless it is contemplated in the initial cash flow or any subsequent cash flow approved by the Lender.

98 As noted earlier, on the motion to approve the Initial Order the Court had affidavit information from Automotive that the DIP Loan does not provide for the funding of any special payments, along with a copy of the cash flow which states that no provision is made for the payment of any special pension payments.

99 So, based on the above analysis, the Court, in the Initial Order, by reason of paragraph 34 (as to which no reservation of a right to object has been made or is now asserted), has ordered that the DIP Loan is not to be applied to special payments except with the consent of the DIP Lender.

100 The Superintendent seeks an order requiring the Applicant to pay the Special Payments. For the reasons given above, such an order would constitute a collateral attack on DIP Approval because the evidence is that the Applicant has no funds available to it other than the DIP Loan. Consequently, the order the Superintendent requests would effectively order the Applicant to use the DIP Loan for a purpose which, pursuant to paragraph 34 of the Initial Order, is not permitted.

101 Chrysler's agreement to act as DIP lender is based on the fact that the Applicant's supply is required to maintain Chrysler's own just-in-time vehicle manufacturing operations. The Superintendent submits that if Chrysler has concluded that it requires the output derived from the labour of the employees, then it is only fair and equitable that Chrysler bears the cost, in terms of remuneration to the employees including special payments to the Pension Plans, of that labour.

102 In the decision in *Ivaco Inc. (Re)* (2005), 47 C.C.P.B. 62 at paragraph 4 (Ont. S.C.J. [Commercial List]) (affirmed (2006) 275 D.L.R. (4th) 132 (Ont. C.A.), leave to appeal granted [2006] S.C.C.A. No. 490) at the first instance, Farley J. characterized the nature of special payments, stating that "notwithstanding that past service contributions could be characterized as functionally a pre-filing obligation, legally the obligation pursuant to the applicable pension legislation is a fresh' obligation".

103 The amount of the outstanding special payments in the present case appears to have been determined prior to the Initial Order based on information relating to the pre-filing period. It is not apparent that the continuation of the operations of the Applicant in the post-filing period has given rise to an increase in the amount of the special payments from the amount that would otherwise have been applicable by reason of the pre-filing experience. Consequently, it seems tendentious to characterize the outstanding special payments as the costs of operating in the post-filing period.

104 The Superintendent objects that the approach that has been taken by the Applicant in the present case has been done without the requisite negotiation with the Superintendent and the pension plan stakeholders. In the decision in *United Airlines, Inc., supra*, Farley J. cited the example of a case where the company obtained specific relief from the requirement to make special payments although current service costs were made. The Court, however, concluded that such an arrangement "is not a given right' of the company" and is to be achieved "on a consensual basis after negotiation" with the pension plan stakeholders.

105 If there had been an objection to paragraph 34 of the Initial Order, that might well have occasioned negotiations of this kind, but there was no such objection. As noted, if there had been, each side could have assessed its own interests *vis-à-vis* the position of the other and the extent to which it would take the risk of insisting on its position or instead seek a compromise. Instead, what has happened is that the DIP Facility has proceeded without objection and the DIP Lender has changed its position on the basis of the Court orders given to date and now, after it has done so, an effort is made to put it in a position where it has no choice but to increase its funding or risk the loss of the continuing operations. This might yield a negotiation but it would be a lopsided one by reason of the DIP Lender already having provided funding in accordance with the Court orders.

106 The USW contends that its submissions in respect of paragraph 6 of the Initial Order are not in conflict with paragraph 34 because they do not seek an order that the DIP Lender provide the funds that Automotive would require to make the special payments or that Automotive make the payments, but only that it not be ordered that Automotive is not required to make those payments.

107 Since the material before the Court is to the effect that Automotive had and has no funds and has no expectation of having funds available which could be used to make the special payments, other than the monies available under the DIP Facility, if the Court were now to countenance and make the amendment to paragraph 6 which the moving party seeks, the necessary practical consequence of that amendment would be to allow pressure to be put on the DIP Lender to increase its funding commitment to Automotive and consent to Automotive making the special payments, because Automotive would otherwise be potentially vulnerable to proceedings to force it to meet its payment obligations and there would inevitably be concerns about the consequences that could flow from default on its part. That situation would be contrary to the expectations which both Automotive and the DIP Lender would reasonably have been entitled to hold in respect of the Initial Order. It might well be different if the moving party had instead sought an order that the "not required" clause in paragraph 6 should be subject to a proviso that it would not apply to the extent that payment of such amounts could be funded out of monies other than from the DIP Facility. There is no alternative request for such a proviso, perhaps because no one expects it would be of any use.

108 So what remains is a request that the Court, in the exercise of its discretion under s. 11, should make an order that would be contrary to the reasonable expectations of the Applicant and the DIP Lender based on the steps already taken and the orders already granted under the CCAA in this proceeding. That would be unfair and it would not contribute to the fair application of the CCAA in this case or as a precedent for others.

109 Moreover, the failure of the moving parties to reserve in respect of and then dispute paragraph 34 of the Initial Order has the following unsatisfactory effect. If the moving parties had duly disputed paragraph 34 there would have been an opportunity for the Court to consider what would have been the two opposing positions on whether the DIP terms proposed by the DIP Lender should be accepted. If that question had properly been put in issue, then there would also have been an opportunity for each side to consider whether it would seek to press its position or would compromise for the sake of the respective potential benefits to each side. No such opportunity would exists with the request that is now before the Court. So the request should not be granted.

110 For the reasons given above, there is no fair way at the present time to put the parties on a level playing field for negotiation about the special payments. For the reasons mentioned at other points above, it is desirable to ensure that there is an opportunity for such negotiation in CCAA circumstances, as an important means of achieving the most satisfactory arrangements for all concerned to the extent possible. With these considerations in mind, it is appropriate to take into account that the period of the application of the Initial Order was extended by Court order and will expire on the date set by the last such Order unless further extended. If a motion is made for a further extension of the Initial Order beyond its present expiry date, there would seem to be no basis in the above reasons to object to the legitimacy of interested parties raising an objection to paragraph 6 at that time, provided they are also prepared to object to paragraph 34.

Paragraph 11

111 The objection taken by the USW is that the provisions of s. 11 are open to an interpretation that would permit Automotive to repudiate its collective agreements with the USW's members.

112 Paragraph 11 is stated to be subject to covenants in the Definitive Documents as defined in the Initial Order. (They appear to be certain security documents.) The provision does not state that the right to terminate is subject only to such covenants. No mention is made in paragraph 11 of other obligations to which the Applicant may or may not be subject.

113 The USW seeks to have the rights provided for in clauses (b) and (d) of paragraph 11 made subject to all applicable collective agreements and labour laws. Those rights can only be exercised by agreement with the affected employees or other counterparty or under a plan filed under the CCAA, failing which the matters are to be left to be dealt with in any plan of arrangement filed by the Applicant under the CCAA. Nothing in the provision purports to abrogate any applicable collective agreement or labour laws. No reason was advanced why the authorized bargaining agent could not withhold agreement to any proposed exercise of clause (b) or (d) and if Automotive then sought to deal further with the matter pursuant to the CCAA there is no apparent reason why the matter could not be pursued against Automotive in court under the CCAA.

114 Reference is made to the discussion set out earlier with respect to the provision in paragraph 4 relating to further hirings. The comments made there are, with appropriate changes, applicable with respect to the issue relating to paragraph 11.

Paragraph 26

115 The USW and the CAW object to the part of paragraph 26 which provides that the monitor, by fulfilling its obligations under the Initial Order, shall not be deemed to have taken control of the business or be deemed to have "been or become an employer of any of the Applicant's employees." [The word "employees" does not appear in the text of the Order in certain of the materials, but it is obviously intended.]

116 The USW objects to the provision on the basis that the determination of whether the monitor is an employer is within the exclusive jurisdiction of the O.L.R.B. by reason of s. 69, s. 111 and s. 116 of the LRA. Section 69(2) of that Act provides that a person to whom an employer sells its business becomes the employer (the "successor employer") for the purposes specified in that section until the Board declares otherwise.

117 The Initial Order does not expressly purport to determine the application of s. 69(2) of the LRA, since it does not refer to that Act. The application of paragraph 26 is stated to be limited to the monitor in its limited role under the Initial Order, which leaves the Applicant in possession and control of the business and, therefore, as the employer . This consideration has been regarded as determinative in finding such a provision to be acceptable: see the *Jeffrey Mine* decision at paragraph [76].

118 The discussion in *Re Jeffrey Mine* about a provision of this kind did not address statutory provisions such as s. 69(2) of the LRA.

119 As worded, it is not apparent that paragraph 26 warrants the concern expressed by the USW. It seems reasonable to assume that if the monitor were to take action of a kind that would suggest that the monitor has started to act *de facto* as the employer, in breach of paragraph 26, a motion might be brought before the Court under the CCAA and/or to the Ontario Labour Relations Board and the matter would then be considered in the context of an actual fact situation rather than in the present abstract and ill-defined circumstances. No order to give effect to the objection of the USW and the CAW in respect of this feature of paragraph 26 is appropriate at the present time.

Paragraph 29

120 The USW objects that the immunity, or limitation of liability, provided to the monitor in the first sentence of paragraph 29 is not within the jurisdiction of the Court under the CCAA, or if it is, the granting of this immunity is not a proper exercise of the discretion of the Court. The impugned provision limits liability to gross negligence and willful misconduct.

121 There was no reservation of rights in the endorsement of Stinson J. of July 30, 2007 with respect to this paragraph.

122 The USW cites no authority that has been decided with respect to the CCAA in support of

its contention that the limitation of liability is beyond the jurisdiction of the Court under the CCAA. In view of the stay jurisdiction of s. 11 of the CCAA and taking into account the "on such terms" jurisdiction under that section, it might seem that the better view is that the Court does have the jurisdiction to make such an order and that the only issue is whether the grant of limited liability of the kind specified is a proper exercise of the discretion of the Court.

123 The USW submits that other court decisions show that the Court does not have the jurisdiction to grant a limitation of liability to the monitor of the kind set out in paragraph 29.

124 In *GMAC Commercial Credit Corp. - Canada v. T.C.T. Logistics Inc.*, [2006] 2 S.C.R. 123 ("*T.C.T. Logistics*"), the Supreme Court of Canada held that the "boiler plate" immunization of the receiver, though not uncommon in receivership orders, was invalid in the absence of "explicit statutory language" to authorize such an extreme measure:

> Flexibility is required to cure the problems in any particular bankruptcy. But guarding that flexibility with boiler plate immunizations that inoculate against the assertion of rights is beyond the therapeutic reach of the Bankruptcy and Insolvency Act.
>
> ...
>
> As Major J. stated in *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3 (CanLII), [2004] 1 S.C.R. 60, 2004 SCC 3:
>
> > ... explicit statutory language is required to divest persons of rights they otherwise enjoy at law ... [S]o long as the doctrine of paramountcy is not triggered, federally regulated bankruptcy and insolvency proceedings cannot be used to subvert provincially regulated property and civil rights. [para. 43]

125 The USW also relies on s. 11.8(1) of the CCAA. Indeed, subsection 11.8(1) explicitly exempts a monitor from liability in respect of claims against the company which arise "before or upon the monitor's appointment":

> Notwithstanding anything in any federal or provincial law, where a monitor carries on in that position the business of a debtor company or continues the employment of the company's employees, the monitor is not by reason of that fact personally liable in respect of any claim against the company or related to a requirement imposed on the company to pay an amount where the claim arose before or upon the monitor's appointment.

126 The decision in *T.C.T. Logistics* did not deal with the CCAA. The monitor in that case had been appointed by the Court with a mandate to hire employees and carry on the business, but in the present case the monitor is restricted from hiring any employees and Automotive remains the employer of all of the unionized employees. The statements quoted from the *T.C.T. Logistics* decision are made in the context of a consideration of the issue whether a bankruptcy court judge can determine successor rights issues relating to the LRA. The immunity given in that case was that no action could be taken against the interim receiver without the leave of the Court.

127 Section 11.8(1) deals with the situation where a monitor carries on in that position the business of a debtor company or continues the employment of the company's employees and it provides a blanket immunity against claims which arose before or upon the monitor's appointment. It is understandable that in the situation addressed in the section that the immunity would be limited to such claims and that it would be a blanket immunity in respect of such claims. The existence of s. 11.8(1) does not given rise to any implication as to what kind of limitation of liability would be reasonable in respect of a monitor with the limited powers given in the present case.

128 The specific wording in paragraph 29 of the Initial Order is consistent with the standard limitation of liability protections granted to monitors under the standard-form model CCAA Initial Order, which was authorized and approved by the Commercial List Users' Committee on September 12, 2006.

129 That is, of course, not determinative but it suggest that the clause has received serious favourable consideration from members of the bar in a context unrelated to particular party interests.

130 The monitor submitted in its factum a list of twelve recent CCAA proceedings in which orders have been granted with similar provisions to the limitation of liability in this case. This would seem to suggest that in those cases the clause limiting liability was not disputed or, if it was, the Court found the clause to be acceptable.

131 For these reasons, paragraph 29 is acceptable.

Paragraph 4 of the CRO Order

132 The USW advances the submissions made with respect to jurisdiction as regards the monitor based on *T.C.T. Logistics* against the clause limiting the liability of the CRO.

133 Automotive does not have D&O insurance in place. The protection set out in paragraph 4 of the CRO Order can reasonably be regarded as a fundamental condition of Axis Consulting Group Inc. and Mr. Rutman's agreement to accept and continue as CRO. Automotive would probably be severely restricted in its ability to appoint a capable and experienced Chief Restructuring Officer without the ability to offer a limitation on potential liability.

134 The USW's claim that the Court does not have authority to grant this protection to the CRO is contrary to established practice. These protections are consistent with limitations of liability granted to Chief Restructuring Officers in other CCAA proceedings, and are consistent with the protections granted to Monitors under the standard-form CCAA Initial Order. The same or similar language was used in paragraph 19 of the Order of July 29, 2004 in the Stelco Inc. CCAA proceedings and in paragraph 3 of the Order of November 28, 2003 in the Ivaco Inc. CCAA proceeding, both granted by Farley J.

135 In *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, [2007] S.J. No. 154 the Saskatchewan Court of Queen's Bench upheld a similar limitation of liability for the Chief Restructuring Officer of Bricore. In dismissing a motion to lift the stay against the Chief Restructuring Officer, Koch J. stated:

> The [CCAA] is intended to facilitate restructuring to serve the public interest. In many cases such as the present it is necessary for the Court to appoint officers whose expertise is required to fulfill its mandate. It is clearly in the public interest that capable people be willing to accept such assignments. It is to be expected that such acceptance be contingent on protective provisions such as are included in the order of May 23, 2006, appointing Mr. Duval. It is important that the Court exercise caution in removing such restrictions; otherwise, the ability of the Court to obtain the assistance of needed experts will necessarily be impaired. Qualified professionals will be less willing to accept assignments absent the protection provisions in the appointing order.

136 The Saskatchewan Court of Appeal upheld the decision, [2007] S.J. No. 313.

137 The terms of the limitation of liability given to the CRO are similar to the limitation in the indemnity ordered in paragraph 21 of the Initial Order to be given by the Applicant to the directors and officers of the Applicant. The moving parties have not requested any amendment of that paragraph.

138 It is hard to imagine how a prospective CRO would be prepared to take on the responsibilities of that position in the context of a situation like the present one, fraught as it is with obvious conflicting interests on the part of the different parties involved and a background of action in the work place and litigation in court, without significant protection against liability.

139 Paragraph 4 of the CRO Order appears satisfactory for the above reasons.

Conclusion

140 For the reasons given above, the motions are dismissed.

141 Counsel may make written submissions as to costs if necessary.

J.M. SPENCE J.

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